NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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1. Removed from office by N. C. Supreme Court 6 December 1983.

2. Appointed Judge 29 September 1983 to succeed Peter W. Hairston who retired 31 August 1983.

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1. Appointed Judge 23 September 1983 to succeed E. Alex Erwin III who resigned 31 July 1983.
2. Resigned effective 30 September 1983.
3. Appointed Judge 1 August 1983 to succeed James Ezzell, Jr. who resigned 31 July 1983.
4. Appointed Judge 10 November 1983.
5. Appointed Judge 1 August 1983 to succeed Arnold Max Harris who died 1 May 1983.

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State v. Johnson	60 N.C. App. 369	Denied, 308 N.C. 679
State v. Keaton	61 N.C. App. 279	Denied, 309 N.C. 463
State v. Linker	61 N.C. App. 348	Allowed, 308 N.C. 389
State v. Locklear	61 N.C. App. 594	Denied, 308 N.C. 679
State v. Marlow	61 N.C. App. 300	Allowed, 308 N.C. 389
State v. Marshburn	61 N.C. App. 752	Denied, 309 N.C. 323
State v. Morrow	61 N.C. App. 162	Denied, 308 N.C. 546 Appeal Dismissed

Case	*Reported*	*Disposition in Supreme Court*
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State v. Rogers	60 N.C. App. 217	Denied, 308 N.C. 390 Appeal Dismissed
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State v. Sandlin	61 N.C. App. 421	Denied, 308 N.C. 679
State v. Setzer	61 N.C. App. 500	Denied, 308 N.C. 680
State v. Shephard	61 N.C. App. 159	Denied, 308 N.C. 547 Appeal Dismissed
State v. Staton	61 N.C. App. 225	Denied, 308 N.C. 547
State v. Sugg	61 N.C. App. 106	Denied, 308 N.C. 390
State v. Swinson	61 N.C. App. 349	Denied, 308 N.C. 547 Appeal Dismissed
State v. Tart	61 N.C. App. 349	Denied, 308 N.C. 391 Appeal Dismissed
State v. Ward	61 N.C. App. 605	Denied, 308 N.C. 680
State v. Ward	61 N.C. App. 747	Allowed, 308 N.C. 680
State v. Willis	61 N.C. App. 244	Allowed, 308 N.C. 391
State v. Willis	61 N.C. App. 244	Denied, 308 N.C. 680
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Waters v. Phosphate Corp.	61 N.C. App. 79	Allowed, 308 N.C. 548
West v. Slick	60 N.C. App. 345	Allowed, 309 N.C. 324

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. LEE ROY MILLER AND WILLIAM "BILL" DENNIS

No. 8223SC620

(Filed 1 March 1983)

1. **Criminal Law § 92.4— consolidation of multiple charges against defendant proper**

Where a solicitation to commit arson charge and a burning of a building charge both involved the same structure, it was not error for the trial court to consolidate the two charges against defendant. G.S. 15A-926(a).

2. **Criminal Law § 92.1— denial of motion to sever trial from codefendant proper**

Where both defendants were charged with violations of the same statute, both testified, both were subject to cross-examination and both denied guilt which precluded their defenses from being antagonistic, defendant failed to show that he had been deprived of a fair trial by consolidation or by denial of his motion to sever his trial from that of his codefendant who was also charged with burning a building under construction.

3. **Jury § 5.1— reopening voir dire of one juror—no error**

The trial court did not err in allowing the State to reopen its *voir dire* of one juror and to challenge the juror peremptorily after the jury had been passed by the State, but before being impaneled, where the juror stated that he had talked with the defendant less than a week after the fire in question, during the investigation and before any charges were filed. G.S. 15A-1214(g).

4. **Criminal Law § 87— prospective juror becoming witness for State—no duty to give witness list to defendant**

There is no requirement for the State to furnish a list of the prospective witnesses to defense counsel at any stage of the proceedings. Where a witness came to the court as a member of the jury panel, and where the State first learned of this potential witness during the *voir dire* examination of the

witness as juror, the State was free to call the prospective juror as a witness at trial.

5. **Criminal Law § 99— bench conference by judge with juror—sufficient disclosure—no prejudicial error**

While court was still in session and before any jurors left, and where the judge had just announced that court was about to recess for the day, with all jurors to return on Saturday, there was no prejudicial error in the trial judge having a bench conference of two minutes duration with a juror in the presence of the other jurors since there was sufficient disclosure to defense counsel that the juror had approached the trial judge and asked to be excused from deliberating from the case.

6. **Bills of Discovery § 6— denial of motions to produce prior statements of witnesses and criminal records of witnesses**

The trial court did not err in denying defendant's motions to produce prior statements of the State's witnesses made to the police officers and criminal records of witnesses since G.S. 15A-903 in conjunction with G.S. 15A-904 limits the extent of disclosure of evidence by the State to the persons and things mentioned, and those items are not mentioned in the statutes.

7. **Criminal Law § 124— verdict sheet signed by other than original foreman**

The verdict as received in the courtroom conformed to G.S. 15A-1237 even though it was signed by a juror different from the juror who had earlier orally responded to the judge that he was the foreman.

8. **Criminal Law § 34.4— evidence of unrelated crimes—codefendant "opening the door"**

The trial court did not err in the admission into evidence of unrelated crimes by defendant where the State's evidence was relevant to explain or rebut facts solicited by the codefendant, and where the exceptions to the evidence were on a subject matter to which the codefendant had opened the door.

9. **Criminal Law § 34.4— motion in limine concerning evidence of other offenses—condition not met—admission not error**

Where the trial court granted defendant's pretrial motion to prohibit the district attorney from introducing evidence or making reference to the appellant being involved in two cases charging him with conspiracy to commit armed robbery on the condition that neither the defendant nor his codefendant bring the substance or anything regarding the requested motion *in limine* into evidence and the codefendant did "open the door," the trial court did not err in allowing evidence of the two unrelated crimes.

10. **Criminal Law § 107.2— variance between indictment and proof not fatal**

A variance between the indictment, which alleged that defendant solicited a man to commit arson of a building on or about 1 June 1980, and the evidence which showed the offense to have occurred about the last of April or the first of May, 1980 was not fatal.

11. Arson and Other Burnings § 5— failure to submit instruction on presumption that fire resulted from accident proper

The trial court properly failed to instruct the jury that there is a presumption that the fire resulted from an accident where there was evidence that one of the codefendants willfully and intentionally set the fire by use of a highly flammable material; that when the material was spread around, the fumes were very strong; and that when the same codefendant did ignite the material, the fire went so fast it almost blew him up.

12. Criminal Law § 117.3— testimony by State's witnesses—grants of immunity properly before jury

Where there was actual knowledge of two State's witnesses testifying because of immunity from prosecuting them for offenses in another county which was made well known to the jury and which was sufficiently explained to the jury in the judge's final charge, and where, at the conclusion of the charge, there was no request for further clarification or additional instructions, there was no prejudicial error even though no instruction was given by the judge prior to the State's witnesses testifying. G.S. 15A-1052(c).

13. Criminal Law § 51.1— qualification of arson expert

The trial court did not err in allowing a witness to testify as an arson expert where the witness testified he was a forensic chemist whose major area of responsibility was "to examine and analyze fire evidence submitted to" the SBI laboratory office, and where as soon as the State started establishing his background by asking about his qualifications, each defense counsel stipulated that the witness was an expert without limitation as to field.

14. Criminal Law § 43— photographs—limiting instructions

While the record showed no limiting instructions were given at the moment certain photographs were received into evidence, the court did give appropriate instructions in its final charge to the jury.

APPEAL by defendants from *Davis, Judge.* Judgment entered 10 October 1981 in Superior Court, YADKIN County. Heard in the Court of Appeals 10 January 1983.

Lee Roy Miller was charged with procuring the arson of a building under construction in violation of G.S. 14-62.1 and with solicitation of arson in violation of G.S. 14-2. Upon the District Attorney's oral motion, these two charges were consolidated for trial and simultaneously were joined for trial with the case of William "Bill" Dennis. Dennis was charged with violation of G.S. 14-62.1, burning a building under construction. In each of the several cases, the building alleged was the Town Diner in Yadkinville.

A jury found both defendants guilty of all charges. On 10 October 1981, the court entered a judgment on each verdict wherein

defendants were sentenced in each case to imprisonment for a minimum of eight years and a maximum of ten years. Defendants appealed.

Other facts pertinent to a specific assignment of error will be included in the opinion as each assignment is discussed.

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

Zachary, Zachary & Harding by Warren E. Kasper for defendant appellant Miller.

Charles R. Redden for defendant appellant Dennis.

BRASWELL, Judge.

I. DEFENDANT MILLER'S APPEAL

[1] In defendant Miller's first argument, he contends that consolidation for trial of the two charges against him lacked the transactional connection required by G.S. 15A-926(a) and that he was, therefore, precluded from obtaining a fair trial in either case.

G.S. 15A-926(a) furnishes authority for joinder of offenses by providing that "Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." In construing this statute, the following rule was stated in *State v. Oxendine*, 303 N.C. 235, 240, 278 S.E. 2d 200, 203 (1981):

> "[I]n deciding whether two or more offenses should be joined for trial, the trial court must determine whether the offenses are *'so separate in time and place* and *so distinct in circumstances* as to render the consolidation unjust and prejudicial to defendant.' *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). Thus, there must be some type of 'transactional connection' between the offenses before they may be consolidated for trial. [Citations omitted.] In addition, the trial judge's exercise of discretion in consolidating charges will not be disturbed on appeal absent a showing

that the defendant has been denied a fair trial by the order of consolidation. [Citations omitted.]"

We believe the trial court's ruling was proper in this case because the solicitation to commit arson charge and the burning of the building charge both involved the same structure, the Town Diner in Yadkinville. The offenses, therefore, constituted a transaction to burn the diner.

[2] The basis of defendant Miller's second argument is the denial of his motion to sever his trial from that of this codefendant, Dennis, who was also charged with burning the same building under construction.

> "Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. [Citations omitted] As a general rule, whether defendants who are jointly indicted should be tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal. [Citations omitted.]"

State v. Brower, 289 N.C. 644, 658-59, 224 S.E. 2d 551, 561-62 (1976). *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982).

In this case, both defendants were charged with violation of the same statute, both testified, both were subject to cross-examination, and both denied guilt which precluded their defenses from being antagonistic. As stated in *State v. Lake*, *supra*, at 147, 286 S.E. 2d at 543, "both were charged with accountability for the same offense." Defendant has failed to show that he has been deprived of a fair trial by consolidation or by denial of his motion to sever, and his argument should therefore be overruled.

Three assignments of error relate to actions by the trial judge with respect to jurors:

(1) allowing the State to reopen its *voir dire;*

(2) allowing a prospective juror who was peremptorily excused by the State to become a witness for the State, and

(3) conducting an off-record conference with a juror.

In each of these assignments we find no error on the facts shown.

[3] (1) After the jury had been passed by the State, but before being impaneled, the State moved to reopen its *voir dire* of one juror, giving as reason: "Based on the response of one of the jurors, Mr. Shore." After the court allowed the motion, the first question by the prosecutor was: "You stated that you talked to the defendant about the fire?" Shore answered that he had talked with the defendant less than a week after the fire, during the investigation and before any charges were filed. Whereupon the State peremptorily excused the juror. In allowing the reopening of the evidence and the subsequent peremptory challenge, the court said it was doing so "in its discretion, based upon a response made by this particular juror that he had on a previous occasion discussed this particular case with one of the defendants."

G.S. 15A-1214(g)[1] gives the trial judge the discretion to reopen the *voir dire* examination of a juror even if he has previously been accepted by both the State and the defendant. The judge is also given statutory discretion to allow a party to exercise an unused peremptory challenge. A good reason to reopen the examination was shown to exist, and the trial judge properly exercised his discretion. *State v. Parton*, 303 N.C. 55, 70-71, 277 S.E. 2d 410, 421-22 (1981).

[4] (2) Ervin Johnson came to court as a member of the jury panel. Johnson later became a witness for the State. When in the

1. "(g) If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

(2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.

(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror."

box as a prospective juror the State had peremptorily excused Johnson. At no time was Johnson's name on any list of State's witnesses. When objection was made to Johnson being called as a witness, the district attorney stated that he did not know of the witness when the list was given to the court and that Johnson was being called to establish the fact that the defendants had been seen together, this information having been gained on *voir dire.*

Upon separate examinations by the court of the witness and the impaneled jurors, the court found that neither had discussed the case with the other. Although no request by counsel was made to be allowed to question the jury at the time the court questioned them about Johnson, defendant now argues that error was committed because he was not allowed to question the jury, because a former member of the jury panel became a State's witness and because the juror-witness's name was not on any witness list. In 81 Am. Jur. 2d *Witnesses* § 102, p. 147 (1976), we find this statement of the law: "In the absence of a statute providing otherwise, it has been held that a juror is not incompetent to testify as a witness solely because of having been sworn and impaneled in the case, if he is otherwise competent."

We hold that Johnson was competent to be a witness. The mere fact that Johnson had been a member of the jury panel does not automatically disqualify him. The State first learned of this potential witness during the *voir dire* examination. At such point either party was free to call Johnson as a witness. "[T]he current general rule is that anyone can be a witness who has sufficient intelligence and is sensible of the obligation of an oath or affirmation." 1 Brandis on North Carolina Evidence § 53, p. 198 (1982). Brandis also tells us at § 16, p. 52, that "In a criminal case it is the prerogative of the prosecuting officer to determine what witnesses shall be called and examined for the State." *State v. Lucas,* 124 N.C. 825, 32 S.E. 962 (1899) (witnesses were sworn for the State but not placed on the stand). *See* 81 Am. Jur. 2d *Witnesses* § 2, p. 26 (1976).

Subchapter XII of G.S. 15A covers the subject of criminal "Trial Procedure in Superior Court." Article 71 thereof encompasses statutes on "Right to Trial by Jury." Nowhere is there any mention of a requirement for a witness list. While custom has

been to exchange witness lists between counsel for use in the jury *voir dire* in criminal cases prior to questioning, we know of no requirement for the State to furnish a list of the prospective witnesses to defense counsel at any stage. As observed by our Supreme Court, ". . . the legislature rejected a proposal that would have allowed defendants to discover the names . . . of witnesses the State intended to call . . . ." *State v. Hardy,* 293 N.C. 105, 124, 235 S.E. 2d 828, 839 (1977). Compare civil practice as mentioned in the sample Order On Final Pretrial Conference, 4A N.C.G.S. Appendix I and Note thereunder.

[5] (3) A bench conference of two-minute duration was had by the trial judge with a juror at the conclusion of all evidence on Friday evening. The judge had just announced that court was about to recess for the day, with all jurors to return on Saturday. In his cautionary remarks the judge said: "I know I had a request from one of the jurors—I am sure all of you have requests. And I apologize sincerely for having to make you folks come back tomorrow but I don't have any choice about the matter. I would say this, after all of you are back tomorrow, I will consider that one request I had this morning. I cannot consider it at this time. If one of the other jury members got sick and was unable to be back, I would have a serious problem."

While court was still in session and before any jurors left, upon request of the judge, juror Davis approached the bench and the unrecorded conference occurred in the presence of the other jurors.

In his brief, but not in the record, counsel for defendant Miller says: "Counsel were later informed in chambers by the Court that the juror had previously approached the trial judge and asked to be excused from deliberating in the case as the Court session had been extended into Saturday and interfered with his work." The juror was never excused.

In seeking to distinguish *State v. Tate,* 294 N.C. 189, 239 S.E. 2d 821 (1978), counsel said in his brief that the "defendant immediately renewed his motion for a mistrial and cannot be said to have waived his objection" to the bench conference. However, this argument is not borne out by the record. No objections appear in the record. No motion for a mistrial appears in the record at this juncture.

After sheriff's officers had escorted the jurors from the courtroom, the record does show that counsel for defendant Miller said, after moving for nonsuit and for a directed verdict: "And we renew our motion for a mistrial." No grounds were given. No motion for a mistrial having been freshly made at the time of the occurrence now complained of, counsel's reference to renewing his motion for a mistrial apparently refers to an earlier procedure in the trial when counsel did move for a mistrial.

Taking the record as presented to us, in accordance with *State v. Williams*, 304 N.C. 394, 415, 284 S.E. 2d 437, 450-51 (1981), *cert. denied*, --- U.S. ---, 72 L.Ed. 2d 450, --- S.Ct. --- (1982), we have considered the assignment of error and find nothing which would indicate anything improper or prejudicial to have occurred at the bench conference. In *State v. Tate, supra*, at 198, 239 S.E. 2d at 827, while disapproving of the practice of private bench conversations with jurors, our Supreme Court went on to say: "At least, the questions and the court's response should be made in the presence of counsel. The record indicates, however, that defendant did not object to the procedure or request disclosure of the substance of the conversation. Failure to object in apt time to alleged procedural irregularities or improprieties constitutes a waiver." Even should we accept the judge's in-chamber disclosure to counsel as related in defendant's brief, there was sufficient disclosure in accordance with *State v. Tate, supra.* No prejudicial error appears. This assignment of error is overruled.

[6] In the third question argued, defendant contends that the trial court erred in denying defendant's motions to produce prior statements of the State's witnesses made to police officers and criminal records of witnesses. The language of the first motion was ". . . to reveal any statements made by persons who have testified or will testify on behalf of the State." Pertinent language of the second motion asked the court ". . . for entry of an order directing the State to investigate and disclose . . ." all consideration or promises made to government witnesses, for knowledge of any prosecutions, investigations, or possible pending prosecutions against witnesses, for knowledge of any probationary, parole or deferred prosecution status of any witness, for all felony conviction records, and for "all records and information showing prior misconduct or bad acts committed by the witness."

The transcript shows that the defendant was informed of the grants of immunity to two people, Mr. and Mrs. Morland. When the court inquired if any other witnesses had been granted immunity, the district attorney replied: "Not through me, no, sir." All other requests in the motions were denied by the court.

Unfortunately for the defendant our General Assembly has not gone as far in the permissible scope of pretrial discovery as defendant contends. G.S. 15A-903 in conjunction with G.S. 15A-904 limits the extent of disclosure of evidence by the State to the persons and things mentioned. No discovery statute requires the State "to investigate" matters sought by the defendant to be investigated. Defendant cites and relies on *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Hardy, supra*, and *State v. Voncannon*, 49 N.C. App. 637, 272 S.E. 2d 153 (1980). However, *Hardy, supra*, at 125, 235 S.E. 2d at 840, held that ". . . where a statute expressly restricts pretrial discovery, as does G.S. 15A-904(a), the trial court has no authority to order discovery." *Hardy* also pointed out that ". . . the legislature rejected a proposal that would have allowed defendants to discover the names, addresses, and criminal records of witnesses the state intended to call, . . ." *Id.* at 124, 235 S.E. 2d at 839.

Unlike the action of counsel for the defendant in the *Voncannon* case, *supra*, at 639-40, 272 S.E. 2d at 156, the defendant here made no motion immediately prior to cross-examination of the State's witnesses that he be allowed to examine any witnesses' statements that had been reduced to writing or that the judge make an in camera inspection of the writing before the cross-examination began. We also note that our Supreme Court reversed *Voncannon* in 302 N.C. 619, 276 S.E. 2d 370 (1981). Although the issue discussed here was not discussed in the Supreme Court opinion, the case provides no authority for defendant's position.

Upon examination of *Silhan, supra*, we find the fact situation on the subject of discovery quite different from our case. In *Silhan* the defense motions to examine the files of the district attorney for exculpatory evidence were made at trial after evidence came to light that the results of fingerprint tests had not been revealed to defendant. While the trial judge ordered the district attorney to produce any known exculpatory evidence, the trial

judge was upheld in his denial of defendant's motion "to have these files surrendered to the court 'for appellate purposes.'" *Silhan, supra,* at 240, 275 S.E. 2d at 465.

Defendant has failed to show any prejudicial error in this case on the subject of discovery or disclosure.

[7] In his seventh question presented for review defendant contends that G.S. 15A-1237(a) was violated in that the verdict of the jury was not signed by its foreman. A search of the record shows that the verdict sheet itself and the courtroom clerk's jury record do reveal that juror Henry Vanhoy signed the verdict sheet indicating that he was foreman. The problem originates from an apparent difference in foreman at a time when the jury was returned into the courtroom, but before any verdict was received or seconded. At that earlier time juror James Davis orally responded to the judge that he was the foreman. This response of Davis came after the judge had brought the jury back into the courtroom at 6:20 p.m. on Saturday night to ask questions seeking information as to whether any verdict in any case had been reached, and to inquire if they wanted "a recess at this time and have your supper." No actual verdict was taken at that time. The jury returned to its room, then came back to court and said it wanted no recess, and returned to deliberating. In his final words before the jury resumed its deliberations, the judge said: "When you have reached a unanimous verdict, knock on the door and the bailiff will attend your call." At 6:52 p.m. the jury returned with a verdict in all three cases. The transcript lists the foreman only as "Mr. Foreman." The signed verdict sheet has the handwritten name of Henry Vanhoy.

In its consideration of G.S. 15A-1237 our Supreme Court has said that: "This section is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself." *State v. Goodman,* 298 N.C. 1, 15-16, 257 S.E. 2d 569, 580 (1979). In the case before us there is no allegation of omission of any essential element of the verdict itself. The verdict was in writing, it was signed by a juror who indicated in writing that he was the foreman. In practice it is not unheard of for a jury during its deliberations to change foreman. The verdict as received in the courtroom does conform to the statute.

In *State v. Collins*, 50 N.C. App. 155, 272 S.E. 2d 603 (1980), the verdict was not signed by the foreman. Since the verdict as received and recorded in court did substantially answer the issues and permit judgment to be pronounced, we found no merit to the defendant's contention that the form was not signed. While here the defendant urges us to reconsider *Collins* and overrule it, we find no new reasoning or basis for doing so. This assignment of error is without merit.

The eighth question presented for review contends that the court abused its discretion or expressed its opinion during the course of the trial by seven actions:

1. failing to limit the scope of redirect examination,
2. allowing a State's witness to be recalled,
3. refusing to allow a continuing line of objections,
4. failing to properly instruct on illustrative evidence,
5. allowing leading questions,
6. permitting non-corroborating evidence, and
7. permitting incompetent evidence and expressing his opinion.

We have carefully reviewed each of these assignments and find no prejudice which would justify awarding defendant a new trial. In each instance the action complained of was within the judge's discretion, and no abuse is revealed. A proper exercise of the judge's discretion in making an evidentiary ruling does not rise to the level of an expression of an opinion on the evidence or constitute an expression of opinion about the witness by the court. A full reading of the record does not reveal a cumulative impact of unfairness or impartiality. When taken as a whole, the actions do not constitute an expression of an opinion by the judge or violate G.S. 15A-1222 or G.S. 15A-1232 as alleged.

[8] In his ninth question presented for review defendant alleges that the court's erroneous admission into evidence of unrelated crimes deprived him of a fair trial. The State contends that the trial court did not err in allowing evidence of another crime after defendant had "opened the door" to this testimony on cross-examination.

Clyde Morland testified as a witness for the State. Codefendant Dennis's counsel, Mr. Redden, cross-examined Mr. Morland. Two questions were asked by Mr. Redden, with the responses as shown:

"Q. When you were arrested for a variety of charges, were some of those serious charges here in Yadkin County?

A. Yes.

Q. Have you been promised immunity for your testimony in those charges?

A. Yes, sir."

Immediately the witness was returned to the State and the prosecutor opened with: "What are those charges that you have been promised immunity in?" The answer was, "Armed robbery"; and when asked later if he had any codefendants in those cases, Morland replied that they were "Lee Roy Miller, and Bill Dennis, and my wife." Further explanation of the armed robbery of a poker game was given, over objection. In response to the arguments of counsel which then followed defendant's motion for a mistrial, the court said: "Don't you think that would be utterly ridiculous for you (defense attorneys) to bring out the fact that he was promised immunity for something and the State not be able to show what that immunity was."

Under this assignment of error and question for review counsel has grouped 22 exceptions. Some of the exceptions are to testimony by State's witness Betty Morland, wife of Clyde Morland, who testified after her husband. The substance of her testimony of which complaint is here made related to evidence about an armed robbery of a poker game, that one "Doc" Dockery had burned another building for defendant, and that defendant had shown her and her husband a number of houses to be robbed.

Both defendants later testified during the presentation of their own cases.

In discussing an "opening the door" fact situation involving a polygraph test, which test results are generally not permitted, our Supreme Court said:

"Under such circumstances, the law wisely permits evidence not otherwise admissible to be offered to explain or

> rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially."

State v. Albert, 303 N.C. 173, 177, 277 S.E. 2d 439, 441 (1981). When the whole of the case before us is considered, the exceptions to the evidence were on a subject matter to which the codefendant had opened the door. The State's evidence was relevant to explain or rebut facts elicited by the codefendant. Even if we should consider the admission of this evidence erroneous, defendant is not entitled to relief under the harmless error rule. *State v. Taylor*, 304 N.C. 249, 270, 283 S.E. 2d 761, 775 (1981); G.S. 15A-1443(a).

[9] The defendant's motion *in limine* is the subject of his 10th question presented for review. The court granted the defendant's pretrial motion to prohibit the district attorney from introducing evidence or making reference to the appellant being ". . . involved as perpetrator in two cases charging him with conspiracy to commit armed robbery, said offenses alleged to have occurred in February 1981," and then pending in Yadkin County. In its ruling the court said: "The motion in limine is granted on condition that the defendant does not bring the substance or anything regarding the requested motion in limine." In a clarification in the following exchange with counsel, the court explained: "I am saying I denied the motion unless you open the door, either of you open the door."

The presently challenged evidence did "come in," as related above under the 9th question presented for review. Upon the reception of this testimony into evidence, each defendant moved for a mistrial. In the discussion that followed, the court said:

> "Counselor, I admonished both of you prior to the trial of this case not to bring up anything that would allow any testimony regarding any armed robberies and granted your motion in limine based upon the fact that neither of you mention anything that opened the door. I, at that time, expressly told you that once you opened the door . . . that neither of you bring up the matter."

In his brief defendant contends that the limiting condition placed on him by the court's ruling was improper and contends that the court's original order of exclusion implicitly contained a finding that the evidence was irrelevant and prejudicial, and that defendant is not responsible for his codefendant's opening the door. We disagree with defendant's contentions based on our earlier discussion of "opening the door" in our review of question number 9. No limiting instructions were requested when the evidence was received. Defendant argues that *State v. Davis* and *State v. Fish*, 284 N.C. 701, 202 S.E. 2d 770, *cert. denied*, 419 U.S. 857, 42 L.Ed. 2d 91, 95 S.Ct. 104 (1974), is analogous to his position. However, in *Davis*, none of the three defendants testified, and the court found that ". . . competent evidence against [defendants] so positively establishes their guilty participation in [the victim's] murder that the incompetent evidence, even in its totality, was harmless beyond a reasonable doubt." *Davis, supra*, at 722, 202 S.E. 2d at 784. We find no merit in this assignment.

[10] The defendant's motion to dismiss at the close of the evidence is brought forward as question 11 presented for review and is argued under the term "non-suit."

Defendant concedes in his brief "that there is sufficient evidence in the record to have supported the submission of the charge of procuring arson to the jury." The question advanced for review is whether there was a fatal variance between the indictment, which alleged that defendant solicited Crawford to commit arson of the building on or about 1 June 1980, and the evidence which showed the offense to have occurred about the last of April or the first of May, 1980.

We hold that the defendant's evidence that a State's witness, Crawford, was not present in North Carolina but was in Chicago at the time alleged in the indictment, goes to the weight to be given the witness Crawford's testimony and is not a fatal variance requiring a dismissal of the charge. *See State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Bailey*, 49 N.C. App. 377, 271 S.E. 2d 752 (1980), *disc. rev. denied*, 301 N.C. 723, 276 S.E. 2d 288 (1981); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979); *State v. Locklear*, 33 N.C. App. 647, 236 S.E. 2d 376, *disc. rev. denied*, 293 N.C. 363, 237 S.E. 2d 851 (1977). The motion to dismiss, or for nonsuit, was properly denied.

The issue of the court's failure to declare a mistrial is the defendant's 12th question presented for review. Through 23 exceptions defendant contends that he suffered substantial and irreparable prejudice at three stages of the trial: when the court allowed evidence of unrelated crimes, when the cases were consolidated in the face of his motion *in limine* by limiting his approach to the evidence, and when the judge held an off-record conference with a juror.

No new arguments were brought forth under this assignment. The facts were presented, discussed, and ruled upon earlier in this opinion. We find that no prejudice or abuse of discretion has been shown. The applicable rule is well stated in *State v. Allen*, 50 N.C. App. 173, 176, 272 S.E. 2d 785, 787 (1980), *app. dismissed*, 302 N.C. 399, 279 S.E. 2d 353 (1981): "A motion for mistrial in a non-capital case is addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion."

[11] Questions 13 and 14 of those groupings of errors presented for review deal with jury instructions. In the assignment involving question 13, defendant tendered a request that the judge instruct the jury with regard to a presumption concerning the accidental nature of fire. Appellant alleges in his brief that he adapted his request from language in *Phelps v. Winston-Salem*, 272 N.C. 24, 157 S.E. 2d 719 (1967), and also cites 5 Am. Jur. 2d, *Arson and Related Offenses* § 46, p. 836 (1962). Appellant concedes that "The presumption that fire results from accident rather than intentional action does not appear to have been discussed in any criminal case in this State."

When a requested instruction on a feature of the case is aptly tendered, and when the requested instruction correctly states the law based upon the evidence of the case, it is error for the court to fail to give in substance the requested instruction. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973); *State v. Boyd*, 278 N.C. 682, 180 S.E. 2d 794 (1971). The requested instruction reads as follows:

> "This is an unexplained fire. Proof of the burning alone is not sufficient to establish the defendant's guilt. If nothing more appears, the presumption of the law is that the fire was the result of accident or some providential cause. There can be

no verdict of guilt in this case unless the State proves to you beyond reasonable doubt, by either direct or circumstantial evidence not only the intentional burning of the property in question, but also that the fire did not result from natural or accidental causes."

The tendered instruction was not justified under the evidence. Far from being "an unexplained fire" as is the positive statement in the instruction, the transcript shows, through the testimony of Clyde Morland, that Bill Dennis willfully and intentionally set the fire by use of a highly flammable material, a mixture of naphtha and gasoline; that when the material was spread around, the fumes were very strong; and when Dennis did ignite it, the fire went so fast it almost blew him up. The payment of money was given as the reason Dennis did the act. This was not an allegation of a negligently set fire, as in *Phelps, supra*, and the evidence showed a known cause for the burning, instead of an unknown cause or accident. The tendered instruction being incorrect in its application of the law to this case, the trial judge correctly refused to give it. This assignment is without merit.

[12] The second jury instruction assignment of error, brought forward under question 14, alleges that the judge erred by failing to instruct the jury regarding grants of immunity to State's witnesses, Clyde Morland and Betty Morland, as required by G.S. 15A-1052(c). This question was raised by an addendum to the record which placed exceptions in the transcript prior to the testimony of Clyde and Betty Morland.

In his charge the judge instructed the jury as follows:

"There is evidence in this case which tends to show that Clyde and Betty Morland were testifying under a grant of immunity in some other cases and not these particular cases. If you find that they testified in whole or in part for this reason, you should examine their testimony with great care and caution in deciding whether or not to believe them.

If after doing so, you believe their testimony in whole or in part, you should treat what you believe the same as any other believable evidence."

On the subject of grants of immunity in court proceedings, G.S. 15A-1052(b) speaks of the district attorney's procuring an

order issued by a Superior Court Judge for the witness to testify, and in (c) states that "In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses."

In construing this statute our Supreme Court in *State v. Hardy, supra,* held that while the statute specifies "prior" to the testimony, there was no requirement that the instructions be given "immediately" preceding the witnesses' testimony, and that the instruction about scrutinizing the testimony is properly given during the "final" charge to the jury.

Our present facts are different. Here there is nothing in the record to indicate there was ever an order for either witness to testify. According to the record, the immunity as orally given by the district attorney was divulged to counsel pretrial and at court during motion hearings. In the presence of the jury each defense counsel questioned Clyde Morland about his testifying because of immunity given to him. Neither Mr. nor Mrs. Morland were codefendants in the present cases. The immunity concerned other offenses in another county in which the witnesses were directly involved.

The transcript reveals in the charge conference that any instructions requested by defendants were granted except defendant Miller's request regarding a presumption of accidental fires (which subject is discussed under question 13 above).

As pointed out in *Hardy, supra,* at 120, 235 S.E. 2d at 837, "Obviously, the legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear on his credibility." We hold here that actual knowledge of the Morlands testifying because of immunity from prosecuting them for offenses in another county was made well known to this jury and sufficiently explained to the jury in the judge's final charge. At the conclusion of the charge there was no request for further clarification or additional instructions. As expressed in *State v. Harris,* 290 N.C. 681, 699-700, 228 S.E. 2d 437, 447 (1976), and cited with approval in *Hardy, supra,* at 121, 235 S.E. 2d at 838, "[I]t must be borne in mind that every poorly stated instruction does not result in such prejudice as to require a

new trial. In order to constitute reversible error, it must be made to appear that, in light of all the facts and circumstances, the challenged instruction might reasonably have had a prejudicial effect on the result of the trial." Even though no instruction was given in this case by the judge prior to the Morlands testifying, we find no prejudicial error.

Several rule violations concerning exceptions and the certifying of the record on appeal after 150 days are noted. However, because this is a criminal case we have, nonetheless, carefully examined all assignments of error and questions presented for review by each defendant.

As to the defendant Miller's appeal, we find no error.

II. DEFENDANT DENNIS'S APPEAL

From fourteen assignments of error nine questions are presented for review in the brief. Some of them cover the same issues, evidence, and legal subjects as presented by the appeal of codefendant Miller. We find no error in each of the following questions for the same reasons given under the corresponding discussion of the Miller questions:

a. denial of motion to consolidate,

b. restriction of cross-examination by virtue of the ruling of the court on the motion *in limine*,

c. improper expression of an opinion through the court's rulings and conduct,

d. admission of evidence of other unrelated crimes,

e. improper denial of the motion to dismiss,

f. denial of his motion for a mistrial, and

g. the court's holding an improper off-the-record conference with a juror.

The remaining three questions, numbers 3, 4 and 7 in the brief, deal with evidentiary matters not otherwise discussed. We note that the third question alleged that the court permitted improper leading questions. However, this point was not brought forward in argument in the brief and is deemed abandoned. Even

so, having read the assigned exceptions we find no abuse of discretion.

Question 4 deals with the admission of opinion evidence through Larry Ford as an expert witness, the appellant contending the opinions were incompetent.

The evidence shows that Larry Ford is a forensic chemist employed by the State Bureau of Investigation of North Carolina for eight years. Early in his examination, the district attorney asked, "In this capacity as a chemist for the S.B.I., what are your responsibilities?" Mr. Ford answered that, "My major responsibility is to examine and analyze fire evidence submitted to our office by law enforcement agents throughout the state." The next question was, "What are your qualifications?" Immediately, the record shows Attorney Redden said, "We stipulate that he is an expert." Attorney Kasper said, "Likewise." Whereupon the court said, "Let the record show that it is stipulated by both attorneys for the defendants that this witness is an expert in the field of forensic chemistry."

There was an extensive examination and cross-examination. In particular, the cross-examination by defendant Dennis's counsel concerned the nature and properties of toluene. This substance had been mentioned many times previously. Toluene was stated to be a very volatile substance and was found by chemical analysis of the fire scene material examined by the witness. Toluene is a flammable hydrocarbon. The witness explained how toluene would burn, how it would probably explode if ignited in a sealed area, how it evaporates as a gas and how it is nonsoluble.

The trial judge asked certain questions:

"COURT: . . . Could the gases from toluene cause burn patterns in the floor?

A. Gases would not. Those are flammable liquid patterns.

* * * *

A. Any time you have gas, you would have a situation that would totally involve the volume of the building rather than a confined area.

COURT: Could it cause spalling of concrete?

A. No, sir, it would not, not in a concentrated area on the floor.

COURT: Could it cause a piece of 2 by 4 that was located above the floor level and flushed against another 2 by 4, could it cause it to burn in the fashion that State's exhibit No. 12 is burned?

A. In my opinion, I don't think it would."

There was no objection by defendant and no motion to strike. "An objection to the admission of evidence is necessary to present a contention that the evidence was incompetent." *State v. Thompson*, 26 N.C. App. 171, 174, 215 S.E. 2d 371, 373 (1975).

On re-recross examination, defendant Dennis's counsel asked about spalling from fire on a poured concrete outside floor and fire in an outside oil drum causing concrete to spall. The counsel asked if wind currents could cause burn patterns on floors or walls or any area. The witness gave this answer: "Obviously, the wind current you are talking about would be in this area in question" and was "outside of my expertise." The State's direct evidence had shown that the fire originated inside the closed building and that a witness at the scene heard what sounded like an explosion in the building.

[13] On this evidence the appellant presents two arguments. He first challenges the opinion of Mr. Ford on the ground that he was not an arson expert. On this we rule that since the defendant failed to object at the time, the argument is not properly before us. Nevertheless, the whole of Mr. Ford's testimony reveals that he was an expert in the field in which he was questioned. In particular, this forensic chemist had answered that his area of major responsibility was "to examine and analyze fire evidence submitted to" the S.B.I. Laboratory office by statewide law enforcement officers. As soon as the State started establishing his background for same by asking about his qualifications, each counsel stipulated that the witness was an expert without limitation as to field. The whole record shows him qualified to answer all of the "expert" questions in evidence. *See State v. Culpepper*, 302 N.C. 179, 273 S.E. 2d 686 (1981).

The second argument contends that the district attorney asked Mr. Ford opinion questions as if he were an arson expert.

This argument answers itself from the whole of Mr. Ford's testimony. State's exhibits 14 and 15, properly identified in the evidence as to source, contained fire scene materials which were chemically analyzed by Mr. Ford. Counsel had stipulated that Ford was a forensic chemist. He testified from his personal knowledge about his findings. He answered questions calling for expert knowledge of toluene. The fact that the questions related to toluene and its reaction to fire and heat did not carry the witness outside his field. He had eight years' experience in analyzing fire evidence. We hold his answers were properly admitted.

[14] In his further challenge of alleged incompetent evidence under question 4, appellant contends that the court erred by not giving a requested limiting instruction that certain photograph exhibits be considered only for illustrative purposes. While it is true that the record shows no limiting instructions were given at the moment the photographs were received into evidence, the court did give appropriate instructions in its final charge to the jury, and this assignment of error is without merit.

By his seventh, and final, question for review the appellant charges that the judge committed error when he sustained the State's objection to his question of Officer Ralph Hammesfahr "about his knowledge of insurance proceeds" on the burned building. Appellant alleges in his brief that "the court did not allow the answer to be preserved for the record." This allegation is totally incorrect. The question and answer for the record proper are found in the transcript: "I had no information at the time," to the court's question, and, "No, sir, I didn't know whether the insurance had paid off or not" to counsel's question. Even if these answers had been given in the presence of the jury, it could not have affected the outcome of this case beyond a reasonable doubt. It is also noted that the question was improperly put to this witness and that the objection was properly sustained, because the answer would have been based on hearsay and was not shown to be within the realm of personal knowledge of the officer. This assignment of error is without merit.

In the defendant Dennis's appeal, we find no error.

After examination of the record and the assignments of error, we find that defendants Miller and Dennis received a fair trial, free of prejudicial error.

No error.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. EDELL WILLIS

No. 8210SC749

(Filed 1 March 1983)

1. Arrest and Bail § 3.4— legality of arrest for narcotics offenses

An officer had reasonable grounds to believe that defendant was committing or had committed a narcotics offense and, therefore, lawfully arrested defendant without a warrant, where the officer received information from a confidential informant that defendant, a subject known to both the officer and the informant, would be delivering packages of heroin to several people at a certain location; past information from this informant had proven reliable and had led to convictions in approximately 25 cases; the officer and another officer drove to the area in an unmarked police car at about 10:30 p.m.; the officer saw a Cadillac rolling forward at a slow speed without its headlights on; as the police car passed the Cadillac, the officer recognized defendant as being the person who was sitting in the passenger seat; when the police car drove up behind the Cadillac, the officer saw defendant throw a white package from the Cadillac; when the officer jumped from his police car, defendant yelled, "Get out of here," and the Cadillac sped off; the Cadillac was stopped several blocks away; the second officer retrieved the package which had been thrown out of the Cadillac by defendant; large sums of money were found in the Cadillac and on defendant's person; and the second officer told the arresting officer that the recovered package contained a white powder substance.

2. Searches and Seizures § 8— search incident to arrest—lawfulness of intensity

The intensity of a search of defendant's person as an incident to his lawful arrest for a narcotics offense, during which bundles of money were found in various parts of his clothing and four papers were found in his wallet, was reasonable and lawful, and the money and papers were lawfully seized and received into evidence.

3. Criminal Law § 51— opinion testimony—failure to tender witness as expert

The fact that an officer was never tendered as an expert witness nor held by the court to be an expert witness did not prevent him from giving opinion testimony where it appeared from the record that he had acquired such skill

that he was better qualified than the jury to form an opinion on the particular subject of his testimony.

4. Criminal Law § 80— names on pieces of paper—identification by officer

In a prosecution for felonious possession of heroin, the trial court properly ruled that an officer who was familiar with persons listed on pieces of paper found in defendant's wallet could identify each such person listed and explain his knowledge of that person. Furthermore, since the papers were taken directly from defendant's wallet and the defendant's own name appeared as addressee on one of the pieces of paper, the State was not required to prove who wrote the papers or made any of the markings thereon or any other type of authentication.

5. Criminal Law § 102.6— prosecutor's jury argument—plausible inference from the evidence

In a prosecution for felonious possession of heroin, the prosecutor's jury argument that, according to the testimony of two officers, persons whose names were written on papers found in defendant's wallet were known heroin users and dealers and that numbers beside the names of some of the persons represented a record of defendant's heroin sales merely suggested a plausible inference to be drawn from the evidence and was not improper.

6. Criminal Law §§ 34.7, 34.8— evidence of other crimes—admissibility to show common plan or scheme, knowledge and intent

In a prosecution for trafficking in heroin, bundles of money found in various parts of defendant's clothing and papers found in defendant's wallet which contained the names of known heroin users with numbers beside some of the names were relevant as tending to show a plan or scheme and a disposition by defendant to deal in heroin, to show that defendant had knowledge of the presence of heroin in a package which he threw from an automobile, and to show that defendant intended to possess and traffic in heroin.

7. Narcotics § 4.7— trafficking in heroin by possession—failure to instruct on lesser offenses

In this prosecution for trafficking in heroin by possessing between four and fourteen grams thereof, the trial court did not err in failing to charge the jury on the lesser included offense of simple possession of heroin where all of the evidence tended to show that the total weight of the mixture of white powder possessed by defendant was 13.2 grams and that the mixture contained approximately 30% of pure heroin.

8. Criminal Law § 112.4— instructions on circumstantial evidence

In a prosecution for felonious possession of heroin, the trial court properly refused to instruct on "no eyewitness testimony or direct evidence" where there was direct evidence of the offense through an officer's testimony that he saw defendant throw a package containing heroin from a car. Furthermore, the instruction given by the trial court on circumstantial evidence was sufficient although it was not in the language requested by defense counsel.

9. Narcotics § 4— trafficking in heroin by possession—sufficiency of evidence

The State's evidence was sufficient for the jury to find defendant guilty of trafficking in heroin by possessing between four and fourteen grams thereof.

10. Narcotics § 5— trafficking in heroin—cooperation with authorities—statute permitting more lenient sentence—constitutionality

The subsection of the heroin trafficking statute which permits the trial judge to impose a more lenient sentence on a defendant who provides substantial assistance in the identification, arrest or conviction of any accomplices, accessories, co-conspirators or principals, G.S. 90-95(h)(6), is not unconstitutional on the theory that it coerces a defendant to abandon his Fifth Amendment rights against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. Nor is the statute unconstitutionally vague in its use of the phrase "substantial assistance."

11. Narcotics § 5— trafficking in heroin—mandatory minimum sentence—constitutionality

The mandatory minimum sentence and fine provision of a subsection of the heroin trafficking statute, G.S. 90-95(h)(5), does not violate a defendant's equal protection rights and the separation of powers clause of the North Carolina Constitution on the theory that it places impermissible legislative restraints on the judiciary and, in effect, places sentencing power in the hands of the prosecutor.

12. Narcotics § 5— heroin trafficking statute—no violation of equal protection

The statute defining the offense of trafficking in heroin, G.S. 90-95(h)(4)a., does not violate a defendant's equal protection rights because it penalizes possession of a particular amount of any mixture containing heroin without regard to the percentage of heroin in the mixture.

APPEAL by defendant from *Battle, Judge.* Judgment entered 24 February 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 19 January 1983.

The jury convicted the defendant of feloniously possessing 4 to 14 grams of the controlled substance heroin in violation of G.S. 90-95(h)(4). Pretrial, the judge conducted a full evidentiary hearing on defendant's motion to suppress items seized without a search warrant following an asserted arrest of his person. Defendant contends that the search was without probable cause. The suppression motion was denied and the items were subsequently admitted into evidence.

The State's evidence tended to show that on 22 June 1981, Raleigh police detective O'Shields received information from a

confidential informant that defendant, a subject known to both detective and informant, would be delivering packages of heroin to several people near Shirley's Restaurant and Lounge. Acting on this information, Officers O'Shields and Peoples of the Drugs and Vice Division drove to the area in an unmarked police car at about 10:30 p.m. on 22 June 1981. The officers saw a dark blue Cadillac in the middle of Florence Street, without headlights, rolling forward at a slow speed. As the police car passed the Cadillac, shining its headlights into the car, O'Shields recognized defendant, who was sitting in the passenger seat. The officers went around the block and drove up behind the Cadillac, which now was parked against the curb.

O'Shields saw defendant turn around and look out the back window of the Cadillac when the two vehicles were approximately three car lengths apart. As the Cadillac's passenger side door came open, two large interior lights at the back rear illuminated the interior. O'Shields could then clearly see defendant looking out the back window, and the officers were about a car length behind. The officers stopped. Before O'Shields could open his door, "Edell Willis stuck his right arm out of the vehicle, up under the vehicle, and threw a white package up under the car." O'Shields jumped out of the police car, and before O'Shields could go in front of his own vehicle, the defendant slammed the Cadillac door and yelled, "Go, go, go. Get out of here. Get out of here." The Cadillac sped off.

The package, or object thrown from the Cadillac, was pinpointed by O'Shields as lying four feet away from a pecan tree in front of a house on Florence Street with no other objects around. The package was bundled or rolled up and approximately three or four inches long in a manila, white, glassine bag and had white powder in it.

The officers followed the Cadillac for several blocks and then stopped it, removing the two men from the car. Peoples immediately returned to the location on Florence Street to pick up the package that had been thrown out by defendant.

In the search of the Cadillac, O'Shields recovered two large sums of money. In a money bag on the floor at the driver's feet was a total of $1,077.00. O'Shields was still searching the Cadillac

when Sgt. Peoples returned. Sgt. Peoples told Detective O'Shields that he had recovered a package of white powder substance and "he picked it up where they threw it out." Peoples secured the white powder in the trunk.

O'Shields placed defendant and Monroe, the driver of the Cadillac, under arrest for possession of heroin. Defendant was searched and a total of $7,064.10 was found in various places on him.

On 18 November 1981, a hearing was held on defendant's motion to suppress evidence. The judge denied the motion, concluding that there was probable cause, that once arrested there was a search of defendant's person incident to the arrest, and that the glassine bag was abandoned in the street and not the subject of the law of search and seizure.

On 23 February 1982 when the case came on for trial before Judge Battle, another hearing on the motion to suppress evidence was held and again the motion was denied. This hearing centered around four pieces of paper which were taken from the defendant's wallet the night of the arrest. The pieces of paper contained names of individuals with either telephone numbers or numerals noted beside them.

During the jury trial a *voir dire* hearing was held out of the presence of the jury regarding the search of the defendant's person and the relevancy of the four pieces of paper. Both Detective O'Shields and Sgt. Peoples testified. The *voir dire* evidence showed that O'Shields had been involved in the investigation of heroin trafficking in the City of Raleigh for approximately six years, and that based on that experience and his knowledge of heroin trafficking, heroin dealers, and heroin addicts, the amounts next to the names on the four pieces of paper from the wallet of the defendant were amounts of heroin that dealers had passed to the defendant. O'Shields made "a connection with the names there with the heroin trafficking in Raleigh." He had arrested four of those people, and four of them were in prison for heroin trafficking. He said he knew Miss D (also known to him as Dee Jones, Linda Shaw Jones, and Linda Evans), J. J. Young, Bobby Ray Cox, Peach Smith, Drake, Sam Man (who was known to him as Sammy Perry) and Johnny (who was known to him to be John-

ny Blalock) and related each to words or entries or notes on the pieces of paper. O'Shields testified on cross-examination that he looked at the papers then "in front of him and pretty much based on the information that I have gathered over the years as a narcotics officer, place an interpretation on these items as to who they are and what it means." He did not know who wrote the entries or when they were written. His interpretation of names came "from informants and with (him) talking with these people themselves telling me their names, their street names." As to the telephone numbers listed on the papers, he knew personally the numbers of Dee Jones and Sammy Perry.

Sgt. Peoples testified on *voir dire* as to his own understanding of the meaning of the names and numbers on the papers. He based his answers on about two years of investigation of heroin trafficking in Raleigh and an examination of the papers themselves. He explained the names he knew and that he had checked telephone numbers with Southern Bell as listed on the papers. He said: "I am making an assumption about these names and the people to whom they refer to. With regard to the figures that are written on these papers, it is based on experience in talking with addicts."

At the conclusion of *voir dire*, Judge Battle ruled that he would permit the officers, where they were personally familiar with the name on the piece of paper, to identify the person and explain their knowledge.

When again before the jury, O'Shields testified as to the money found and amounts, and as to the four pieces of paper. The money and papers were received into evidence over objection.

Upon further questioning by the State, O'Shields told the jury that he recognized certain names on the four pieces of paper. Those he identified were Miss D, J. J., Johnnie, B. Ray, Peach, Drake and S. Man. An example of one of his answers illustrates the nature of his testimony: "I recognize that name as a street dealer called Miss D or D. Jones. They call her just D. I know her as Linda Shaw Jones. I have arrested her and searched her twice and she is now in prison for selling heroin." O'Shields further testified that he knew the home phone number of Miss D on one

of the papers, and that he had talked with her at this number on numerous occasions.

Sgt. Peoples, in testifying before the jury, related that before he first left the Florence Street location and pursued the Cadillac, "I saw the white package on the ground." In returning to the scene to retrieve the package, he found it out in the street approximately four feet away from the curb with nothing else around it, and in the near vicinity of a tree and of 705 Florence Street. The elapsed time was approximately 3 to 5 minutes between first seeing the package and retrieving it.

Defendant presented the testimony of one witness, Janet Graves. She testified that she lived at 707 Florence Street and was on her front porch at the time the Cadillac was first parked at the curb and when the police car first appeared. On direct, she said that "no door to the Cadillac came open. Nor did any door to the police car come open at that time. No one got out of the police car. . . . No one threw anything out of the Cadillac." On cross-examination she testified, "I watched the policeman and I watched the Cadillac and I was trying to figure out what was going on but I didn't see the door open to the Cadillac but I guess I couldn't really say that it didn't open." She did not see anybody throw anything on the street.

Attorney General Edmisten by Assistant Attorney General Joan H. Byers for the State.

Loflin & Loflin by Thomas F. Loflin, III; Of Counsel, Eagles, Hafer & Hall by Kyle S. Hall for defendant appellant.

BRASWELL, Judge.

Under his multi-faceted assignments of error defendant argues that there was no probable cause for his warrantless arrest or search of his person, that currency and papers seized from his person were improperly admitted into evidence, that certain jury instructions were improper, that his motions to dismiss and nonsuit should have been allowed, and that the controlled substances trafficking statute is unconstitutional.

We hold that probable cause existed for the warrantless arrest, search of the person incidental to arrest, seizure of money

from the person, and seizure of four pieces of paper from the defendant's wallet.

When a warrantless arrest is made upon the basis of probable cause, the arrest is constitutionally valid. The framework for a determination of the existence of probable cause in any case is conditioned upon " 'whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' " *State v. Bright*, 301 N.C. 243, 255, 271 S.E. 2d 368, 376 (1980), quoting *Beck v. Ohio*, 379 U.S. 89, 91, 13 L.Ed. 2d 142, 145, 85 S.Ct. 223, 225 (1964).

[1] In our case Detective O'Shields, a 10-year veteran of the Raleigh Police Department, received information from a confidential informant on 22 June 1981, the same date of the arrest, that the defendant, a subject known to both officer and informant, would be delivering packages of heroin to several people in the vicinity of South and South Saunders Streets at Shirley's Restaurant and Lounge. Past information from this informant had proven reliable and had led to convictions in approximately 25 cases, of which 6 or 7 of them had been in the previous 6 months. The detective had dealt with this informant many times.

On the basis of this intelligence, Detective O'Shields, accompanied by Sgt. Peoples, drove in an unmarked car to the vicinity of South and South Saunders Streets at approximately 10:30 p.m. After circling the area twice, the officers met a Cadillac automobile on Florence Street. A subsequent chase of the Cadillac for a block to a block and a half led to the arrest of the defendant, who was a passenger in the Cadillac, at the rear parking lot of Shirley's Restaurant and Lounge.

The facts and circumstances of the encounter with the Cadillac, as more specifically related under the facts of this opinion; what was happening at the moment of the encounter; the fresh knowledge from the confidential informant; the proven past reliable knowledge through 25 convictions; the self-verifying details of the officers finding the defendant in the exact vicinity where the informant had said the defendant would be delivering packages of heroin; the defendant being one of the two occupants of the Cadillac; the throwing of a glassine package by the defend-

ant from the car; the defendant yelling, "Go, go, go. Get out of here. Get out of here"; the way and manner of the automobile leaving its position on Florence Street; the way the defendant, during the chase, "was all down in front of the vehicle making all sorts of motions with his hands"; the Cadillac being in motion at night without lights; the leaving and prompt return by Sgt. Peoples to the place where the package had been thrown from the Cadillac; the retrieval of the glassine package from the exact same area from which an object had been thrown by defendant and prompt return with the package to the parking lot of Shirley's Restaurant; the white powder appearance of the contents of the package—all of which, when taken en masse, were sufficient to warrant a prudent man in believing that defendant had committed or was committing a criminal offense in violation of the North Carolina Controlled Substances Act. O'Shields possessed a reasonable ground for belief that defendant was committing or had committed an offense, justifying the arrest of the defendant without a warrant. *State v. Bright, supra.* As said in *Adams v. Williams,* 407 U.S. 143, 147, 32 L.Ed. 2d 612, 617-18, 92 S.Ct. 1921, 1924 (1972), "One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, . . . when a credible informant warns of a specific impending crime—the subleties of the hearsay rule should not thwart an appropriate police response." O'Shields was acting and "relying on something more substantial than a casual rumor." *Spinelli v. United States,* 393 U.S. 410, 416, 89 S.Ct. 584, 589, 21 L.Ed. 2d 637, 644 (1969).

Our case is similar to *McCray v. Illinois,* 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056 (1967). In affirming a possession of heroin conviction, the court in *McCray* noted the following evidentiary summary of the officers' testimony:

> "Officer Jackson stated that he and two fellow officers had had a conversation with an informant on the morning of January 16 in their unmarked police car. The officer said that the informant had told them that the petitioner, with whom Jackson was acquainted, 'was selling narcotics and had narcotics on his person and that he could be found in the vicinity of 47th and Calumet at this particular time.' Jackson said

that he and his fellow officers drove to that vicinity in the police car and that when they spotted the petitioner, the informant pointed him out and then departed on foot. Jackson stated that the officers observed the petitioner walking with a woman, then separating from her and meeting briefly with a man, then proceeding alone, and finally, after seeing the police car, 'hurriedly walk[ing] between two buildings.' 'At this point,' Jackson testified, 'my partner and myself got out of the car and informed him we had information he had narcotics on his person, placed him in the police vehicle at this point.' Jackson stated that the officers then searched the petitioner and found the heroin in a cigarette package.

Jackson testified that he had been acquainted with the informant for approximately a year, that during this period the informant had supplied him with information about narcotics activities 'fifteen, sixteen times at least,' that the information had proved to be accurate and had resulted in numerous arrests and convictions."

Id. at 302-03, 18 L.Ed. 2d at 65-66, 87 S.Ct. at 1058.

[2] We also hold that the intensity of the search of the person of the defendant was lawful and that the money and papers were properly seized and received into evidence. Judge D. B. Herring, Jr., the trial judge who heard the pretrial motion to suppress, based upon facts found, and which we also find to be fully supported in the record, concluded that the search here did not take place until after a lawful arrest, and that "once arrested a search, incident to the arrest, of the defendant's person . . . was lawful and proper." It was during the search that the money was found in bundles in various parts of his clothing and the four papers were found in his wallet. As held by the United States Supreme Court in *United States v. Robinson*, 414 U.S. 218, 235, 38 L.Ed. 2d 427, 440-41, 94 S.Ct. 467, 477 (1973),

"A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover

evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

The issue of the lawful seizure of a wallet, and other items, from a defendant in a drug case was discussed in *United States v. House*, 604 F. 2d 1135, 1142 (8th Cir. 1979), *cert. denied*, 445 U.S. 931, 63 L.Ed. 2d 764, 100 S.Ct. 1320 (1980):

"The government argues that the jacket, wallet, keys, and car ownership papers were seized to show constructive possession by appellant of drugs or money. Over $3,000 was found in the wallet; drugs were found in the jacket, a locked overnight bag in the bedroom closet, and the car. The government argues that these items constituted 'mere evidence' that would aid in a particular apprehension or conviction. [Citation omitted.] We find the government's position to be well taken. Moreover, the car keys and wallet were seized incident to appellant's lawful arrest."

The defendant makes a specific six-prong attack on the admission into evidence of the currency taken from his person and the automobile, and to the admission into evidence of the four pieces of paper taken from defendant's wallet, contending prejudicial error, as follows:

"(1) O'Shields's belief as to the meaning of the papers was an impermissible assertion of an opinion by a nonexpert witness with no firsthand knowledge of the facts about which he was testifying.

(2) The documents, and the interpretations that O'Shields ascribed to them, were attributed to the Defendant in the absence of any evidence to show that they were written by the Defendant.

(3) The documents and the meaning given them by O'Shields were admitted for the purpose of proving the truth of the meaning that O'Shields had given them and thus are hearsay.

(4) The purpose for the introduction of this evidence was to create the impression in the minds of the jurors that the Defendant had engaged in a variety of heroin transactions for which he had not been charged and was not on trial. The admission of the evidence for that purpose constituted an attack upon the Defendant's character during the State's case in chief and without the Defendant having first put his character in issue.

(5) The money, documents, and the testimony about the documents were offered to conjure up the implication that the Defendant was engaged in the sale of heroin, which is irrelevant to the offense of *possession* of heroin, for which the Defendant was on trial, and was calculated to create substantial prejudice against the Defendant in the minds of the jurors.

(6) The documents and currency were seized from the Defendant without probable cause in violation of the United States Constitution and Chapter 15A of the North Carolina General Statutes and were, therefore, inadmissible at the Defendant's trial. For each of these reasons the Court erred. For any of them the Defendant is entitled to a new trial."

[3] We merge our discussion of these arguments by first considering whether O'Shields was an expert or a lay witness as to his testimony about the papers. The uncontradicted evidence shows that Detective O'Shields had been a Raleigh police officer for 10 years. He had experience as a patrolman with the Selective Enforcement Unit and for a year and a half with the Drugs and Vice Unit. His present duties were working with narcotics and vice cases. On *voir dire* O'Shields stated that he was trained by attending several drug identification schools and search warrant classes, by working drug campaigns with the investigative division, by working on the east and south sides of Raleigh and by his previous experience on the Selective Enforcement Unit. He had been involved in the investigation of heroin trafficking in the City of Raleigh for approximately six years. Thus, it appears from the

record that through his study, experience and personal knowledge of the area, O'Shields had "acquired such skill that he was better qualified than the jury to form an opinion on the particular subject of his testimony." *Maloney v. Hospital Systems*, 45 N.C. App. 172, 177, 262 S.E. 2d 680, 683, *disc. rev. denied*, 300 N.C. 375 (1980), citing *State v. Johnson*, 280 N.C. 281, 286, 185 S.E. 2d 698, 701 (1972). The mere fact that O'Shields was never tendered as an expert witness nor held by the court to be an expert witness, does not in fact prevent him, otherwise qualified in the record, from giving his opinion. It is the substance of the background evidence of qualifications in the record and not any magic words spoken by the judge that determine if the witness may give opinion testimony. In *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973), there was no formal ruling that a fingerprint identification witness was an expert, but the record showed that he was better qualified than the jury to form an opinion on the subject. *See State v. Covington*, 22 N.C. App. 250, 206 S.E. 2d 361 (1974); and 1 Brandis on North Carolina Evidence § 133, fn. 6, p. 515 (1982). In *Covington, supra*, at 253, 206 S.E. 2d at 363, it was held proper to allow a Durham Vice Squad officer with years of vice squad experience to describe "use of narcotics paraphernalia and cutting of heroin." *Also see, State v. Clark*, 30 N.C. App. 253, 226 S.E. 2d 398 (1976). "The absence of a record finding of qualification is not ground for challenging the ruling implicitly made in allowing him to testify. At least if the record indicates that such a finding could have been made, it will be assumed the judge found him qualified, . . ." *Brandis, supra*, at p. 517.

[4] There was a *voir dire* as to O'Shields' actual interpretation of the names, figures, and telephone numbers appearing on the four pieces of paper taken from defendant's wallet. The trial judge properly concluded that during the *voir dire* itself, O'Shields had gone too far in giving his opinions. However, we hold that Judge Battle properly ruled that where the officers were personally familiar with the name on the piece of paper, the officer could identify the person and explain his knowledge of same. Since the papers were taken directly from defendant's wallet and the defendant's own name appeared as addressee on one of the pieces of paper, a receipt for the rental of post-hole diggers, it was not required that the State prove who wrote the papers or made any of the markings on them or any other type of authentication. The

fact that the papers were found in his wallet indicates that the defendant considered the papers important to himself.

[5] Coupled with his complaint of O'Shields' opinion evidence is an allegation of improper comment by the district attorney in his closing jury argument. We agree with the State that since the defense counsel's argument is not brought forward in the record, the defendant ought not to be allowed to object to the argument of the State because the argument might well have been in response to comments made by the defendant's counsel. *See* G.S. 15A-1241(b). We have nevertheless examined the challenged comment and find it to be without merit. The district attorney here had argued that based on the testimony of O'Shields and Peoples,

> "[T]hat what we have here is Edell Willis' records of his heroin sales. We have got the names of the people who you now know, according to the evidence testified by Detective O'Shields, are known and convicted heroin users, with each one of them having next to them certain numbers, nine hundred, five hundred, seven hundred fifty, nine hundred, three hundred, five hundred fifty, etc. What is that? Doesn't the evidence show, ladies and gentlemen, that Edell Willis had just made sales of certain amounts of heroin for certain prices that he now had with him. Did he sell a package of heroin for five hundred dollars to Miss D., to Young J.J. two packages, one nine hundred dollar package and a five hundred dollar package? What does this say? What does the money say? Isn't that exactly what was going on? Or is that just one of those coincidental things that point to innocence that Mr. Hall was talking about."

The defendant's objection to this argument has already been answered in *United States v. Washington*, 677 F. 2d 394, 396 (4th Cir.) *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 105, 103 S.Ct. 120 (1982), as follows:

> "The defendants also complain about the prosecutor's statement to the jury that matching names and figures in the address books and slips of paper found on the two defendants give 'an idea of how drug dealers do business, the names of customers and the amounts of money.' The defendants argue that, since no expert witness had testified on the business practices of drug dealers, this comment went beyond the

evidence in the case. We disagree. The prosecutor was merely suggesting a plausible inference to be drawn from the evidence. Such suggestions are proper. *See United States v. Welebir*, 498 F. 2d 346, 351-52 (4th Cir. 1974)."

The defendant argues further that O'Shields' testimony that he was "making an assumption" as to the identification of names, nicknames, and figures violates the hearsay rule, was an attack upon the defendant's character, and tended to show that the defendant was engaged in other offenses which were not relevant to the crime charged. We do not agree.

[6] The defendant was indicted under G.S. 90-95(h)(4). The opinion by O'Shields was relevant and admissible as evidence concerning defendant's guilty knowledge of what he possessed. The trafficking in drugs statute is aimed at an offender who is facilitating a large scale flow of drugs, and the General Assembly aimed to deal with such an offender. Our Court held in *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E. 2d 918, 919 (1978), that "In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found." Defense counsel could have, but did not, request the trial judge to instruct the jury as to the limited purpose for which this evidence was received. *Id. Richardson* was cited with approval by our Court in *State v. Haynes*, 54 N.C. App. 186, 282 S.E. 2d 830 (1981), a case where the officer was permitted in a drug case "to identify certain papers which had been removed from defendant's billfold at the time of arrest and to testify as to their contents." *Id.* at 186, 282 S.E. 2d at 831. Here, the four pieces of paper and the bundles of money were relevant and tended to show a plan or scheme to traffic in drugs and a disposition of the defendant to deal in illicit drugs; that defendant had knowledge of the presence of heroin in the package abandoned and thrown by him from the automobile; and that it was defendant's intent to possess heroin and traffic in same.

[7] By his third question the defendant contends that the trial judge erred in its failure to charge the jury on the lesser-included charge of simple possession of a controlled substance, or any other lesser offense. This contention is without merit.

Only when there is evidence of a lesser-included offense is the judge required to charge on a lesser offense. All of the evidence, if believed—and credibility is a jury function—shows the total weight of the mixture of white powder to be 13.2 grams and that the mixture contained approximately 30% of pure heroin. The amount was well over the lower limit of 4 grams so as to fall within the trafficking statute. The fact that the mixture was analyzed to be 30% pure heroin instead of 100% pure heroin is not controlling. So long as the quantity of the mixture in which the percentage of heroin is present is of a weight of 4 grams or more, but less than 14 grams, this aspect of the controlled substances law has been satisfied. *State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981). There was no evidence presented from which a trial judge could legitimately fashion a charge for a lesser offense. *State v. Summitt*, 301 N.C. 591, 273 S.E. 2d 425, *cert. denied*, 451 U.S. 970, 68 L.Ed. 2d 349, 101 S.Ct. 2048 (1981); *State v. Coats*, 46 N.C. App. 615, 275 S.E. 2d 486, *affirmed*, 301 N.C. 216, 270 S.E. 2d 422 (1980).

[8] The judge's charge on circumstantial evidence is the fourth question presented for review. Although the judge did instruct the jury on circumstantial evidence, defendant contends that the instruction was not full and complete and did not comply with the one requested by defendant.

The defendant had requested that the judge use N.C.P.I. Crim. 104.05 (no eyewitness testimony or direct evidence) and that the judge instruct on the two kinds of circumstantial evidence, links in a chain and strands of a rope, so as to put the jury "in a position to recognize either kind if it existed." Defendant also requested a more detailed and thorough explanation of "hypothesis" of guilt or innocence. The actual instruction given is as follows:

> "Circumstantial evidence is evidence of facts from which other facts may logically and reasonably be deduced. Circumstantial evidence is recognized and accepted proof in a court of law. However, before you may rely upon circumstantial evidence to find the defendant guilty in this case you must be satisfied beyond a reasonable doubt that the circumstantial evidence relied upon by the State either alone or together with any direct evidence points unerringly to the

defendant's guilt and excludes every other reasonable hypothesis."

Since there was direct evidence of defendant's guilt through O'Shields' testimony of seeing the defendant physically throw from his hand the package later identified as containing heroin, the trial judge was correct in refusing to charge on "no eyewitness testimony or direct evidence." The actual charge quoted above is complete in itself and supported by the evidence in the case. The trial judge is not required to use the same language requested by counsel, even though the language used could have included more details. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). As noted by our Supreme Court in *Sledge*, reiterating what it had earlier stressed in *State v. Lowther*, 265 N.C. 315, 318, 144 S.E. 2d 64, 67 (1965), "[n]o set form of words is required which the court must use to convey to the jury the rule relating to the degree of proof required for conviction on circumstantial evidence in a criminal case." *State v. Sledge, supra*, at 234, 254 S.E. 2d at 584. We conclude, as did the court in *Sledge*, that there is no reasonable cause to believe that the jury was misled or misinformed by the charge as given.

[9] Another assignment of error is the denial of defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence, and denial of nonsuit. He contends that the evidence presented was insufficient to convict defendant as a matter of law.

After giving full consideration to all of the evidence, including the testimony of the one witness for the defendant, we find this assignment to be without merit. There was substantial evidence of all of the elements of the offense. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

[10] In his fifth assignment of error defendant attacks the constitutionality of G.S. 90-95(h)(4)a., (5) and (6) which provide:

"(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . including heroin, or any mixture containing any such substance, shall be guilty of a felony

which felony shall be known as 'trafficking in opium or heroin' and if the quantity of such substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

* * * *

(5) Notwithstanding any other provision of law, except as provided in G.S. 90-95(h)(6), any person who has been convicted of a violation of this subsection shall serve the applicable minimum prison term provided by this subsection before either unconditional release or parole.

(6) A person sentenced under this subsection is not eligible for early release or early parole if the person is sentenced as a committed youthful offender and the sentencing judge may not suspend the sentence or place the person sentenced on probation. However, the sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance."

Defendant argues that subsection (6) coerces a defendant to abandon his Fifth Amendment rights against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. In *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), the Florida Supreme Court considered the constitutionality of a statute similar to ours and held that:

"Nothing in the statute suggests that 'substantial assistance' must incriminate the defendant of crimes other than those for which he has already been convicted (and for

> which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions. Nonetheless, a defendant need not invoke [N.C. subsection (6)], as nothing in the statute is compulsive. [Citation omitted.] Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. [Citation omitted] . . . . No constitutional deprivation results if a defendant elects to reap the benefits of [subsection 6]."

Id. at 519-20.

We agree with the reasoning of the Florida Supreme Court and reject defendant's argument on this issue. We also find without merit defendant's contention that the phrase "substantial assistance" is unconstitutionally vague in defining a convicted defendant who is eligible for leniency in sentencing. We again agree with the analysis of this issue in *Benitez*:

> "Being a description of a *post-conviction* form of plea bargaining rather than a definition of the crime itself, the phrase 'substantial assistance' can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. [Citation omitted.] The contested phrase, in any event, is susceptible of common understanding in the context of the whole statute. [Citation omitted.] There is no due process infirmity."

Id. at 518-19.

We adopt the language in the *Benitez* decision and hold that defendant's attack on the constitutionality of subsection (6) cannot be sustained.

[11] We likewise reject defendant's argument that the mandatory minimum sentence and fine provision of subsection (4) violates his equal protection rights and the separation of powers clause of the N.C. Constitution because it "places impermissible legislative restraints on the judiciary and, in effect, also places sentencing powers in the hands of the prosecutor, who is a member of the executive branch." It is well-established that the legislature has exclusive power to prescribe the punishment for crimes. *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971); *State v. Vert*, 39 N.C. App. 26, 249 S.E. 2d 476 (1978), *cert. denied*, 296 N.C. 739, 254 S.E. 2d 181 (1979). The function of the court in the punishment of crimes is to determine whether an accused is guilty or innocent and, if guilty, to pronounce the penalty prescribed by the legislature. *Jernigan v. State, supra.*

[12] Defendant next contends that section (4)(a) is a violation of his equal protection rights because it penalizes possession of a particular amount of any mixture containing heroin without regard to the percentage of heroin in the mixture. The holding in *State v. Tyndall, supra,* is dispositive on this issue. In *Tyndall* this Court discussed the rational relationship between proscribing amounts of a mixture without reference to the percentage of drugs and the legitimate State interest in protecting the public welfare. The harsh penalties prescribed in the North Carolina Controlled Substances Act, G.S. 90-86 *et seq.*, represent an attempt by the legislature to deter large scale distribution of drugs and thereby to decrease the number of people potentially harmed by drug use. *Id.*

We cannot agree with defendant's construction of these statutes and hold that G.S. 90-95(h)(4)a., (5) and (6) are not violative of the United States or North Carolina Constitutions. We therefore overrule defendant's fifth assignment of error.

We conclude after a thorough examination of all of the evidence and assignments of error that the defendant received a trial without prejudicial error.

No error.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND THE PUBLIC STAFF v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND CAROLINA TELEPHONE AND TELEGRAPH COMPANY v. THE PUBLIC STAFF

No. 8210UC706

(Filed 1 March 1983)

1. Telecommunications § 1.2; Utilities Commission § 20— telephone rates—consideration of yellow page revenues and expenses

The Utilities Commission properly included the revenues and expenses associated with yellow page directory advertising in computing a telephone company's gross revenues and expenses for ratemaking purposes.

2. Telecommunications § 1.2; Utilities Commission § 20— telephone rates—imputed interest expense from investment tax credit

The Utilities Commission properly excluded all imputed interest expense related to the Job Development Income Tax Credit in determining a telephone company's income tax expense for ratemaking purposes. I.R.C. § 46(f)(2).

APPEAL by Carolina Telephone and Telegraph Company and by the North Carolina Utilities Commission—Public Staff from an Order of the North Carolina Utilities Commission. Order entered 6 April 1982. Heard in the Court of Appeals 10 November 1982.

Carolina Telephone and Telegraph Company (CT&T) filed an application to increase its rates and charges for telecommunications services in North Carolina on 27 August 1981. The Utilities Commission (Commission) declared the application to be a general rate case and ordered public hearings.

Following public hearings on the matter, the Commission issued an order granting an annual increase in gross revenues of $15,896,783. In its order, the Commission included the expenses and revenues associated with and derived from yellow page directory advertising in the revenues and expenses of CT&T. CT&T had not included such revenues and expenses in its application on the grounds that yellow page advertising is not an integral part of telephone service and is subject to competition.

In its order, the Commission also excluded all imputed interest expense related to the Job Development Income Tax Credit (JDITC) in determining CT&T's income tax expense for ratemaking purposes. This treatment was the one proposed by CT&T in its application and presentation. The Public Staff had proposed that a hypothetical interest expense related to JDITC be used as a deduction in determining CT&T's income tax expense for ratemaking purposes. The treatment proposed by the Public Staff would have lowered the cost of service upon which rates are based by decreasing CT&T's tax expense for ratemaking purposes.

CT&T has appealed to this Court on the yellow page issue, and the Public Staff has appealed on the JDITC issue.

Paul L. Lassiter, for the North Carolina Utilities Commission—Public Staff, intervenor-appellee-appellant.

Hunton & Williams, by Edward S. Finley, Jr., for defendant-appellant-appellee.

JOHNSON, Judge.

DEFENDANT'S APPEAL

[1] In our recent decision in *Utilities Commission and The New Telephone Co. v. Central Telephone Co.*, --- N.C. App. ---, --- S.E. 2d --- (No. 8210UC372, filed 18 January 1983), we held that the Commission had properly included the revenues and expenses from yellow page advertising in computing Central Telephone Company's gross revenues and expenses on three grounds: (1) that the furnishing of classified advertising by a telephone company is an essential part of the service it provides; (2) that there was an insufficient demonstration of competition for advertising revenue in the evidence presented; and (3) that this Court's judgment should not be substituted for the Commission's where the Commission's order is supported by a reasonable construction of the evidence. For the same reasons set forth in that opinion, we affirm in the present case the Commission's inclusion of revenues and expenses from yellow page advertising in the gross revenues and expenses of CT&T.

INTERVENOR'S APPEAL

[2] JDITC is an investment tax credit which was enacted by Congress in 1971 to stimulate employment by encouraging investment in new plants and equipment. I.R.C. §§ 38 and 46. It allows a taxpayer to reduce its tax liability to the Internal Revenue Service by a percentage of the cost of eligible property purchased during the tax year. To preserve the benefit of the credit for public utilities, Section 46(f)(2) of the Internal Revenue Code restricts the amount of the benefit generated by JDITC which a regulatory agency may require a utility to pass to its ratepayers in the form of reduced rates. Consequently, although JDITC reduces a utility's actual tax liability to the Internal Revenue Service, it does not so reduce its tax liability for ratemaking purposes. As a result, JDITC generates capital for utilities. CT&T and the Public Staff disagreed as to the treatment of this capital for ratemaking purposes.

In determining the issue, the Commission found and concluded as follows:

FINDINGS OF FACT

. . .

10. That the reasonable level of test year intrastate operating revenue deductions after accounting, pro forma, end-of-period, after-period, and supplemental adjustments is $189,878,168 . . .

. . .

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

. . .

Although the issues raised herein by the Public Staff concerning the proper rate-making treatment of JDITC may appear somewhat complex upon initial consideration, the Commission believes that, in reality, the issues are rather simple and straightforward. Simply stated, the Public Staff has treated JDITC as if this investment tax credit has been contributed by each component of the Company's capital structure in the same ratio as those components bear to the whole. Therefore, the methodology advocated herein by the Public Staff treats a portion of JDITC as if it were capital supplied by creditors, a portion as if it were capital supplied by preferred stockholders, and the remainder as if it were advanced by the common stockholders. On this basis, the amount of JDITC attributed to the creditors or debt holders multiplied by the embedded cost of debt results in an amount of hypothetical interest expense related to JDITC. This hypothetical interest expense is then used as a deduction in determining the Company's test year level of income tax expense for ratemaking purposes.

In contrast to the methodology advocated by the Public Staff, the Company's position is that all effects of JDITC should be excluded from the determination of interest expense to be used in developing the level of the Company income tax expense included in the cost of service. Hence, the methodology used by the Company attributes JDITC entirely to the common shareholders. This treatment is specifically mandated and prescribed by Section 1.46-6 of the Internal Revenue Code of Federal Regulations.

The Commission concludes that under Section 1.46-6 of the Internal Revenue Code, the Commission clearly may only treat JDITC as though it were capital contributed by the

common shareholders. Therefore, in computing the Company's tax liability, no imputed interest expense may lawfully be calculated on any portion of JDITC. Rather, JDITC must be treated as capital supplied by common shareholders and must be given a return no less than the overall cost of capital determined to be appropriate by this Commission. In this regard, the Commission strongly believes that the treatment of JDITC proposed by the Company is fair and reasonable and the only treatment which is permissible under Section 1.46-6 of the Internal Revenue Code.

The issue on appeal, as stated by the Public Staff in its brief, "is whether the Commission erred as a matter of law in concluding that Section 46(f)(2) of the Internal Revenue Code requires that all effects of JDITC should be excluded from the determination of interest expense."

G.S. 62-94 sets forth the standard of judicial review of orders of the Utilities Commission and includes the following:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court . . . may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> . . .
>
> (4) Affected by other errors of law. . .
>
> . . .
>
> (e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable.

In this appeal, we are called upon to interpret the applicable sections of the Internal Revenue Code to determine whether the Commission's order is affected by errors of law. We conclude that the order is not so affected.

Section 46(f)(2) of Title 26 of the Internal Revenue Code provides that JDITC will be disallowed with regard to public utility property in the following two circumstances:

(A) Cost of service reduction.—If the taxpayer's cost of service for ratemaking purposes or in its regulated books of account is reduced by more than a ratable portion of the credit allowable by section 38 (determined without regard to this subsection), or

(B) Rate base reduction.—If the base to which the taxpayer's rate of return for ratemaking purposes is applied is reduced by reason of any portion of the credit allowable by section 38 (determined without regard to this subsection).

The term "ratable portion" is explained in Section 46(f)(6):

For purposes of determining . . . ratable portions under paragraph (2)(A), the period of time used in computing depreciation expense for purposes of reflecting operating results in the taxpayer's regulated books of account shall be used.

The following example of "ratable portion" appears in Section 1.46-6(g)(2) of the Treasury Regulations:

[I]f cost of service is reduced annually by an amount computed by applying a composite annual percentage rate to the amount of the credit, cost of service is reduced by a ratable portion.

The Internal Revenue Service has published the following regulations implementing Section 46(f)(2):

(2) Cost of service. (i) For purposes of this section, "cost of service" is the amount required by a taxpayer to provide regulated goods or services. Cost of service includes operating expenses . . . maintenance expenses, depreciation expenses, tax expenses, and interest expenses. . .

(ii) In determining whether, or to what extent, a credit has been used to reduce cost of service, reference shall be made to any accounting treatment that affects cost of service. Examples of such treatment include reducing by all or a portion of the credit the amount of Federal income tax expense taken into account for ratemaking purposes and reducing the depreciable bases of property by all or a portion of the credit for ratemaking purposes.

(3) Rate base. (i) For purposes of this section, "rate base" is the monetary amount that is multiplied by a rate of return to determine the permitted return on investment.

> (ii) In determining whether, or to what extent, a credit has been used to reduce rate base, reference shall be made to any accounting treatment that affects rate base. In addition, in those cases in which the rate of return is based on the taxpayer's cost of capital, reference shall be made to any accounting treatment that affects the permitted return on investment by treating the credit in any way other than as though it were capital supplied by common shareholders to which a "cost of capital" rate is assigned that is not less than the taxpayer's overall cost of capital rate (determined without regard to the credit). What is the overall cost of capital rate depends upon the practice of the regulatory body. Thus, for example, an overall cost of capital rate may be a rate determined on the basis of an average, or weighted average, of the costs of capital provided by common shareholders, preferred shareholders, and creditors.

Treas. Reg. § 1.46-6(b) (2) (i), (ii) and (3) (i), (ii) (1979).

Essentially, Section 46(f)(2) and the regulation provide that a utility remains eligible for the credit as long as cost of service is reduced by no more than "a ratable portion of the credit," and as long as no reduction is made in the rate base. The purpose of this scheme, as revealed by legislative history, is to permit the benefits of the credit to be shared by the consumers and the investors of the utility. H.R. Rep. No. 533, 92d Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Ad. News 1825, 1839 (1971).

Pursuant to paragraph (A) of Section 46(f)(2), CT&T "flows through" directly to its customers an annual percentage of JDITC based upon the useful life of the property producing the credit and thereby reduces its tax expense, and thus its cost of service, by a ratable portion of the credit. This treatment of JDITC by CT&T is not at issue in the present case.

Pursuant to paragraph (B) of Section 46(f)(2), CT&T makes no reduction in its rate base on account of the credit and assigns the overall cost of capital rate to the capital generated by the credit.

The Public Staff advocates an additional adjustment due to the presence of JDITC. Assuming that, in the absence of JDITC, the capital otherwise supplied by JDITC would be contributed by all capital suppliers, including debt, in the same ratio as those

suppliers exist in CT&T's capital structure, the Public Staff maintains that a hypothetical interest expense attributable to that portion of JDITC which would have been provided by debt, in the absence of JDITC, should be deducted from CT&T's income tax expense for ratemaking purposes, in addition to the ratable reduction in taxes already produced by amortization of the credit. The Public Staff asserts that this adjustment to income tax expense for ratemaking purposes is in accord with Section 46(f)(2) based upon the language in Treas. Reg. Section 1.46-6(b)(3)(ii) that JDITC be "assigned a 'cost of capital' rate that is not less than the taxpayer's overall cost of capital rate (determined without regard to the credit)." The Public Staff also maintains that its position has been upheld in three federal court decisions and is, therefore, the correct one. Finally, the Public Staff contends that the ratepayers are entitled to an additional benefit from the proposed imputed interest on JDITC because they are the source of the cost free capital provided by JDITC. We reject each of these arguments.

The Public Staff's interpretation of the pertinent regulation completely ignores the words which precede the phrase relied upon by the Public Staff. The regulation clearly states that, to determine whether an improper reduction in rate base has occurred, reference should be made to any accounting treatment which treats JDITC "in any way other than as though it were capital supplied by common shareholders. . ." The phrase relied upon by the Public Staff refers to the determination of the "overall cost of capital rate" which must be applied to JDITC under the regulation. As such, the phrase deals with the rate of return which the utility is entitled to receive on JDITC, but does not require that a utility's interest expense be calculated without regard to the credit (i.e., as though capital generated by JDITC were supplied by other sources of capital reflected in the utility's capital structure). Rather, the preceding phrase strongly indicates that in other instances, JDITC is to be treated as "capital supplied by common shareholders." The imputation of interest to a portion of JDITC as though supplied by creditors does not treat that portion of JDITC as though supplied by common shareholders and, in addition, reduces the cost of service by more than a "ratable portion" of JDITC. For these reasons, the adjustment proposed by the Public Staff contravenes Section 46(f)(2) and the regulation thereunder.

The cases cited by the Public Staff do not persuade us to interpret Section 46(f)(2) otherwise because each of the cases completely ignores the clear requirement in the regulation to that Section that JDITC be treated as "capital supplied by common shareholders."

In the case of *Public Service Company of New Mexico v. Federal Energy Regulatory Commission*, 653 F. 2d 681 (D.C. Cir. 1981), the main issue before the court was whether capital provided by JDITC should receive the overall or common equity rate of return. The court concluded that, for purposes of determining the overall rate of return, JDITC could be treated as capital supplied by all capital suppliers in the same proportion as those suppliers existed in the capital structure of the utility, absent the credit. The court further held that excluding JDITC from the capital structure of the utility did not alter the debt/equity ratio such that the utility's interest expense deduction was increased, resulting in an additional, impermissible reduction in cost of service. No issue of imputing interest to JDITC was before the court.

That issue was before the court in *New England Power Company v. Federal Energy Regulatory Commission*, 668 F. 2d 1327 (D.C. Cir. 1981), *cert. denied*, --- U.S. ---, 102 S.Ct. 2928 (1982). However, in determining that the Federal Energy Regulatory Commission could require the utility to impute hypothetical interest to JDITC, the court relied on its earlier decision in *Public Service Company of New Mexico, supra*. Upon stating that, "[t]he question in this section is whether FERC may properly treat tax credit funds in relation to interest deduction in the same way it treats tax credit funds in relation to rate of return determination," the court quoted that portion of its earlier opinion in which it had approved the Federal Energy Regulatory Commission's treatment of JDITC as capital supplied by all capital suppliers in a proportionate manner *for purposes of determining the overall rate of return on capital*. As we have previously stated, the questions of how to treat JDITC for purposes of determining the overall rate of return on capital and for purposes of determining interest expense for ratemaking purposes are separate issues. The court in *New England Power Company* did not treat them as such and failed to analyze in any way the tax laws or the arguments supporting the impermissible nature of the adjustment.

In *Union Electric Company v. Federal Energy Regulatory Commission*, 668 F. 2d 389 (8th Cir. 1981), the third case cited by the Public Staff, the court again relied upon that portion of the regulation under Section 46(f)(2) which permits a ratemaking agency to assign the "overall cost of capital rate (determined without regard to credit)" to JDITC and ignored the remainder of the regulation. Reasoning that because the regulation allows JDITC to be "treated like other capital" in one instance, the court concluded that the regulation should be interpreted to allow such treatment on the interest deduction issue as well. In our opinion, such reasoning contravenes the clear requirement of Section 46(f)(2)(A) that only a "ratable portion" of JDITC be flowed through to customers and of Treas. Reg. Section 1.46-6(b)(3)(ii) that JDITC be treated as "capital supplied by common shareholders," and we decline to follow it.

The final argument advanced by the Public Staff in support of imputing hypothetical interest to JDITC is that ratepayers are entitled to the additional benefit that would enure to them as a result of imputing interest to a portion of JDITC because they supplied the capital produced by JDITC by paying rates computed without regard to the tax credit (other than the ratable portion flowed through to them). We disagree. Without regard to the credit, a utility owes a certain amount of taxes at the end of its tax year upon which its rates are based. The credit essentially forgives or returns to the utility a portion of the taxes owed by it if certain capital assets have been purchased during the tax year. As such, the capital generated by JDITC comes from the Treasury of the United States, not the ratepayers of the qualifying utility.

Based upon the express language of Section 46(f)(2) and the regulation thereunder, as well as a consideration of the history and purpose of JDITC, that being primarily to benefit the utility so as to stimulate investment and thereby increase employment and additionally to share a ratable portion of the credit with ratepayers, we affirm the decision of the Commission to exclude all imputed interest expense related to JDITC in determining CT&T's income tax expense for ratemaking purposes.

The order of the Utilities Commission is

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. JESSIE EARL SMITH

No. 8212SC487

(Filed 1 March 1983)

1. **Criminal Law § 75.11— voluntary waiver of rights—supported by evidence**

In a prosecution for second degree murder of defendant's infant daughter where defendant and his wife voluntarily went to a law enforcement center where they talked with a deputy sheriff from 10:46 p.m. until defendant was charged with second degree murder at about 3:00 a.m., the evidence supported the trial court's findings that defendant was properly informed of his constitutional rights, although the investigation had not been clearly focused on him as a suspect at the time the warnings were given, and that he affirmed his understanding and voluntarily waived those rights.

2. **Criminal Law § 34.6— evidence of prior offenses—establishing requisite mental intent—properly admissible**

In a prosecution for the second degree murder of defendant's infant daughter, the trial court did not err in admitting a portion of defendant's confession where he stated that he didn't take his daughter to the hospital right away because he had been in trouble for striking his other child with a hairbrush and "because they think I'm a child abuser" since evidence of previous acts of child abuse tended to show that the injuries were the result of intentional blows and not of an accidental fall.

3. **Homicide § 21.7— second degree murder—sufficiency of evidence**

In a prosecution for the second degree murder of defendant's infant daughter, the trial court did not err in failing to dismiss the charge of second degree murder where the medical testimony indicated that a minimum of three blows were required to make the injuries observed and that such injuries would not have occurred from a fall, and where the medical testimony combined with other evidence, including the inculpatory statements of the defendant and the observations of the police officers, was sufficient to overcome the motion to dismiss.

4. **Criminal Law § 102.6— improper argument to jury—curative attempts of trial court sufficient**

In a prosecution for second degree murder of defendant's infant daughter, the assistant district attorney made an improper remark in his argument to the jury when he stated "if you believe it was an accident, then find him not

guilty and let him go; back to his other children"; however, where defendant's objection to the remark was sustained and defendant's motion to strike was granted, and where the trial court instructed the jury to disregard the last statement of the district attorney, the remark was not so prejudicial in nature as to require a new trial.

5. Criminal Law § 112.6— instruction—defense of accident—proper

The trial court did not err in failing to give defense counsel's requested instruction on accident where the trial judge set forth the basic law as to accident including instruction on the burden of proof and applying the law to the facts and where, in substance, the requested instruction was given except for a portion relating to criminal negligence which was not at issue in the case.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 18 December 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 November 1982.

Defendant Jessie Earl Smith was indicted for second degree murder of his infant daughter, convicted of that charge and sentenced to imprisonment for not less than eight and a half years nor more than twenty years. Defendant appeals from the judgment and sentence imposed in this case.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

Assistant Public Defender James R. Parish, for the defendant appellant.

JOHNSON, Judge.

The State's evidence tended to show that on 8 November 1980 defendant's infant daughter, Jessie Elaine Smith, six and a half weeks old, was brought by defendant and his wife to the Cape Fear Valley Hospital. The baby was barely breathing at the time. The efforts made to resuscitate the baby were unsuccessful, and she died. The baby had bruises on her head, back, and thighs; both eyes were swollen, and she had puncture marks on her body. The defendant told several law enforcement officers that he had been changing Jessie's diaper, left her unattended on a bed, and upon returning found the child on the floor. He picked her up and thought she was all right. Later on the baby showed no reaction, was hardly breathing and defendant took her to the hospital.

Deputy Sheriff Daws testified that defendant and his wife voluntarily went to the Law Enforcement Center where he talked

with defendant from 10:46 p.m. until he was charged with second degree murder at about 3:00 a.m. Defendant was given *Miranda* warnings after being advised that he was not under arrest.

A *voir dire* was held on the admissibility of defendant's statements made to Daws. The court made findings of fact and conclusions of law that defendant's statement was voluntary and denied defendant's motion to suppress.

In his statement to Daws, defendant initially recounted the same version of events he had earlier told law enforcement officers. In addition, he admitted having hit Jessie with an army belt. Later in the interview defendant said that Jessie had not fallen on the floor, but rather he had slapped her in the face with his hand because she had cried all night. After a while defendant noticed she was no longer crying. Defendant tried to get her to take a bottle, pinched and spanked her to try to get some reaction from her. After she opened her eyes and went back to sleep defendant left the room. Four hours later he noticed she wasn't breathing and took her to the hospital. Defendant stated he had not taken her to the hospital sooner because he had been in trouble six months earlier for striking his two year old stepchild with a hairbrush and he was afraid that the doctor thought that he was a child abuser.

The medical examiner testified that there were bruises on Jessie's body and that it was his opinion that the cause of death was three sharp blows to her head from a blunt instrument such as a hand.

At the close of the State's evidence, defendant moved to dismiss the charge of second degree murder. The motion was denied. Defendant presented evidence of his good character in the community. Defendant's renewed motion to dismiss at the close of all the evidence was denied.

I

[1] Defendant first assigns error to the trial court's admitting into evidence defendant's statement given to Detective Daws in violation of his fifth amendment rights as stated in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966).

The prosecution must demonstrate that adequate warnings were given a defendant to secure the privilege against self-

incrimination before using statements resulting from custodial interrogation of that defendant, *Miranda v. Arizona, supra.* The Supreme Court prescribed the following procedural safeguards:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

384 U.S. at 444, 16 L.Ed. 2d at 706-707, 86 S.Ct. at 1612. The Supreme Court also stated that a defendant may effectively waive those rights provided the waiver is done voluntarily, knowingly, and intelligently.

Defendant contends on appeal that although he was advised of both his *Dunaway* rights and his *Miranda* rights, the *Miranda* warnings were diluted and undercut by being given at the very beginning of the investigatory period when the focus was not yet clearly on the defendant.[1] Defendant argues that he was entitled to be given the *Miranda* warnings at the precise point in time when the investigation focused upon him as a suspect. It is defendant's position on appeal that he was lulled by the noncoercive investigatory period and was, therefore, not adequately protected when the police focused on him as a suspect. The implication being that defendant was tricked into feeling safe and this rendered his confession involuntary.

During *voir dire* Detective Daws testified that he requested that Mr. and Mrs. Smith voluntarily accompany him to the Law Enforcement Center, which they did. Upon Mr. Smith's arrival, Daws advised him of his *Dunaway* rights by reading from the preprinted form. The defendant was thus informed that he was not under arrest. Daws read the form to defendant line by line, asked if he understood each statement and upon receiving an affirmative answer from defendant, inserted the word "yes" after each statement. Defendant indicated that he understood the form and signed it.

1. Detective Daws testified that *Dunaway* rights are read by the homicide squad to a person who is asked to voluntarily come down to the Law Enforcement Center to explain why they're coming down. Among other things, the person is informed that he is not under arrest. It is clear from the title that the warnings are derived from *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979).

Next Detective Daws followed this exact procedure to advise defendant of his constitutional rights to remain silent and consult with a lawyer. Daws read defendant the waiver section of the form and asked if he understood it. Defendant then executed that form. The form contains the following statement of warning:

> You have the right to remain silent and say nothing. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him present with you during questioning.

The procedure followed by Detective Daws adequately informed the defendant of his constitutional rights without undercutting the "spirit and application" of *Miranda v. Arizona, supra,* as defendant contends. The *Miranda* warning given defendant *itself* indicates the possibility of charges and further proceedings by the phrase "anything you say can be used against you in court."

In *State v. Cass,* 55 N.C. App. 291, 285 S.E. 2d 337 (1982) a similar situation was presented. The defendant voluntarily accompanied the police officer to the jail. When they arrived at the jail at approximately 5:45 p.m. the defendant was advised of his *Miranda* rights. At approximately 10:00 p.m. the defendant made an inculpatory statement and he was then formally arrested and served with a warrant shortly after 10:00 p.m. This Court affirmed the trial court's findings that the defendant was properly informed of his constitutional rights and voluntarily waived them, ruling the statement given admissible.

In defendant's case, the trial court found that the required constitutional rights were read to defendant Smith and that he affirmed his understanding and voluntarily waived those rights. These findings are supported by the evidence on *voir dire* and are, therefore, conclusive on appeal. *State v. Small,* 293 N.C. 646, 239 S.E. 2d 429 (1977). It does not appear from the record that the defendant was positively misled by any statements or actions of the police so as to render his waiver of rights and statement involuntary. The prosecution carried its burden of proving the defendant effectively waived his rights and made a voluntary confession.

II

[2] Defendant next contends that the trial court erred in admitting, over objection, those portions of defendant's statement to Detective Daws which indicate that prior incidents of child abuse may have occurred when defendant hit his other daughter with a hairbrush. In particular, defendant argues his statement that he didn't take Jessie to the hospital right away "because they think I'm a child abuser" was irrelevant, highly prejudicial and should have been ruled inadmissible.

As a general rule, proof that a defendant has committed an independent, unrelated crime is not admissible to prove the defendant's guilt of the crime for which he is being tried. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). This rule applies even when that evidence consists of defendant's confession to the unrelated crime made as part of his confession to the crime for which he is being charged. Therefore, portions of a confession which are irrelevant to the issue of guilt and which tend to prejudice the defendant at trial should not be admitted over objection. *State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979).

However, proof of independent crimes is competent to show *quo animo*, intent, design, guilty knowledge or scienter, or to make out the *res gestae*. *State v. McClain, supra; State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975). Thus, where a specific mental intent is an essential element of the crime, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses commission of another offense by the accused. *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980). Also, when the issue is whether an act was done intentionally or by accident, such evidence is also relevant and competent. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050; *reh. denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, 101 S.Ct. 41 (1980).

The victim was a six and a half week old infant who died as a result of injuries to her head which could have been caused by blows from the defendant's hands. Evidence of previous acts of child abuse would tend to show that the injuries were a result of intentional blows and not of an accidental fall.

In addition, this Court has held previous acts of child abuse admissible to show the state of mind necessary to establish malice, an essential element of second degree murder in *State v. Vega*, 40 N.C. App. 326, 253 S.E. 2d 94 (1979). Therefore, the defendant's full statement was relevant and competent as it would tend to show malice and intentional action.

III

[3] Defendant combines two assignments of error and argues the trial court erred in failing to dismiss the charge of second degree murder; there being no evidence of malice. Defendant bases this argument on the fact that when defendant became aware of the seriousness of the infant's injuries he carried her to the hospital. In addition, defendant's character witnesses testified that defendant was shocked and terribly upset by the death of his daughter.

In considering defendant's argument, which is based on his motion to dismiss, the evidence is to be considered in the light most favorable to the State and the State is to be given the benefit of every reasonable inference that can be drawn therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The State's evidence tended to show that the victim had been struck, resulting in fatal injury to the brain. It was the opinion of the medical expert that a minimum of three blows were required to make the injuries observed. There was also evidence of puncture marks on the child's body which were caused by some sharp or pointed object. The expert testified that such injuries would not have occurred from a fall and that it is very unlikely that an infant of six weeks could actually roll and move off a bed. Defendant admitted to Detective Daws that Jessie never fell out of the bed and that he had slapped her around the face because he was "mad because she had been crying all night."

Second degree murder is the unlawful killing of a human being with malice but without premeditation. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). The element of malice may be either express or implied. *Id.* Malice may be implied when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life. *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980). The *Mapp* case was one of child abuse in which this Court noted that as the

act of abuse is often surreptitious, circumstantial evidence must be relied upon to prove the fact.

> "When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty." (Citation omitted) *State v. Cook*, 273 N.C. 377, 383, 160 S.E. 2d 49, 53 (1968).

45 N.C. App. at 581, 264 S.E. 2d at 353. In *Mapp*, the very extent and severity of the physical abuse were considered of such magnitude that malice was implied. Similarly, in *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979) the Supreme Court found sufficient indication of malice to overcome a motion for nonsuit from evidence showing that the defendant had inflicted a number of injuries on the body of his two year old son over a period of time.

In the case under discussion the medical testimony combined with other evidence, including the inculpatory statements of the defendant and the observations of the police officers was sufficient, when viewed in a light most favorable to the State, to overcome the motion to dismiss the charge of second degree murder.

IV

[4] During his jury argument, the Assistant District Attorney made the following remark:

> If you believe she fell off the bed and sustained those injuries, find him not guilty. If you believe it was an accident, then find him not guilty and let him go; back to his other children.

Defense counsel promptly objected to the remark as improper argument. The objection was sustained and defendant's motion to strike was granted. The trial court instructed the jury to disregard the last statement of the District Attorney. Defendant's motion for mistrial was denied and defendant assigns error.

"It is well settled that a motion for mistrial in a noncapital case is addressed to the discretion of the trial court, and his ruling thereon is not reviewable without a showing of gross abuse of

discretion." *State v. Pearce*, 296 N.C. 281, 288, 250 S.E. 2d 640, 646 (1979).

Defendant contends that the curative attempts of the trial court were insufficient to undo the prejudice engendered by the reference to letting the defendant go back to his other children. We do not agree. Although the remark was clearly improper, it was not so prejudicial in nature as to require a new trial. The record shows that an immediate objection was made and sustained and the jury instructed to disregard the statement. Defendant has failed to demonstrate a gross abuse of discretion in denying the motion for mistrial or that substantial and irreparable prejudice against the defendant resulted.

V

[5] Defendant's final argument relates to the trial court's instruction to the jury regarding the defense of accident. Defendant contends that the instruction actually given was unintelligible and that the trial court erred in failing to give the clearer instruction tendered by the defendant.

The trial court instructed the jury on accident as follows:

> If Jesse Elaine Smith died by accident or misadventure, that is, without an unlawful act on the part of the Defendant, then the Defendant would be not guilty.
>
> The burden of proving accident is not on the Defendant. His assertion of accident is merely a denial that he committed any crime. The burden remains on the State to prove the Defendant's guilt beyond a reasonable doubt. Specifically, under the evidence in this case if the State fails to prove beyond a reasonable doubt that Jessie Elaine Smith did not sustain any injuries to her head as a result of a fall off of a bed and that those injuries resulting from a fall off a bed were not the proximate cause of Jessie Elaine Smith's death, if the State fails to prove these things—excuse me—if the State fails to prove beyond a reasonable doubt that these things did not occur, then Jessie Elaine Smith's death would be the result of accident or misadventure and it would be your duty to return a verdict of not guilty.

A jury charge must be construed as a whole and isolated portions will not be held prejudicial when the charge as a whole is correct and represents the law fairly and clearly. *State v. Simpson*, 302 N.C. 613, 276 S.E. 2d 361 (1981). Even if portions are erroneous it must be shown that there were reasonable grounds for the jury to be misled. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978).

The trial court adequately set forth the law regarding accident and clearly stated that the burden of proving there was no accident remained upon the State. Earlier in the charge, defendant's contention that the death of his daughter resulted from an accident was set forth. The error made regarding what facts the State must prove was immediately corrected. The charge as a whole was fair and could not have misled the jury. While it is true that the defense counsel's requested instruction on accident was more extensive, containing an explanation of criminal negligence, the court is not required to give the exact words of a requested instruction. *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980). There is no error if the trial court gives in substance those requested instructions which were correct in law and supported by evidence. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976).

The trial judge set forth the basic law as to accident including instruction on the burden of proof and applying the law to the facts. In substance the requested instruction was given except for the portion relating to criminal negligence. Inasmuch as neither the State nor the defendant contended that criminal negligence was at issue, no error resulted from excluding that part of the instruction.

In sum, defendant was accorded a fair trial, free from error.

No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. WALTER RUSHING

No. 8220SC594

(Filed 1 March 1983)

1. **Burglary and Unlawful Breakings § 5.11— first degree burglary—insufficient evidence of intent to rape**

The evidence was insufficient to permit the jury to find that defendant intended to commit rape at the time of a breaking and entering as alleged in the indictment so as to support his conviction of first degree burglary where it tended to show that defendant climbed in the window of the bedroom in which the prosecutrix was sleeping during the nighttime; defendant was wearing white gloves and no shirt; defendant told the prosecutrix not to scream and stated that he had a gun, although the prosecutrix never saw a gun; the prosecutrix backed up to the head of her bed, whereupon defendant came to the side of the bed and grabbed her arm; every time the prosecutrix tried to turn on the light, defendant told her not to move; when the prosecutrix started screaming, defendant put his hand over her mouth; and when the small child of the prosecutrix started screaming, defendant let go of the prosecutrix's arm and dived out the window head first.

2. **Rape and Allied Offenses § 5— attempted rape—insufficiency of evidence**

The State's evidence was insufficient to sustain defendant's conviction of attempted rape where it tended to show that defendant climbed in the window of the bedroom in which the prosecutrix was sleeping during the nighttime; defendant was wearing white gloves and no shirt; defendant told the prosecutrix not to scream and stated that he had a gun, although the prosecutrix never saw a gun; the prosecutrix backed up to the head of her bed, whereupon defendant came to the side of the bed and grabbed her arm; every time the prosecutrix tried to turn on the light, defendant told her not to move; when the prosecutrix started screaming, defendant put his hand over her mouth; and when the small child of the prosecutrix started screaming, defendant let go of the prosecutrix's arm and dived out the window head first.

Chief Judge VAUGHN concurring in part and dissenting in part.

APPEAL by defendant from *Collier, Judge.* Judgment entered 23 March 1982 in STANLY County Superior Court. Heard in the Court of Appeals 7 December 1982.

Defendant, Walter Rushing, was tried on indictments charging him with first degree burglary and attempted rape.

The State's evidence tended to show the following. The prosecutrix was awakened from her sleep on 3 August 1981 in the early morning hours by a noise. Although there was no light in her room, she saw someone climb in her window. She could tell that

the intruder was a black male, and that he was wearing dark pants, white fabric gloves and no shirt. The woman asked who it was and he said "Don't holler, don't scream, I got a gun, I'll shoot you." The prosecutrix backed up to the head of her bed, whereupon the intruder came to the side of the bed and grabbed her arm. Every time she tried to turn on the light, the man told her not to move. The prosecutrix started screaming and called for her grandmother. The intruder put his hand over her mouth. Her small child woke up and started screaming. The man let go of her arm and dove out the window head first. The woman ran to the window and watched him run away. She never saw a gun. The prosecutrix knows defendant's wife, and has spoken with defendant in the past. Although she has asked men other than her boyfriend to come to her house, she never asked defendant to come there. Lab analysis tended to show that fibers found at the scene of the crime matched pants and gloves found at defendant's house. The gloves found at defendant's house had makeup and grass stains on them.

Defendant's evidence tended to show that he is a 39 year old married man. He had known the prosecuting witness for about a year. In June of 1981 he saw her at a convenience store and she complained to him that her boyfriend did not spend enough time with her. Defendant told her that he had plenty of time and they agreed to meet sometime. She told him which bedroom window was hers and that he should stay away when her boyfriend's car was at her house. Late on August 2, defendant went to the woman's front door and knocked. Upon getting no answer, he went to her window and knocked. He pushed the partially open window up, put a shoulder and hand through the window, and called to her. The woman called out in fright and he ran home and stayed there.

The jury found defendant guilty as charged and the trial court entered judgment on the verdict, imposing an active sentence of imprisonment. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant.

WELLS, Judge.

By his assignments of error, defendant contends that the evidence is insufficient as a matter of law to support defendant's convictions of attempted rape and first degree burglary. In order to support a conviction, each element of the charged offense must be supported by "more than a scintilla" of evidence, *State v. Summit*, 301 N.C. 591, 273 S.E. 2d 425, *cert. denied*, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed. 2d 349 (1981), which means "substantial evidence." *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). The evidence must be sufficient to convince a rational finder of fact of the existence of each essential element. *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). It does not matter that the evidence presented is circumstantial. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). On review, the State is entitled to all reasonable inferences which may be drawn from the evidence. *See State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

[1] By his first assignment of error, defendant contends that the State's evidence was insufficient to sustain his first degree burglary conviction. To support a verdict of guilty of first degree burglary, there must be evidence from which a jury could find that defendant broke and entered a dwelling house at nighttime, with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). The intent to commit a felony must exist at the time of entry, and it is no defense that the defendant abandoned the intent after entering. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977); *State v. Wells, supra.* The intended felony alleged in defendant's burglary indictment was the felony of rape. Thus, it was necessary for the State to present sufficient evidence to permit the jury to find that, at the time defendant entered the house of the prosecutrix, he intended to have vaginal intercourse with the prosecutrix by force and against her will. *See* G.S. 14-27.2; *and* G.S. 14-27.3.

The question of sufficiency of evidence to justify an inference of intent to rape has been addressed by our Supreme Court in a number of cases. In *State v. Gay*, 224 N.C. 141, 29 S.E. 2d 458 (1944), our Supreme Court held that where the defendant indecently exposed himself to the victim on a city street, posed an indecent question, and chased her briefly when she screamed and

ran, but did not touch the victim, there was insufficent evidence of assault with intent to commit rape because there was no showing that the defendant intended to gratify his passions notwithstanding the resistance of the victim. The Court, noting that the evidence would warrant a verdict of guilty of assault on a female, granted the defendant a new trial.

In *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963), the evidence tended to show that the defendant, who was a minister, told the prosecutrix that the Lord had told him to have sexual relations with her in order to heal her, pushed her down on a bed and laid on top of her, put his hand up her dress removing her underclothes and touched her "body" with his. When the woman threatened to scream, which would have alerted the minister's wife, he ceased in his efforts, threatening her with death should she tell. The Court held that there was insufficient evidence to show that the defendant intended to overcome the victim's resistance and granted the defendant a new trial on the lesser included misdemeanor of assault on a female.

In *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974) the defendant appealed a conviction of first degree burglary where the State had relied on evidence of an attempted rape for the necessary element of intent to commit a felony. The Supreme Court held that there was sufficient evidence of the defendant's intent to commit rape where the State's proof tended to show that the intruder—who climbed into the victim's window, got into bed with her with his outside pants down and put his hand over her mouth, threatening to cut her throat if she screamed—ran away only when another girl turned on the light in the room.

In *State v. Wells, supra*, the defendant had broken into the window of the victim's apartment at night. She woke up to find the defendant lying on top of her kissing her on the neck. When she screamed, he put his hand over her mouth and told her to shut up and that all he wanted was some sex. She told him that her boyfriend would kill him, whereupon he left by the door. The Court held that this evidence was sufficient to support an inference that the defendant intended to rape the victim at the time he broke and entered the apartment.

In *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982) our Supreme Court vacated the defendant's conviction of first degree

burglary where the necessary felony allegedly intended was rape. The Court held that evidence that the defendant was wearing only a gym shoe on one foot and a knee-high cast, shorts, and a raincoat was insufficient to support an inference that the defendant intended to rape the lady inside the house. Noting that, by finding the defendant guilty of burglary, the jury necessarily found that defendant had committed the misdemeanor of breaking and entering, the Court remanded the case for sentencing on that misdemeanor.

Most recently, in *State v. Freeman*, --- N.C. ---, --- S.E. 2d --- (filed 11 January 1983), our Supreme Court reversed the defendant's conviction for first degree burglary, holding that the State had failed to offer sufficient evidence of the intended felony alleged in the indictment, rape. In *Freeman*, the State's evidence tended to show that the defendant, dressed in a sweat shirt type jacket and blue jeans, upon asking permission to enter and being refused, twice forcibly entered the female victim's home at night, telling her that she "shouldn't have enticed" him. *Citing State v. Bell, supra*, as an example of where sufficient intent to rape had been shown, the Court held that defendant Freeman's conviction of burglary could not stand, stating that "[t]here was nothing in defendant's dress or demeanor to suggest an intent to commit rape" and that the "words spoken by the defendant. . ., [i]n light of [the victim's] testimony that she was fully clothed and in no way encouraged the defendant, . . . are at best ambiguous and . . . are virtually meaningless."

The State contends that the facts in the present case (specifically, a shirtless male's nocturnal entry into the bedroom of a sleeping woman) permit an inference that defendant intended to commit rape at the time he entered her room. We do not agree. In support of its argument, the State cites *State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189 (1971), *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968), *State v. Norman*, 14 N.C. App. 394, 188 S.E. 2d 667 (1972), and *State v. Gaston*, 4 N.C. App. 575, 167 S.E. 2d 510 (1969). In all of those cases, there was some overt manifestation of an intended forcible sexual gratification, an element not shown by the evidence in the case before us. The only evidence presented tending to show that defendant had a sexual purpose was evidence presented by defendant himself, and defendant's evidence tended only to show that he intended to

engage in consensual intercourse with the prosecutrix. We further note that defendant's dress, while possibly indicating an intent to commit a crime, does not of itself indicate an intent to engage in nonconsensual intercourse.

Consistently with *Freeman, supra,* we find that the State's evidence as to defendant's intent was "at best ambiguous" and is not sufficient to support an inference that at the time he entered the window of prosecutrix's bedroom he intended to rape the prosecutrix. Therefore, defendant's conviction of first degree burglary must be vacated.

[2] By his second assignment of error, defendant contends that the State's evidence was insufficient to sustain his conviction of attempted rape. There are two elements to the crime of attempt: there must be the intent to commit a specific crime and an overt act which in the ordinary and likely course of events would result in the commission of the crime. *State v. Dowd,* 28 N.C. App. 32, 220 S.E. 2d 393 (1975). An attempt is an act done with the *specific intent* to commit a crime. *Id.* Thus, in order to carry its burden, it was necessary for the State to present sufficient evidence to permit the jury to find first, that when defendant assaulted the prosecutrix he intended to engage in forcible, nonconsensual intercourse with her and second, that in the ordinary and likely course of events his assaultive acts would result in the commission of a rape. Applying the standards articulated in *State v. Gay, supra, State v. Gammons, supra,* and the other cases involving attempted rape discussed above, we hold that defendant's conviction of attempted rape cannot stand. The State's evidence showed nothing more than that defendant attempted to forcibly subdue the prosecutrix and to avoid detection by other persons in the house. The State's evidence of defendant's conduct after entering the prosecutrix's house is insufficient to permit the jury to find either that defendant intended to commit a rape when he assaulted the victim or that defendant committed an overt act which in the ordinary and likely course of events would result in the commission of a rape. Defendant's conviction for attempted rape must be vacated.

Misdemeanor breaking or entering, G.S. 14-54(b), requires only proof of wrongful breaking or entry into any building. Assault on a female, G.S. 14-33(b)(2), requires only proof of an

assault on a female person by a male person over the age of eighteen years. The evidence being uncontroverted and conclusive that defendant is a male over eighteen years of age, we hold that, by finding defendant guilty of attempted rape and burglary, the jury necessarily found facts that would support defendant's conviction of assault on a female and non-felonious breaking or entering. Thus, this case must be remanded for sentencing for assault on a female and non-felonious breaking or entering.[1]

Judgment vacated.

Remanded for entry of appropriate judgment.

Judge WHICHARD concurs.

Chief Judge VAUGHN concurs in part and dissents in part.

Chief Judge VAUGHN concurring in part and dissenting in part.

I find no error in defendant's conviction for first degree burglary. The majority opinion fairly summarizes the evidence. The result reached, however, appears to spring from an unconscious weighing of the evidence, a process that should be left to the jury.

Defendant's own evidence tends to show that he entered the bedroom with the intent to have intercourse. For purposes of this appeal, that part of his evidence that tends to show he only intended to have consensual intercourse must be disregarded. His threat to use a gun would certainly permit the jury to find that he entered the bedroom of his sleeping victim with the intent to use that gun to carry out his intent to rape. It was for the jury to weigh the effect of the victim's statement that she did not see the gun, as well as her admission with respect to entertaining other men. The jury had the opportunity to see and hear the witnesses. We do not. I believe the jury could reasonably infer that defend-

1. We note that the results in this case cause us considerable concern, and suggest that the General Assembly may want to consider whether the act of forceful entry by one person into the occupied sleeping quarters of another should itself be a felony.

ant made the forcible entry through the victim's bedroom window with the intent to commit rape. *State v. Dawkins* and *State v. Freeman*, relied upon by the majority, are distinguishable. In *Dawkins*, the evidence tended to show the entry was made with the intent to commit larceny. *Freeman* is also distinguishable, among other ways, in that there was no direct evidence that defendant intended to have intercourse, either consensual or by force. There the defendant entered the prosecutrix's living room, made no threats, and did not touch her. In the case before us, however, defendant came through the bedroom window of his sleeping victim. I see a difference.

I agree with the majority that the evidence was insufficient to take the case to the jury on the charge of attempted rape. Although the evidence permits a finding that defendant broke and entered through the bedroom window with the intent to commit rape, it also shows that, because of the screams of his intended victim and her infant child, he abandoned his scheme and fled before attempting to commit the rape.

I vote to find no error in the conviction for first degree burglary.

I agree that the charge of attempted rape should be dismissed, and defendant should be sentenced for assault on a female.

TONIA KAY RIGGAN, ADMINISTRATRIX OF THE ESTATE OF LEWIS G. RIGGAN v. NORTH CAROLINA STATE HIGHWAY PATROL, A DIVISION OF THE NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

No. 8210IC354

(Filed 1 March 1983)

1. State §§ 8, 10.1 — negligence of State employee not supported by record — Commission misinterpreted and misapplied findings of fact to law

In a proceeding under the North Carolina Tort Claims Act, G.S. 143-291 *et seq.* for compensation for the death of a person allegedly resulting from the negligence of a North Carolina Highway Patrolman, the Industrial Commission misinterpreted the evidence and misapplied its findings of fact to the law in arriving at its conclusion that the negligence of the trooper was a proximate cause of the collision and the resulting death of the victim.

2. Negligence § 16— sudden emergency situation—locking brakes

In a proceeding under the North Carolina Tort Claims Act, the Industrial Commission erred in finding that a highway patrolman was negligent in "swerving" his automobile into the left lane of a highway where it struck decedent's motorcycle since there was no evidence in the record that the trooper in any way precipitated the sudden emergency which arose when another vehicle blocked the southern lane, and where the evidence indicated that, upon observing the automobile turning and blocking his lane, the officer exercised reasonable care to avoid a collision when he locked his brakes in the face of the sudden emergency.

APPEAL by defendant from the Opinion and Award of the North Carolina Industrial Commission filed on 25 November 1981. Heard in the Court of Appeals on 15 February 1983.

This is a proceeding under the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.*, for compensation for the death of Lewis G. Riggan allegedly resulting from the negligence of a North Carolina Highway Patrolman, an employee of the Department of Crime Control and Public Safety, an agency of the State of North Carolina.

After a hearing, Deputy Commissioner Denson made findings of fact and conclusions of law and entered an order awarding plaintiff $100,000. Commissioners Vance and Clay, a majority of the commission, "affirms and adopts as its own the Decision and Order filed in this case on January 14, 1981." The chairman of the Commission, William H. Stephenson, dissented from the Opinion and Award of the Commission on the grounds that the record disclosed contributory negligence as a matter of law upon the part of the deceased.

The pertinent findings and conclusions of the Commission are as follows:

FINDINGS OF FACT

1. The intersection where this accident occurred is the intersection of North Carolina Highway 211 which runs east and west and is a two lane highway with very wide shoulders at that point and North Carolina rural paved road 1003 which runs north and south, is also a two lane road. At the point of the intersection, there are cement medians which bisect the two lanes and North Carolina 211 is the dominant highway

with stop signs erected on North Carolina 1003 on either side of the intersection.

The intersection is a very open one with vision not being blocked by vehicles entering from any of the four points of the traffic situation in the intersection and its immediate vicinity.

2. As one proceeds west from the intersection, there is an unobstructed view for approximately .25 miles to a point where there is a slight curve.

3. On the night of April 28, 1980 at the time of the collision, Mrs. Elizabeth Hill was headed west on Highway 211 and was going to turn left into rural paved road 1003. She had her turn signal on and as she was stopped to make her turn, she saw the highway patrol car come around the slight curve and saw that his blue light and siren were operating. She did not see the motorcycle which was being operated by Mr. Riggan which was coming on the highway ahead of her at that point and she proceeded to make her turn and was well out of the intersection before the collision between the patrol car and the Riggan motorcycle occurred.

. . .

5. At approximately 4 miles west of the intersection of the Highway 211 and 1003, Trooper Lovette was on patrol and clocked the decedent, Mr. Riggan, driving approximately 79 miles per hour on his motorcycle. Trooper Lovette turned to pursue the motorcycle and turned on his blue light and siren and clocked the decedent for the approximately 4 miles prior to the intersection where the collision occurred. They increased speed at various points and time and were going at times in excess of 100 miles an hour. Trooper Lovette found that he was not gaining on the Riggan motorcycle.

6. Mr. Riggan made no move to stop in heed of the blue light or siren of the patrol car but instead increased his speed at various times during the 3 and a half miles after the chase began.

7. As Trooper Lovette pursued Mr. Riggan at speeds in excess of 70 miles an hour he lost sight of the Riggan motor-

cycle for the few brief seconds as he rounded the curve which is approximately .25 miles west of the intersection where the accident occurred. As soon as he again came in sight of the Riggan motorcycle, Mr. Riggan was putting on his brakes although he did not have a turn signal on and was beginning to slow down. Although Trooper Lovette observed this, he did not himself apply brakes, but only let up on the accelerator to slow his vehicle somewhat. Trooper Lovette then observed Mr. Riggan go into the left lane, he observed Mrs. Hill turn into rural paved 1003 to his right and only then did Trooper Lovette apply his brakes. He lost control of the car, failing to make the slight curve which the intersection makes beyond the point of its intersection with Highway 1003 and swerved into the left lane, striking Mr. Riggan's motorcycle almost directly behind but slightly to the right of the motorcycle with the left front of his highway patrol car.

8. Mr. Riggan was knocked for some distance and was, of course, killed instantly in the accident.

9. At the time of the collision, Trooper Lovette failed to exercise reasonable care, although he had been in pursuit of a violator of the law, when he failed to apply brakes as he saw Mr. Riggan apply brakes, failed to exercise the duty of a reasonably prudent man, and such negligence of Trooper Lovette was a proximate cause of the death of Mr. Riggan.

10. At the time of the collision, Mr. Riggan was not contributorily negligent in that, although he had been trying to evade arrest and had been speeding, he was at the point of slowing down and applying his brakes at that point, was hit by Trooper Lovette in the left lane when Trooper Lovette had a means of safety to go elsewhere and therefore there was no contributory negligence on Mr. Riggan's part which was a proximate cause of his death.

. . . .

CONCLUSIONS OF LAW

1. The damages sustained by the plaintiff in the wrongful death of Lewis Riggan arose as a result of the negligence of Trooper Lovette in that although in chase for violation of the law, the trooper failed to exercise due regard

for the safety of others by operating his vehicle at a high rate of speed and failed to slow down when a reasonable prudent man would have done so. Further, he drove into the left lane when driving into the right lane, had he retained control of his vehicle, could have prevented the accident. (Citation omitted.)

2. The decedent was not contributorily negligent, in that he was in the process of applying brakes at the time the injury occurred, and he was in the left-hand lane, and none of these actions was a proximate cause of decedent's wrongful death.

. . . .

From the order of the Commission awarding plaintiff $100,000, defendant appealed.

Morgan, Bryan, Jones & Johnson, by Robert C. Bryan, and Stewart & Hayes, by D. K. Stewart for the plaintiff, appellee.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Sandra M. King for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant assigns error to the finding and conclusion that Trooper Lovette was negligent and that such negligence was a proximate cause of Lewis G. Riggan's death. The exceptions upon which this assignment of error is based raise the question of whether the facts found by the Commission are supported by competent evidence and whether the findings which were supported by competent evidence support the conclusions drawn therefrom. We hold the Commission found critical facts which are not supported by the evidence, failed to make findings determinative of some of the issues raised by the evidence, and drew conclusions of law which are not supported by the findings of fact.

The majority of the Commission found as a fact (Finding of Fact No. 3) that Mrs. Hill did not see the motorcycle which was approaching her from the west as she prepared to turn from the north side of Highway 211 into rural paved road #1003. The only evidence in the record with respect to what Mrs. Hill saw is in her own testimony. On direct examination she testified: ". . . As I

approached I stopped, I give a signal to turn. I saw a patrol car coming down the highway there around that curve at the colored church and there was a motorcycle in front of me, and a patrol light [sic] did have its blue light on. . . ." On cross examination she testified: ". . . I was approaching the intersection when I saw the motorcycle and patrol car coming in the opposite direction. I saw the blue light—that was what really got my attention was the blue light going on the patrol car. I just saw the motorcycle coming down the road in front of me. . . ." This obvious mistake upon the part of the Commission is significant because it demonstrates clearly that the Commission attached little or no importance to the fact that Mrs. Hill, although she saw both the motorcycle and the patrol car approaching her from the west, turned her automobile across the eastbound lane (southern lane) directly in front of the approaching traffic.

The principle finding upon which the Commission based its conclusion as to negligence and proximate cause was that Trooper Lovette "did not himself apply brakes" when he came around the curve .25 miles from the intersection and regained sight of Riggan who was then applying brakes and slowing down. The only testimony with respect to this critical finding comes from Trooper Lovette. We quote extensively from the patrolman's testimony to demonstrate that the record does not support the finding relied upon by the Commission. On direct examination Trooper Lovette testified:

. . .

> It was when—he was in the left lane and I was—come out of a curve. I saw him, started slowing and *applying my brakes* and a car turned from the westbound lane in front of us making a left-hand turn, at which time *I slammed on brakes.* I started sliding and as I was sliding the motorcycle went back to the right lane and as I got near the intersection he cut back in front of it. That's when I hit him. As to whether I slammed on my brakes at the time I saw the car heading the other way to turn, yes, sir and I locked the brakes. As to whether at any time I took my foot off the brakes after I hit him, I released it shortly and then put it back on. As to where my car was when I first stated slamming on the brakes, I was in the right lane. My car went from the right

over to the left out of the curve there. The impact took place in the left lane near the intersection. All four wheels of my car were on the pavement. Both wheels of the cycle were on the pavement.

As to how far I was from the intersection at the point of the impact, I would say from here to the window just before we get to the intersection, the best I can remember. As to what this distance is, maybe 20 foot, something like that. As to whether I saw a turn signal from the car heading toward me, no, sir. All I saw was lights and a car turning. I don't know if it had signals or not. As to whether I saw a turn signal on the motorcycle, no, I didn't see any. All I saw was taillights. The taillight and the brake light were on. As to when I last saw the car that turned left to cross the road, the best of my recollection after—when the car turned the road was completely full. It was in the left lane. The car was across the road. There is—nowhere to go, so I just *slammed on brakes.* As to whether the time I slammed on brakes is the last time I saw the car, that's what I'm getting to. I was approaching the intersection. The motorcycle had gone to the left and the best I can remember the car was clearing the eastbound lane at that time and he cut back in front of them. When I first came around the curve, the motorcycle when I first saw it was in the left lane. As to whether it stayed in the left lane until the point of impact, it went from the left over to the right lane and then back to the left. (Emphasis added.)

. . . .

On cross examination Trooper Lovette testified:

. . .

Skid marks from my car began in the right lane and they continued until I hit the motorcycle. I say that as I was approaching the intersection somewhere up around the curve the motorcycle went out of my sight. Just as I was coming out of the curve, he was again in my sight and at that time I saw those brake lights. As to whether the brake lights continued on until the collision, I wouldn't say for sure. They were on when I first saw—I don't remember if they stayed on or not. I had just come out of the curve when I saw the brake lights on the motorcycle and I saw it in the left lane.

As to whether I applied my brakes I had applied them. I hadn't locked them. I had started slowing. As to whether I had seen any marks then, no, sir. I was in my right and proper lane. The motorcycle was in the left lane. As to whether it had a turn signal on, I don't know. I don't recall. I'm not saying it did or it didn't. I didn't see it. As to whether I know what speed I was doing at the time, no, sir. I don't know what speed the motorcycle was going. Both of us had slowed down. As to whether from the church I could see all the way beyond the intersection of 211 and 1003, after you come around the curve, yes, sir. As to whether as soon as you came out of the curve thereabout the church you could see all the way down, you could at day. You could see lights if there was any. I didn't see any cars at that time coming. The first time I saw the car was when it started turning. It had lights on when I saw it. I couldn't tell you how fast I was going. I came around the curve and saw the motorcycle in the left lane with his brake lights on, I had started slowing, let off the gas and *applied the brakes* but I weren't sliding then. That's when the car turned. I don't know where it came from or what. I was watching to see what he was going to do and slowing at the same time.

All of the sudden there was a car turning. As to whether I was looking to see if any cars were coming from any direction, I didn't see any until she had started turning. It's the first I'd seen of it. I was coming out of the curve when I saw her begin to turn. As to whether I know that it is 1325 feet to that church from where this intersection—I don't know. I wouldn't say whether it's any less than that. (Emphasis added.)

. . . .

No construction of the evidence, in our opinion, supports the finding that Trooper Lovette did not apply his brakes. The only inference reasonably deducible from the evidence is that Trooper Lovette did apply his brakes immediately upon seeing that he and Riggan were approaching an intersection, and that Riggan was slowing the motorcycle. Thus, the conclusion that Lovette was negligent in failing to apply his brakes, and that such negligence was a proximate cause of Riggan's death, is not supported by the record.

Additionally, the Commission misinterpreted the evidence and misapplied its findings of fact to the law in arriving at its conclusion that the negligence of Trooper Lovette was a proximate cause of the collision and the resulting death of Riggan.

The majority of the Commission, in addition to finding facts not supported by the evidence, failed to find facts determinative of the issues raised by the evidence, and then misapplied the facts it did find to the law.

When confronted with a sudden emergency, a person is held to act as a person of ordinary care and prudence would have acted under similar circumstances. He is not held to make the wisest or best decision. 2 N.C. Index 3d, *Automobiles and Other Vehicles* § 72 (1976). In *Schloss v. Hallman*, 255 N.C. 686, 122 S.E. 2d 513 (1961), a defendant lost control of his vehicle when another vehicle cut in front of him. The court held this was sufficient evidence to invoke the doctrine of sudden emergency and preclude the submission of the issue of negligence to the jury. Also, in *Dixon v. Cox*, 266 N.C. 637, 146 S.E. 2d 673 (1966), the Court held there was insufficient evidence to submit to the jury the issue of negligence for failure to take evasive action where the defendant applied his brakes and veered to avoid an oncoming vehicle.

[2] The evidence in the present case, and that portion of Finding of Fact No. 7 which is supported by the evidence, reveals a classic sudden emergency situation. The only inference reasonably deducible from the evidence is that Lovette locked his brakes when the Hill vehicle turned across Highway 211 directly in the path of the patrol car. Although the majority of the Commission found this to be a fact, it ignored its legal significance when it concluded that Trooper Lovette was negligent in "swerving" his automobile into the left lane of Highway 211 where it struck Riggan's motorcycle. There is no evidence in this record that Trooper Lovette in any way precipitated the sudden emergency which arose when the Hill vehicle blocked the southern lane of Highway 211. Officer Lovette was under no duty to anticipate negligence on the part of others driving upon the public highway. *Privette v. Lewis*, 255 N.C. 612, 122 S.E. 2d 381 (1961). Lovette had a right to assume that Mrs. Hill would remain on the north side of Highway 211 until the very moment she turned into the south side of the

highway directly in the path of the patrol car. Upon observing Mrs. Hill's automobile turning, the officer had a duty to exercise reasonable care to avoid a collision. This is precisely what the evidence and the findings disclose he did when he locked his brakes in the face of the sudden emergency. The evidence supports the Commission's finding that the patrolman lost control of the vehicle he was operating and struck Riggan's motorcycle, but it does not follow that he was negligent in losing control. The evidence and the findings disclose affirmatively and conclusively that Trooper Lovette exercised reasonable care under the circumstances.

We hold the Commission's finding and conclusion that Riggan's death was the proximate result of the negligence of the defendant is erroneous and must be reversed.

Because of our decision with respect to Assignment of Error No. 1, it is not necessary for us to discuss Assignment of Error No. 2 relating to the contributory negligence of plaintiff's intestate.

The Opinion and Award of the Industrial Commission filed 25 November 1981 is reversed and the cause is remanded to the Industrial Commission for the entry of an order dismissing plaintiff's claim.

Reversed and remanded.

Judges WHICHARD and BRASWELL concur.

PAUL R. WATERS AND WIFE, ALMA M. WATERS, AND WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE UNDER THE WILL OF JAMES A. TINGLE, DECEASED v. NORTH CAROLINA PHOSPHATE CORPORATION, DAVID B. ALLEMAN AND WIFE, RUTH G. ALLEMAN, AND ELIZABETH KEYS ALLEMAN WHEELER (DIVORCED)

No. 823SC74

(Filed 1 March 1983)

1. **Appeal and Error § 68— law of the case—inapplicability to dicta**

The doctrine of the law of the case did not apply to a statement in a prior appellate decision which was not necessary to the holding in that decision.

2. **Vendor and Purchaser § 4— contract to purchase land—visible easements**

The presumption that a vendee in a contract to purchase land contracted to accept the land subject to visible easements of an open and notorious nature is rebuttable.

3. **Vendor and Purchaser § 4— contract to convey land—covenant against encumbrances—power company easement**

The visible easement rule did not apply to a contract to convey land which required the land to be conveyed subject to no encumbrances not satisfactory to the buyer and which provided that the buyer should be given exclusive possession of the property free from the claims and interferences of all persons on the date of closing, and the trial court properly held that a power company easement on the land constituted a breach of the conditions of the contract.

Judge WELLS concurring in the result.

APPEAL by plaintiffs from *McKinnon, Judge.* Judgment entered 30 September 1981 in Superior Court, PAMLICO County. Heard in the Court of Appeals 18 November 1982.

This case arises from a contract to convey land executed by plaintiffs and defendant North Carolina Phosphate Corporation (Phosphate) on 30 October 1974. In the contract plaintiffs agreed to convey and Phosphate agreed to buy a tract of land containing approximately 1,712 acres. The land had previously been conveyed to plaintiffs by David B. Alleman and wife. The following two paragraphs were in the contract:

> (5) *QUALITY OF TITLE.* . . . It is specifically understood and agreed that this property shall be conveyed subject to no encumbrances not satisfactory to BUYER, and that the same shall convey indefeasible fee simple and marketable title in

and to any and all mineral rights within the perimeter of said property. It is understood the the BUYER shall accept the conveyance of said property subject to 1975 ad valorem taxes.

. . .

(7) *POSSESSION.* BUYER shall be given the exclusive possession of the property free from the claims and interferences of all persons whomsoever at the time of closing.

After a deed was tendered to Phosphate on 17 January 1975, and rejected, plaintiffs filed a complaint seeking specific performance under the contract. In its answer Phosphate alleged that the title to the land was not marketable because the deed from the Allemans to plaintiffs contained language which purported to create a right of reentry on breach of express conditions and because the property was subject to an easement in favor of Carolina Power and Light Company (CP&L). The Allemans, in their answer, alleged a right to immediate possession of the property due to breach of the express conditions in the deed. On 9 April 1976, summary judgment in favor of plaintiffs against the Allemans was granted. This Court affirmed the judgment noting that since the language purporting to create a valid right of reentry on breach of the stated conditions was found only in the description of the deed, it was ineffectual. *Waters v. Phosphate Corp.*, 32 N.C. App. 305, 232 S.E. 2d 275, *review denied*, 292 N.C. 470, 233 S.E. 2d 925 (1977).

When the matter came to trial, Phosphate's motion for a directed verdict at the close of plaintiffs' evidence was granted. On appeal, this Court reversed and the case was remanded for trial. *Waters v. Phosphate Corp.*, 50 N.C. App. 252, 273 S.E. 2d 517, *review denied*, 302 N.C. 402, 279 S.E. 2d 357 (1981). At retrial, the court, sitting without a jury, held that plaintiffs' title was not unmarketable on the date of closing by reason of the purported reverter clause in the deed. As to the CP&L easement, the trial court made the following findings of fact:

2. . . . The description of the (CP&L) right-of-way calls for a center line running almost straight north and south for approximately 8,550 feet across the property of plaintiffs, immediately adjacent to the western boundary line of plaintiffs' lands. Shortly after the entry of this judgment, Carolina

Power and Light Company established a large transmission line along this easement, clearing a right-of-way 100 feet wide of all trees and obstructions and building a line consisting of towers made of two wooden poles 40-50 feet high with cross-bars between the poles and bearing 5 transmission lines. This right-of-way and line has been continuously maintained in substantially the same condition since it was established.

3. Except for a small area at the northern end of the property, this line passes through the wooded area of plaintiffs' land and to observe it from the land, one would have to be near the right-of-way on either side. There is a woods road on the land which crosses the right-of-way, and a public road known as the Paul Road crosses the right-of-way approximately one-half mile south of plaintiffs' lands, and the existence of the power line and right-of-way as it extends onto and across plaintiffs' land is apparent from the Paul Road. There are no visible markers or landmarks to show the exact boundary of the plaintiffs' lands.

4. The power line would be clearly visible to anyone making reasonable inspection of the whole of plaintiffs' lands, and its physical character is such as to be "of a visible, open and notorious nature."

5. At the time of negotiations between Paul R. Waters and Dewey Walker, an agent of the defendant who was one of those in charge of negotiating for the purchase of the land involved in this proceeding, before the contract was entered into, Mr. Waters told Mr. Walker that there were power lines along the western boundary of the property and that he would like to go with the surveyor to be employed by the defendant to show the surveyor the boundaries.

6. Plaintiffs have not been able to offer any evidence that any representative of the defendant in fact saw the existing power line and right-of-way, and the representatives of the defendant who testified have stated that they never inspected the land or saw the right-of-way before entering into the contract, and the defendant has offered reasons why in the nature of its operations this was not necessary or customary. . . .

7. At the time of entering into negotiations for the purchase of plaintiffs' land the defendant was engaged in acquiring property for the purpose of establishing a phosphate mining operation and was seeking to obtain properties which would block a competitor from carrying out such operations in the area and which would allow the defendant to make advantageous exchanges of land for this purpose. Both the defendant and its competitor own numerous tracts of land in the vicinity of plaintiffs' land. The mining of phosphate requires the ownership and possession of contiguous tracts of land larger than the tract owned by the plaintiff, and the economic feasibility of mining phosphate requires assembling of such large parcels of land unobstructed by things such as large power line easements.

8. The existence of the easement in favor of Carolina Power and Light Company across the lands of the plaintiffs constituted a detriment to the use of this land by the defendant for phosphate mining or for exchange with others for that purpose and created a condition which was not satisfactory to the defendant as an encumbrance upon the land and as an interference with its right of exclusive possession.

9. The existence of the power lines and 100 foot right-of-way was only a portion of the easement in favor of Carolina Power & Light Company over the lands of the plaintiffs. Among other things, the easement also gave officers, agents, and workmen of Carolina Power & Light Company the right to go to and from the power lines over the entire property including private roads, and to take materials, supplies, machinery, and equipment over the said property as may be desirable to construct, reconstruct, work upon, repair, alter, or inspect said power lines, and to do any other thing necessary or convenient to maintain and operate said power lines for the transmission of electricity for public use. The easement also gave Carolina Power & Light Company the right to install guy wires and anchors outside the right-of-way and to cut some trees outside the right-of-way.

10. The defendant's evidence is sufficient to rebut any presumption that it was presumed to have contracted to accept the land subject to the existing easement of Carolina Power and Light Company.

11. The existence of the easement, as well as the existence of the reverter clause, was given as a reason for the refusal of the defendant to accept the deed tendered by the plaintiffs at the time for closing.

In addition to concluding the easement was an encumbrance and Phosphate did not have notice of the entire rights and obligations thereunder the trial court made the following conclusions of law:

5. Under the contract, the defendant had the right to determine the nature and extent of any easements and the encumbrance created thereby, prior to closing the purchase, and to waive the existence of any encumbrances which were satisfactory to it and not real interferences with its use of the property, and to object to any encumbrances not satisfactory to it or which prevented the defendant from being given the exclusive possession of the property free from claims and interferences of all persons whomsoever at the time of the closing.

6. The easement was not beneficial to the defendant in its proposed use of the property and constituted more than a minor detriment to it and was not satisfactory to the buyer, and the defendant did not unreasonably refuse to accept the tender of the deed because of this encumbrance.

7. The existence of this easement at the time of closing was a breach of the condition of the contract that the property be conveyed subject to no encumbrances not satisfactory to the buyer and of the condition that the buyer be given the exclusive possession of the property free from the claims and interferences of all persons whomsoever at the time of the closing, and the defendant was justified in refusing to accept the deed tendered by the plaintiffs.

The court decreed that plaintiffs were not entitled to specific performance of the contract between the parties.

Gaylord, Singleton & McNally, by Louis W. Gaylord, Jr., and Danny D. McNally, for plaintiff appellants.

Sumrell, Sugg & Carmichael, by Fred M. Carmichael and Rudolph A. Ashton, III, for defendant appellee.

VAUGHN, Chief Judge.

[1] Plaintiffs argue that the trial court erred in admitting evidence and making findings of fact and conclusions of law regarding the CP&L easement. They contend that this Court had previously ruled on this issue in *Waters II* and the trial court was bound by that decision under the doctrine of law of the case.

In general, when an appellate court decides a question and remands the case for further proceedings, the questions determined by the appellate court become the law of the case, both in subsequent proceedings in the trial court, and on appeal. *Bruce v. O'Neal Flying Service, Inc.*, 234 N.C. 79, 66 S.E. 2d 312 (1951). The doctrine of law of the case does not apply to dicta, but only to points actually presented and necessary to the determination of the case. *Hayes v. City of Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956).

In *Waters II* this Court reversed the judgment directing verdict in Phosphate's favor. Since Phosphate did not state specific grounds for its motion, this Court examined every possible basis for the motion to determine whether the evidence was sufficient to go to the jury. The directed verdict was reversed on the following grounds: the purported reverter clause had previously been deemed ineffectual; the evidence presented regarding a 1960 judgment creating a canal corporation was insufficient to justify a directed verdict; and plaintiffs had presented sufficient evidence to submit to the jury the issue of whether the CP&L easement constituted a visible easement. With regard to this last issue, this Court noted:

> If the CP&L easement is found by the jury to be a visible easement, defendant would be deemed to have entered the contract to convey intending to take subject to the easement and defendant could not assert the CP&L easement as a reason to refuse to perform the contract.

Waters II, 50 N.C. App. at 256, 273 S.E. 2d at 520. Since the sole issue before the court was whether there was sufficient evidence to go to the jury, the above statement, which is more applicable to covenants against encumbrances in a deed than to contracts, was not necessary to the holding and was not binding on the subsequent trial.

[2] In this case, the findings of fact regarding the CP&L easement, particularly as to its visibility, CP&L's entire rights thereunder, and Phosphate's knowledge of these rights, were clearly relevant to decide the issue of whether the easement was of a visible, open and notorious nature. The evidence showed, and Judge McKinnon properly concluded, that the easement consisted of more than the visible power lines and right-of-way; and that Phosphate was not given notice of the entire rights of CP&L. We also find no error in the trial court's interpretation of the rules as established by *Waters II.* Judge McKinnon further concluded that the presumption that a vendee in a contract to purchase land is presumed to have contracted to accept the land subject to visible easements of an open and notorious nature, is rebuttable. This interpretation is consistent with the following statement in 77 Am. Jur. 2d *Vendor and Purchaser,* § 222 at 399 (1975): "In the ordinary case the vendee is presumed to have contracted to accept the land subject to visible easements of an open and notorious nature, although it would seem that the circumstances may be such as to repel this presumption. . . ." "Where the vendee protects himself against encumbrances by a positive covenant that the premises shall be conveyed clear of all encumbrances, the vendor does not comply with the contract by tendering a conveyance where the land is subject to a visible easement, even though the vendee knew of it." In *Waters II* this Court quoted this first sentence but omitted that portion beginning with "although."

Plaintiffs' reliance on *Hawks v. Brindle,* 51 N.C. App. 19, 275 S.E. 2d 277 (1981), for their argument that the presumption is irrebuttable, is misplaced. *Hawks* involved a breach of the covenant against encumbrances found in a *general warranty deed.* In *Hawks,* this Court reversed the judgment directing verdict in defendants' favor on the breach of covenant against encumbrances because there was no evidence that either plaintiffs or defendants knew that the tract of land was subject to a highway right-of-way. This Court, citing *Goodman v. Heilig,* 157 N.C. 6, 8-9, 72 S.E. 866, 867 (1911) applied the following rule of law:

> The rule in North Carolina appears to be that a covenantee may not recover for breach of the covenant against encumbrances where the encumbrance he alleges is a public highway or railroad right-of-way and *either* (1) the covenan-

tee purchased the property with *actual knowledge* that it was subject to the right-of-way or (2) the property was *"obviously and notoriously* subjected at the time to some right of easement or servitude . . . ." (Emphasis added.)

Hawks v. Brindle, 51 N.C. App. at 24, 275 S.E. 2d at 281.

[3] In this case we are dealing with a contract to convey land where the parties expressly agreed that the land would be conveyed subject to no encumbrances not satisfactory to Phosphate and to give Phosphate "exclusive possession of the property free from the claims and interferences of all persons whomsoever at the time of closing." In the contract Phosphate waived no encumbrance other than an existing agricultural lease. By entering into this contract, Phosphate provided itself with an opportunity to investigate the property and any encumbrances thereon before closing. The very purpose of the aforementioned terms was to protect Phosphate against any unsatisfactory encumbrances. To hold that Phosphate was only protected against unknown encumbrances would rob the contract of its value and destroy the force of its language. Under the terms of the contract between the parties, the visibility of the easement would be immaterial. The question before the trial court involved the interpretation of this contract. On remand the trial court made findings of fact determining both issues. Since the evidence supports the findings of fact, and these findings of fact support the conclusions of law, we affirm the judgment. In light of this holding we deem it unnecessary to discuss defendant Phosphate's cross-assignments of error.

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

Affirmed.

Judge WELLS concurs in the result.

Judge WHICHARD concurs.

Judge WELLS concurring in the result.

I disagree with the majority reasoning, but agree with the result reached.

I am persuaded that in *Waters v. Phosphate Corp.*, 50 N.C. App. 252, 273 S.E. 2d 517, *disc. rev. denied*, 302 N.C. 402, 279 S.E. 2d 357 (1981), this Court clearly held that the visible easement rule applies to contracts to convey land, as well as to deeds of conveyance. I take that to be the law of this case, as well as the law of this jurisdiction. The rule, correctly applied, requires that the visible easements, *known* to the vendee, will not excuse performance by the vendee. Judge McKinnon found that the CP&L easement, while having visibility, had characteristics not known to the vendee in this case, *e.g.*, rights of ingress and egress, etc. (see paragraph nine of Judge McKinnon's order). The evidence supports this finding, and this finding supports Judge McKinnon's conclusions of law, which support his judgment. For these reasons, I concur in the result.

STATE OF NORTH CAROLINA v. HARRY LEE BATTLE

No. 828SC342

(Filed 1 March 1983)

1. Criminal Law § 66.9— photographic lineup—proper

A series of photographic lineups were not improperly suggestive where defendant's photograph was unique in each of the lineups.

2. Criminal Law § 73.2— statement not within hearsay rule

It was not improper for a police captain to testify that a witness to a robbery told him that if he could be shown a "more up-to-date picture" he could be 100% positive of the identification of defendant since the testimony was proof as to why the captain showed the witness a fourth photographic lineup and was not introduced for the truth of the witness's statement.

3. Criminal Law § 162.2— failure to properly object to testimony—previous objection not controlling

It was necessary for defendant to object to a witness's testimony in order for it to be reviewed by the appellate court. The defendant's objection to a similar line of testimony did not prevent his need to object to the specific testimony which he contends was erroneously admitted since the trial court properly overruled his objection to the previous line of questioning. G.S. 15A-1446(d)(10).

4. Kidnapping § 1.2— sufficiency of evidence

The removal of a victim of armed robbery at gunpoint from a store after the defendant had taken money from him and his father at gunpoint was done

to facilitate the flight of the defendant "while in the commission of a felony" and supported a conviction of kidnapping. G.S. 14-39(a)(2).

5. **Kidnapping § 1.3— instructions—removal of victim as separate from felony**

Where the trial court instructed the jury that the State must prove beyond a reasonable doubt "that the defendant removed [the victim] from one place to another for the purpose of facilitating flight after committing a felony," the instruction was sufficient for the jury to understand that it must find that the removal was separate and apart from the other felony in order to find defendant guilty of kidnapping.

6. **Criminal Law § 99.2— statement to jury concerning defendant's address—no expression of opinion**

The trial court did not express an opinion as to defendant's guilt in violation of G.S. 15A-1232 when, shortly before the jury was impaneled, the court stated that defendant "allegedly lived on Magnolia Street in Sanford" where the judge's comment reflected a discrepancy among the arrest warrants as to the defendant's correct address and was made in an effort to determine whether any prospective jurors knew the defendant or were related to him.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 17 September 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 19 October 1982.

Defendant was tried for armed robbery, kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. Prior to the trial, a hearing was held on the defendant's motion to suppress the identification testimony of Tracey Grady who was in his father's store in Mount Olive at the time of the robbery. The evidence showed a black male came into the store. Tracey was watching television and paid no attention to the man until he heard a shot. Tracey Grady then saw his father, who had been shot, lying on the floor. The man who had come into the store forced Tracey, at gunpoint, to give him the money from the cash register. The robber asked Tracey where the remainder of the money was located and Tracey tried to open the door to the office, which was locked. He then forced Tracey to give him the money from Tracey's wallet and his father's wallet. The store was well-lighted at the time of the robbery.

The robber then forced Tracey, at gunpoint, to walk out of the store in front of him. He made Tracey walk to the side of the store and then ordered Tracey to "[t]urn around and run." Tracey ran down the street and returned shortly thereafter. As Tracey left the store, he noticed a yellow "Duster" automobile, with black

stripes on the side, parked in the parking lot. The car was no longer there when he returned to the store.

Tracey was shown a group of eight photographs by police officers on 19 December 1980. All the photographs were front view pictures. A photo of the defendant taken in 1973 was in the group. Tracey was not able to identify the defendant. The next day the officers replaced three of the photographs in the group, including the picture of the defendant, with three side view pictures of men. A side view picture of the defendant taken in 1973 was in this group. The other two photos were of men not included in the first group. Tracey did not identify the photograph of the defendant in this group as being the photograph of the robber. During the week of 4 January 1981 the officers showed Tracey a third photographic lineup. It contained seven of the photographs from the previous lineup with the defendant's photograph being replaced by another side view picture of the defendant. Tracey said the defendant's photograph looked like a photograph of the robber but it appeared to be an old photograph. He asked to see a more recent picture in order to make a more positive identification. The defendant was arrested and a photograph was taken of him on 4 February 1981. This picture was shown to Tracey in a photographic lineup with six pictures that had not previously been shown to him. Tracey identified the defendant's photograph and said he was sure it was a photograph of the robber.

The court found facts based on the evidence and held that the photographic lineups were not impermissibly suggestive. The court also held that Tracey Grady's in-court identification of the defendant was based on his observation of the defendant at the time of the robbery. The defendant's motion to suppress evidence of the lineups and the in-court identification of the defendant by Tracey Grady was denied.

The defendant was convicted of all charges and received an active prison sentence. He appealed.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

WEBB, Judge.

[1] Under his first assignment of error the defendant argues that the photographic lineups were impermissibly suggestive and it was error to admit testimony as to these lineups. The defendant argues under the same assignment of error that Tracey Grady's in-court identification was tainted by the lineup and should have been excluded.

The defendant argues that it was impermissibly suggestive for the defendant to be the only person to appear in a different photograph in the first two lineups and for the change of the defendant's photograph to be the only difference between the second and third lineups. The defendant contends that since his photograph was unique in each photographic lineup, the lineups effectively conveyed to Tracey Grady the message that the defendant was the man whom the police thought was the robber. We believe we are bound by *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982) to reject this argument by the defendant. In *Leggett* our Supreme Court held "The fact that a defendant's photograph is the only one common to two groups of photographs shown a victim is not sufficient, standing alone, to support a determination that pretrial photographic identification was conducted in an impermissibly suggestive manner." *Id.* at 222, 287 S.E. 2d at 838. The defendant does not contend that the photographic lineups were improper except for the manner in which the defendant's photographs were changed without changing other photographs in the lineups. We hold that we cannot disturb the findings of fact or the conclusion that the photographic lineups used in this case were not impermissibly suggestive. Since we have held the photographic lineups were not impermissibly suggestive, we also hold that the witness's in-court identification of the defendant was not tainted by an impermissibly suggestive lineup. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant argues that the court on two separate occasions admitted hearsay testimony. Tracey Grady testified that when he was being shown the third photographic lineup, he told Captain Ed Hudson of the Mount Olive Police Department he was 80% certain that the picture of the defendant was a picture of the robber. He testified further

that he did not say anything else to Captain Hudson at the time he was shown the pictures. Captain Hudson testified that Tracey told him that if he could show him a "more up-to-date picture," he could be 100% positive. The defendant argues that this was hearsay testimony and prejudicial to the defendant because it explained to the jury why Tracey could not identify the defendant's picture in the first three lineups. It is stated in 1 Brandis on N.C. Evidence § 139 (1982), at page 552 that:

> "Whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay."

In this case the testimony to which defendant objects was proof as to why Captain Hudson showed Tracey a fourth photographic lineup. It was not introduced for the truth of Tracey Grady's statement. It was not hearsay testimony.

[3] The defendant also argues under this assignment of error that he was prejudiced by other hearsay testimony of Captain Hudson. Walter Grady, the father of Tracey Grady, testified that he was shown four or five photographic lineups by Captain Hudson. He testified that when he was shown the last lineup, he said there was only one person in the lineup who could possibly be the man. When Captain Hudson was testifying, he said that Walter Grady pointed to the defendant's picture when he was shown the last lineup and said "The only one it looks close like is that one." The defendant argues this was hearsay testimony and it did not corroborate the testimony of Walter Grady.

The defendant did not object to this testimony. He contends that since he objected to what he contended was Captain Hudson's hearsay testimony as to what Tracey Grady had said, he did not have to object to the hearsay testimony of Captain Hudson as to what Walter Grady said. The defendant relies on G.S. 15A-1446 which provides in part:

> "(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.

. . . .

(10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning."

One of the requirements for appellate review under this statute is that there be an improperly overruled objection to testimony. If there is such a ruling, the appellant does not have to object to questions involving matters in the same line. In this case we have held that Captain Hudson's testimony as to the statement of Tracey Grady was properly admitted. Assuming that Captain Hudson's testimony as to the statement of Walter Grady was in the same line as his testimony of Tracey Grady, it was necessary to object to this testimony in order for it to be reviewed by this Court. The defendant's second assignment of error is overruled.

[4] The defendant argues under his third assignment of error that the evidence was insufficient to support a conviction of kidnapping. The defendant, relying on *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981) argues that the asportation in this case was an inherent and integrated part of the armed robbery and cannot be considered as a separate crime of kidnapping. G.S. 14-39 provides in part:

"(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

. . . .

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony."

We believe the removal of Tracey Grady at gunpoint from the store after the defendant had taken money from him and his father at gunpoint was done to facilitate the flight of the defendant "following the commission of a felony" and is a violation of G.S. 14-39(a)(2). It is distinguishable from *Irwin* in which no person was forced to leave the premises after the robbery.

[5] The defendant also argues under his third assignment of error that the court committed error in the charge in that the court did not instruct the jury that the removal must have been "separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Irwin, supra* at 103, 282 S.E. 2d at 446. The court instructed the jury that the State must prove beyond a reasonable doubt "that the defendant removed James Tracey Grady from one place to another for the purpose of facilitating flight after committing a felony." Judge Bruce charged in the words of the statute and we believe this complied with the requirement of *Irwin* that the jury find that the removal be separate and apart from the other felony in order to find him guilty of kidnapping.

The defendant also contends the final mandate was misleading to the jury. The court charged:

> "I instruct you that if you find from the evidence and beyond a reasonable doubt that on or about the 5th day of December 1980 that the defendant, Harry Lee Battle, removed James Tracey Grady from one place to another within Grady's Grocery or from inside Grady's Grocery to somewhere outside . . . then it would be your duty to return a verdict of guilty of second degree kidnapping . . . ."

The defendant argues that this allowed the jury to convict him of kidnapping on the evidence that Tracey Grady was removed from one part of the store to another during the course of the robbery. There was evidence that the defendant forced Tracey Grady to move within the store and toward the exit after the defendant had taken the money and started for the door. Judge Bruce instructed the jury they had to find the removal of Tracey Grady was for the purpose of facilitating flight in order to convict the defendant of kidnapping. We do not believe that the final mandate misled the jury when read in conjunction with Judge Bruce's other instructions. The defendant's third assignment of error is overruled.

[6] In his last assignment of error the defendant argues that the court expressed an opinion as to his guilt in violation of G.S. 15A-1232. Shortly before the jury was impaneled, the following occurred:

"THE COURT: Have any of you people formed or expressed any opinion about the guilt or innocence of Harry Lee Battle for any reason? If so raise your hand.

NO RESPONSE.

THE COURT: The defendant in this case, Harry Lee Battle, is seated at counsel table furthest away from you. He has on a light blue shirt. He allegedly lives on Magnolia Street in Sanford, North Carolina, and has lived at Vann Street in Goldsboro, North Carolina, or was living there on the date of this offense."

The court stated that the prosecuting witnesses resided in Dudley, North Carolina. The defendant contends that by questioning the truthfulness of the defendant's place of residence, the court intimated a view that the defendant and his witnesses were not worthy of belief. We do not believe this was an expression of an opinion as to the credibility of these witnesses. The record reveals there was some discrepancy among the arrest warrants as to the defendant's correct address. We believe the judge's comment reflected this discrepancy and was made in an effort to determine whether any prospective jurors knew the defendant or were related to him. We do not believe this remark prejudiced the defendant. The defendant's last assignment of error is overruled.

No error.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. ROBERT EARL PARKER

No. 827SC807

(Filed 1 March 1983)

1. Criminal Law § 66.4— lineup identification—in-court identification—admissibility in evidence

The trial court did not err in admitting into evidence a robbery victim's lineup and in-court identifications of defendant where the trial court conducted a voir dire hearing and made specific findings of fact regarding the victim's op-

portunity to observe the robbers, and where there was no evidence on voir dire that showed any significant discrepancies between the victim's contemporaneous description of the robber and defendant's appearance at the time the robbery occurred, although discrepancies in identification did appear during the trial.

2. **Robbery § 4.3— armed robbery—sufficiency of evidence**

The evidence, including lineup and in-court identifications of defendant by the victim, was sufficient to support conviction of defendant for the armed robbery of a convenience store employee, although there were discrepancies in the evidence concerning defendant's height and weight and whether he wore a beard at the time of the robbery.

3. **Bills of Discovery § 6— voluntary discovery—failure to disclose prior conviction—cross-examination about conviction by State—motion for appropriate relief**

The trial court did not err in permitting the State to question defendant about a prior nonsupport conviction which had not been revealed to defense counsel pursuant to a request for voluntary discovery or in denying defendant's motion for appropriate relief based upon such cross-examination where the record reveals that the trial court was unaware that the nonsupport matter had not been revealed pursuant to the request for voluntary discovery or that the failure to disclose constituted defendant's basis for his objections to the questions on cross-examination, and where the issue was not presented in the motion for appropriate relief. G.S. 15A-1420(a)(1)(b); G.S. 15A-1420(b).

4. **Criminal Law § 126— instruction on unanimity of verdict—no impropriety**

The trial court's instruction that the jury should begin its deliberations with a view toward "reaching a unanimous verdict because it will not be a verdict until the twelve of you agree" did not imply that the option of not reaching a unanimous verdict was unavailable when the charge is considered as a whole.

5. **Criminal Law § 101.4— exhibits not in evidence—no examination by jury**

The trial court had no authority to permit the jury to examine or take to the jury room lineup photographs which had not been introduced into evidence. G.S. 15A-1233.

APPEAL by defendant from *Brown, Judge.* Judgment entered 26 January 1982 in Superior Court, NASH County. Heard in the Court of Appeals 8 February 1983.

Defendant appeals from a judgment entered upon a jury verdict finding defendant guilty of armed robbery.

Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Spruill, Lane, McCotter & Jolly, by Sarah F. Patterson, for defendant-appellant.

HILL, Judge.

The State's evidence tends to show that on 3 September 1981, Sandra Cone was working alone in Langley's Expressway, a convenience market in Nash County, North Carolina. At approximately 11:15 p.m., two men entered the store. The defendant, Robert Earl Parker, grabbed her, held a gun to her head and pushed her into the stockroom where he forced her to open the safe. He thereafter took her to the store section and told her to open the cash register. The two men fled with $2,000. While the men were in the building, both the store and the stockroom were well lighted with fluorescent tube lights. The men were in the store 15 to 20 minutes. Ms. Cone described defendant to the sheriff's department as a clean-shaven black man wearing a work uniform and white tennis shoes.

On 26 October 1981, Ms. Cone was working at Benvenue Expressway, another convenience market in Nash County. She saw defendant sitting in a van parked in the store lot and recognized him as one of the men who robbed her at the Langley Expressway. About two hours later, she attended a lineup at the sheriff's department and identified defendant as one of the robbers. Defendant had agreed to participate in the lineup and to be photographed along with the other participants in the lineup.

At the trial of the case, the trial judge conducted a *voir dire* at which Ms. Cone and a deputy sheriff testified. The defendant offered no testimony at the *voir dire*, and the trial judge made findings of fact, conclusions of law, and entered an order allowing into evidence the pretrial and subsequent in-court identification.

Defendant offered evidence tending to show he was at his home with his girlfriend and their baby the evening of the robbery. Defendant's cousin and his housemate were present also. Defendant left home briefly to get some beer. Between 11:00 p.m. and 12:00 p.m., he borrowed a car to take his cousin home, and his girlfriend and his housemate went with them. He did not go to Langley's Expressway.

Defendant further testified, and offered corroborating evidence, that he had worn a beard for seven years. He admitted on cross-examination that he was $1,200.00 in arrears in his support payments for his two other children, and that he formerly had been convicted of nonsupport.

The jury returned a verdict of guilty, and defendant appeals from the judgment entered thereon. We find no error in the trial of the case.

[1] By his first assigment of error defendant argues the trial court erred by admitting into evidence the prosecuting witness's in-court and lineup identification of defendant. The argument is without merit.

Defendant offered no evidence in opposition to the evidence of identification by Ms. Cone at the *voir dire.* Although discrepancies in identification appeared during trial, the trial judge on *voir dire* had no evidence before him that showed any significant discrepancies between the witness's contemporaneous description of the robber and his appearance at the time the robbery occurred. The trial judge made specific findings of fact regarding the prosecuting witness's opportunity to observe the robbers. The findings are supported by competent evidence and are binding on this Court on appeal. *State v. Bright,* 301 N.C. 243, 271 S.E. 2d 368 (1980); *State v. Roberts,* 293 N.C. 1, 235 S.E. 2d 203 (1977).

[2] The defendant further argues that the trial judge's failure to dismiss for insufficiency of the evidence was error. We disagree.

Defendant presented evidence at the close of the State's evidence. By doing so, he waived his motion to dismiss at the close of the State's evidence. Thus, this Court would be limited to consideration of a motion to dismiss made at the close of all the evidence. *State v. Leonard,* 300 N.C. 223, 266 S.E. 2d 631, *cert. denied,* 449 U.S. 960, 101 S.Ct. 372, 66 L.Ed. 2d 227 (1980). Defendant failed to move for dismissal at the close of all the evidence and, instead, moved to dismiss after the jury returned its verdict of guilty. The Court is limited, therefore, to the sole question of whether the trial judge abused his discretion when he denied the motion. Where the record shows the evidence was substantial enough to submit the matter to the jury, no abuse of discretion is shown by denial of the motion. *State v. Hamm,* 299 N.C. 519, 263 S.E. 2d 556 (1980). We find that the trial judge acted within his discretion in denying defendant's motion.

Defendant argues that the identification of defendant was so inherently incredible as to require dismissal for insufficiency of the evidence. He points to *State v. Davis,* 297 N.C. 566, 256 S.E.

2d 184 (1979), in which the victim's contemporaneous identification varied from defendant's actual appearance.

While there appears to be variance in the evidence concerning defendant's height, weight and whether he wore a beard at the time of the robbery—all of which tend to weaken the probative force of the witness's testimony—the question of credibility was properly submitted to the jury. It has long been the rule in North Carolina that positive identification of the perpetrator of the crime by the prosecuting witness alone is sufficient to carry the case to the jury. *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978).

The evidence was adequate for submission to the jury. Defendant has shown no abuse of the trial judge's discretion. These assignments are overruled.

(3) Next, defendant argues that the trial judge erred in permitting the State to question defendant about his prior criminal record and by denying his motion for appropriate relief.

Defendant had submitted a written request to the district attorney for voluntary discovery of evidence to be used against defendant at trial as provided by G.S. 15A-902, *et seq.* The district attorney responded "orally" by providing defendant's attorney with a list of defendant's convictions, consisting principally of traffic violations. At trial, the district attorney questioned defendant about his nonsupport conviction. This conviction had not been disclosed by the district attorney to defendant's counsel prior to trial. Later, the district attorney advised attorney for defendant that he did not remember when he became aware of the nonsupport conviction and did not remember that it had not been disclosed. Defendant contends that failure to disclose the conviction acted as a bar to further questioning on this conviction. In the course of trial, defendant's attorney was denied the right to approach the bench on this matter. Defendant's appellate counsel contends that had defense counsel had the information in advance he could have elicited it on direct examination to minimize its effect, or have kept defendant from testifying altogether.

An examination of the record on appeal reveals that the trial court was unaware that the nonsupport matter had not been re-

vealed pursuant to the request for voluntary discovery or that the failure to disclose constituted defendant's basis for his objections to the questions on cross-examination. The issue was not presented in the motion for appropriate relief. G.S. 15A-1420(a)(1)(b) requires the defendant to set forth grounds for his motion for appropriate relief. G.S. 15A-1420(b) requires the motion to be supported by affidavit or other documentary evidence. Failure to do so presents no issue for review. Since the trial judge was unaware of this particular issue, his denial of defendant's motion for appropriate relief was clearly not an abuse of discretion.

[4] By his next assignment of error, defendant contends that the trial judge erred in his instructions to the jury regarding reasonable doubt. Defendant notes that the court instructed the jury to begin its deliberations with a view toward ". . . reaching a unanimous verdict because it will not be a verdict until the twelve of you agree." Defendant argues that the phrase "until the twelve of you agree" is deceptive because it implies that the option of not reaching a unanimous verdict is unavailable. Defendant argues that the trial judge erred by failing clearly to instruct the jury that reasonable doubt could arise in their minds either from insufficiency of the evidence or from conflicts in the evidence actually presented.

It is apparent from a reading of the entire charge that the jury was properly instructed. We note that the judge summoned both attorneys to the bench after the charge was given, and inquired whether they wished to request additional instructions. Neither attorney requested further instructions. Nor did defendant object to the instruction at trial. *See* N. C. Rules of Appellate Procedure, Rule 10(b)(2). Indeed, defendant later polled the jury, and there is no indication that any of the jurors was hesitant or equivocal in his individual determination of the defendant's guilt. The assignment is without merit.

[5] Finally, defendant contends that the trial judge erred in refusing to permit the jury to examine the photographs of the participants in the lineup. Defendant confuses evidence introduced in the voir dire with evidence introduced at trial. Although the photographs were identified at trial, they never were introduced into evidence. The trial judge has no authority to permit the jury to take exhibits or other materials to the jury room that

have not been received into evidence. G.S. 15A-1233; *State v. Grogan*, 40 N.C. App. 371, 253 S.E. 2d 20 (1979).

The defendant received a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and WHICHARD concur.

FRANK B. GODFREY, JOE N. SUTTON, O. FRED HOWEY AND BILLUPS HOOD v. UNION COUNTY BOARD OF COMMISSIONERS, UNION COUNTY AND JAMES DENNIS RAPE

No. 8220SC258

(Filed 1 March 1983)

Municipal Corporations § 30.9— rezoning of property—spot zoning

The evidence and facts in a declaratory judgment action supported the trial judge's conclusion and judgment that the rezoning in the case constituted "spot zoning" and should therefore be set aside where the evidence tended to show that at the time the tract was rezoned, Union County had in effect a comprehensive land use and development plan; that the whole intent and purpose of the application for rezoning was to accommodate the individual defendant's plans to relocate his grain bin operation and not to promote the most appropriate use of the land throughout the community; and that the tract of land in question is surrounded on all sides by property zoned for single family residences.

APPEAL by defendants from *Kivett, Judge.* Judgment entered 11 December 1981 in UNION County Superior Court. Heard in the Court of Appeals 19 January 1983.

Plaintiffs brought this declaratory judgment action seeking to have the rezoning of a tract of real property by defendant County declared null and void. On 12 September 1980, defendant Rape petitioned the County to have his property rezoned to H-I (heavy industrial). Under the comprehensive plan, property zoned H-I may be put to various commercial and industrial uses such as for warehouses, food-processing plants, manufacture and distribution of various construction materials, sawmills, mines and agri-

cultural processing plants. Additional conditional uses may be permitted as well.

The stipulations and evidence before Judge Kivett, who heard the case without a jury, tended to show the following. Plaintiffs each own land adjoining a 17.45 acre tract of land owned by defendant Rape. The land of plaintiffs and defendant has been subject to Union County's comprehensive land use plan since 2 June 1975, the effective date of the County's Zoning Ordinance which implemented the land use plan pursuant to G.S. 153A-340 *et seq.* The property of plaintiffs and defendant Rape was zoned R-20 (single family residential) under the Ordinance, and was thus limited to use for single family dwellings, churches, and agriculture and horticulture. All of the property surrounding the Rape tract is zoned either R-20 or R-10 (residential suburban, a classification slightly more restrictive than R-20, limiting permitted agricultural uses and requiring that certain lots utilize county water and sewer services). Twelve residences are in the area immediately surrounding defendant Rape's tract. In a small community approximately one-half mile from the Rape property, there is a cluster of light and heavy industrial zoned property. Under the comprehensive plan, the Rape property was designated as low density residential.

Union County's Planning Director, Luther M. McPherson, visited the Rape property in order to assess its suitability for rezoning. McPherson made a written recommendation to the County Planning Board that the property be rezoned H-I for the following reasons:

- The Rape property is located on highway N.C. 75 and the Land Development Plan (the portion of the Zoning Ordinance setting out the zoning classifications for the whole county) states that industrial zoning should be located near major thoroughfares such as N.C. 75.

- The property is situated on a major highway and a railroad which runs parallel to the highway, in a location unlikely to develop in the future for residential purposes.

- Adequate parking space, as required by the Zoning Ordinance, could be provided.

—Because of the property's proximity to N.C. 75 and the railroad, rezoning to industrial should not adversely affect property values of adjacent land to an unreasonable degree.

—The area is already subject to a high level of noise.

—Railroad access, public highway access and public water are available.

—Buffering and setback would remove any detrimental effects that rezoning would have on public health, safety and welfare in the vicinity.

At the hearing before the Planning Commission, defendant Rape attempted to justify his proposed rezoning by informing the Commission that he operated a grain bin on the property located one-half mile from the tract proposed for rezoning and that he wanted to relocate his grain bin to the tract proposed for rezoning. Other than describing the suitability of the tract for his grain bin operation and asserting that the continued operation of his grain bin would be of benefit to farmers in the area, defendant Rape offered no other evidence of need to change the zoning classifications of his 17.45 acre tract.

On 3 October 1980, the County Planning Board voted six to one in favor of recommending rezoning. On 10 November 1980, defendant County held a public hearing on defendant Rape's petition. On 23 November 1980, the County Commissioners, by a vote of three to two, voted to amend the Zoning Ordinance, rezoning the Rape property H-I.

Following the trial, Judge Kivett entered the following order:

Petitioners and Union County Board of Commissioners and Union County through counsel having stipulated to the evidence presented and the Court having heard arguments of Counsel, the Court finds as a fact the following:

1. That on September 12, 1980, James Dennis Rape petitioned the Union County Board of Commissioners to rezone 17.45 acres from R-20 (Single Family Residential) to H-I (Heavy Industrial), as shown in Exhibit "A."

2. That on November 23, 1980, the Union County Board of Commissioners rezoned the Rape property in Petition 000313 from R-20 to H-I.

3. On September 12, 1980, Union County had a Land Use Survey Analysis and Land Development Plan for Union County which designated on the land development map the 17.45 acres of Rape property as projected to be low density residential.

4. That the 17.45 acres in question is surrounded on three sides by R-20 (Single Family Residential) and on one side by R-10 (Single Family Residential with 10,000 square feet lots) as shown on the official zoning map for Union County.

5. That there has been no showing to distinguish the Rape 17.45 acres from the surrounding properties.

6. That the predominant existing land use in the area is residential.

7. That there has been no showing that the Rape 17.45 acres could not be used for residential purposes.

Based upon the foregoing findings of fact, the Court concludes as a matter of law that the rezoning of the Rape 17.45 acres in Petition #000313 from R-20 (Single Family Residential) to H-I (Heavy Industrial) constituted spot zoning.

IT IS THEREFORE ORDERED AND ADJUDGED that the rezoning of 17.45 acres of the property of the defendant, James Dennis Rape from R-20 to Heavy Industrial by the Union County Board of Commissioners on November 23, 1980, Petition number 000313, is declared null and void and of no effect.

Defendant Union County appealed.

Joe P. McCollum, Jr. for plaintiffs.

Griffin, Caldwell, Helder & Steelman, P.A., by C. Frank Griffin and Thomas J. Caldwell, for defendants.

WELLS, Judge.

By its three assignments of error and two arguments, defendant challenges Judge Kivett's finding of fact number five and his single conclusion of law.

While we perceive that Judge Kivett's finding of fact number five may be more in the nature of a conclusion, we need not dwell on that aspect of his order. There is no dispute as to the underlying evidence in this case or the facts established by that evidence. The only controversy involves the legal significance of the evidence and the facts. *See, e.g., Lathan v. Board of Commissioners*, 47 N.C. App. 357, 267 S.E. 2d 30, *disc. rev. denied*, 301 N.C. 92, 273 S.E. 2d 298 (1980). The dispositive question before us is, therefore, whether the evidence and facts in this case support Judge Kivett's conclusion and judgment that the rezoning in this case constituted "spot zoning" and should therefore be set aside. We hold that Judge Kivett was correct in his conclusion and judgment and therefore affirm.

There is no dispute that at the time the Rape tract was rezoned Union County had in effect a comprehensive land use and development plan. While such plans may be appropriately modified after their adoption, such changes must be made consistently with the overall purposes contemplated by the adoption of the plan, and not to accommodate the needs or plans of a single property owner. As our Supreme Court stated in *Blades v. City of Raleigh*:

> The whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him but detrimental to the value of other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole. The police power, upon which zoning ordinances must rest, permits such restriction upon the right of the owner of a specific tract, when the legislative body has reasonable basis to believe that it will promote the general welfare by conserving the values of other properties and encouraging the most appropriate use thereof. (Cites omitted.)

280 N.C. 531, 187 S.E. 2d 35 (1972).

In the case now before us, the evidence before the trial court clearly showed that the whole intent and purpose of Mr. Rape's application for rezoning was to accommodate his plans to relocate his grain bin operation, not to promote the most appropriate use of the land throughout the community.

There is no dispute that Mr. Rape's tract of land is surrounded on all sides by property zoned for single family residences. As our Supreme Court stated in *Blades, supra,*

> A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning." It is beyond the authority of the municipality, in the absence of a clear showing of a reasonable basis for such distinction. (Cites omitted.)

Defendant County contends that the Rape property has characteristics that distinguish it from the property adjoining it. Judge Kivett correctly did not view the evidence as supporting this contention. While the evidence clearly does show that the Rape property has certain characteristics that make it suitable for industrial use, *i.e.*, paved public highway and a railroad on the tract and public water available, viewed in the context of the general characteristics of the area in which it is located, the Rape tract is essentially similar to the property or land that surrounds it and the characteristics of the Rape tract provide no reasonable basis for zoning it differently from the surrounding property.

We are persuaded that the attempted rezoning here constituted both "spot zoning" and "contract" zoning, *Blades, supra,* and was therefore invalid.

For the reason given, the judgment of the trial court is

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

STATE OF NORTH CAROLINA v. JAMES THOMAS SUGG, II

No. 8226SC654

(Filed 1 March 1983)

Searches and Seizures §§ 12, 33— investigatory stop—seizure of person—seizure of cocaine in plain view

Defendant was lawfully seized upon a reasonable and articulable suspicion that he was engaged in criminal activity and thereafter voluntarily relinquished his briefcase and accompanied officers where the officers saw defendant disembark from an airline flight from Florida at an airport in Charlotte; the officers knew the flight was connected to Florida cities which are points of entry for narcotics smuggling; defendant was the first person off the airplane, was casually dressed, appeared to be unusually nervous, and carried only a briefcase; defendant repeatedly glanced back at the officers following him as he walked through the terminal; defendant met another man at the airport gift shop with whom he walked to the terminal parking lot; an officer approached defendant, obtained defendant's consent to speak with him, and asked defendant to show him his plane ticket and some identification; the officer noticed that the ticket was purchased for cash and was for a round-trip flight returning to Florida some 3-½ hours later; defendant became increasingly nervous, and his companion began denying any involvement in the affair; the officer informed defendant he was conducting a narcotics investigation and asked if he could search defendant's person and briefcase; when defendant declined, an officer informed defendant that he was free to go but that the officers would detain his briefcase for further investigation; and after telephoning his attorney, defendant voluntarily relinquished his briefcase to the officers and accompanied them to their office. Furthermore, officers lawfully seized cocaine from defendant's briefcase pursuant to the "plain view" doctrine where defendant requested permission to remove some personal papers from the briefcase, opened the briefcase and a leather pouch therein in the officers' presence, and exposed to the officers' view a plastic bag containing a white powder which appeared to the officers to be cocaine.

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 28 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 January 1983.

The defendant was charged in a proper bill of indictment with possession with intent to sell and deliver a controlled substance (cocaine) in violation of G.S. 90-95(a)(1). Defendant's motion to suppress evidence on grounds of an unlawful search and seizure was denied. Pursuant to G.S. 15A-979, defendant appeals from entry of judgment against him and seeks review of the denial of his motion to suppress.

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

Henry T. Drake for defendant-appellant.

HILL, Judge.

On 28 April 1981, defendant James Thomas Sugg, II, a commercial airline passenger, was questioned at Douglas Municipal Airport in Charlotte, North Carolina, by a law enforcement officer who believed defendant's behavior was within the Federal Drug Enforcement Agency drug courier profile. Sugg was charged with possession with intent to sell and deliver the cocaine subsequently seized from his briefcase. From an order of the hearing judge entered 6 August 1981 denying his motion to suppress evidence of the cocaine, Sugg gave notice of appeal. He later pleaded guilty to the offense charged, reserving his right to appellate review of the order denying his motion to suppress.

Defendant contends that: (1) the hearing judge failed to make the proper findings and conclusions in support of his denial of defendant's motion to suppress, and (2) the seizure of contraband from defendant's briefcase violated the Fourth and Fourteenth Amendments of the United States Constitution. We find, however, that the evidence submitted at hearing supports the judge's denial of the motion and that the seizure of the contraband was proper. We, therefore, affirm the order of the hearing judge.

Special Agents Davis and Gross of the State Bureau of Investigation saw James Thomas Sugg, II, deplane from Eastern Airlines Flight 386 from Florida at Douglas Municipal Airport in Charlotte. Sugg, casually dressed and carrying a Halliburton briefcase, was apparently the "first one off the aircraft." He "made immediate eye contact" with Davis, "appeared . . . to be nervous," and repeatedly glanced back at the officers following him as he walked through the terminal. Sugg met another man at the airport gift shop with whom he walked to the terminal parking lot.

Approaching Sugg and his companion, Davis identified himself and asked if he could speak with Sugg. Sugg assented, and Davis asked Sugg to show him his plane ticket and some iden-

tification. Davis noticed the ticket had been purchased with cash and was for a round-trip flight from West Palm Beach, Florida, through Atlanta, Georgia, to Charlotte, returning some 3 to 3-½ hours later. Although Sugg apparently carried a Florida driver's license and said he lived in Hawaii, he produced a North Carolina license bearing an Ellerbe, North Carolina, address. Sugg said he was, in fact, going to Ellerbe that day.

Davis then informed Sugg he was conducting a narcotics investigation and asked if he could conduct a search of Sugg's person and briefcase. When Sugg demurred, Davis said that Sugg was free to leave, but Davis would hold his bag "and attempt to obtain a search warrant." Sugg's companion immediately "said something to the effect, 'I'm not involved in this. I just came to give him a ride.' " Sugg indicated he wanted to talk to his attorney, and Davis invited him to do so.

After telephoning his attorney, Sugg released his bag to the officers; and upon being asked to provide further identification, accompanied Davis and Gross to their office in the terminal. Once there, Sugg requested permission to remove some personal papers from his briefcase which he opened in the officers' presence. He opened, as well, a leather pouch that was inside the briefcase and, in doing so, exposed a plastic bag containing cocaine. He was immediately placed under arrest, and his briefcase was searched.

The determinative issue of defendant's assignments of error is whether the initial intrusion by the officer, which eventually led to the officers' observation of the cocaine seized, infringed upon defendant's rights under the Fourth Amendment to the U.S. Constitution. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), established that objects in plain view of an officer who is *rightfully* in a position to see those objects may be seized without obtaining a search warrant. Thus, the legality of the officer's stop of defendant is critical.

I.

U. S. Supreme Court holdings carve out, at least theoretically, three tiers of police encounters: communication between the police and citizens involving no coercion or detention and therefore outside the compass of the Fourth Amendment, brief

"seizures" that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause. *United States v. Berry*, 670 F. 2d 583 (5th Cir. 1982) (*en banc*). "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry v. Ohio*, 392 U.S. 1, 34, 88 S.Ct. 1868, 1886, 20 L.Ed. 2d 889, 913 (1968) (White, concurring). Indeed, a police officer may in appropriate circumstances and in an appropriate manner question persons, even though there is no probable cause for an arrest. 392 U.S. at 22, 88 S.Ct. at 1880, 20 L.Ed. 2d at 906. Whenever, however, a police officer "accosts an individual and restrains his freedom to walk away, he has 'seized' that person," 392 U.S. at 16, 88 S.Ct. at 1877, 20 L.Ed. 2d at 903, and is required to show that the seizure (1) was brief, *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2d 824 (1979), and (2) was supported at least by a reasonable and articulable suspicion that the person seized was engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979). This rationale, which initially applied to stops for questioning, *see Terry v. Ohio*, has been extended to stops made for investigatory purposes, as well: "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed. 2d 612, 617 (1972); *see United States v. Brigoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed. 2d 607 (1975). The standard suggested by the foregoing principles and adopted by the Supreme Court of North Carolina in *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979) "requires only that the officer have a 'reasonable' or 'founded' suspicion as justification for a limited investigative seizure." *Id.* at 706, 252 S.E. 2d at 779.

II.

We note that whether the officer's conduct in this case constituted a "seizure" that invoked Fourth Amendment protections is problematic. All too often, subtle differences in circumstances distinguish a "non-seizure," which does not invoke Fourth Amendment safeguards, from a "seizure," which does. We believe that the officer's conduct was constitutionally proper under the standards governing an actual "seizure." At some point in the encounter, the officer effected a "seizure" of the defendant. Thus,

we must consider both the articulable facts known to Davis at the time he determined to approach Sugg and his companion, and the rational inferences that the officer was entitled to draw from these facts. In so doing, we analyze the circumstances as a whole "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *United States v. Hall*, 525 F. 2d 857, 859 (D.C. Cir. 1976); *State v. Thompson*, *supra*.

Relying on evidence presented at hearing and on the court's findings of fact which are supported by competent evidence and thus conclusive, *State v. Thompson*, we consider the facts and inferences upon which the officer's conduct was predicated. Officer Davis saw Sugg disembark from Eastern Airlines Flight 386. Davis "knew [the flight] was connected to Florida source cities" which are points of entry for narcotics smuggling, cocaine, in particular. Sugg was "the first individual off the airplane," apparently "scanned" the area "to see who was out there," was casually dressed and appeared to be unusually nervous. He carried only a Halliburton briefcase, luggage that, in his 7 years' experience in criminal investigations of narcotics, Davis had come to associate with drug couriers. Sugg met another man with whom he hurriedly left the terminal, frequently glancing back at Davis. Davis's initial stop of Sugg certainly was within the officer's prerogative merely to approach and question a citizen in a public place. *See Terry v. Ohio, supra; United States v. Berry, supra.* Given Sugg's conduct and appearance, which by his experience and familiarity with the drug courier profile Davis had come to associate with the typical drug courier, further investigation was warranted.

Davis requested identification, and Sugg produced a North Carolina driver's license, saying that he lived in Hawaii. Davis noticed Sugg also appeared to be carrying a Florida driver's license in possible violation of the law. Davis examined Sugg's plane ticket and found that: (1) Sugg had boarded in West Palm Beach, Florida, a known "source city" for cocaine, (2) Sugg had purchased the ticket in cash, and (3) perhaps most significantly, the ticket was for a round-trip flight, returning to West Palm Beach in 3 to 3-½ hours. Sugg said he was going to Ellerbe, North Carolina, a city that Davis reasonably concluded was far too distant from the Charlotte airport for Sugg to make the return flight. Sugg became increasingly nervous, and his compan-

ion began denying any involvement in the affair. These circumstances, as a whole characteristic of those engaged in the drug trade and consistent with the officer's experience in narcotics investigation, would, we believe, justify a reasonable suspicion that Sugg might be engaged in or connected with criminal activity. On that basis, we find that the officer acted within the confines of the Fourth Amendment in approaching Sugg and seeking identification and further information from him.

There is no significant claim that Sugg's cooperation beyond this point was involuntary. Davis had informed Sugg that he was free to go but that the officers would detain the bag for further investigation. After speaking with his attorney, Sugg voluntarily relinquished his briefcase to the officers and accompanied them to their office.

III.

Having concluded that defendant was legally seized upon a reasonable and articulable suspicion that he was engaged in criminal activity and that he thereafter voluntarily relinquished his briefcase and accompanied the officers, we consider whether the cocaine was properly seized pursuant to the "plain view" doctrine. The constitutional guaranty against unreasonable searches and seizures applies only to those instances in which the seizure is assisted by a necessary search. "It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand." 47 Am. Jur., Searches and Seizures, § 20; *State v. Duboise*, 279 N.C. 73, 84, 181 S.E. 2d 393, 400 (1971). The plain view doctrine may properly be invoked where the following elements concur:

1. the prior intrusion must be valid;
2. the discovery must be inadvertent;
3. the evidence must be immediately apparent as such; and
4. the evidence must be in plain view.

Coolidge v. New Hampshire, supra; State v. Wynn, 45 N.C. App. 267, 267-268, 262 S.E. 2d 689, 691 (1980).

The "valid intrusion" element has been applied liberally where the police discover evidence in plain view; in general, it is

only required that the officer have legal justification to be at the place where he or she sees evidence in plain view. *State v. Thompson, supra; State v. Wynn, supra.* The officers legally "seized" defendant who later voluntarily accompanied them to their office. Clearly, the officers had legal justification to be with defendant in their office. Defendant himself exposed the contraband to view when, at his request and in the officers' presence, he opened his briefcase and the pouch containing the contraband. The testimony at hearing indicates the officers were surprised that Sugg opened the briefcase and bag in their presence. The evidence reveals that when defendant opened his pouch the officers plainly saw a plastic bag containing what appeared to them to be cocaine, and that, in any event, they reasonably believed an offense was being committed in their presence. *State v. Wynn, supra. See* also *State v. Prevette,* 43 N.C. App. 450, 259 S.E. 2d 595 (1979), *disc. rev. denied,* 299 N.C. 124, 261 S.E. 2d 925 (1980); and *United States v. Drew,* 451 F. 2d 230 (5th Cir. 1971).

We find, under the circumstances, that the seizure of the controlled substance was pursuant to the plain view doctrine and attendant to a prior legal investigatory stop. The hearing judge properly denied defendant's motion to suppress. The judgment below is

Affirmed.

Judges ARNOLD and WHICHARD concur.

BARBARA STEWART v. HARRY LEE STEWART

No. 8212DC321

(Filed 1 March 1983)

1. Divorce and Alimony § 21; Duress § 1— action to enforce separation agreement—defense of duress—summary judgment for plaintiff proper

In an action to enforce a separation agreement where defendant alleged a defense of duress in entering the agreement, the trial court properly granted plaintiff's motion for summary judgment where defendant's pleadings and forecast of evidence tended to show only that plaintiff had threatened to prosecute him for assault but failed to establish that plaintiff's threats of prosecution on the alleged assault charge were made with a corrupt intent to coerce a

transaction grossly unfair to defendant and not related to the subject of such proceedings.

2. Divorce and Alimony § 21.2— enforcement of separation agreement—specific performance proper

The trial court did not err in ordering specific performance of a separation agreement where defendant failed to establish his alleged defense of duress and where defendant was only one payment in arrears.

APPEAL by defendant from *Cherry, Judge.* Judgment entered 15 February 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 10 February 1983.

Defendant appeals from summary judgment for plaintiff in an action to enforce a separation agreement.

Smith & Dickey, by W. Ritchie Smith, Jr., for plaintiff appellee.

Brady, Jackson & Peck, by Richard W. Jackson, for defendant appellant.

WHICHARD, Judge.

I.

Plaintiff alleged that she and defendant entered a separation agreement on 5 June 1981; that defendant failed to abide by its terms in that he was delinquent in his alimony payments, and had stated that he would not comply; and that she did not have an adequate remedy at law for enforcement. She prayed, *inter alia,* that the agreement be incorporated into a court order, and that defendant be required specifically to perform its provisions.

Defendant admitted entering the agreement, but pled that he was without counsel and that the agreement was not a valid contract because he entered it under duress. He alleged that plaintiff "had through the use of duress and the threat of an impending criminal action intimidated, and through the use of coercive pressure and duress caused [him] to enter into said Agreement . . . ." He further alleged that defendant, by using duress to effect execution of the agreement, was "seeking to take inequitable advantage of [him] and force upon him both an intolerable and unconscionable burden . . . ." In response to a request for admissions, plaintiff denied that she had used duress to coerce execution of the agreement.

II.

Plaintiff moved for summary judgment. By affidavit in support of the motion she averred that her attorney had prepared documents for her and defendant to sign; that defendant had read the documents and requested certain changes; that she had agreed to the changes, her attorney had redrafted the agreement to reflect them, and the parties had then signed the agreement. She further averred that no criminal action against defendant was then pending, and that she "did not ever cause any criminal process to be issued for the purpose of exerting pressure or duress upon the Defendant." She stated: "Any warrants brought . . . were . . . to stop the constant harassment and threats of the Defendant and in an effort to prevent further vandalism of [my] house and car."

Defendant's reply denied that plaintiff was entitled to summary judgment, again alleged his defense of duress, and asked "that the matter be tried to a jury as to the existence of a genuine issue." His affidavit in response to the motion reasserted that when he entered the agreement he was "operating under duress, in that the Plaintiff . . . was threatening to bring criminal charges against [him] for an incident which allegedly occurred on May 27, 1981, at which time the Plaintiff alleges that the Defendant did assault the Plaintiff in violation of G.S. 14-33(b)(2)." He averred that a warrant for that offense was issued on 6 August 1981, and

> [t]hat although the alleged incident occurred on the 27th day of May, 1981, the Plaintiff continu[al]ly pressured the Defendant that criminal charges were instigated [sic] and that, in fact, on June 5, 1981, the Defendant was advised that if he did not sign said Separation Agreement he would, in fact, be arrested.

III.

The court found no genuine issue as to any material fact and concluded that plaintiff was entitled to judgment as a matter of law. It ordered the agreement incorporated into its decree, and that defendant specifically perform the terms thereof.

Defendant appeals, and we affirm.

IV.

[1] It is axiomatic that "[t]he court properly granted [plaintiff's] motion if the pleadings and affidavits demonstrate that no genuine issue as to any material fact exists and that defendant is entitled to judgment as a matter of law." *Cone v. Cone*, 50 N.C. App. 343, 345, 274 S.E. 2d 341, 343, *disc. rev. denied*, 302 N.C. 629, 280 S.E. 2d 440 (1981). The principle that "[a] threat to do what one has a legal right to do cannot constitute duress" was, for many years, well established in our jurisprudence. *Kirby v. Reynolds*, 212 N.C. 271, 282, 193 S.E. 412, 419 (1937). *See also Bakeries v. Insurance Co.*, 245 N.C. 408, 419, 96 S.E. 2d 408, 416 (1957); *Bank v. Smith*, 193 N.C. 141, 144, 136 S.E. 358, 359 (1927). A *wrongful* or *unlawful* act or threat, which deprived a party of the exercise of free will, was an essential element of duress. *Link v. Link*, 278 N.C. 181, 194, 179 S.E. 2d 697, 705 (1971).

Defendant here neither pled nor forecast evidence tending to prove that plaintiff had no legal right to prosecute him for assault. Under the foregoing principles, then, his alleged defense of duress would fail.

V.

"The law with reference to duress has, however, undergone an evolution favorable to the victim of oppressive action or threats." *Link*, 278 N.C. at 194, 179 S.E. 2d at 705. Our Supreme Court has followed this evolving trend by adopting the rule, supported by the weight of modern authority,

> that the act done or threatened may be wrongful even though not unlawful, *per se*; and that the 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.

Id. See generally 25 Am. Jur. 2d, Duress and Undue Influence, §§ 15, 16; 17 C.J.S., Contracts, § 175. *See also* Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. Rev. 819, 837-38 (1981).

Judged by this standard, defendant's pleadings and forecast of evidence remain insufficient to establish a genuine issue of fact

as to duress. Nothing therein tends to establish that plaintiff's threats of prosecution on the alleged assault charge were "made with the corrupt intent to coerce a transaction grossly unfair to [defendant] and not related to the subject of such proceedings." *Link*, 278 N.C. at 194, 179 S.E. 2d at 705. Defendant's pleadings and affidavits were not explicit as to plaintiff's intent in threatening the assault prosecution. Assuming that they implicitly allege and forecast evidence of the requisite corrupt intent, they do not allege and forecast evidence tending to establish that the transaction allegedly coerced was "grossly unfair to [defendant] and not related to the subject of [the threatened assault] proceedings." While defendant alleged that the alimony provisions of the settlement would consume twenty-eight percent of his gross earnings, that standing alone is not "grossly unfair" to defendant; and he has forecast no evidence tending to show particular circumstances which render it grossly unfair.

VI.

G.S. 1A-1, Rule 9(b) requires that the circumstances constituting the defense of duress be pled with particularity. *Link* places, on a party resisting a summary judgment motion through an alleged defense of duress by threat of legal proceedings, the further burden of forecasting evidence showing with particularity circumstances which tend to indicate that the alleged threats were "made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." Sound policy considerations support this approach. Were the burden otherwise, amorphous allegations and forecasts of evidence of duress, frivolous in nature, could consume valuable court time, delay resolution of disputes, and tend to force settlements less than equitable to the party accused of duress.

VII.

Because defendant failed to carry this burden, he established no genuine issue of material fact as to whether he entered the separation agreement under such duress as to render it an invalid contract. Plaintiff had pled and forecast evidence of the existence of a valid contract. Absent the alleged defense of duress, no genuine issue of material fact existed, and plaintiff was entitled to judgment as a matter of law. The court thus did not err in grant-

ing summary judgment. G.S. 1A-1, Rule 56(c). *See McDowell v. McDowell*, 55 N.C. App. 261, 284 S.E. 2d 695 (1981); *Cone, supra.*

VIII.

[2] Defendant contends the court erred in ordering specific performance of the agreement. It is now well established in this jurisdiction that alimony and support provisions of a separation agreement are enforceable by a decree ordering specific performance. *See Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979); *McDowell, supra; Gibson v. Gibson*, 49 N.C. App. 156, 157, 270 S.E. 2d 600, 601 (1980). *See also* Note, *DOMESTIC RELATIONS-Enforcement of Contractual Separation Agreements By Specific Performance-Moore v. Moore*, 16 Wake Forest L. Rev. 117 (1980). Defendant nevertheless argues that specific performance should not issue where the agreement was entered as a result of duress. We have held, *supra*, that defendant failed to establish his alleged defense of duress; and we thus reject this contention.

IX.

Defendant also contends specific performance should not issue because plaintiff only alleged that he was one alimony payment in arrears, he alleged that he had placed this payment in escrow pending determination of the validity of the separation agreement, and thus plaintiff has shown no deliberate pattern of conduct designed to defeat her rights under the agreement.

Plaintiff alleged, however, that defendant had stated that he would not comply with the terms of the agreement. Further, no valid reason appears for compelling a party to accumulate arrearages before seeking specific performance. The breacher's initial failure to comply establishes the inadequacy of the breachee's remedy at law. To make iteration of breach prerequisite to equitable relief would afflict the equitable remedy with the very inadequacy it was designed to amend. Given plaintiff's allegation regarding defendant's statement of intent not to comply, and defendant's failure to make a payment when due, we find no abuse of the court's discretion in ordering specific performance. *See Harris v. Harris*, 50 N.C. App. 305, 313-14, 274 S.E. 2d 489, 494, *disc. rev. denied and appeal dismissed*, 302 N.C. 397, 279 S.E. 2d 351 (1981).

Affirmed.

Judges ARNOLD and HILL concur.

GOLDIE IRENE McCALL, ADMINISTRATRIX FOR THE ESTATE OF MARTIN McCALL, DECEASED, EMPLOYEE-PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 8210IC296

(Filed 1 March 1983)

Master and Servant §§ 68, 91— workers' compensation—claim for byssinosis not timely filed

Plaintiff's decedent did not file his claim for disability from the occupational disease byssinosis within two years of notification by competent medical authority of the nature and work-related cause of his disease as required by G.S. 97-58(c) where a doctor advised decedent in 1965 that he had an occupational disease, that it was caused by breathing cotton dust, and that continuation of employment which involved exposure to cotton dust would ultimately prove fatal, but decedent's claim was not filed until 1977.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 7 December 1981. Heard in the Court of Appeals 8 February 1983.

Defendants appeal from a decision awarding workers' compensation to plaintiff's decedent for the occupational disease byssinosis.

Michaels & Jernigan, by Leonard T. Jernigan, Jr., for plaintiff appellee.

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

WHICHARD, Judge.

Plaintiff's decedent was born in 1910. He worked in a textile mill in Erwin from 1927 to 1947. From 1947 to 1956 he farmed. He commenced work for defendant Cone Mills in October 1956, and last worked there on 8 March 1965.

When decedent first went to work at the mill in Erwin, he was experiencing no breathing problems. After a few years of

working there he began experiencing chest tightness and developed a cough and breathing difficulties. During the years that he farmed, his breathing problems improved. When he subsequently went to work for defendant employer Cone Mills, his chest tightness with cough recurred; and exertional dyspnea became a permanent feature of his health.

In September 1959 he was hospitalized with bronchitis and emphysema. His pulmonary condition remained about the same from 1959 to 1965. In March 1965 he was hospitalized with acute illness, and did not return to work thereafter.

On 2 December 1977 decedent, through counsel, filed a claim for workers' compensation for disability resulting from pulmonary disease caused by exposure to cotton dust. The Hearing Commissioner concluded that decedent "did not file [his] claim . . . within two years after determining that his pulmonary disease and accompanying incapacity to earn wages were in part occupational in origin," and accordingly denied the claim. *See* G.S. 97-58(b) & (c); *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980).

The full Commission, in an opinion by Commissioner Clay in which Commissioner Vance concurred, reversed and awarded benefits. Its conclusion that the claim was timely filed was grounded on the following "finding of fact," to which defendants have duly excepted: "Plaintiff decided to retire after his hospitalization in March, 1965 because he believed his breathing problems were caused by his employment. However, at this time he had not been informed by competent medical authority of the nature and work-related cause of his occupational disease."

Chairman Stephenson dissented, stating that this "[f]inding of [f]act . . . is not only unsupported by any evidence, but is also completely contrary to all the evidence." We agree, and accordingly reverse.

G.S. 97-58(c) provides: "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." "[T]he two-year time limit for filing claims under . . . G.S. 97-58(c) is a condition precedent with which claimants must comply in order to confer jurisdiction on

the Industrial Commission to hear the claim." *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 382, 283 S.E. 2d 573, 577 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982). "[W]ith 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." *Taylor v. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E. 2d 144, 149 (1980) (interpreting G.S. 97-58(b), (c)).

Plaintiff's decedent testified, in pertinent part, as follows:

> While I was working for Cone . . . Dr. Arthur Freedman was my family doctor. He put me in Moses Cone Hospital twice. The first time was in 1959.
>
> Q. Why did Dr. Freedman put you in Moses Cone Hospital in 1959?
>
> A. On account of my breathing.
>
> . . . .
>
> Q. What do you recall telling Dr. Freedman [sic] what caused you to collapse?
>
> A. He said my lung was full of lint.
>
> . . . .
>
> Q. Dr. Freedman told you your lungs were full of lint and dust, didn't he?
>
> A. That's right. That's exactly what it was.
>
> Q. You knew that in 1959?
>
> A. I'll say I knew it. In other words, I knowed I couldn't breathe and I knowed when I was out there [*i.e.*, out of the mill] that I won't as sick as I was when I was in there, as far as my breathing.
>
> . . . .
>
> Q. Did you know what was causing your breathing difficulty when you went to work at Cone Mill?
>
> A. Well, I figured it was the dust.
>
> Q. The cotton dust?

A. Yes, I did. That's what I figured.

Q. OK, and at least in 1959 Dr. Freedman told you you had lint and dust in your lungs?

A. Right.

. . . .

Q. Did Dr. Freedman say anything to you about stopping work at Cone and finding other work?

A. Yes, sir. He told me . . . that I needed to get out of that mill. He said, "If you don't get out it[']s going to kill you."

. . . .

. . . I know I stopped working at Cone Mill . . . the 9th of March of 1965. I reckon it was the same year Dr. Freedman said I needed to get out of that mill, "if you don't it[']s going to kill you," . . . .

. . . .

Q. Would it be safe to say it was in 1965 [that Dr. Freedman told you to get out of the mill, if you didn't it was going to kill you]?

A. Yeah, it was '65 because that was—I had worked—well, tried to work January and February and started working on March.

. . . .

Q. When Dr. Freedman had you in Moses Cone Hospital the last time in 1965 did he say anything to you about the work at Cone Mills causing your breathing problems?

A. He said, "That cotton dust will kill you."

. . . .

Q. Did Dr. Freedman tell you in 1965 that the cotton dust would kill you if you didn't get out of [it]?

A. Absolutely. Absolutely.

Dr. Arthur Freedman, whom the court, without objection, found to be "a physician duly licensed to practice medicine by the

State of North Carolina, engaged in the general practice of medicine and diagnostic medicine," testified for defendants, in pertinent part, as follows:

> The final diagnoses when [decedent] was discharged . . . were . . . allergic pneumonitis due to exposure to cotton fibers and hypertensive vascular disease.
>
> . . . .
>
> . . . [Decedent] was advised to change his employment at the mill and to avoid exposure to cotton.
>
> . . . .
>
> . . . He was advised to change his employment at the mill and to avoid exposure to all cotton.
>
> . . . .
>
> . . . Somewhere it is in the record that I advised him at the time, back in 1965, that he did in fact have byssinosis. This is the initial impression of his admission in 1965. It says asthma associated with emphysema and possibly with byssinosis. That was my clinical impression. As to whether I know for a fact that [decedent] was advised that he had byssinosis, I think that we said the same thing, that he was advised to change his employment at the mill and to avoid exposure to all cotton.
>
> . . . .
>
> . . . Would I probably have told him that his breathing difficulty was due to working in the mill?
>
> . . . .
>
> . . . I probably would have done so, yes.

Dr. Freedman, as a licensed physician engaged in the general practice of medicine, who was sufficiently astute to diagnose byssinosis in 1965, was, as a matter of law, a competent medical authority. *See Poythress, supra*, 54 N.C. App. at 384, 283 S.E. 2d at 578. The foregoing evidence, which was uncontroverted, established that Dr. Freedman advised plaintiff's decedent in 1965 that he had an occupational disease, that it was caused by breathing cotton dust, and that continuation of employment which

involved exposure to cotton would ultimately prove fatal. Plaintiff's decedent thus "was fully apprised of the nature and work-related cause of [his] disease when [he] . . . left [his] job in 1965." *Id.* The time for filing his claim began to run, then, in March 1965, *id.*; and the prescribed filing period had long since expired when the claim was filed in 1977. This created a jurisdictional bar to the claim, and it should therefore have been dismissed "as being time-barred." *Id.* at 385, 283 S.E. 2d at 579. *See also Taylor, supra.*

We are advertent to the recent decision of this Court in *Dowdy v. Fieldcrest Mills, Inc.*, 59 N.C. App. 696, 298 S.E. 2d 82 (1982). Plaintiff there, like plaintiff here, did not file his claim within two years of notification that he had an occupational disease. An award of compensation was nevertheless upheld because plaintiff there did not become disabled from the disease until a time within the two year period; and both the disease and disability therefrom are required to trigger the running of the two year period. *See Taylor*, 300 N.C. at 98-99, 265 S.E. 2d at 147. Here, by contrast, the only conclusion the evidence permits is that plaintiff was disabled by his disease at the time he was informed thereof in March 1965. The cases are thus distinguishable.

We also consider *McKee v. Spinning Company*, 54 N.C. App. 558, 284 S.E. 2d 175 (1981), *disc. rev. denied*, 305 N.C. 301, 291 S.E. 2d 150 (1982), on which plaintiff in part relies, distinguishable. The Court there found the information conveyed to claimant insufficient to inform him of the nature and work-related cause of his disease. The specificity of information given to plaintiff here considerably exceeded that of the knowledge imparted to claimant there; and we believe plaintiff here, unlike the claimant in *McKee*, was advised in unmistakable terms of the nature and work-related cause of his disease.

Reference is made to *Payne v. Cone Mills Corp.*, 60 N.C. App. 692, 299 S.E. 2d 847 (1983), wherein another panel of this Court reached the same result upon similar facts.

For the reasons stated, the award is vacated.

Vacated.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS POWELL

No. 8217SC785

(Filed 1 March 1983)

1. **Criminal Law § 81— best evidence rule—failure to offer tractors into evidence not error**

The best evidence rule did not require that the actual serial number inscription on four tractors be introduced since the owner's oral testimony as to the serial numbers was competent to establish the inscription numbers on the tractors. Further, defendant did not make a timely motion to inspect the tractors pursuant to G.S. 15A-903(d). G.S. 15A-902.

2. **Larceny § 7.4— possession of stolen property—sufficiency of evidence**

In a prosecution for felonious larceny of four tractors, defendant's evidence which tended to show that defendant did not possess the stolen property was for the jury to consider in light of the State's evidence which tended to show the defendant's guilt.

CERTIORARI to review *Walker, Judge.* Judgment entered 12 June 1980 in ROCKINGHAM County Superior Court. Heard in the Court of Appeals 7 February 1983.

Defendant, William Thomas Powell, was indicted and tried for the felonious larceny of four Massey-Ferguson tractors from Ashworth Tractor Company, Inc.

The State's evidence, in pertinent part, was as follows. Wayles Ashworth, the manager of Ashworth Tractor Company, testifed that on Saturday, 24 March 1979, there were twelve or fifteen Massey-Ferguson tractors lined up in front of Ashworth's Tractor Company in Eden, Rockingham County. Sunday, the next day, when Mr. Ashworth returned to the company, four new Model 245D Massey-Ferguson tractors were missing. Ashworth observed tractor tire impressions on a truck loading ramp and, leading up to the loading ramp, dual-wheel truck tracks which had not been there the day before. Ashworth next saw these tractors in September or October when they were delivered back to him by the Sheriff from Randolph County. The returned tractors had been used, but otherwise they matched the descriptions on the invoices which accompanied the tractors when they were purchased by Ashworth's company. The serial numbers on the invoices matched the numbers on the tractors except that some of the numbers on one of the tractors had been obliterated.

Jessie H. Pike and Benjamin H. Foust had business dealings with defendant for two or three years prior to 1979 in the purchase of hay, corn, pigs, cars and trucks. In January or February of 1979, defendant told Foust that he could get John Deere tractors with a value of $8,000.00 or $9,000.00, which might be damaged, for a price of $3,500.00. Foust later told defendant that he had sold his tractor and needed to have it replaced. On Saturday, March 24, around six or seven o'clock, defendant called Foust's home and told him that he would probably come that night with tractors. Around ten or ten-thirty that evening, defendant called Foust and stated that his truck had broken down and that he wanted Foust or Pike to come and pick up the tractors. Foust told defendant that he expected defendant to deliver the tractors. Defendant continued to call Pike and Foust, advising them where they could see the tractors on Sunday morning. Pike and Foust met defendant near Fayetteville at a truck stop on Sunday. There, defendant had four Massey-Ferguson tractors on a flat-bed trailer. Defendant agreed to sell all four tractors plus the trailer to Pike and Foust for $12,500.00 and that night he delivered the tractors to Foust's farm. Foust and Pike paid for the tractors, part in cash and part by check. Foust wrote the check, noting on it that it was in payment for pigs. Foust testified that he did not buy any pigs from defendant.

Robert Gray, captain of the Rockingham County Sheriff's Department, investigated the theft of the tractors. Gray corroborated Ashworth's testimony as to what the serial numbers and descriptions on the invoices were. Gray testified that on 20 October he found three model 245D Massey-Ferguson tractors on Foust's farm and that on 22 October Harold Ensley directed him to the location of a fourth tractor. The four tractors discovered by Gray met the description of the tractors that Ashworth testified were missing, except they had been used and the last two digits of the serial number on one of the tractors had been obliterated. The tractors recovered were removed to Ashworth Tractor Company.

Defendant's evidence tended to show that he was in and around Robeson County the entire weekend of 24 March. Defendant testifed that he had received a check from Foust on 26 March, but he said the check was payment for pigs which Foust bought from defendant and he introduced a bill of sale for pigs

which he said he had purchased for Foust. Defendant denied taking any tractors from Ashworth's Tractor Company.

The jury found defendant guilty of felonious larceny and the trial judge sentenced defendant to an active term of imprisonment. Defendant appealed. On the State's motion, Judge Smith ordered defendant's appeal dismissed for failure to timely perfect the appeal. Thereafter, this Court granted defendant's Petition for Writ of Certiorari on 4 May 1982.

Attorney General Rufus L. Edmisten, by Assistant Attorney General William B. Ray, for the State.

Bethea, Robinson, Moore & Sands, by Alexander P. Sands, III, for defendant.

WELLS, Judge.

[1] In one of his assignments of error, defendant contends that the trial court erred in failing to require the State to offer the actual stolen property, the tractors, into evidence to establish the fact that the tractors recovered by the officers were the same tractors defendant allegedly stole. Defendant argues that the trial judge should have required the State to offer the actual stolen property, which had been recovered by the officers and returned to its rightful owner, into evidence because defendant had a right to inspect the tractors and because the State was required by the best evidence rule to offer the original "writing" in order to prove what the serial numbers on the tractors' identification plates were. We disagree with defendant and hold that the State was not required to offer the tractors into evidence.

While pursuant to G.S. 15A-903(d) defendant had a right to inspect the tractors because they were tangible objects obtained from defendant, the record does not show that defendant made a timely motion to assert this statutory right of discovery, as he must under G.S. 15A-902. Under these circumstances, defendant may not argue that he was denied his right to inspect the tractors by the mere failure of the State to offer them into evidence.

Witness Ashworth testifed that the tractors that were recovered by the Sheriff's Department were the same tractors as were taken from the tractor company. Detective Gray testified, over defendant's general objection, as to what the serial numbers

on the recovered tractors were. Defendant's contention that the best evidence rule required the State to offer the tractors into evidence because, as the original writings, they are the best evidence of what the serial numbers of the tractors are, presents the question of whether the best evidence rule applies to inscribed chattels. We hold that the best evidence rule did not require that the actual serial number inscription on the tractors be introduced, and that Ashworth's oral testimony as to the serial numbers was competent to establish the inscription of the serial numbers on the tractors. This assignment is overruled.

[2] In another of his assignments of error, defendant contends that there was insufficient evidence to establish that defendant ever possessed the tractors. Defendant argues that the State relied on the doctrine of recent possession and that this doctrine merely raised a "presumption" which defendant had rebutted. The inference that the person in possession of stolen goods is the thief arises upon proof beyond a reasonable doubt that the property described in the indictment was stolen, that the property which defendant possessed was the same property, and that the possession was recently after the larceny. *State v. Fair*, 291 N.C. 171, 229 S.E. 2d 189 (1976). Proof of these elements does not raise any presumption; the State has the burden of proving every element of larceny. *Id.* Proof of these requisite elements permits *an inference of fact* that the person found in possession of the property was the one who stole it. *Id.* Inferences are for the jury to draw. Defendant's evidence which tended to show that defendant did not possess the stolen property was for the jury to consider in light of the State's evidence which tended to show the defendant's guilt. The State's evidence was sufficient to support the jury's verdict. This assignment is overruled.

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

Defendant received a fair trial, free of prejudicial error.

No error.

Chief Judge VAUGHN and Judge BRASWELL concur.

STATE OF NORTH CAROLINA v. SYBIL GAYNOR

No. 822SC617

(Filed 1 March 1983)

1. **Criminal Law § 138— second degree murder—aggravating factor—use of deadly weapon**

In imposing a sentence upon defendant's plea of guilty to second degree murder, the trial court erred in finding as an aggravating factor that defendant used a deadly weapon since use of the weapon was an element of the offense under the circumstances of this case. G.S. 15A-1340.4(a)(1).

2. **Criminal Law § 138— second degree murder—aggravating factor—age of victim**

In imposing a sentence upon defendant for second degree murder by shooting the victim with a rifle, the trial court erred in finding as an aggravating factor that the victim was very old since defendant's single shot with the rifle would have killed the victim in the same way regardless of her age or strength.

3. **Criminal Law § 138— second degree murder—premeditation as aggravating factor**

The trial court could properly find that premeditation was an aggravating factor when imposing a sentence upon defendant for second degree murder.

4. **Criminal Law § 138— aggravating factors invalid—remand for resentencing**

Where two of the three aggravating factors found by the trial court were incorrect, the trial court could not have properly balanced the aggravating and mitigating factors, and the case must be remanded for resentencing.

APPEAL by defendant from *Small, Judge.* Judgment entered 8 March 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 9 December 1982.

Defendant pled guilty to the charge of second degree murder. She appeals, pursuant to G.S. 15A-1444(a1), from alleged errors in the sentencing hearing. The State presented the following evidence in the sentencing hearing. Dr. Volkman, a pathologist, testified that the cause of the victim's death was massive bleeding. He said the decedent had a bullet wound in the front upper part of her left shoulder. The bullet had emerged from her arm, entered the upper part of her front left chest, went through the upper part of the left lung, through the back of the heart, through the right lung, and exited the body wall.

Defendant testified that she was thirty-seven years old and had been living with her mother in Aurora, North Carolina for

several weeks prior to killing her. She said she did not get along with her mother. On two occasions her mother threatened her, once with a hammer and once with a fire iron. Defendant described shooting her mother as follows. When her mother went to the woodshed, she went to the pump house and got the rifle she had hidden three weeks ago. Then she went to the front of the woodshed and fired one shot at her mother. She returned to the house, threw the rifle on the bed, and unsuccessfully tried to reach the sheriff on the telephone. She went to the sheriff's office in Aurora, but he was not in. Then she went to the police station in Washington, North Carolina and admitted she shot her mother.

At the close of the sentencing hearing the trial judge found the following aggravating factors pursuant to G.S. 15A-1340.4(a)(1):

9. The defendant was armed with or used a deadly weapon at the time of the crime.

10. The victim was very old.

16. Additional written findings of factors in aggravation: Some one or two weeks before the homicide the defendant hid a 22-calibre semi-automatic rifle in a pump house located behind the residence where she and her mother lived. Shortly after noon on the day of the crime, she took the gun from its hiding place, loaded it, and walked to the woodhouse where her mother was and without any provocation on the part of her mother, pointed the gun at her and fired the shot which fatally wounded her mother and the act constitutes a planned assault upon her mother for the purpose of taking her life.

The trial judge found the following mitigating factors:

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 culpability for the offense.

12. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

The trial judge concluded that the factors in aggravation outweighed the factors in mitigation and imposed a sentence of thirty years, a term in excess of the presumptive sentence of fifteen years for second degree murder.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, and Associate Attorney John F. Maddrey, for the State.

Franklin B. Johnston, for defendant appellant.

VAUGHN, Chief Judge.

Defendant's appeal, pursuant to G.S. 15A-1444(a1), is limited to the issue of whether her sentence is supported by the evidence introduced at the sentencing hearing. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658 (1982). She contends that the trial court erred in finding each of the aggravating factors and in concluding that the aggravating factors outweighed the mitigating factors.

[1] Defendant argues that the court erred in finding, as an aggravating factor, that she used a deadly weapon. We agree. "Evidence 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). In this case the offense was second degree murder which was committed by defendant shooting her victim with a rifle. Murder in the second degree is "the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 458, 128 S.E. 2d 889, 892 (1963). "The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree." *State v. Duboise*, 279 N.C. 73, 81, 181 S.E. 2d 393, 398 (1971). In this case, the intentional use of the rifle, resulting in the victim's death, composed the elements of second degree murder. On these facts the rifle was evidence necessary to prove an element of the offense, and cannot be used to prove any factor in aggravation.

[2] Defendant's next argument is that the trial judge erred in finding, as an aggravating factor, that the victim was very old. Defendant contends that this finding was not supported by any

evidence. The psychiatric evaluation contained evidence, however, that defendant was thirty-seven years old, and the seventh of eight children, which indicates that the victim was very old. Every aggravating factor, however, must be "reasonably related to the purposes of sentencing." G.S. 15A-1340.4(a). The purposes of sentencing are as follows:

> The primary purposes of sentencing a person convicted of a crime are 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.

G.S. 15A-1340.3. Under some circumstances the extreme old age or extreme youthfulness of the victim may increase the offender's culpability. This is primarily because of the victim's relative defenselessness; for example, assaulting a frail, elderly person may be more blameworthy than assaulting a strong young man. In this case, however, where the victim was shot with a rifle, we fail to see how the victim's old age increased defendant's culpability. Regardless of the age or strength of the victim, defendant's single shot would have killed her in the same way. For this reason, we hold that the trial judge incorrectly found the victim's age to be an aggravating factor.

[3] Defendant next contends that the trial judge erred in finding, as an aggravating factor, that the attack on her mother was premeditated. She argues that the same evidence, the rifle, was used to prove two factors in aggravation: the use of a deadly weapon and premeditation. Even if we had not found that the use of a deadly weapon should not have been an aggravating factor, defendant's assignment of error is without merit. While it is true that "the same item of evidence may not be used to prove more than one factor in aggravation," G.S. 15A-1340.4(a)(1), this aggravating factor was not based solely on the rifle, but was based on defendant's actions in removing the rifle from its hiding place and, without any provocation, fatally wounding her mother in a planned assault. Moreover, defendant's plea bargain for murder in the second degree does not preclude the trial judge from review-

ing all the circumstances surrounding the offense in finding aggravating factors. *State v. Melton*, --- N.C. ---, --- S.E. 2d --- (417A82) (filed 11 January 1982). The aggravating factor of premeditation, when proven by a preponderance of the evidence, is reasonably related to the purposes of sentencing when a defendant pleads guilty to second degree murder. *State v. Melton, supra.*

[4] Defendant assigns as error the trial judge's conclusion that the aggravating factors outweighed the mitigating factors. Although the weighing of the aggravating and mitigating factors is a matter within the sound discretion of the trial judge, *State v. Davis, supra,* in this situation, where two of the three aggravating factors were incorrect, we fail to see how the trial judge could have properly balanced the aggravating and mitigating factors.

For the reasons stated, defendant's sentence must be vacated, and the case remanded for resentencing.

Vacated and remanded.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. CRAVEN CLARENCE HOUGH

No. 827SC493

(Filed 1 March 1983)

1. Criminal Law § 138— Fair Sentencing Act—aggravating factor that armed with deadly weapon proper

In a sentencing hearing following a plea of guilty to the charge of second degree murder, the trial court properly found as an aggravating factor that defendant was armed with or used a deadly weapon at the time of the crime since the evidence presented at defendant's sentencing hearing showed that defendant, without excuse or mitigating circumstances, intentionally shot the deceased four times, once in the right upper chest, once in the right upper abdomen and twice in the back, and since the number of shots and manner of the shooting gave rise to an inference of malice. Therefore, defendant's use of the deadly weapon in this case was not necessary to prove the element of malice. G.S. 15A-1340.4(a)(1).

2. Criminal Law § 138— sentencing hearing—consideration of prior convictions proper

In a sentencing hearing following defendant's plea of guilty to the charge of second degree murder, the trial court did not err in considering as an aggravating factor defendant's prior convictions which were not related to the crime of second degree murder. G.S. 15A-1340.3.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 22 January 1982 in Superior Court, NASH County. Heard in the Court of Appeals 15 November 1982.

Defendant entered a plea of guilty to the charge of second degree murder. From a judgment imposing a sentence of twenty-five years, defendant appeals. Defendant appeals under G.S. 15A-1444 for review of his sentence which he contends is not supported by evidence introduced at the sentencing hearing.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Moore, Diedrick, Whitaker & Carlisle, by Joseph M. Hester, Jr., for defendant appellant.

JOHNSON, Judge.

Evidence at the sentencing hearing tends to show that on 1 November 1981, the defendant, after having been ordered to move out of the mobile home of David Perry, returned with a .22 caliber pistol and without excuse or mitigating circumstance, intentionally shot David Perry four times. Perry died as a result of the gunshot wounds. There had been no argument between defendant and Perry; nor were there any hard feelings between them. Defendant has a prior conviction for trespass, felonious possession of marijuana, felonious breaking, entering and larceny.

After accepting defendant's guilty plea and conducting a sentencing hearing, the trial judge found the following aggravating factors:

1. The defendant was armed with or used a deadly weapon at the time of the crime.

2. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement.

The trial judge then found that the factors in aggravation outweigh factors in mitigation and imposed an active sentence of twenty-five years.

[1] Defendant contends that the trial court erroneously found the two aggravating factors and, therefore, he was entitled to have the court impose the presumptive sentence of fifteen years. Defendant first argues that the trial court, in finding in aggravation that defendant was armed with or used a deadly weapon at the time of the crime, used evidence necessary to prove an element of the offense of second degree murder in violation of 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."

Murder in the second degree is defined as the unlawful killing of a human being with malice, but without evidence of premeditation and deliberation. *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980).

Defendant contends the record is devoid of any evidence that there existed any ill will, hatred or spite between defendant and deceased and, therefore, under the facts of this case, it is the very use of the deadly weapon that provides the *only* proof of the element of malice. Defendant properly contends that malice may be implied from the use of a deadly weapon. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). However, defendant's contention that in the absence of evidence of ill will, hatred or spite the element of malice in this case can *only* be proved against the defendant by the presumption of malice arising out of the use of the deadly weapon is untenable.

It is well settled that malice exists as a matter of law whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Jenkins, supra.* In addition, malice may be implied from circumstances other than the use of a deadly weapon and may be implied from the act of the defendant. *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980); *State v. Periman*, 32 N.C. App. 33, 230 S.E. 2d 802 (1977).

Evidence presented at defendant's sentencing hearing shows that defendant, without excuse or mitigating circumstance, inten-

tionally shot the deceased four times; once in the right upper chest, once in the right upper abdomen and twice in the back. The number of shots and manner of the shooting give rise to an inference of malice. Notwithstanding the lack of evidence of ill will, hatred or spite or the lack of presumptive malice arising from the use of a deadly weapon, malice existed as a matter of law from the evidence presented that defendant, without excuse or mitigating circumstances, unlawfully and intentionally shot the deceased. *State v. Moore, supra; State v. Potter, supra; State v. Jenkins, supra.* The trial judge could properly infer the presence of malice from the circumstances and acts of the defendant. Defendant's use of the deadly weapon in this case was not necessary to prove the element of malice. Defendant's assignment of error is without merit.

[2] Defendant next contends that it was error for the trial court to consider defendant's prior convictions (trespass, felonious possession of marijuana, felonious breaking, entering and larceny) as a basis for imposing a sentence greater than the presumptive sentence of fifteen years. Defendant concedes that pursuant to Article 81A of Chapter 15A of the North Carolina General Statutes, the trial court could consider defendant's previous convictions in determining the existence of an aggravating factor. However, defendant argues that his prior convictions were unrelated to the crime of second degree murder, show no propensity to commit crimes of violence and, therefore, the previous convictions were not reasonably related to the purpose of sentencing.

The issue of whether a defendant's prior conviction is related to the crime for which defendant is currently being sentenced does not determine if the trial court may consider the prior conviction in deciding whether to impose a sentence greater than the presumptive sentence. The statutory limitations restricting the trial court's consideration of a defendant's prior conviction are set forth in G.S. 15A-1340. None of those limitations prohibited the trial judge from considering defendant's prior convictions.

G.S. 15A-1340.3 states the purposes of sentencing as follows:

> The primary purposes of sentencing a person convicted of a crime are 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.

The trial court properly considered defendant's prior convictions and the sentence imposed is supported by the evidence introduced at the sentencing hearing.

We find

No error.

Judges ARNOLD and HILL concur.

MIKE METCALF, TERRY METCALF, BILLY METCALF AND MARGIE METCALF, W. J. TEAGUE AND WIFE, LORETTA TEAGUE AND PAUL M. AIKEN, SR., AND WIFE, VERNEDA AIKEN v. W. C. PALMER AND WIFE, HAZEL H. PALMER, AND CHARLES O. COFFEY BUILDERS, INC., AND B. A. BROOKS

No. 8225SC242

(*Filed* 1 March 1983)

1. Contracts § 27.2— breach of contract—sufficiency of evidence

Plaintiffs' evidence was sufficient to be submitted to the jury on the issue of breach of contract by defendants to pave a roadway easement adjoining lots sold by defendants to plaintiffs where it tended to show that the three owner defendants hired the fourth defendant to sell lots later purchased by plaintiffs; the fourth defendant was in possession of an easement contract requiring the three owner defendants to pave a roadway along the common boundary of the lots within a certain time; the fourth defendant made representations to plaintiffs that the owner defendants would build and pave the adjoining roadway; the roadway was not built by defendants within the time required by the contract; and plaintiffs were forced to build the roadway at their own expense.

2. Contracts § 28.2— breach of contract—instructions as to measure of damages

In an action to recover for breach of contract by defendants to pave a roadway easement adjoining lots sold by defendants to plaintiffs, plaintiffs presented sufficient evidence of monetary damages to allow the damages issue to go to the jury, and the trial court's instructions to the jury on the measure of damages were sufficient.

Metcalf v. Palmer

APPEAL by defendants from *Sitton, Judge.* Judgment entered 15 October 1981 in Superior Court, CALDWELL County. Heard in the Court of Appeals 18 January 1983.

Defendants, W. C. Palmer, Hazel H. Palmer and Charles O. Coffey Builders, Inc., owned a parcel of land which they divided into five lots and sold to plaintiffs. Plaintiffs, alleging that defendants breached a promise defendants made at the time of sale to pave a roadway easement adjoining the five lots, filed suit to recover the cost they incurred by having the roadway paved themselves.

The evidence presented at trial tended to show that prior to the sale of the lots owned by Palmer, Palmer and Coffey, defendants acquired a perpetual easement, from persons not party to this suit, to use a roadway along a common boundary of the five lots. The contract permitting this easement stated that defendants Palmer, Palmer and Coffey agreed to pave a 1,400 foot by 14 foot strip within 90 days from 13 April 1973. After obtaining this easement, defendants Palmer, Palmer and Coffey employed defendant Brooks to sell the five lots for them. Defendant Brooks showed at least two of the five plaintiffs the defendants' easement contract before selling them the lots, leading them to believe that defendants would be responsible for paving the roadway within the time period required in the easement contract. Plaintiff W. J. Teague paid an additional $1,000 to defendant Brooks beyond the cost of the lot, with the understanding that the extra $1,000 would be used to help pay for paving costs. Defendants failed to pave the roadway within the 90 day period and plaintiffs, at a cost of $6,678.47, paved a 14 foot by 1,550 foot strip in December 1973.

Defendants presented no evidence and the judge, upon defendant Coffey's motion, dismissed plaintiffs' claims as to defendant Coffey Builders, Inc. After deliberation, a jury found that the remaining three defendants had breached a promise to build and pave a 1,400 foot long and 14 foot wide road running alongside plaintiffs' five lots and assessed damages against defendants in the amount of $6,678.47 plus $1,000 extra to plaintiff W. J. Teague. Defendants appeal from the judgment entered pursuant to this verdict.

Wilson, Palmer and Cannon, by W. C. Palmer for defendant-appellants.

J. Nat Hamrick for plaintiff-appellees.

EAGLES, Judge.

[1] Defendants first assign as error the trial court's denial of their motion for a directed verdict made at the end of plaintiffs' presentation of evidence. In granting or denying such a motion, the trial court must decide whether the evidence when considered in the light most favorable to the non-movant party is sufficient for submission to the jury. *Sessoms v. Roberson*, 47 N.C. App. 573, 268 S.E. 2d 24 (1980). In the present case the plaintiffs presented evidence that defendants Palmer, Palmer and Coffey hired defendant Brooks to sell the property later purchased by plaintiffs, that defendant Brooks was in possession of defendants Palmer's, Palmer's and Coffey's easement contract containing the paving clause during the time he sold the five lots, that defendant Brooks made representations to plaintiffs that the other defendants would build and pave a road adjoining the purchased property, that the road was not built by defendants and that plaintiffs were forced to build the road at their own expense. We hold that plaintiffs presented sufficient evidence of a breach of promise on the part of defendants to allow the trial court to submit the issue to the jury. We therefore reject defendants' first assignment of error.

[2] Defendants next assign as error the trial court's instruction to the jury as to the measure of damages. The trial court instructed the jury that

> [A] party injured by a breach of contract is entitled to be placed in as far as may be possible, in the same position that they would have occupied if the contract had been performed. Damages are reasonably foreseeable, the Court instructs you, if they are ones that arise naturally or according to the usual course of things from breach of a contract. Damages are reasonably foreseeable if they may be fairly supposed to have been within the contemplation of the parties at the time the contract was entered into and as probable result of breach of a contract. As to the issue on damages, the Court instructs you that the burden of proof again, as previously instructed,

> is upon the Plaintiffs; which means that the Plaintiffs must prove by the greater weight of the evidence that the Plaintiffs have suffered damages by the breach of contract of the Defendants and secondly, what amount are said damages. The Plaintiffs contend they are entitled to recover damages as a result of breach of the contract. The Defendants disagree. I instruct you that if you reach this issue, you are not to be governed by the amount of damages suggested by the parties or their attorneys.

We find no error in the trial court's instruction as to the measure of damages, since plaintiffs also presented sufficient evidence of monetary damages to allow the issue to go to the jury. Plaintiffs proved that it cost them $6,678.47 to have the roadway built and paved. Two of the plaintiffs testified that each of the five plaintiffs paid one-fifth of the total cost of building and paving the road. In addition, plaintiff Teague testified that defendants had originally collected $1,000.00 from him to be used to cover his portion of the cost of the road defendants had promised to build. The road was built at the location described in the easement contract and contained approximately the same square footage as the road which defendants obligated themselves to build under that same contract. We find no merit in defendants' second assignment of error.

For the above reasons we also reject defendants' argument that the trial court erred in refusing to set aside the verdict and in signing the judgment.

In the trial below we find

No error.

Judges HEDRICK and JOHNSON concur.

NORTH CAROLINA STATE TREASURER, PLAINTIFF v. CITY OF ASHEVILLE, A MUNICIPALITY, AND CUMBERLAND COUNTY AUDITORIUM COMMISSION, A PUBLIC CORPORATION, DEFENDANTS AND KATHLEEN M. LONG, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ELVIS PRESLEY, AND JERRY WEINTRAUB, INTERVENORS

No. 8228SC247

(Filed 1 March 1983)

Escheats § 2— undemanded money for concert tickets—not derelict or escheated property

In an action brought by the N. C. State Treasurer as custodian of the Escheat Fund for possession of money "in the hands of" the defendants which represented the unrefunded purchase price of tickets for concerts by Elvis Presley, the trial court properly entered summary judgment for defendants since the remaining ticket holders apparently elected to keep their tickets and the property was neither abandoned nor derelict. The proceeds of the sale of the tickets arose out of a contract between the ticket purchaser as one party and the defendants and intervenors as the other parties, and neither the defendants nor the intervenors disclaimed the proceeds.

APPEAL by plaintiff from *Lewis, Judge.* Judgment entered 16 December 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 January 1983.

This is an action brought by the North Carolina State Treasurer, plaintiff, as custodian of the Escheat Fund for possession of money "in the hands of" the defendants, Cumberland Memorial Auditorium Commission and the City of Asheville. The money represents the unrefunded purchase price of tickets for concerts by Elvis Presley scheduled to occur in August 1977 in the defendants' auditoriums, which were cancelled because of Presley's death. Intervenors represent the estate of Elvis Presley and the promoters of the concerts. The action was initiated in Wake County in October 1980 and was transferred to Buncombe County in March 1981. At trial, Judge Lewis denied plaintiff's motion for summary judgment and allowed defendants' and intervenors' joint motion for summary judgment. Plaintiff appeals.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Tally & Tally, by John C. Tally, for intervenors-appellees, Kathleen H. Long, Ancillary Administratrix of the Estate of Elvis Presley, and Jerry Weintraub.

Patla, Straus, Robinson & Moore, by Jones P. Byrd, for defendant-appellee, City of Asheville.

Garris Neil Yarborough for defendant-appellee, Cumberland Memorial Auditorium Commission.

HILL, Judge.

We address the question whether the unrefunded ticket proceeds have become derelict property subject to possession by the State Treasurer. We conclude the property is not derelict and therefore affirm the decision of the trial court.

The City of Asheville and Cumberland County Memorial Auditorium refunded the purchase price of the tickets to those making demand, but many ticket holders elected to retain their tickets, leaving the proceeds in the hands of the City of Asheville and Cumberland County Memorial Auditorium. More than three years have elapsed since the scheduled date of performance and Elvis Presley's death. Such right of ticket holders to demand and receive a refund for the cost of the tickets was barred by the three year statute of limitations prior to the institution of this suit by plaintiff. G.S. 1-52. There is no dispute that the unrefunded money has been in the possession of defendants since 26 August 1977.

G.S. 116A-4 (1978) (*repealed by* 1979 N.C. Sess. Laws, 2d Sess., ch. 1311, § 1, effective 1 January 1981) then in effect, stated in part as follows:

> Personal property . . . including . . . sums of money in the hands of any person . . . which shall not be recovered or claimed by the parties thereto for three years after the same shall become due and payable, shall be deemed derelict property, and shall be paid or delivered to the Escheat Fund and held without liability for profit or interest until a just claim therefor shall be preferred by the parties thereto.

We note a distinction between derelict property and escheated property. An escheat occurs when the property owner dies intestate and without relatives descended from a common parent or grandparent. *Newlin v. Gill, State Treasurer*, 293 N.C. 348, 237 S.E. 2d 819 (1977); G.S. 29-12; G.S. 116A-2 (*repealed and recodified as* G.S. 116B-2). By its express terms, G.S. 116A-4 requires the

State Treasurer to hold derelict property for the rightful owners. The rights of ticket holders having been barred by the statute of limitations, the State Treasurer contends he may properly obtain possession of the property in order to hold it for the benefit of the rightful owners. Until claimed, the earnings of such property would be used to provide tuition funds for North Carolina students at public institutions of higher education. G.S. 116A-9 (*repealed and recodified as* G.S. 116B-37).

The defendants, City of Asheville and Cumberland County Auditorium Commission, claim title to the funds as parties to the contract with Elvis Presley. Jerry Weintraub claims an interest in the proceeds as Presley's concert tour promoter. Kathleen H. Long claims an interest in the proceeds as ancillary administratrix of Presley's estate.

We find that the property is neither abandoned nor derelict. The remaining ticket holders apparently elected to keep their tickets as Elvis Presley memorabilia. Retention of the ticket may be a sentimental or even pecuniary investment that, to the holder, is commensurate with the pleasure of concert attendance. We conclude that the proceeds of the sale of the tickets arise out of a contract between the ticket purchaser as one party and the defendants and intervenors as the other parties. Nowhere do we find a disclaimer of the proceeds by either the defendants or intervenors. All of them claim an interest therein. Their rights and obligations are not before this Court, but common sense leads us to believe that heavy expenses were incurred in connection with the concert by some if not all of the parties claiming the proceeds. We do not believe the legislature intended a windfall to the state under these circumstances.

By purchasing a ticket to the concert, the ticket holder enters into a contract with the auditorium and the performer. If the contract is not performed, he or she may rescind the agreement and demand a refund, but is not compelled to do so. Nor must the auditorium operator or performer refund the purchase price absent a demand. If that were the case, the ticket holder would be unjustly enriched in retaining both money and memento. The auditorium is not a trustee of the unrefunded proceeds of the ticket sale; the auditorium is simply a party to an unperformed contract.

We find the case of *State v. Sperry & Hutchinson Co.*, 56 N.J. Super. 589, 153 A. 2d 691 (1959), *aff'd*, 31 N.J. 385, 157 A. 2d 505 (1960), to be instructive. There, the State of New Jersey sought to claim the cash value of all unredeemed trading stamps for which the statute of limitations had run against their holders. The court looked at the "nature of the rights which are conferred upon members of the consuming public when they acquire trading stamps," and held that if the stamp holders did not enforce their contractual rights within the period of the statute of limitations, the proceeds of the unredeemed trading stamps belonged to the company and not the state. In a similar case involving unclaimed money orders, the New Jersey Supreme Court held that the relationship between Western Union and its money order purchasers was a contract between a debtor and a creditor, and if the debtor made no claim for a refund, the money orders belonged to the creditor and not the state. *State v. Western Union Telegraph Co.*, 17 N.J. 149, 110 A. 2d 115 (1954).

The State failed to show that the proceeds from the sale of the tickets were abandoned or were derelict property. The decision of the trial judge is

Affirmed.

Judges ARNOLD and WHICHARD concur.

TERRY M. KEY, EMPLOYEE v. McLEAN TRUCKING, EMPLOYER, SELF-INSURED

No. 8210IC225

(Filed 1 March 1983)

Master and Servant § 73.1— workers' compensation—damage to cranial nerve—double vision—diminution of earning capacity

An injury to plaintiff truck driver's sixth cranial nerve which causes plaintiff to have double vision when he exceeds eight degrees to the right and ten degrees to the left was compensable under G.S. 97-31(24) as an injury to an important part of the body, and it was proper for the Industrial Commission to consider diminution of earning capacity in making an award for permanent partial disability resulting from such injury.

Key v. McLean Trucking

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 25 November 1981. Heard in the Court of Appeals 13 January 1983.

The plaintiff was injured on 10 February 1977 in his capacity as a truck driver for the defendant. After paying temporary total disability periodically over a period of two years, the self-insured defendant requested that the claim be assigned for a hearing before the Industrial Commission because the parties could not agree on the degree of permanent partial injury.

A hearing was held before Deputy Commissioner Ben E. Roney, Jr. on 1 May 1981 in Winston-Salem. Plaintiff offered the testimony of Dr. Leon Cashwell, Jr. an ophthalmologist at Bowman Gray School of Medicine and Baptist Hospital in Winston-Salem. Cashwell described his treatment of the plaintiff, which included two operations.

According to Cashwell, the plaintiff has permanent damage to the sixth cranial nerve, resulting in diplopia, *i.e.*, double vision, when he exceeds eight degrees to the right and ten degrees to the left. He testified that this condition would be disabling in plaintiff's profession of driving a truck because of the need for constantly monitoring mirrors and traffic.

A letter from Dr. A. C. Chandler, Jr. of Duke University Medical Center to Dr. Albert P. Glod was stipulated into evidence. The letter outlined the results of tests that Chandler performed on the plaintiff on 2 December 1980. Because the plaintiff did not have the central thirty degrees of his visual field binocular, free of diplopia, Chandler's letter stated: "According to the recommendations from the AMA and other disability companies . . . one has to assume that this is 100% disability."

The plaintiff testified that he is presently employed as a dock worker for the defendant and that if he were driving as regularly as he did before the accident, he would earn between $750 and $800 per week. His current earnings are $12.74 per hour which result in a weekly rate of about $500.

In an opinion and award filed on 22 July 1981, Deputy Commissioner Roney awarded the plaintiff $7,500, the value of the diminution of his future earning capacity. The award concluded that the injury was not a loss of an eye or loss of vision of an eye

under G.S. 97-31. Roney found that the plaintiff was capable of earning wages as a road driver when he returned to work as a dock worker on 21 February 1979.

Upon the plaintiff's application for review, the Full Commission affirmed the opinion and award of Deputy Commissioner Roney on 25 November 1981. Plaintiff gave notice of appeal to this Court.

Douglas P. Dettor and Judith G. Behar, for plaintiff-appellant.

Wayne H. Foushee for defendant-appellee.

ARNOLD, Judge.

The plaintiff argues that it was improper to consider diminution of earning capacity in the award when his injury was compensable under G.S. 97-31(24). We disagree.

The relevant portion of G.S. 97-31 states:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and *shall be in lieu of all other compensation* . . .
>
> (24) In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000) (emphasis added).

Although disability compensation under G.S. 97-31 is awarded for physical impairment irrespective of ability to work or loss of wage earning power, *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E. 2d 325 (1976), *disc. rev. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977); *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E. 2d 660, *cert. denied*, 281 N.C. 154, 187 S.E. 2d 585 (1972), we find nothing in the statute or the case law that forbids consideration of loss of earning capacity.

G.S. 97-31 provides that recovery for an injury compensable under one of its subsections "shall be in lieu of all other compen-

sation. . . ." Because the award concluded that the plaintiff's injury was to an important part of the body and there is competent evidence to support this finding, his injury falls within subsection (24) and is compensable.

Cases cited by the plaintiff for the contention that earning capacity cannot be considered here are unpersuasive. All three cases that he cites stand only for the proposition that a claimant can recover under G.S. 97-31 without proving a loss of earning capacity. Those cases also deal with other subsections of G.S. 97-31 than the case *sub judice*. *See Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968); *Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 (1956).

Our courts have not explicitly stated that earning capacity can be considered in a G.S. 97-31(24) award. But two cases support our holding. Although *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E. 2d 627 (1976), was decided on a different question than the one before us, the court there implicitly approved an award of $3,500 for diminution of earning capacity for a G.S. 97-31(21) and (22) injury. We also note *dictum* in *Arrington v. Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965), that "Under the present law, G.S. 97-31(24), an award of compensation for loss of sense of taste or smell would unquestionably be sustained, where from the circumstances it could be reasonably presumed that the workmen suffered diminution of his future earning power by reason of such loss." 264 N.C. at 40, 140 S.E. 2d at 760.

The claimant's other three arguments attack two findings of fact and one conclusion of law. He contends that it was error to find as a fact that:

> 14. Claimant was capable of earning wages as a road driver when he returned to work on 21 February 1979 as a dock worker. . . .
>
> 16. Claimant experienced permanent injury to an important part of the body (sixth cranial nerve) that may be reasonably presumed to cause a diminution of his future earning capacity, the value of which is $7,500.00.

He also argues that it was error to conclude: "1. The permanent injury to claimant's sixth cranial nerve did not result in loss of an eye or loss of vision of an eye."

On an appeal from an award of the Industrial Commission, our review is limited to the questions "(1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions." *Perry*, 296 N.C. at 92, 249 S.E. 2d at 400 and cases cited therein. *See also* G.S. 97-86 (An award is "conclusive and binding as to all questions of fact."). Based on our examination of the record before us, we hold that the evidence supports the Commission's findings and that the findings support its conclusions of law. As a result, we affirm the Commission's opinion and award.

Affirmed.

Judges HILL and WHICHARD concur.

CHEM-SECURITY SYSTEMS, INC. v. DR. SARAH T. MORROW, SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES; DR. RONALD H. LEVINE, DIRECTOR OF THE DIVISION OF HEALTH SERVICES; MR. O. W. STRICKLAND, HEAD OF THE SOLID AND HAZARDOUS WASTE MANAGEMENT BRANCH; RUFUS L. EDMISTEN, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; COUNTY OF ANSON

No. 8210SC228

(Filed 1 March 1983)

Constitutional Law § 13— local legislation—hazardous waste—relating to "health, sanitation and the abatement of nuisances"—unconstitutional

A local act which was entitled "An Act to Regulate The Disposal of Hazardous Wastes And Radioactive Material In Anson County" was unconstitutional in that it violated Article II, § 24(1)(a) of the North Carolina Constitution in that it directly related to health, sanitation and the abatement of nuisances, and since it violated Article XIV, § 3 of the North Carolina Constitution which prohibits the enactment of any local act concerning a subject matter directed or authorized to be accomplished by general laws.

APPEAL by defendants from *Farmer, Judge*. Judgment entered 29 January 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1983.

Plaintiff commenced this action under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, seeking a determination that Chapter 718, Session Laws of 1981, entitled "An Act to Regulate The Disposal of Hazardous Wastes And Radioactive Material In Anson County" (the "Anson County Act"), is unconstitutional and invalid.

Plaintiff moved for summary judgment. Following a hearing on the motion, Judge Farmer concluded that the Anson County Act is local legislation which relates to "health, sanitation and the abatement of nuisances" and therefore violates Article II, Section 24 and Article XIV, Section 3 of the North Carolina Constitution. Judge Farmer further concluded that the Anson County Act is invalid because it was repealed by the Waste Management Act of 1981, Chapter 704, Sessions Laws of 1981. Defendants excepted and assigned error to each of these conclusions.

Ogletree, Deakins, Nash, Smoak and Stewart, by W. Britton Smith, Jr., and Taylor and Bower, by H. P. Taylor, Jr., for plaintiff-appellee.

Attorney General Rufus L. Edmisten, by Assistant Attorneys General Robert R. Reilly and Thomas G. Meacham, Jr., for defendants-appellants.

HILL, Judge.

Article II, Section 24 of the North Carolina Constitution provides, in relevant part, as follows:

> Sec. 24. *Limitations on local, private, and special legislation.*
>
> (1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances;
>
> * * *
>
> (3) *Prohibited acts void.* Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

(4) *General laws.* The General Assembly may enact general laws regulating the matters set out in this Section.

Appellants concede that the Anson County Act is a local act. They contend, however, that it does not violate Article II, Section 24(1)(a) of the North Carolina Constitution because it does not directly relate to health, sanitation and the abatement of nuisances. We disagree.

The Anson County Act provides, in part, as follows:

Whereas, hazardous wastes and radioactive material are inevitable by-products of industry in our technologically and scientifically advanced society; and

Whereas, experience has shown that the improper disposal of hazardous wastes and radioactive material has devastating immediate and long-term effects on the environment including crop damage, soil contamination and loss of wildlife, including fish and game animals; and

Whereas, agriculture and outdoor recreational activity, including hiking, hunting and fishing are essential to the economy of Anson County; and

Whereas, a hazardous waste disposal site located in certain areas in Anson County could be a detriment to the wildlife habitat of the area . . .

* * *

The General Assembly of North Carolina enacts:

Section 1. No hazardous wastes, as defined in G.S. 130-166.14(4), or radioactive material, as defined in G.S. 104E-5(14), may be disposed of in Anson County unless the water table at the disposal site is at least 75 feet below the surface.

Appellants argue that the Anson County Act is addressed to the protection of Anson County's natural resources, not to a particular health or sanitation need, and therefore does not violate Section 24(1)(a) of the Constitution. We cannot accept this rationale, in spite of the preamble to the Act, because we cannot imagine a more pressing health or sanitation need than the proper disposal of hazardous wastes and radioactive material. The

very definition of "hazardous wastes" incorporated into the Anson County Act discloses the direct relationship between the disposal of such wastes and human health. " 'Hazardous waste,' means a solid waste, or combination of solid wastes which . . . may . . . [p]ose a substantial present or potential hazard to human health or the environment when improperly . . . disposed of . . . ." G.S. 130-166.16(4).

It is equally apparent that the Anson County Act relates directly to "sanitation." The sole purpose of the Act is to regulate the disposal of waste in Anson County. Local acts dealing with sewer systems and sewer service for the disposal of waste have been declared unconstitutional as relating to sanitation. *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E. 2d 148 (1967); *Lamb v. Board of Education*, 235 N.C. 377, 70 S.E. 2d 201 (1952). A local act purporting to regulate the disposal of hazardous wastes in landfills clearly relates to sanitation in the same manner.

We also affirm Judge Farmer's conclusion that the Anson County Act unconstitutionally relates to the abatement of nuisances. Improper disposal of hazardous wastes and radioactive material would surely be a public nuisance since it would result, according to the preamble to the Act, in "devastating and immediate and long-term effects on the environment, including crop damage, soil contamination and loss of wildlife . . . ." *Cf. Chadwick v. Salter*, 254 N.C. 389, 119 S.E. 2d 158 (1961) (a local act regarding removal and disposal of cattle roaming on the Outer Banks of North Carolina held unconstitutional as relating to abatement of a public nuisance).

Judge Farmer also concluded correctly that the Anson County Act violates Article XIV, Section 3 of the North Carolina Constitution. That Section prohibits the enactment of any local act concerning a subject matter directed or authorized to be accomplished by general laws. Section 24(4) of Article II authorizes the enactment of general laws relating to health, sanitation and the abatement of nuisances. As we have previously held, the Anson County Act is a local act relating to health, sanitation and the abatement of nuisances. As such, it violates Article XIV, Section 3 of the North Carolina Constitution.

In view of our decision that the Anson County Act is unconstitutional, we need not determine whether it was repealed by the Waste Management Act of 1981.

The decision below is

Affirmed.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. ALPHONSO SIMPSON

No. 825SC618

(Filed 1 March 1983)

1. **Criminal Law § 138— hit and run driving—avoiding arrest as aggravating factor**

In imposing a sentence for felonious hit and run driving, the trial court did not err in finding that the offense was committed for the purpose of avoiding arrest on the theory that the evidence used to prove such factor was necessary to prove an element of the offense where defendant's avoidance of arrest occurred before the hit and run and was thus not necessary to prove an element of that offense. G.S. 15A-1340.4(a)(1).

2. **Criminal Law § 145.5— restitution as condition of work-release or parole—amount supported by record**

The trial court properly ordered defendant to make partial restitution to a hit and run victim as a condition of work-release or parole, but the court erred in ordering defendant to pay one-half of his earnings while on work-release or parole without fixing a maximum supported by the record as required by G.S. 15A-1343(d). G.S. 148-33.2(c).

APPEAL by defendant from *Collier, Judge.* Judgment entered 27 October 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 January 1983.

Defendant pled guilty to the misdemeanor offenses of driving while his license was revoked and without financial responsibility. He pled no contest to felonious hit and run, failure to stop for siren and blue light, and reckless operation. At the sentencing hearing, the State presented the following evidence. Officer Farris testified that on 7 September 1981, there was a roadblock for

a driver's license check on Princess Place Drive. Defendant was stopped, and Officer Clark asked him for his license. Defendant did not have one. He pulled over, turned around, and proceeded down Princess Place Drive heading southeast. Clark pursued defendant with his blue light and siren on. When defendant reached the intersection of Market Street and Kerr Avenue, he drove through the parking lot of a gas station. Several blocks later, he collided with another car, causing it to leave the road and hit a tree. After the collision, defendant was clocked at sixty-seven miles per hour. The speed limit was forty-five. One and six-tenths miles later, Trooper Smith and Officer Clark forced defendant off the road. Smith pointed his revolver at defendant to make him stop. Defendant's car left skid marks two hundred and twenty feet long. The driver of the car defendant collided with, Debbie Mathis, suffered the following injuries: broken left foot; crushed right kneecap, which had to be removed; both bones in her left arm were broken; broken jaws; crushed sinus cavities; broken nose; crushed forehead; and her right eye was damaged. Defendant was uninsured, his car was not registered, and his license had been revoked from 3 May 1981 to 3 May 1982. On cross-examination, Farris said that defendant told him his brakes were not working. Farris checked the brakes and discovered they would not work unless they were pumped.

Defendant testified as follows. He said he worked as a mechanic at an Amoco service station. On 7 September 1981, he was going to an insurance company to get insurance so he could register his car. After he was stopped at the roadblock, he thought Officer Clark was going to follow him to the insurance company. He was getting ready to pull over when he hit Mathis' car. He tried to stop after she went off the road. He said he was not trying to get away, he wanted to go back and see Mathis' condition. On cross-examination, he admitted he had previously said Mathis' injuries were caused by her heart attack, not the collision. He also said he applied for title to his car under the name "Al Simmons" because he was under the influence of some medicine.

In sentencing defendant for the offense of felonious hit and run, the trial judge found the following aggravating factors: "The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" and "[t]he

defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement." The judge found no mitigating factors. The judge found that the factors in aggravation outweighed the factors in mitigation, and sentenced defendant to three years imprisonment. Defendant received a two-year sentence for the misdemeanor offenses, to begin at the expiration of the sentence for felonious hit and run. The judge also recommended defendant pay one-half of all his earnings while on work-release or parole to the victim, Debbie Mathis, as restitution.

Attorney General Edmisten, by Associate Attorney Michael Rivers Morgan, for the State.

Appellate Defender Adam Stein and Assistant Appellate Defender Nora B. Henry, for defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant contends the trial court erred in imposing a sentence in excess of the presumptive sentence because the aggravating factors were not supported by the evidence. Defendant contends that an aggravating factor, that the offense was committed for the purpose of avoiding arrest, was improperly found because the evidence used to prove the factor in aggravation was necessary to prove an element of the offense.

"Evidence 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 offense of felonious hit and run is as follows: "The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182." G.S. 20-166(a). The elements of the offense are that defendant was driving the vehicle; the vehicle came into contact with another person resulting in injury or death; and defendant failed to stop immediately, knowing he had struck the victim. *State v. Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981). Defendant contends that since the accident occurred while he was avoiding arrest the "run" element of hit and run was used to prove an aggravating factor. Defendant, however, had driven several blocks in attempting to avoid arrest before the collision

occurred. His avoiding arrest occurred before the hit and run, and was not evidence necessary to prove an element of the offense.

Defendant's next argument is that the trial judge erred in failing to find the following mitigating factors: "Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer," and "The defendant has been a person of good character or has had a good reputation in the community in which he lives." There was absolutely no evidence introduced at the sentencing hearing to support either of these mitigating factors, and the trial judge did not err by not finding that they existed.

[2] Defendant also argues that the trial court erred in ordering restitution as a condition of work-release when there was no evidence supporting the amount of restitution ordered.

G.S. 148-33.2(c) authorizes the court to impose restitution as a condition of attaining work-release privileges. G.S. 15A-1343(d) provides, in part:

> When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and other such matters as shall pertain to his ability to make restitution or reparation. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay.

It is obvious from the description of the injuries to the victim that defendant will never be able to make full restitution, and the judge was correct in his determination that partial restitution should be required. He erred, however, in ordering defendant to pay one-half of his earnings while on work-release or parole without fixing a maximum supported by the record as required by G.S. 15A-1343(d).

That part of the judgment ordering restitution is vacated, and the case is remanded for the entry of judgment consistent with this opinion.

Remanded.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. JACK KILLIAN

No. 8222SC797

(Filed 1 March 1983)

Criminal Law § 16.1— appeal from district court—new statement of charges—superior court having no jurisdiction

In a prosecution for willful failure to support defendant's illegitimate child, the superior court had no jurisdiction to try defendant for a new offense, a separate and distinct violation of G.S. 49-2, since a violation of G.S. 49-2 is a misdemeanor, and the district court had exclusive, original jurisdiction of the new offense. G.S. 7A-272(a).

APPEAL by defendant from *Washington, Judge.* Judgment entered 30 March 1982 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 8 February 1983.

Defendant appeals from a judgment entered upon his conviction for willful failure to support his illegitimate child.

Attorney General Edmisten, by Assistant Attorney General Barry S. McNeill, for the State.

Rudisill & Brackett, P.A., by J. Steven Brackett, for defendant appellant.

WHICHARD, Judge.

A warrant issued 23 December 1981 charged defendant with, on that date, willfully neglecting and refusing to provide adequate support for his illegitimate child, a violation of G.S. 49-2. The warrant alleged that the child was born on 9 September 1981, and that defendant's "refusal and neglect to provide adequate support and maintain the child continued after due notice and demand was made upon him on September 9, 1981 and on March 12, 1981 and January 12, 1982 by Registered Mail . . . ."

Violation of G.S. 49-2 is a misdemeanor. None of the exceptions in G.S. 7A-271(a) applied; and the district court thus had ex-

clusive, original jurisdiction. G.S. 7A-272(a). On 25 January 1982 that court found defendant guilty, and he appealed to superior court.

On 30 March 1982 when the matter came before the superior court for trial *de novo*, *see* G.S. 7A-271(a)(5), the District Attorney issued a "misdemeanor statement of charges," *see* G.S. 15A-922(d), (e), alleging that on or about 26 January 1982 defendant willfully neglected and refused to provide adequate support and to maintain the child, which "continued after due notice and demand . . . upon the defendant on January 12, 1982." The State and defendant have stipulated that this statement was duly served on defendant, and that defendant was arraigned and pled not guilty to the offense charged therein. A superior court jury found defendant guilty as charged, and he appeals from a judgment on that verdict.

> In order to support a finding of wilful nonsupport of an illegitimate child by the father, the State must prove beyond a reasonable doubt that the mother . . . has, *after the child was born and before the prosecution was commenced*, made demand upon the father for support and *after such demand and before prosecution* the father wilfully neglected and refused to provide adequate support according to his means and condition and the necessities of the child.

State v. Ellis, 262 N.C. 446, 451, 137 S.E. 2d 840, 845 (1964) (emphasis supplied). A non-support charge under G.S. 49-2 "cannot be supported by evidence of willful failure supervening between the time the charge was made and the time of the trial—at least when the trial is had . . . upon the original warrant." *State v. Perry*, 241 N.C. 119, 120, 84 S.E. 2d 329, 330 (1954) (quoting *State v. Summerlin*, 224 N.C. 178, 181, 29 S.E. 2d 462, 464 (1944)). *See also State v. Thompson*, 233 N.C. 345, 347, 64 S.E. 2d 157, 159 (1951).

The only evidence here of demand for support of the child was the mother's testimony that she and her attorney made demand on defendant on or about 12 January 1982. Pursuant to the foregoing authorities, demand on 12 January 1982 would not sustain a warrant charging violation of G.S. 49-2 on 23 December 1981. It was apparently on that account that the State abandoned its prosecution on the original warrant, upon which defendant had

been convicted in the district court, and issued the "misdemeanor statement of charges" alleging non-support by defendant on 26 January 1982, a date subsequent to that on which demand allegedly was made.

A "statement of charges" is governed by the following provisions of G.S. 15A-922:

> (d) Statement of Charges upon Determination of Prosecutor—The prosecutor may file a statement of charges upon his own determination *at any time prior to arraignment in the district court.* It may charge the same offenses as the citation, criminal summons, warrant for arrest, or magistrate's order or additional or different offenses.
>
> (e) Objection to Sufficiency of Criminal Summons . . . .—If the defendant by appropriate motion objects to the sufficiency of a criminal summons, warrant for arrest, or magistrate's order as a pleading, at the time of or after arraignment in the district court or upon trial de novo in the superior court, and the judge rules that the pleading is insufficient, the prosecutor may file a statement of charges, but a statement of charges filed pursuant to this authorization may not change the nature of the offense. [Emphasis supplied.]

The record contains no motion by defendant objecting to the sufficiency of the original warrant. The statement of charges was filed by the prosecutor "upon his own determination"; and that could only be done "prior to arraignment in the district court," not upon trial *de novo* on appeal to superior court. G.S. 15A-922(d). If the statement had realleged the original charge of an offense on 23 December 1981, then, it would have been untimely and thereby without legal authorization.

The statement did not reallege the original 23 December 1981 offense, however. It alleged instead a separate violation of G.S. 49-2 committed on 26 January 1982.

G.S. 49-2 "creates a continuing offense." *Perry, supra,* at 120, 84 S.E. 2d at 330. "[C]ontinuing the offense . . . is a new violation of the law. Each day during which it is continued constitutes a separate offense and will support a separate prosecution, provided the warrant or indictment alleges separate and distinct

times during which the offense was committed." *State v. Johnson*, 212 N.C. 566, 570, 194 S.E. 319, 321 (1937).

The 26 January 1982 offense alleged by the statement of charges thus was a new violation of G.S. 49-2, separate and distinct from the 23 December 1981 offense alleged by the original warrant. While the 23 December 1981 offense charged in the original warrant would properly have been before the superior court for trial *de novo* on appeal from the district court, G.S. 7A-271(a)(5), the statement brought before the superior court a new offense—a separate and distinct violation of G.S. 49-2—alleged to have occurred on 26 January 1982.

Because violation of G.S. 49-2 is a misdemeanor, the district court had exclusive, original jurisdiction of the new offense. G.S. 7A-272(a). Until defendant was tried and convicted in district court and appealed to superior court for trial *de novo*, the superior court had no jurisdiction of the case. *State v. Bryant*, 280 N.C. 407, 411, 185 S.E. 2d 854, 857 (1972). "The jurisdiction of the superior court is derivative and arises only upon an appeal from a conviction of the misdemeanor in the district court." *State v. McKoy*, 44 N.C. App. 516, 517, 261 S.E. 2d 226, 226, *cert. denied*, 299 N.C. 546, 265 S.E. 2d 405 (1980). *See also Cline v. Cline*, 6 N.C. App. 523, 528, 170 S.E. 2d 645, 649 (1969). The superior court thus had no jurisdiction to try defendant for the new offense alleged in the statement, and the conviction accordingly must be reversed.

Because the offense is a continuing one, "the decision here will not preclude further prosecution in keeping with the existing factual situation." *Perry, supra*, at 120, 84 S.E. 2d at 330.

Reversed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. LOWELL EDSELL SHEPARD

No. 825SC841

(Filed 1 March 1983)

1. **Homicide § 21.9— involuntary manslaughter—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of involuntary manslaughter where the evidence showed that defendant shot decedent with a pistol, both the State and defendant offered evidence that immediately following the shooting defendant stated that he had not known the pistol was cocked, and defendant testified that he stated he had not known the pistol was loaded, since the jury could find from this evidence that, while defendant intentionally pointed and shot the pistol, he did not intend to shoot a cocked or loaded pistol, and that he was culpably negligent in failing to ascertain, prior to shooting the pistol in the direction of decedent, whether it was cocked or loaded.

2. **Homicide § 28— self-defense—instructions on reasonableness of apprehension—refusal to instruct on reputation of decedent**

In an involuntary manslaughter prosecution in which defendant contended that he shot decedent in self-defense, the trial court did not err in refusing defendant's request for instructions on the violent reputation of decedent as bearing on defendant's reasonable apprehension of death or bodily harm where the court properly instructed the jury that in determining the reasonableness of defendant's apprehension the jury should consider whether decedent had a weapon in his possession and the reputation, if any, of decedent for danger and violence, and the instructions otherwise adequately informed the jury on the issue of self-defense.

3. **Criminal Law § 138— presumptive sentence—failure to find mitigating or aggravating circumstances**

The trial court did not err in giving the presumptive sentence without making findings of fact as to mitigating or aggravating circumstances. G.S. 15A-1340.4(b).

APPEAL by defendant from *Rouse, Judge.* Judgment entered 1 April 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 February 1983.

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

Attorney General Edmisten, by Associate Attorney William N. Farrell, for the State.

W. G. Smith and Bruce H. Jackson, Jr., for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in denying his motion to dismiss for insufficiency of the evidence. The State's evidence tended to show the following:

Decedent died from a gunshot wound in the right temple. Several witnesses observed a pistol lying between his feet. A police officer testified that the pistol was loaded but uncocked.

Several witnesses heard a shot from the area where decedent died, though none observed the shooting. Immediately after he heard the shot, however, one witness observed defendant where he "would have been standing right over the [decedent]." Less than a minute later this witness heard defendant say, "Oh, Lord, I didn't know it was cocked."

Defendant testified that he shot decedent. He stated, however, that decedent had a pistol between his legs, "pulled the slide back and pointed it in [defendant's] face" and said: "I am going to blow you away. I am not joking."

Defendant felt "absolute terror" because he knew decedent normally carried a weapon and had a reputation for using it. Decedent had told defendant he had shot a man in Virginia and a woman in Wilmington. Defendant had been with decedent when decedent had "[taken] out a pistol and shot down in the floor."

Defendant further testified he did not know his pistol was cocked, and that was exactly what he said after the shooting. He subsequently testified that he had said he did not know the pistol was loaded rather than that he did not know it was cocked. He did squeeze the trigger, but he did not think "there was anything to make it go off." His statement was, "Oh, Lord, I didn't know the gun was loaded."

[1] Defendant argues he could not be guilty of involuntary manslaughter because all the evidence showed his act was clearly intentional. He relies in part on *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980), as applied in *State v. Brooks*, 46 N.C. App. 833, 266 S.E. 2d 3 (1980). We disagree.

> Involuntary manslaughter "is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally

> dangerous to human life, or (2) by an act or omission constituting culpable negligence." [Citation omitted.] "[T]he crime of involuntary manslaughter involves the commission of an act, *whether intentional or not*, which in itself is not a felony or likely to result in death or great bodily harm." *[State v.] Ray*, 299 N.C. at 158, 261 S.E. 2d at 794 (emphasis added).

State v. Hall, 54 N.C. App. 672, 674, 283 S.E. 2d 902, 903 (1981), *cert. denied*, 307 N.C. 470, 299 S.E. 2d 225 (1983).

In *Ray*, defendant testified that he intentionally pointed the gun at *and intentionally shot at* the decedent. *Ray*, 299 N.C. at 154-56, 261 S.E. 2d at 792-93. The evidence in *State v. Cason*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981) and *State v. Brooks, supra*, like that in *Ray*, showed that the defendants intentionally pointed a gun at *and intentionally shot at* the victims. In those cases the court found that there was no evidence to support a verdict of involuntary manslaughter.

Here, by contrast, both the State and defendant offered evidence that immediately following the shooting defendant lamented that he had not known the pistol was cocked. Defendant testified to an alternative lament that he had not known the pistol was loaded. The jury could find from this evidence that while defendant intentionally pointed and shot the pistol, he did not intend to shoot a cocked or loaded pistol; and that his shooting of a cocked or loaded pistol resulted from his handling the pistol in a culpably negligent manner. It could find culpable negligence on the part of defendant in his failure to ascertain, prior to shooting the pistol in the direction of decedent, whether it was cocked or loaded. Whether decedent's death resulted from an intentional shooting in self-defense or an unintentional shooting caused by defendant's culpably negligent failure to ascertain whether the pistol was cocked or loaded, was properly for the jury, *see State v. Hall*, 54 N.C. App. at 675, 283 S.E. 2d at 904, and the court would have usurped the jury's function had it allowed the motion to dismiss.

[2] Defendant contends the court erred in refusing his request for instructions on the violent reputation of decedent as bearing on defendant's reasonable apprehension of death or bodily harm. The court did, however, instruct that in determining the reasonableness of defendant's apprehension the jury should con-

sider "whether . . . [decedent] had a weapon in his possession and the reputation, if any, of [decedent] for danger and violence . . . ." The instructions otherwise adequately informed the jury on the issue of self-defense, and we thus decline to find reversible error. *See State v. Rummage*, 280 N.C. 51, 54-55, 185 S.E. 2d 221, 224 (1971); *State v. Cole*, 31 N.C. App. 673, 677-78, 230 S.E. 2d 588, 591-92 (1976).

[3] Defendant contends the court erred in giving the presumptive sentence without making findings of fact as to mitigating or aggravating circumstances. "[A] judge need not make any findings regarding aggravating and mitigating factors . . . if he imposes the presumptive term." G.S. 15A-1340.4(b) (Cum. Supp. 1981).

No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. SAMMY KAY MORROW

No. 8226SC695

(Filed 1 March 1983)

Criminal Law § 66.17— possible improper out-of-court identification procedure— independent origin of in-court identification

The trial court properly found that a larceny victim's in-court identification was independent of and untainted by his possibly improper showup identification of defendant where the evidence indicated that the victim felt someone remove his wallet from his back pocket as he waited in line at a bus stop; that the victim immediately turned around and observed, face to face at a distance of one foot to eighteen inches, a black man dressed in white pants, a navy jacket and a dark hat standing behind him smiling and holding the victim's wallet; that the victim then observed the man run down the street; that the victim's attention was completely focused on the defendant when he turned to see who had taken his wallet; and that the victim stated he looked the defendant over so he could remember him.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 18 February 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 January 1983.

Defendant was charged with common law larceny. From a verdict of guilty and entry of judgment, defendant appeals. His appeal questions the admissibility of evidence of the victim's out-of-court and in-court identification of defendant as the person who took his wallet. We hold the defendant suffered no prejudice as a result of the admission in evidence of the victim's out-of-court and in-court identification of the defendant.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.

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

EAGLES, Judge.

It appears from the record that defendant has failed to follow North Carolina Rules of Appellate Procedure 10(b)(1) which requires that exceptions be "properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action. . . . Each exception shall be set out immediately following the record of judicial action to which it is addressed. . . ." But while the defendant failed to enter objections at trial following the judicial actions to which he now excepts and assigns as error, we nevertheless have examined each assignment on its merits.

In this case, within minutes after the crime occurred, the victim, Williams, reported having his wallet stolen and described to police officers the perpetrator's dress and physical appearance. Defendant was picked up by the police a few minutes later and was immediately taken to Williams, who upon observing the defendant sitting in the back seat of a police car, identified defendant as the person who had taken his wallet.

Defendant first contends that this out-of-court identification procedure was impermissibly suggestive and that defendant was unfairly prejudiced by the admission of the out-of-court identification into evidence. The practice of showing suspects singly to persons for purposes of identification has been widely condemned. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). We need not

address the question of whether the out-of-court identification procedure was improper in this case since we hold that, regardless of the propriety of the circumstances of the showup, the victim's in-court identification was independent of and untainted by his out-of-court identification, and standing alone was sufficient evidence of identity to allow the question of defendant's innocence or guilt to go to the jury.

The evidence at trial indicated and the trial court on *voir dire* found as a fact that at about 2:00 p.m. the victim, John Williams, felt someone remove his wallet from his back pocket as he waited in line at a bus stop. Williams immediately turned around and observed, face to face at a distance of one foot to eighteen inches, a black man dressed in white pants, a navy jacket and a dark hat standing behind him smiling and holding Williams' wallet. Williams then observed the man run down the street.

The court found further that Williams' attention was completely focused on the defendant when he turned to see who had taken his wallet, and that Williams stated he looked the defendant over so he could remember him. Nothing indicated that Williams' in-court identification was suggested by another person, nor was there any evidence that Williams was irreparably mistaken as to the identification of the defendant. Finally, the court found no evidence indicating an infirmity on the part of Williams which would have prevented him from observing the perpetrator at the time the crime was committed and remembering his observations.

> When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts.

State v. Tuggle, 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974).

The above findings of fact are supported by competent evidence and sufficiently support the trial court's conclusion that the in-court identification was based on Williams' observation of

defendant at the time of the theft and that it was independent of the out-of-court identification. As in *State v. Whitney*, 26 N.C. App. 460, 216 S.E. 2d 439 (1975), we conclude that the victim's in-court identification of defendant was of independent origin and not tainted by a showup at which defendant was exhibited to the victim while sitting alone in a police car.

Finally, we need not examine defendant's last contention that the out-of-court identification impermissibly bolstered evidence of the in-court identification, since the issue was not raised as an assignment of error in the record. North Carolina Rules of Appellate Procedure 10(c).

For the foregoing reasons, in the trial we find

No error.

Judges HEDRICK and JOHNSON concur.

STATE OF NORTH CAROLINA v. JOHN EDWARD FEDORIS

No. 8226SC904

(Filed 1 March 1983)

Robbery § 4.3— robbery with dangerous weapon—danger to life of victim—sufficiency of evidence

The State's evidence was sufficient to show a danger or threat to the life of a robbery victim so as to support defendant's conviction of robbery with a dangerous weapon where it tended to show that, when defendant entered a convenience store, he wore a split pillowcase over his head and carried a wedge-axe which had a sledgehammer head on one end and an axe blade on the other; defendant advised the store employee to stay where she was and stated that he wanted the money in the register; during the robbery defendant held the weapon in his right hand with the blade portion in front of him; at no time was the employee more than 3½ to 4 feet from defendant; and as defendant was leaving the store he ordered the employee not to call the police.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 20 April 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 February 1983.

Defendant was found guilty of robbery with a dangerous weapon in violation of G.S. 14-87. He appeals from a judgment imposing an active sentence of sixteen years.

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

Assistant Public Defender Grant Smithson for defendant-appellant.

HILL, Judge.

Defendant contends there was insufficient evidence to submit the case to the jury on the charge of robbery with a dangerous weapon. We disagree and therefore find no error in the trial of the case.

Evidence for the State tends to show that on 9 August 1981 a man later identified as defendant entered The Pantry, a store in Cornelius, North Carolina. He wore a split pillowcase over his head and carried a wedge-axe commonly known as a "go-devil." This instrument has a sledgehammer head on one end and an axe blade on the other. During the robbery defendant held the weapon in his right hand with the head or blade portion in front of him. Upon entry, defendant advised the salesperson: "Just stay where you are. I just want the money in your register." He ordered her to open the cash register; at no time was she more than 3½ to 4 feet from him. Further, defendant ordered her as he was leaving not to call the police. He threatened that there was a machine gun aimed at the front of the store.

Defendant contends that the court should have allowed his motion for nonsuit because the evidence showed only possession of a dangerous weapon; no evidence of a danger or threat to the life of the victim was offered. *See State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981).

Defendant's argument is without merit. The element of force in a robbery may be actual or constructive. The acts of defendant are sufficient to create constructive force. His acts generated an apprehension of fear sufficient to induce the salesperson to part with property to protect herself. *State v. Norris*, 264 N.C. 470,

141 S.E. 2d 869 (1965). *See State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979).

No error.

Judges WELLS and JOHNSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 MARCH 1983

BROWN v. BROWN No. 8215DC312	Orange (80CVD933)	Affirmed
DICKERSON v. JARVIS No. 822SC922	Beaufort (80SP57)	Affirmed
DUKE POWER v. JOWDY d/b/a IGA STORES No. 8218SC260	Guilford (76CVS5781)	Affirmed
ELIXSON v. UNC AT WILMINGTON No. 8210SC964	Wake (81CVS9508)	Affirmed
HOLDING BROS., INC. v. MILLS No. 8219DC710	Cabarrus (80CVD688)	Affirmed
KRESS v. KRESS No. 8222SC932	Iredell (81SP276)	Affirmed
ORGILL BROS. v. BRADSHAW No. 8230DC846	Cherokee (82CVD05)	Appeal Dismissed
SANDERS v. WHITE No. 8210DC911	Wake (81CVD6623)	Remanded
STATE v. ANDERSON No. 8226SC743	Mecklenburg (81CRS32545)	No Error
STATE v. CAVINESS No. 8214SC812	Durham (81CRS20179)	No Error
STATE v. CRUMPLER No. 8212SC872	Cumberland (79CRS4967)	No Error
STATE v. GOODE No. 8227SC891	Gaston (69CRS14505)	Affirmed
STATE v. HAIRSTON No. 8218SC838	Guilford (81CRS45695)	No Error
STATE v. HALL No. 8218SC892	Guilford (81CRS72062)	No Error
STATE v. JEFFERSON No. 8227SC688	Gaston (81CRS22943)	No Error
STATE v. LOCKLEAR No. 8216SC893	Robeson (81CRS23888)	No Error

STATE v. MILLS No. 829SC832	Warren (81CRS1266) (81CRS1268)	Dismissed in Part; No Error in Part
STATE v. PIERCE No. 8216SC860	Robeson (81CRS4031)	No Error
STATE v. ROBINSON No. 8221SC862	Forsyth (82CRS3777)	No Error
STATE v. RUE No. 828SC865	Lenoir (82CRS298) (82CRS299)	No Error
WALL v. TOWN OF MADISON No. 8217SC294	Rockingham (81CVS199)	Affirmed

JEFFREY P. MAZZA v. ROBERT A. HUFFAKER AND ROBERT A. HUFFAKER, M.D., P.A.

No. 8115SC1180

(Filed 15 March 1983)

1. **Physicians, Surgeons, and Allied Professions § 14— psychiatrist—malpractice—sufficiency of evidence**

Where there was evidence in a case that the relevant standard of care applicable to Chapel Hill psychiatrists included the negative imperative that they not have sexual relations with their patients' spouses, and there was evidence that defendant violated such standard, plaintiff presented sufficient evidence of the professional malpractice element of his claim.

2. **Physicians, Surgeons, and Allied Professions § 20.2— malpractice—instructions on abandonment of patient**

Evidence that a psychiatrist-patient relationship existed between defendant and plaintiff, and that defendant had sexual relations with plaintiff's wife thereby acting in violation of the standard of care required of a psychiatrist was evidence which supported an instruction that the jury must find there was malpractice if it found that defendant "abandoned [plaintiff] as a patient."

3. **Physicians, Surgeons, and Allied Professions § 20.2— malpractice—instructions on failure to use proper skill and ability**

In an action to recover damages for malpractice by defendant psychiatrist, the trial court did not err in instructing the jury that it must find malpractice if it determined defendant "failed to use that degree of professional learning, skill and ability which others similarly situated ordinarily possess." When considered with other instructions, the court sufficiently provided guidance as to the applicable standard of care and as to what could be considered as evidence of violations by defendant of the standard of care.

4. **Physicians, Surgeons, and Allied Professions § 20.2— malpractice—instructions**

The trial court properly instructed the jury that it could find malpractice if it determined that defendant "continued to treat [plaintiff] after becoming emotionally and sexually involved with [plaintiff's] wife."

5. **Physicians, Surgeons, and Allied Professions § 20.2— malpractice—instructions**

Where the evidence and instructions in a case placed central focus on the sexual relations between defendant and the plaintiff's wife during the term of defendant's and plaintiff's psychiatrist-patient relationship, the trial judge did not err in instructing that the jury must find malpractice if it determined that defendant "failed to recognize and guard against the transfer or countertransference phenomenon."

6. Physicians, Surgeons, and Allied Professions § 20.2— malpractice—instructions

The trial court did not err in instructing that the jury must find malpractice if it found that defendant psychiatrist abandoned plaintiff as a patient or if it found defendant continued to treat plaintiff after becoming emotionally and sexually involved with plaintiff's wife since each may be answered in the affirmative in that each deals with defendant having sexual relations with plaintiff's wife prior to an appropriate, gradual and careful cessation of the psychiatrist-patient relationship between defendant and plaintiff.

7. Physicians, Surgeons, and Allied Professions § 20.2— malpractice—failure to instruct on contributory negligence proper

In an action to recover damages from defendant on the grounds of negligence, criminal conversation, and alienation of affections, the trial court properly failed to instruct on contributory negligence with respect to the malpractice claim.

8. Physicians, Surgeons, and Allied Professions § 15.1— medical malpractice—expert testimony proper

The trial court properly admitted expert testimony that sexual relations between a psychiatrist and the wife of a patient would render useless previous treatment of that patient by the psychiatrist and would make it extremely difficult for the patient to ever enter again into a trusting relationship with any other psychiatrist since the testimony dealt directly with the situation presented by the evidence.

9. Physicians, Surgeons, and Allied Professions § 15.1— medical malpractice—expert testimony properly admitted

It was not improper for an expert witness to give content to the accepted standards of care by referring to the ethical standards of the profession since expert testimony asserted that both standards were the same.

10. Physicians, Surgeons, and Allied Professions § 21— medical malpractice—submission of issue of punitive damages proper

In an action in which defendant psychiatrist proceeded to have sexual relations with his patient's wife despite an awareness of the special vulnerabilities of his patient if the patient were to discover such a rendezvous, the evidence was sufficient to support an inference by the jury that defendant acted with conscious disregard of the mental well-being of his patient, and hence, the evidence was sufficient to support submission of a punitive damage issue in the medical malpractice case.

11. Physicians, Surgeons, and Allied Professions § 21— medical malpractice—damages—permanent pain and suffering and prospective income loss

Evidence tending to show that a patient who discovered his wife in bed with his psychiatrist would never again be able to form the trust and relationship with a psychiatrist which is necessary for psychiatric treatment, and that such a discovery would harm the mental well-being of a patient combined with evidence that plaintiff is a manic depressive requiring psychiatric care and that he constantly relives the discovery of his psychiatrist with his wife in his

bed and that it impairs his concentration and deprives him of sleep, was sufficient to permit the jury to infer with reasonable certainty that defendant's tortious act will cause plaintiff pain and suffering of a permanent nature.

12. Physicians, Surgeons, and Allied Professions § 21— malpractice action—damages—prospective losses in income

Evidence of plaintiff's profession, age, and life expectancy, evidence about the permanent nature of plaintiff's injury, testimony about plaintiff's annual gross income, and testimony that an incident had a deleterious effect on plaintiff's dental practice, academic work, and clinical skills presented a sufficient basis to allow the jury to draw an inference as to the amount of money necessary to compensate him for reduced earning capacity.

13. Physicians, Surgeons, and Allied Professions § 21— malpractice action—compensatory damages for past medical expenses

Where plaintiff incurred expenses of approximately $17,000 for psychiatric treatment paid by plaintiff to defendant and where defendant's wrongful conduct destroyed whatever benefits the plaintiff had purchased from the defendant, the trial judge properly allowed plaintiff to recover the reasonable value of all medical expenses incurred by plaintiff which were rendered worthless by defendant's tortious conduct.

14. Damages § 11.2— assault, battery, and destruction of personal property—failure to submit issue of punitive damages proper

In a medical malpractice action where defendant psychiatrist counterclaimed for assault, battery, and destruction of personal property, the trial judge properly failed to submit an issue of punitive damages on defendant's counterclaim in light of the undeniable evidence of the defendant's provoking conduct.

APPEAL by defendants from *Bailey, Judge.* Judgment entered 10 June 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals on 31 August 1982.

This appeal arose from plaintiff's action to recover damages from defendants Robert A. Huffaker and Robert A. Huffaker, M.D., P.A., on the grounds of negligence, and from defendant Robert A. Huffaker on the grounds of criminal conversation, and alienation of affections. Defendant counterclaimed, seeking damages from plaintiff for assault, battery, and destruction of personal property. Upon a trial by jury, a verdict was returned containing the following issues and answers:

1. Did the Defendant, Robert A. Huffaker, have criminal conversation with the Plaintiff's wife?

ANSWER: Yes.

2. What amount, if any, is due and owing the Plaintiff due to the Defendant's criminal conversation with the Plaintiff's wife?

ANSWER: $50,670.00.

3. Did the Defendant, Robert A. Huffaker, alienate the affections of the Plaintiff's wife?

ANSWER: No.

. . .

5. Did the Defendants, Robert A. Huffaker and Robert A. Huffaker, M.D., P.A. commit medical malpractice on their treatment of the Plaintiff?

ANSWER: Yes.

6. What amount, if any, is due to the Plaintiff due to the malpractice by the Defendants upon the Plaintiff?

ANSWER: $102,000.00.

. . .

7. What amount, if any, is the Plaintiff entitled to recover from the Defendants for punitive damages for

. . .

(c) Medical malpractice: $500,000.00

8. Was Defendant, Robert A. Huffaker, injured and damaged by the Plaintiff?

ANSWER: Yes.

9. What amount, if any, is Defendant, Robert A. Huffaker, entitled to recover for

(a) Personal injury: $3,000.00

(b) Property damage: $85.00

The Court entered judgment upon such verdict, setting defendant Huffaker's $3,085 counterclaim recovery off against plaintiff's $50,670 criminal conversation recovery, for a net recovery of $47,585 on the criminal conversation verdict; the court further ad-

judged that plaintiff recover from defendants $102,000 in compensatory damages and $500,000 in punitive damages on the medical malpractice verdict. Defendants appealed.

Boyce, Morgan, Mitchell, Burns & Smith, by G. Eugene Boyce and James M. Day, and Midgette, Higgins, Lembo & Graves, by Thomas D. Higgins III, for plaintiff, appellee.

Young, Moore, Henderson & Alvis, by Beth R. Fleishman and Jerry S. Alvis, for defendant, appellants.

HEDRICK, Judge.

Defendant's first assignment of error brought forth in his brief is that "[t]he court erred in denying defendants' motions for directed verdict and judgment notwithstanding [the] verdict on the malpractice claim for reason that no act of professional malpractice was shown by plaintiff's evidence."

In passing upon a defendant's motion for directed verdict, the plaintiff's "evidence must be taken as true, . . . and [the motion] may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiffs." *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974). "In a negligence case, '[i]f the evidence in the light most favorable to the plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion . . . [for directed verdict].' " *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 645, 272 S.E. 2d 357, 360 (1980) (citation omitted). In addition to the rule giving the plaintiff the benefit of the doubt on a motion for nonsuit, "judicial caution is particularly called for in actions alleging negligence as a basis for recovery." *Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E. 2d 286, 289 (1981) (citations omitted). In passing on a motion for judgment notwithstanding the verdict, the court employs the same standards as are used in passing on a motion for directed verdict. *Kaperonis v. Underwriters*, 25 N.C. App. 119, 212 S.E. 2d 532 (1975).

In actions for damages for personal injury arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care, the health care provider's liability is conditioned on proof by the plaintiff "that

the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12. A showing that the health care provider violated such standards of practice satisfies plaintiff's burden on the professional malpractice element of his claim.

> Usually [the question of] what is the standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information. As to this, both the court and jury must be dependent on expert testimony. Ordinarily there can be no other guide.

Jackson v. Sanitarium, 234 N.C. 222, 226-227, 67 S.E. 2d 57, 61 (1951).

In the present case, plaintiff presented evidence tending to show the following:

Plaintiff suffers from manic depressive psychosis. Since 1975, he had received ongoing treatment of his illness from defendant Huffaker, a psychiatrist. As part of his treatment, plaintiff was prescribed medication by defendant Huffaker and participated in frequent and regular sessions at Huffaker's office, during which plaintiff was encouraged to have very intimate, self-revelatory, and uninhibited discussions with Huffaker. The treatment was described as "insight therapy" and "psychoanalysis." Plaintiff, in many of his sessions, for example, one on 4 May 1979, expressed to Huffaker serious concern about maintaining a healthy marital relationship with his wife, Jacqueline Mazza. Plaintiff had come to think of defendant Huffaker as his best friend. In May 1979, Jacqueline requested that she and plaintiff separate, and on 28 May 1979, plaintiff moved out of the Woodhaven Road house, in Chapel Hill, in which he, his wife, and family had lived. On 6 July 1979, plaintiff was entertaining one of his and Jacqueline's sons, with her prior agreement. Upon calling his wife at the Woodhaven Road home, at 10:40 p.m., to check with her as to whether he could bring the son back to her the next morning, plaintiff became concerned about his wife's welfare after noticing her conduct over the telephone. Plaintiff thereupon drove over to the

Woodhaven Road house "to make sure everything was okay." Plaintiff observed his psychiatrist's automobile parked near the Woodhaven Road house and saw some of his psychiatrist's clothing strewn about the family room. Upon approaching and entering the locked master bedroom, plaintiff discovered his psychiatrist, Robert Huffaker, and his wife, Jacqueline Mazza, together in bed. Huffaker was naked and putting on his undershorts, and Jacqueline was naked and putting on a light housecoat.

Plaintiff also presented expert testimony tending to show the following:

Psychiatrists are physicians. The first duty of a physician to a patient is to do no harm; the second is to maintain the patient's trust and confidence in the physician. These basic duties apply and are even more stringent with psychiatrists, since a psychiatrist's patient reveals his innermost thoughts, feelings, worries, and concerns. Psychiatrists, therefore, have a strict duty not to breach the trusting relationship and must be very careful about what they say and how they influence patients. Psychiatrists have to take great care in the termination of a relationship with a patient so that the psychiatric patient, who is very sensitive, does not feel that he is abandoned or rejected. Especially in light of the intimate relationship between psychiatrist and patient, the psychiatrist's duty once the psychiatrist-patient relationship has been established extends beyond the hospital or consulting room and includes social situations. The psychiatrist must endeavor to assure that the patient does not forget that the doctor is a doctor. A patient can be seriously harmed if the relationship changes from a therapeutic one to a social one. Special duties exist in the practice of medicine not to ruin a doctor and patient relationship, and those duties are more critical in psychiatry than in other areas of medicine. If the relationships are not terminated properly, but too abruptly, great harm can result to a patient. The psychiatrist's duty to advance his patient's interests is violated if the psychiatrist has sex with the patient's spouse; such sexual relations are not therapeutic. Sexual relations between a psychiatrist and his patient's wife would destroy the patient's trust in the psychiatrist and would destroy the doctor-patient relationship. Covert sexual relations between a psychiatrist and a patient's wife, if discovered by the

patient, would make it extremely difficult for the patient to establish ever again a necessary trusting relationship with any psychiatrist, would render previous treatment useless, and would do harm to the mental well-being of the patient. A psychiatrist who becomes sexually involved with a relative of a patient is not exercising the requisite amount of skill, learning, and ability that a psychiatrist in any community in the United States ought to exercise. All the aforementioned standards and duties of physicians and psychiatrists are applicable in Chapel Hill.

[1] There is ample evidence in the present case that the relevant standard of care applicable to Chapel Hill psychiatrists included the negative imperative that they not have sexual relations with their patients' spouses. The expert testimony tended to establish an obligation on the part of psychiatrists, as a part of their duties within the patient-psychiatrist relationship, to conduct themselves in a certain way and this obligation applies even beyond the office, clinic, hospital, or laboratory.

There was abundant evidence that defendant Huffaker did not refrain from having sexual relations with the plaintiff's wife. Hence, there was expert evidence defining the applicable standard of care and evidence that defendant Huffaker violated such standard. Contrary to defendants' assertions, plaintiff thus presented sufficient evidence of the professional malpractice element of his claim.

Defendants, however, object in portions of their brief to the judicial deference accorded expert testimony on the standard of care. Defendants suggest that, notwithstanding expert testimony, defendant Huffaker's conduct was not, as a matter of law, malpractice. There may well be some instances in which (1) expert testimony established that certain conduct on the part of a physician is either required or prohibited by the applicable standard of care, and (2) other evidence shows noncompliance by the defendant with such a standard and yet the court nevertheless regards such evidence as insufficient as a matter of law to support a verdict of malpractice. Such an instance would represent a ruling by the court that the standards testified to by the expert were in excess of what the law requires. In the present case, however, we believe that the expert testimony on the applicable standard of care and the other evidence showing a departure therefrom were

sufficient to permit the jury to pass upon the issue of whether malpractice occurred. We are not prepared to rule *as a matter of law* that the expert testimony proscribing sexual relations between a psychiatrist and his patient's wife was a too-burdensome or otherwise incorrect statement of the standard of care applicable to psychiatrists. *See Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57 (1951); *Smithers v. Collins*, 52 N.C. App. 255, 278 S.E. 2d 286 (1981). Defendants' first assignment of error is overruled.

In their next six assignments of error, defendants challenge instructions given by the court about conduct upon which the jury could base a finding of malpractice. In each assignment of error, defendants challenge a particular instruction on the ground that the evidence was insufficient to permit the giving of such instruction. An instruction relating to a factual situation not properly supported by the evidence is erroneous. Conversely, the court has a duty to declare and explain the law as it relates to those factual situations for which there is evidentiary support. *Foods, Inc. v. Super Markets*, 288 N.C. 213, 217 S.E. 2d 566 (1975). Further,

> the court's charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, this Court will not sustain an exception on the grounds that the instruction might have been better.

Hanks v. Insurance Co., 47 N.C. App. 393, 404, 267 S.E. 2d 409, 415 (1980) (citations omitted).

[2] Defendants first challenge the court's instruction that the jury must find there was malpractice if it found that defendant Huffaker "abandoned Dr. Mazza as a patient." Defendant contends there was no "evidence of abandonment." There was, however, evidence in the present case that while the psychiatrist-patient relationship existed between defendant and plaintiff, defendant Huffaker had sexual relations with plaintiff's wife and in so doing acted in violation of the standard of care required of a psychiatrist. This evidence would suffice to permit the jury to find that defendant Huffaker has abruptly abandoned his patient, Dr. Mazza, and was acting as if there had been no psychiatrist-

patient relationship with Dr. Mazza. The instruction on abandonment was not improper, and this assignment of error is not sustained. The above-mentioned evidence and expert testimony about the requirement of trust in a psychiatrist-patient relationship were also sufficient to permit the court to give the instruction next assigned as error, wherein the court stated the jury must find malpractice if it found defendant Huffaker "used his position of trust and confidence to harm his patient."

[3] Defendant next challenges the court's instruction that the jury must find malpractice if it determined defendant Huffaker "failed to use that degree of professional learning, skill and ability which others similarly situated ordinarily possess." Under this assignment of error, defendants contend the court did not provide sufficiently elaborate instructions as to what evidence there was of the applicable standard of care, and as to what could be considered as evidence of violations by defendant Huffaker of the standard of care. Hence, defendant argues, the jury could have found defendant Huffaker liable for malpractice on the basis of conduct wholly unrelated to anything testified to at trial. We disagree. First, the instructions sufficiently apprised the jury of what evidence it should consider with respect to the applicable standard of care when the court specifically referred the jury to the testimony given by the expert witnesses on the standard of care. Secondly, the court provided the jury with sufficient guidance as to what evidence could permissibly be considered as conduct constituting malpractice, in that the instructions on the malpractice issue pointed out no malpractice could be found if the jury determined the psychiatrist-patient relationship between defendant Huffaker and plaintiff had terminated prior to any sexual or social contact between defendant Huffaker and plaintiff's wife. These instructions adequately directed the jury's attention to the evidence of defendant Huffaker's relations with plaintiff's wife as the relevant conduct to be considered on the malpractice issue. This assignment of error has no merit.

[4] Next defendant argues the court erred in instructing the jury that it should find malpractice if it determined defendant Huffaker "continued to treat Dr. Mazza after becoming emotionally and sexually involved with Dr. Mazza's wife." Defendants contend that such a determination could not be a basis for a verdict finding medical malpractice, since the existence of a psychiatrist-

patient relationship between defendant Huffaker and plaintiff, at the time defendant Huffaker and plaintiff's wife were discovered in bed together by plaintiff, would not affect the character of the legal wrong done plaintiff. Defendants argue that such legal wrong would be the same as if there had been no psychiatrist-patient relationship at the time of the discovery, and the legal wrong would not be malpractice but would be criminal conversation or alienation of affections, if anything. Expert testimony in the present case, however, asserted that the existence of the psychiatrist-patient relationship is not irrelevant or superfluous, since sexual relations between a psychiatrist and his patient's wife during the term of the psychiatrist-patient relationship is a violation of the applicable standard of care for psychiatrists. This testimony sufficed to permit the court to issue the challenged instruction as a basis for malpractice. The assignment of error is overruled.

[5] Defendants next assign error to the court's instruction that the jury must find malpractice if it determined that defendant Huffaker "failed to recognize and guard against the transfer or counter-transference phenomenon." According to expert testimony, transference is a common phenomenon in psychiatric therapy in which the psychiatric patient transfers onto the psychiatrist emotions the patient has towards someone else. Counter-transference is a similarly common phenomenon in which the psychiatrist projects onto his patient feelings that the psychiatrist has towards someone else. Defendants first contend there was no evidence that defendant Huffaker failed to recognize and respond correctly to transference and counter-transference between Jacqueline Mazza, whom he was treating as a patient, and himself. Defendants contend secondly that even if there were such evidence, defendant Huffaker's improper response to transference or counter-transference would be the basis of a malpractice action only on behalf of Jacqueline Mazza, if anyone, and not on behalf of plaintiff.

The evidence and instructions in the present case placed central focus on the sexual relations between defendant Huffaker and the plaintiff's wife during the term of Huffaker's and plaintiff's psychiatrist-patient relationship. In light of that central focus, the instruction challenged here must also be deemed to pertain to the sexual relations between defendant Huffaker and the plaintiff's

wife, with the added issues of transference and counter-transference. Hence, if the jury based its finding of malpractice on the instruction that it find malpractice if it determined defendant Huffaker reacted improperly to transference or counter-transference, then the jury necessarily found that defendant Huffaker had sexual relations with plaintiff's wife during the course of the psychiatrist-patient relationship, since such sexual relations are of what the improper reaction to transference or counter-transference consisted. This assignment of error is meritless.

[6] In their final assignment of error directed to the court's charge to the jury on liability, defendants challenge the court's instructions that the jury must find malpractice if it found defendant Huffaker abandoned plaintiff as a patient or if it found defendant Huffaker continued to treat plaintiff after becoming emotionally and sexually involved with plaintiff's wife. Defendants contend this charge "was tantamount to a virtual peremptory instruction on the malpractice issue" in that it compelled the jury to find malpractice by requiring it to do so whether it found one set of facts as true or whether it found the opposite set of facts as true. The court's instructions on abandonment and continued treatment do not pose a situation in which the jury must find malpractice if it finds that either of two mutually exclusive events occurred. The two prongs of the challenged instruction do not call for opposite determinations by the jury; rather, each may be answered in the affirmative since each deals with defendant Huffaker's having sexual relations with plaintiff's wife prior to an appropriate, gradual, and careful cessation of the psychiatrist-patient relationship between defendant Huffaker and plaintiff. The jury would have to find that the same essential set of facts occurred to answer either prong in the affirmative, and that set of facts, i.e. Huffaker's sexual relations with plaintiff's wife on 6 July 1979, sufficed as a predicate for malpractice liability. This assignment of error is without merit.

[7] Defendants next assign error to the court's failure to submit an issue of plaintiff's contributory negligence with respect to the malpractice claim. Defendants first contend there was sufficient evidence to warrant the submission of such issue because of evidence that (1) prior to discovering his wife and defendant in bed together on 6 July 1979, plaintiff suspected the two were hav-

ing an affair, (2) prior to his breaking down the door of the bedroom occupied by the two on 6 July 1979, plaintiff was aware of the possibility defendant Huffaker was in the house with plaintiff's wife, since plaintiff had seen Huffaker's clothing in the family room and his automobile parked nearby, and (3) plaintiff was sufficiently informed about his psychological vulnerabilities to have reason to know he would be very distressed if he were to see his wife and his psychiatrist in bed together. Defendants contend this evidence shows that plaintiff, in entering the bedroom, did not exercise ordinary care for his own safety in light of a foreseeable danger and unreasonable risk and that his conduct contributed to his injury. Defendants also contend the issue of contributory negligence should have been submitted on the basis of evidence tending to show that plaintiff had led defendant Huffaker to believe their psychiatrist-patient relationship was terminated.

We have carefully perused the record in light of defendants' imaginative contentions with respect to an issue of contributory negligence and conclude the trial court did not err in failing to submit such an issue. We can hardly perceive of a situation where an issue of contributory negligence would be less appropriate.

[8] Defendants next assign error to the admission of expert testimony that sexual relations between a psychiatrist and the wife of a patient would render useless previous treatment of the patient by the psychiatrist and would make it extremely difficult for the patient to enter ever again into a trusting relationship with any other psychiatrist. Defendants contend this expert testimony failed to comply with the requirement that expert opinion evidence be in response to hypothetical questions which incorporate all the relevant underlying facts upon which the opinion is to be based. The fatal omission, according to defendants, is a specific reference to Dr. Huffaker, rather than "a psychiatrist" and to Dr. Mazza instead of "a patient." Defendants argue that the testimony was inadmissible because it was in the abstract, rather than being particularized to deal with the specific *dramatis personae* in this case. The testimony, however, about what sexual relations between "a psychiatrist" and his patient's wife would do to his "patient" necessarily covered the situation in the present case, since defendant Huffaker was "a psychiatrist," and plaintiff was "a patient" of Huffaker's. The evil posed by improperly ad-

mitted expert opinion is the possibility that it could be based on factual premises different from those presented at trial and that such expert opinion, coming from highly regarded witnesses, could have undue influence on the jury on an issue with which the expert testimony really does not deal. *See* 1 BRANDIS ON NORTH CAROLINA EVIDENCE § 123 (2d Rev. Ed. 1982). In the present case, however, there is no possibility that the challenged expert testimony misled the jury into trusting the experts' conclusions as relevant when such conclusions actually dealt with different premises and a different issue. The testimony challenged here deals directly with the situation presented by the evidence, and thus its admission to show that defendant Huffaker's conduct rendered useless his previous treatment of plaintiff, was not improper. Other testimony about possible adverse consequences to "a patient" upon certain acts or omissions of "a psychiatrist" (e.g. the toxic effect upon a manic depressive patient when he gets too much lithium) was admitted more as general background information about a psychiatrist's standard of care than as pertaining to the specific injuries incurred by plaintiff in the present case, and the jury would have so understood, particularly in light of the court's not instructing on such injuries. The exclusion of such testimony would not likely have produced a different result at trial, and its admission, if erroneous, is not grounds for reversal. This assignment of error is overruled.

[9] In their next assignment of error, defendants argue, "[t]he Court erred in permitting the [expert] witnesses . . . to express their opinions as to professional ethics for reason that breaches of professional ethics are not civilly actionable as malpractice, and this error . . . permitted . . . [the jury] to impose liability upon defendants for a breach of professional ethics."

As previously discussed, the professional malpractice element of an actionable malpractice claim is satisfied if it is shown that the health care provider violated the relevant standard of practice for his profession, and such standard of practice may be supplied by expert testimony. In the present case, expert testimony supplied such standard of practice and equated it with the standards of professional ethics. According to such expert testimony, the accepted standards of care are coterminous with the relevant standards of professional ethics. Hence, it was not improper for the expert witnesses to give content to the accepted standards of

care by referring to the ethical standards of the profession, since expert testimony asserted that both standards are the same. Although defendants may be correct in arguing that breaches of professional ethics are not actionable in a malpractice suit when such standards differ from the reasonable standard of care imposed by tort law, their argument is unavailing in the present case, where expert testimony equated the two sets of standards. This assignment of error is overruled.

[10] Defendants also assign error to the court's submission of an issue of punitive damages. Defendants contend there was insufficient evidence to warrant submission of such issue.

> In jury trials the usual rules governing motions for a directed verdict apply when there is such a motion as to a claim for punitive damages on the grounds of insufficiency of evidence, and the trial judge must determine as a matter of law whether the evidence when considered in the light most favorable to plaintiff is sufficient to carry the issue of punitive damages to the jury.

Shugar v. Guill, 304 N.C. 332, 339, 283 S.E. 2d 507, 511 (1981) (citations omitted). The purpose of assessing punitive damages is "to punish a defendant for his wrongful acts and to deter others from committing similar acts." 304 N.C. at 335, 283 S.E. 2d at 509. Since the malpractice liability found by the jury in the present case is based on defendant Huffaker's breach of the accepted standards of care for psychiatrists, the following excerpt on punitive damages in negligence actions is relevant:

> References to *gross* negligence as a basis for recovery of punitive damages may be found in our decisions. . . .
>
> An analysis of our decisions impels the conclusion that this Court, in references to gross negligence, has used that term in the sense of wanton conduct. Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

Hinson v. Dawson, 244 N.C. 23, 27-28, 92 S.E. 2d 393, 396-97 (1956) (emphasis in original) (citations omitted).

The evidence in the present case, taken in the light most favorable to plaintiff, tends to show that on 6 July 1979 defendant Huffaker proceeded to have sexual relations with his patient's wife despite an awareness of the special vulnerabilities of his patient if the patient were to discover such a rendezvous. Evidence of such conduct by a psychiatrist towards his patient, in the face of the trusting relationship which develops between psychiatrist and patient, is evidence of more than mere inadvertence on the part of the psychiatrist. The evidence tends to show a wilful act by defendant Huffaker of having sex with his patient's wife, and an awareness, although disregarded, of the risks such an act posed towards his patient, Dr. Mazza. This evidence was sufficient to support an inference by the jury that defendant Huffaker acted with conscious disregard of the mental well-being of Dr. Mazza, the very mental well-being with which defendant Huffaker had been entrusted. Hence, the evidence was sufficient to support submission of a punitive damage issue in the medical malpractice case. The case of *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981), wherein our Supreme Court held that the plaintiff was not entitled to submission of a punitive damage issue against the defendant, who intentionally struck plaintiff in the face and thereby broke his nose and caused it to bleed profusely, is distinguishable. There, the court pointed to the plaintiff's provoking conduct and indicated that such conduct can so mitigate the defendant's tort as to preclude a punitive damages issue against the defendant. In the present case, there was no such provoking conduct by plaintiff, Dr. Mazza, which would be in mitigation of the tortious act of defendant Huffaker's having sex with his patient's wife. This assignment of error is overruled.

[11] Defendants also assign error to the court's instructions permitting the jury to consider, in its computation of damages, plaintiff's permanent pain and suffering and his prospective income loss. With respect to the court's instructions on permanency and future pain and suffering, defendant contends there was none of the required expert testimony necessary to warrant instructions on such items of damage, particularly the permanency aspect. There was, however, competent expert testimony tending to show that a patient who discovered his wife in bed with his psychiatrist

would *never again* be able to form the trusting relationship with a psychiatrist which is necessary for psychiatric treatment, and that such a discovery would harm the mental well-being of a patient. This evidence, in conjunction with evidence that plaintiff is a manic depressive requiring psychiatric care and that he constantly relives the 6 July 1979 discovery and that it impairs his concentration and deprives him of sleep, is sufficient to permit the jury to infer with reasonable certainty that defendant Huffaker's tortious act will cause plaintiff pain and suffering of a permanent nature. Hence, the court's instructions on plaintiff's future pain and suffering of a possibly permanent nature were not improper. *See Mitchem v. Sims*, 55 N.C. App. 459, 285 S.E. 2d 839 (1982). *See generally, Kimberly v. Howland*, 143 N.C. 399, 55 S.E. 778 (1906); *Crews v. Finance Company*, 271 N.C. 684, 157 S.E. 2d 381 (1967); *Sparks v. Products Corp.*, 212 N.C. 211, 193 S.E. 31 (1937). *Compare McDowell v. Davis*, 33 N.C. App. 529, 235 S.E. 2d 896 (1977).

[12] Similarly, there was sufficient evidence to warrant an instruction on plaintiff's prospective losses in income. Defendants erroneously contend that with respect to plaintiff's diminished earning capacity, there was insufficient evidence to allow the jury to do anything other than speculate. The evidence of plaintiff's profession, age, and life expectancy, the aforementioned evidence about the permanent effect of plaintiff's injury, the concomitant impairment of his ability to concentrate and to sleep, testimony about plaintiff's annual gross income from 1976 through May 1981, and testimony that the 6 July 1979 incident had a deleterious effect on plaintiff's dental practice, academic work and clinical skills present a sufficient basis to allow the jury to draw an inference as to the amount of money necessary to compensate him for reduced earning capacity. Defendants' exceptions pertaining to future pain and suffering and prospective income loss are overruled.

[13] Defendants next assign error to a portion of the court's instructions on recoverable compensatory damages for plaintiff's past medical expenses. The pertinent challenged instructions are as follows:

> A person who suffers personal injury proximately caused by the negligence of another is entitled to recover in a lump

> sum the present worth of all damages past, present and future which naturally and proximately result from that negligence. Such damages include medical expenses . . .
>
> Medical expenses would include the actual amount which you find by the greater weight of the evidence has been paid or incurred or rendered worthless by the . . . defendant as a proximate result of the defendant's negligence. You may consider hospital bills, doctors' bills and drug bills and any other medical expenses that you find to have existed.

The court also instructed:

> In this case Dr. Mazza contends that he has expended in past medical expenses prior to this matter the sum of approximately $17,000 for the treatment of himself and of his wife; and he contends among other things that he is entitled to recover this. That the value of that treatment having been destroyed by the alleged acts of Dr. Huffaker.

The "approximately $17,000" referred to in the court's instructions pertain to the treatment fee paid by plaintiff to defendant Huffaker from 1975 through 1979 for psychiatric services rendered by defendant Huffaker. This treatment was received and the fees therefor were incurred by plaintiff prior to his discovery of the rendezvous between his wife and defendant Huffaker.

"[C]ompensatory damages are allowed as indemnity to the person who suffers loss, in satisfaction and recompense for the loss sustained." *Bowen v. Bank*, 209 N.C. 140, 144, 183 S.E. 266, 268 (1936). The purpose of the law in allowing such damages "is to place the party as near as may be in the condition which he would have occupied had he not suffered the injury complained of." *Id.* In a malpractice action, plaintiff is "entitled to recover compensation only for those injuries which proximately resulted from defendant's negligent treatment." *Payne v. Stanton*, 211 N.C. 43, 45, 188 S.E. 629, 630 (1936).

In the present case, the defendant can hardly argue that his services to the plaintiff were not worth the fees paid. At the time of the tort, the plaintiff's mental condition reflected the benefit of the defendant's professional services. However, by his wrongful conduct, the defendant destroyed whatever benefits the plaintiff

had purchased from the defendant for $17,000.00. We agree with the trial judge that the plaintiff is entitled to recover the reasonable value of all medical expenses incurred by plaintiff which were rendered worthless by defendant's tortious conduct. This assignment of error is not sustained.

Defendants have additional assignments of error relating to the instructions to the jury on damages, which we have carefully reviewed. We realize that the instructions deviate in some respects from the approved instructions on damages in the usual personal injury case; however, we find that under the unusual circumstances of this case, that when the instructions with respect to both compensatory and punitive damages are considered contextually as a whole, the charge is free from prejudicial error.

[14] Finally, defendants assign error to the court's failure to submit an issue of punitive damages to be assessed against plaintiff for his liability in defendant Huffaker's counterclaim for assault, battery, and destruction of personal property. If there is sufficient evidence from which the jury may reasonably infer that the wrongdoer's actions were activated by personal ill will toward the victim or that his acts were aggravated by oppression, insult, rudeness, or a wanton and reckless disregard of plaintiff's rights, the issue of punitive damages should be submitted to the jury. *See Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981); *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). The evidence of plaintiff's acts, considered in the light most favorable to the counterclaiming defendant, is as follows: Upon discovering his wife and Huffaker in bed together on 6 July 1979, plaintiff aimed a loaded shotgun at Huffaker and fired the gun over Huffaker's head, just missing Huffaker. Plaintiff and Huffaker then wrestled and during that affray plaintiff tried to gouge out both of Huffaker's eyeballs and thereby bruised them. Upon his release from North Carolina Memorial Hospital on 10 July 1979, plaintiff located defendant Huffaker's automobile and slashed two of its tires with a pocketknife and removed from the automobile Huffaker's briefcase and suitcase. Evidence that plaintiff assaulted Huffaker with a deadly weapon or inflicted or attempted to inflict serious bodily injury upon Huffaker, insofar as it is evidence of an aggravated criminal assault under N.C. Gen. Stat. § 14-33, would ordinarily require submission to the jury of an issue of punitive damages in defendant Huffaker's counterclaim against plaintiff.

Carawan v. Tate, 53 N.C. App. 161, 280 S.E. 2d 528 (1981), *modified and aff'd*, 304 N.C. 696, 286 S.E. 2d 99 (1982); *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936).

However, we hold as a matter of law that the trial judge correctly refused to submit an issue of punitive damage on defendant's counterclaim, in light of the undeniable evidence of Huffaker's provoking conduct. *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981).

Defendants have not brought forward and argued any assignments of error relating to the judgment for criminal conversation, and we have held there was no error in the case relating to the defendants' counterclaim against the plaintiff, and we have also held there was no error in plaintiff's claim against the defendants for psychiatric malpractice, thus the judgment will be affirmed in all respects.

No error.

Judges ARNOLD and WELLS concur.

JOE HENRY, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE HENRY v. FLOYD DEEN, JR., M.D., FLOYD DEEN, JR., M.D., P.A., ANN HALL AND ABDULHAKIM NIAZI-SAI, M.D.

No. 8220SC266

(Filed 15 March 1983)

1. **Rules of Civil Procedure § 15.1— refusal to grant amendment to complaint error**

Where there was no evidence of undue delay, undue prejudice to the defendant, or bad faith on the plaintiff's part, the trial court erred in not allowing plaintiff to amend his complaint pursuant to G.S. 1A-1, Rule 15(a).

2. **Physicians, Surgeons, and Allied Professions § 16.1— allegations of complaint sufficient to raise claim of medical malpractice**

In a civil action involving claims for wrongful death and civil conspiracy, the trial court erred in dismissing plaintiff's complaint as it related to the culpability of one of the doctors for medical malpractice since plaintiff's amended complaint contained allegations that the physician attempted to diagnose and treat the patient by telephone and failed to examine the radiologist's report and X-rays of the patient. These allegations raised a claim

of medical malpractice, and the original pleading gave sufficient notice of the physician's involvement in the treatment of the patient to trigger the relation back provision of G.S. 1A-1, Rule 15(c).

3. Damages § 12.1— pleadings for punitive damages insufficient

In a civil action involving claims for wrongful death and civil conspiracy against two physicians and a physician's assistant, the trial court did not err in dismissing plaintiff's claim for punitive damages against defendants since plaintiff alleged gross negligence and willful and wanton conduct on the part of the defendant but failed to make allegations of any fact showing any aggravating circumstances which would give rise to punitive damages.

4. Conspiracy § 2.1— civil conspiracy—insufficient evidence

The basis for an action for civil conspiracy is not the agreement to conspire, but the damage suffered by the plaintiff; therefore, where the plaintiff showed no damage, the trial court's order dismissing all claims of civil conspiracy as against any of the defendants was proper.

Judge EAGLES concurring in part and dissenting in part.

APPEAL by plaintiff from *Kivett, Judge.* Order entered 14 December 1981 in Superior Court, ANSON County. Heard in the Court of Appeals 20 January 1983.

This is a civil action involving claims for wrongful death and civil conspiracy against two physicians and a physician's assistant. Plaintiff, as administrator of the estate of Archie Lee Henry, originated this action on 25 June 1981 by filing a complaint seeking monetary damages for the wrongful death of Henry as the proximate result of negligent conduct of defendants Deen, Hall and Niazi.

In his complaint, the plaintiff alleged the following: The decedent, complaining of severe chest pains went to the emergency room of the Anson County Hospital on 1 July 1979. The emergency room physician diagnosed the decedent's condition as pneumonia, took chest X-rays, prescribed medication and discharged Henry. Later that day the hospital radiologist reviewed the X-rays and indicated Henry's medical condition involved possible cardiac deterioration. The emergency room physician called Henry late in the evening on 1 July 1979 and instructed him to go to Dr. Floyd Deen's office for more complete medical evaluation.

On 3 July 1979 Henry went to Deen's office where he was seen by Dr. Deen and Ann Hall, Deen's physician's assistant.

After examining Henry, Deen and Hall advised him to continue taking the medicine prescribed by the emergency room physician and to return for a follow-up visit on 6 July 1979. Henry returned to Deen's office on 6 July 1979. His medical condition was unchanged. Dr. Deen was not in his office on 6 July 1979 and Henry was seen by Ann Hall. The plaintiff also alleges that Hall performed no diagnostic tests during the visit on 6 July 1979, but told Henry to continue taking his medication. On 8 July 1979 Henry died of a massive myocardial infarction.

After Henry's death, the plaintiff and Henry's family began investigating the nature of the medical treatment given to Henry. Plaintiff alleges that when defendants Deen and Hall learned of the investigation they conspired to create false and misleading entries in decedent's medical records. The complaint specifically states Deen, Hall and the defendant Dr. Niazi further conspired to falsify medical records detailing a nonexistent consultation between Dr. Niazi and Hall on 6 July 1979.

Plaintiff's complaint sets forth six counts against the defendants which can be summarized as follows: (1) Henry's death was proximately caused by defendant Deen's negligence in failing to provide proper medical care; (2) Henry's death was proximately caused by defendant Hall's negligent failure to provide adequate medical care; (3) Hall's negligence was imputed to Dr. Deen's professional association under the doctrine of *respondeat superior*; (4) the gross, wanton, intentional and reckless conduct of Deen and Hall entitled the plaintiff to recover punitive damages; (5) the conspiracy between Deen and Hall to falsify medical records constituted a civil conspiracy giving rise to punitive damages; (6) the conspiracy between Deen, Hall and Niazi to create a record of a nonexistent consultation constituted a civil conspiracy giving rise to punitive damages. Also, in paragraph No. 6 of the complaint, the plaintiff states that this action was for "the wrongful death of Henry as the proximate result of certain negligent and willful, wanton conduct on the part of Deen, Hall and Niazi, acting jointly and severally."

On 30 November 1981 the plaintiff filed a motion for leave to amend his complaint. Plaintiff's amended complaint was substantially similar to the original complaint except that it added more detailed factual allegations of Dr. Niazi's conduct. The amended

complaint pleaded alternatively that, pursuant to an arrangement between Niazi and Deen by which Niazi treated Deen's patients in Deen's absence, Hall did call Niazi concerning Henry's medical condition on 6 July 1979 and that Niazi was negligent in failing to give the decedent proper medical attention.

On 14 December 1981 Judge Kivett denied plaintiff's motion to amend the complaint, dismissed the complaint as to defendant Niazi and dismissed the claim for civil conspiracy and punitive damages as to Deen and Hall.

Plaintiff appealed.

James, McElroy & Diehl, by Gary S. Hemric for plaintiff-appellant.

Charles V. Tompkins, Jr. and Fred B. Clayton for defendant-appellees Floyd Deen, Jr., M.D., and Floyd Deen, Jr., M.D., P.A.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding for defendant-appellee Abdul-Hakim Niazi-Sai, M.D.

No counsel for defendant-appellee Ann Hall.

HEDRICK, Judge.

The plaintiff contends the trial court erred in (1) denying his motion to amend the complaint, (2) dismissing the complaint as it related to defendant Niazi, (3) dismissing the claim of civil conspiracy against defendants Deen and Hall and (4) granting defendants' motion to dismiss and strike from the complaint those paragraphs relating to punitive damages.

[1] We first consider plaintiff's argument that his motion to amend the complaint on 30 November 1981 was improperly denied. Rule 15(a) of the North Carolina Rules of Civil Procedure sets out the conditions for amending pleadings. It states in pertinent part: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In interpreting Fed. R. Civ. P. 15(a), which was the model for the North Carolina rule, the United States Supreme Court wrote in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the

> movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

A recent opinion by this court, *Ledford v. Ledford*, 49 N.C. App. 226, 233-234, 271 S.E. 2d 393, 398-399 (1980), cited the above language from the *Foman v. Davis* case and held:

> In the case *sub judice* the trial court did not set out a justifying reason for denying plaintiff's motion to amend and no such reason appears in the record on appeal. The United States Supreme Court has held that the trial judge abuses his discretion when he refuses to allow an amendment unless a justifying reason is shown. *Foman v. Davis, supra.* Nor does the record reveal any attempt on the part of the defendant to show that he would be prejudiced by the amendment. The burden is on the objecting party to show that he would be prejudiced thereby. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977) (dictum); *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978). It must be concluded that the ruling of the trial court in denying the motion to amend is based on a misapprehension of the law, that the circumstances . . . were sufficient as a matter of law to warrant summary judgment for defendant rendering the amendment futile. We conclude that the denial of the motion to amend without a justifying reason and no showing of prejudice to defendant, and apparently based on a misapprehension of the law, was an abuse of discretion and reversible error.

Likewise, in the case before us, the Court below set forth no reason or explanation for denying plaintiff's motion nor can we find any reason from our review of the record. There is no evidence of undue delay, undue prejudice to the defendants, or bad faith on the plaintiff's part. Absent such a showing, amendments should be granted liberally. Therefore, we hold the trial

court erred in not allowing plaintiff's amendment to the complaint.

[2] We next consider plaintiff's argument that the trial court erred in dismissing the complaint as it related to the culpability of Dr. Niazi for medical malpractice. The original complaint stated that the action was for the wrongful death of Henry as the proximate result of negligent conduct by Deen, Hall and Niazi, but the original complaint gave no further details of Niazi's alleged negligence. The amended complaint gives sufficient details relating to Niazi's involvement in the medical diagnosis and treatment of Henry to make out a claim for medical malpractice against Niazi.

North Carolina Rule of Civil Procedure 15(c) states:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Because of the relation back of amended complaints to the date of the original complaint, the plaintiff's complaint should not have been dismissed. The amended complaint contains allegations that Niazi attempted to diagnose and treat Henry by telephone and failed to examine the radiologist's report and X-rays of Henry. These allegations raise a claim of medical malpractice, and the original pleading gave sufficient notice of Niazi's involvement in the treatment of Henry to trigger the relation back provision of Rule 15. We hold the trial court erred in dismissing the complaint insofar as it relates to Niazi's potential liability for medical malpractice.

[3] Plaintiff also complains that the trial court erred in dismissing his claim for punitive damages against defendants Deen, Hall and Niazi for negligent medical treatment of Henry. In order to sustain a claim at the pleading stage the complaint must set forth

> [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences,

> intended to be proved showing that the pleader is entitled to relief. . . .

N.C. R. Civ. P. 8(a)(1). In *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), our Supreme Court discussed the application of Rule 8(a)(1):

> Under the 'notice theory' of pleading contemplated by Rule 8(a)(1), detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

277 N.C. at 104, 176 S.E. 2d at 167.

Any recovery for punitive damages must be based on aggravated, intentional, wanton or grossly negligent conduct, *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976), and the pleading must allege sufficient facts to place a defendant on notice of the aggravating factors which would justify the awarding of punitive damages. *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981). Here, the plaintiff alleged in his complaint that Henry's death was the proximate result of the gross negligence and willful and wanton conduct of the defendants Deen, Hall and Niazi. The complaint sufficiently notified the defendants of the occurrence of Henry's death to make them cognizant of the claim for medical malpractice; however, there are no allegations of any facts showing any aggravating circumstances which would give rise to punitive damages. All the pleader has done in this regard has been to make conclusory allegations as to willful, wanton conduct and gross negligence. We point out that ordinarily medical malpractice does not have a built-in aggravating factor such as is present in claims for damages arising out of criminal conduct such as fraud, assault or murder. We hold the trial judge did not err in dismissing plaintiff's claim for punitive damages.

[4] Finally, we consider plaintiff's contention that the trial judge erred in dismissing his claim for civil conspiracy against all the defendants. Plaintiff argues he was damaged by the defendants conspiring to falsify evidence and to impede his investigation.

Plaintiff contends he should be allowed to assert such a claim concurrent with his action for medical malpractice. We disagree.

As a general rule, a civil action may not be maintained for damages "for false testimony, or for subornation of false testimony, or for conspiracy to give or to procure false testimony." 16 Am. Jur. 2d, *Conspiracy* § 63 (1979). The basis for an action for civil conspiracy is not the agreement to conspire, but the damage suffered by the plaintiff. 16 Am. Jur. 2d, *Conspiracy* § 52 (1979); 3 N.C. Index 3d, *Conspiracy* § 1 (1976). Therefore, some damage to the plaintiff must predicate an action to recover for civil conspiracy.

Our Supreme Court has addressed this issue in *Gillikin v. Bell*, 254 N.C. 244, 118 S.E. 2d 609 (1961) and *Gillikin v. Springle*, 254 N.C. 240, 118 S.E. 2d 611 (1961). In *Gillikin v. Bell*, the plaintiff sued a commercial photographer for aiding a defendant in a wrongful death action by removing the body of the deceased from a wreck and photographing it in positions damaging to plaintiff's case. In the companion case, *Gillikin v. Springle*, the driver of the wrecked car was charged with a conspiracy to suborn perjured testimony. In each case the court denied relief and stated the general rule that a civil action in tort will not lie for perjury or subornation of perjury.

Furthermore, in the case before us the plaintiff has shown no damage. He alleges he has spent $3,000 in investigating and collecting evidence of Henry's alleged wrongful death, but those are expenses naturally incurred in the bringing of any lawsuit. Plaintiff's problems in gathering proof because of the alleged conspiracy by the defendants in no way make his case unique. He can hardly allege any damage when his right to recover on the tort claim has yet to be adjudicated. We affirm the portion of the trial court's order dismissing all claims of civil conspiracy as against any of the defendants.

The result is: the trial court erred in not allowing plaintiff's motion to amend the complaint; the order dismissing plaintiff's claim for punitive damages and civil conspiracy as to all defendants will be affirmed; the order dismissing plaintiff's claim against Dr. Niazi for medical malpractice is reversed; and the cause is remanded to the Superior Court for further proceedings in accordance with this opinion.

Affirmed in part; reversed and remanded in part.

Judge JOHNSON concurs.

Judge EAGLES concurs in part and dissents in part.

Judge EAGLES concurring in part, dissenting in part.

I respectfully dissent from that portion of the majority opinion which affirms dismissal of the civil conspiracy claim for relief. That claim was based upon alleged fraudulent falsification of medical records by two licensed physicians and a physician's assistant in preparation for trial. To decide as the majority does is to grant a license to persons facing serious civil actions to commit fraud with impunity in preparation for litigation.

The majority relies on two of the *Gillikin* series of cases: *Gillikin v. Bell*, 254 N.C. 244, 118 S.E. 2d 609 (1961) and *Gillikin v. Springle*, 254 N.C. 240, 118 S.E. 2d 611 (1961).

The *Gillikin* cases can be distinguished from the case *sub judice* as follows:

(1) The *Gillikin* cases involved separate lawsuits brought after termination of the initial action thereby invoking the public policy disfavoring endless litigation. Here, the original action is pending and the civil conspiracy is sought by plaintiff to be joined to the initial action, permitting the entire allegations to be resolved at one trial.

The *Gillikin* cases were actions against the alleged original tort-feasor (*Gillikin v. Springle, supra*), a photographer (*Gillikin v. Bell, supra*), an indemnity bond company (*Gillikin v. United States Fidelity & Guaranty Company*, 254 N.C. 247, 118 S.E. 2d 606 (1961)) and an auto liability insurance company (*Gillikin v. Ohio Farmers Indemnity Company*, 254 N.C. 250, 118 S.E. 2d 605 (1961)) for interference with a previously terminated civil action which plaintiff Gillikin had lost to Springle. The practical effect of the outcome in the *Gillikin* cases is to require that all possible claims be put to rest at one time with plaintiff limited to "one day in court." That goal would be achieved here by reversing the dismissal and permitting this claim to be tried at the same time as the related causes.

This action for civil conspiracy involves only those parties who were already party defendants in this pending action and does not involve others as parties.

(2) There is admittedly no civil action for perjury or subornation of perjury since they are punishable as crimes but here the misconduct was the wrongful falsification of medical records with the intent to cover up medical malpractice and thereby defraud the decedent's estate. Had the fraudulent misrepresentation gone undiscovered, if in fact it occurred as was alleged, and the defendants had testified at trial pursuant to their alleged design, then the crime of perjury, a violation of G.S. 14-9, might have resulted. Falsification of medical records with the intent to misrepresent to plaintiffs and to the court the treatment and diagnosis of decedent and thereby defraud a decedent's estate of damages in an action for medical malpractice and a civil conspiracy to accomplish this wrong are actionable.

> To create civil liability for conspiracy, a wrongful act resulting in injury to another must be done by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object. The gravamen of the action is the resultant wrong, and not the conspiracy itself. Ordinarily the conspiracy is important only because of its bearing upon rules of evidence, or the persons liable. 11 Am. Jur., Conspiracy, section 45.

Holt v. Holt, 232 N.C. 497, 500, 61 S.E. 2d 448, 451 (1950).

"In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts." *Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E. 2d 771, 773 (1966). Here the wrongful overt act is the falsification or alteration of medical records pertaining to plaintiff's decedent with the intent to misrepresent the true facts and thereby defraud plaintiff in their efforts to recover for alleged medical malpractice.

In *Reid v. Holden*, 242 N.C. 408, 414-15, 88 S.E. 2d 125, 130 (1955), Bobbitt, J. (later Chief Judge), succinctly stated the law of civil conspiracy:

> "Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the

> conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof —the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable." 11 Am. Jur. 577, Conspiracy sec. 45. To create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to the scheme and in furtherance of the objective. 15 C.J.S. 1000, Conspiracy sec. 5. These principles have been recognized and applied by this Court.

Since the alleged wrongful acts were discovered, the full potential for harm and damages was not realized. Because of plaintiff's alleged discovery that the records contained intentional misrepresentations and had been falsified, plaintiff's damages are the *additional* costs of investigation and ultimate detection of the attempted fraud on the decedent's estate. According to the complaint, they are alleged to amount to approximately $3,000.00.

Suffice it to say, there are allegations of a conspiracy, a wrongful overt act in furtherance of that conspiracy and damages to plaintiff which, if proven, are sufficient to justify recovery.

Conspiracy among professionals to defraud a decedent's estate and ultimately a trial court as alleged, is outrageous, offensive, and egregious conduct. In a system of jurisprudence in which the courts are relied on as an orderly means of settling disputes and differences, it is incongruous to permit misrepresentations, fraud and deception such as is alleged here to occur with impunity.

For these reasons, I respectfully dissent from the majority's decision to dismiss the claim for civil conspiracy. In all other respects, I concur with the majority.

COLONIAL PIPELINE COMPANY v. H. MICHAEL WEAVER AND WIFE, SONJA R. WEAVER

No. 8218SC87

(Filed 15 March 1983)

1. **Eminent Domain § 6.9— purchase price of property eight years earlier—incompetency to show value at time of taking—competency for impeachment**

In an action to condemn a permanent right-of-way easement for a petroleum pipeline, cross-examination of the landowner as to the purchase price he had paid his former business partner for a one-half undivided interest in the property eight years prior to the taking upon dissolution of their development corporation was not competent for the purpose of determining the market value of the property at the time of the taking since (1) the transaction was not sufficiently voluntary to reflect the fair market value of the property at the time of the purchase and (2) the purchase price paid eight years earlier was too remote in time to point fairly to the value of the property at the time of the taking. However, such evidence was competent for purposes of impeachment to test the accuracy of the landowner's opinion as to the value of the property.

2. **Eminent Domain § 6.9— value witness—cross-examination as to knowledge of other easements on property—remark by trial judge**

In an action to condemn a permanent right-of-way easement for a petroleum pipeline, the trial court erred in refusing to permit petitioner to cross-examine respondent landowners' expert value witness concerning his knowledge of two prior easements on respondents' property which contained three pipelines since such evidence was relevant to impeach the credibility of the expert witness and his testimony regarding factors he considered in arriving at his valuation and to establish the market value of the property before the taking. Furthermore, such error was aggravated by the trial court's remark, *before any objection had been made to such line of questioning, that* "I don't believe that is relevant."

Judge ARNOLD dissents.

APPEAL by petitioner from *Wood, Judge.* Judgment entered 16 October 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 November 1982.

The petitioner, Colonial Pipeline Company filed a petition seeking the condemnation of a temporary and permanent right-of-way and easement for the installation of a petroleum pipeline, and for the appointment of commissioners of appraisal. The commissioners of appraisal assessed the damages to respondents H. Michael Weaver and Sonja R. Weaver's property as being in the amount of $51,245. Both parties excepted to the report of the com-

missioners. The report was confirmed by the Assistant Clerk of Superior Court. Both parties appealed the confirmation. In addition, respondents demanded a jury trial.

A trial was held on the sole issue of compensation. The respondents presented evidence that they owned a 348 acre tract of land northwest of Greensboro. The permanent right-of-way, which would have taken 3.615 acres, varied in width from 30 feet at the southern end to 50 feet at the northern end. The highest and best use of repondents' property was for residential use. The respondents' expert estimated the diminution in value to respondents' property due to the taking amounted to $175,000. Respondent H. Michael Weaver testified that he had been damaged in the amount of $200,000.

The petitioner's expert agreed that the highest and best use was residential. He estimated damages to be in the amount of $17,000.

The jury found that $80,000 was just compensation, and the court entered judgment ordering the payment of that sum to respondents as just compensation. The court denied the petitioner's motions to set aside the verdict as being excessive and against the greater weight of the evidence, and for a new trial. From the verdict and judgment entered thereon, petitioner appeals.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Joseph W. Moss and Larry I. Moore, III, for petitioner appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by C. T. Leonard, Jr., James T. Williams, Jr. and S. Leigh Rodenbough, IV, for respondent appellee.

JOHNSON, Judge.

This appeal arises out of a condemnation proceeding. The petitioner, Colonial Pipeline Company (Colonial) appeals the award of $80,000 damages to the respondents, H. Michael Weaver and Sonja R. Weaver. Colonial makes ten assignments of error and presents eight questions for review. The issues presented concern whether the court erred in its evidentiary rulings, in its supplemental charge, and in denying petitioner's motions to set aside the jury's verdict and for a new trial. Our review of the

assignments of error and record discloses a number of errors in the trial court's evidentiary rulings.

[1] Petitioner's first assignment of error relates to the trial court's exclusion of evidence of a previous purchase price respondent H. Michael Weaver paid for a one-half undivided interest in the subject property.

On direct examination Weaver testified that in his opinion the property over which the right-of-way had been condemned was worth $4,500,000 prior to the taking. Weaver testified further that he acquired a joint interest in the property with his business partner in 1962 and full interest in the property in September of 1971. On cross-examination, Mr. Weaver was questioned at length about his acquisition of the property across which the right-of-way had been condemned. Colonial's attorney then asked Mr. Weaver a series of questions regarding the purchase price Mr. Weaver had paid his former business partner for the one-half undivided interest in the subject property approximately eight years prior to the taking. When Colonial's attorney asked Mr. Weaver if he had not in fact paid his partner $160,000, the Weavers' attorney objected and moved to strike. The trial court sustained the objection and instructed the jury not to consider the question because the price "paid for this property in 1971 would not be relevant in this case."

Petitioner Colonial assigns error to the exclusion of evidence of the purchase price paid for the one-half undivided interest in the condemned property. Colonial argues that the excluded evidence would have furnished a fair criterion for determining the value at the time of taking. In addition, Colonial argues that it was entitled to inquire into this matter on cross-examination to test the accuracy of Mr. Weaver's opinion as to the value of the property.

It is well established that when land is taken in the exercise of eminent domain it is competent, as evidence of market value, to show the price at which it was bought if the sale was voluntary and not too remote in point of time. *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967); *Palmer v. Highway Commission*,195 N.C. 1, 141 S.E. 338 (1928). The reasonableness of the interval of time that has passed is dependent upon the nature of the property, its location, and the surrounding cir-

cumstances, the criterion being whether the evidence fairly points to the value of the property at the time in question. *Id.; Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265 (1964). 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. *Board of Transportation v. Revis,* 40 N.C. App. 182, 252 S.E. 2d 262 (1979).

The record discloses that neither of the tests for admissibility of a previous purchase price as direct evidence—voluntariness or lack of remoteness in time of that purchase—has been met by Colonial in this case. The requirement of voluntariness in order to introduce evidence of the previous purchase price in a condemnation proceeding is designed to ensure that the price previously paid for condemned property represented the fair market value at the time of that purchase. *See State Highway Comm. v. Moore,* 3 N.C. App. 207, 164 S.E. 2d 385 (1968). Although Mr. Weaver, on cross-examination, responded affirmatively to the question whether he had paid "full price" in his 1971 purchase, the 1971 transaction involved the purchase of a one-half undivided interest in the subject property from Mr. Weaver's former business partner at a time when the Weavers already owned the other one-half undivided interest in the property.

On cross-examination Mr. Weaver was asked if he recalled how much he paid for the land. Weaver responded:

> You did ask me, and I don't remember. And, of course, I don't remember—I must have bought the land from him but we dissolved [the corporation], and I acquired his interest, basically a simultaneous transaction.

It may be inferred from the testimony of Mr. Weaver that the 1971 transaction between he and his partner, Mr. Taylor, arose out of the dissolution of their development corporation, which had originally held title to the subject property.

In *Redevelopment Comm. v. Panel Co.,* 273 N.C. 368, 159 S.E. 2d 861 (1968), the Supreme Court affirmed a trial court's exclusion of testimony concerning the price paid for an industrial site

"within sight of" the subject industrial property because the transaction did not reflect the fair market value of the property. The court pointed out that while the industrial site was "comparable" to the subject property, the transaction under consideration was one between two corporations that apparently included the sale of an entire business and involved some tax considerations. *Id.*, at 373-74, 159 S.E. 2d at 865. Thus, the Supreme Court has recognized that in certain circumstances the price paid in sales not on the open market cannot be admitted as evidence of the value of comparable properties.

While the exact nature of the transaction is unclear, the circumstances surrounding Mr. Weaver's purchase of the remaining one-half undivided interest in the subject property from his former business partner indicate that the 1971 transaction was not the type that would yield the same price as an entirely voluntary sale in an arm's length transaction on the open market.

The other factor to be considered in determining the competency of the price previously paid for property that is the subject of condemnation is the remoteness in time of that purchase. Among the circumstances to be considered are both physical changes in the property itself and changes in the vicinity of the property which might have affected its value. *Highway Commission v. Nuckles, supra; Board of Transportation v. Revis, supra.* Colonial concedes that there was testimony by the Weavers' expert that the property is located in an area northwest of Greensboro and that the northwest area is developing faster than other areas around Greensboro, but argues that this evidence fails to render the sale too remote in time because "there is no evidence of substantial changes in the nature of the property in the vicinity of the property subject to the taking." We do not agree.

The evidence presented by the Weavers was sufficient to demonstrate the remoteness in time of the previous sale with regard to changes in the vicinity of the property which might have affected its value, which is all that need be demonstrated under the test set forth in *Highway Commission v. Nuckles, supra* and *Board of Transportation v. Revis, supra.*

In *Redevelopment Commission v. Hinkle,* 260 N.C. 423, 132 S.E. 2d 761 (1963), the Supreme Court held that the price paid in

a voluntary purchase of the subject property, ten years prior to the time of taking was not admissible. In support of its decision, the court noted:

> No evidence was offered tending to show similarity of conditions at the different times. To the contrary, petitioner's evidence shows some enlargement and additions to the buildings made by defendants subsequent to their purchase.

Id. at 424-25, 132 S.E. 2d at 762.

As in *Hinkle*, the petitioner in the present case offered no evidence tending to show similarity of conditions in either the subject property or its vicinity between the time of the 1971 transaction and the time of the taking. To the contrary, there was sufficient evidence of record to demonstrate significant changes in the vicinity of the subject property during that period. In addition, respondent H. Michael Weaver testified that during his term of ownership he had made significant improvements to the property by thinning, treating and planting trees. Mr. Flynt, the Weavers' value witness testified that the fact that the property "was very heavily wooded with about eighty percent hardwood" figured prominently in his opinion of the value of the property for its highest and best use.

> "The fact that some changes have taken place does not *per se* render the evidence incompetent. But 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." (Emphasis added.)

Highway Commission v. Nuckles, supra at 18, 155 S.E. 2d at 786 quoting from *Shopping Center v. Highway Commission*, 265 N.C. 209, 212, 143 S.E. 2d 244, 246; *Board of Transportation v. Revis, supra* at 186, 252 S.E. 2d at 264. Taken as a whole, the evidence presented by the respondents shows that the purchase price paid by Mr. Weaver in 1971 was too remote in time to fairly point to the value of the property at the time of the taking. In addition, as we stated above, the transaction itself was not sufficiently voluntary to reflect the fair market value of the property in 1971. Accordingly, it was proper for the trial court to exclude evidence of

the price paid by the respondents in the 1971 transaction for purposes of determining the market value of the property.

However, the evidence was competent for purposes of impeachment to test the accuracy of Mr. Weaver's opinion as to the value of the property. *Palmer v. Highway Commission, supra.* In *Palmer,* the plaintiffs sought compensation primarily for the destruction of a store building upon their land. On cross-examination the plaintiff-witness admitted that the building had been upon the land when they bought it 18 years prior. The defendant asked the witness what the purchase price was for the entire property. The plaintiffs objected to the question and the objection was overruled. The Supreme Court affirmed admission of the purchase price evidence for purposes of impeachment even though it would have been incompetent on the issue of market value.

> Certainly the value of property eighteen years before the taking, nothing else appearing, would be incompetent, but upon the present record it appears that the plaintiff had testified that they had owned the property for eighteen years, and that the building was then upon the property. The plaintiffs had further testified that at the time of the taking the property was worth $3,000. It was therefore permissible on cross-examination to test the accuracy of the opinion of the witness as to the value of the property as well as to demonstrate the basis of his opinion as to the value thereof.

195 N.C. at 2, 141 S.E. at 339.

Here, respondent Weaver had testified on direct examination that he had, in effect, owned the property since 1962 and that in his opinion the property had a value of $4,500,000 prior to the taking in 1979. Petitioner was entitled to test the credibility of Mr. Weaver's opinion testimony regarding the property's value by inquiring into matters relevant to the accuracy of and basis for this opinion, such as the price Mr. Weaver himself paid for a one-half undivided interest in the property in 1971. The trial court's exclusion of the evidence of the previous purchase price for purposes of impeachment was error.

[2] By a related assignment of error, petitioner contends that its cross-examination of respondent's sole expert value witness, Mr.

Flynt, concerning his knowledge of previously existing rights-of-way, was prejudicially limited by the trial court.

The record shows that in 1963 and 1964 three pipelines were constructed in two rights-of-way in respondents' property which were roughly parallel and in the same area as the subject right-of-way. The respondents offered the testimony of only one independent expert value witness, Mr. Flynt. On cross-examination Mr. Flynt admitted that he was not completely aware of all the rights that were granted under the earlier rights-of-way, but said that he had "a pretty general feeling for what was contained in those documents" and that "those were certainly taken into consideration." Mr. Flynt had also testified at length concerning the effect of the petitioner's removal of 458 trees for the temporary work space and of the need to create a "buffer zone" between the right-of-way and the remainder of respondents' property.

The testimony forming the basis of petitioner's assignment of error is as follows:

Q. Do you know the width of the Colonial Pipeline right-of-way that was in existence there prior to February 21, 1979?

A. It is approximately fifty feet.

Q. Approximately? You don't know the dimensions of the right-of-way?

THE COURT: Are you talking about Colonial?

MR. MOSS: The original Colonial, the 1963 Colonial right-of-way that was in existence at the time he made his appraisal.

THE COURT: I don't believe that is relevant.

Q. Did you know or did you note at that time the width of the Plantation Pipeline right-of-way across the property?

A. Approximately.

Q. You don't know exactly?

A. Fifty feet, give or take five feet. It has the same effect on the property.

Q. Do you know whether or not Colonial Pipeline Company and/or Plantation Pipeline Company acquired a temporary

working easement at the time they acquired their rights to the pipeline rights-of-way which were in existence for 1963 and 1964?

MR. WILLIAMS: Objection, your Honor.

THE COURT: Sustained.

The sole issue for the jury in this case was the determination of what sum was just compensation for the appropriation of an easement and right-of-way in the respondents' property, based upon the before-and-after market values of the property. It is necessary, therefore, for the jury to understand both the degree of limitation of the landowners' use of their property after the taking and any limitation of the landowners' use of their property before the taking which would tend to affect its market value. Mr. Flynt had admittedly considered the previously-existing rights-of-way in making his appraisal of the property's market value prior to the taking. Consequently, his knowledge or lack of knowledge concerning the before-and-after limitations of the respondents' use of the property engendered by those rights-of-way was a proper area for cross-examination.

One of the three general purposes cross-examination may serve is to impeach the witness, or cast doubt upon his credibility. Brandis on North Carolina Evidence § 38 (Rev. Ed. 1982). The trial court erred by denying petitioners the opportunity to test the knowledge of respondents' only independent value witness concerning a previously-existing limitation upon the use of the land which he admittedly had considered, and thus attempt to cast doubt upon his credibility. The largest possible scope should be given in cross-examination and almost any question may be put to test the value of a witness' testimony. Brandis on North Carolina Evidence, *supra*, § 42.

The limitation of the scope of cross-examination of Mr. Flynt was aggravated by the trial court's interruption, before any objection had been made, of the line of questioning concerning the witness' lack of detailed knowledge of the previously existing rights-of-way and the trial court's spontaneous remark, "I don't believe that is relevant."

In *Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E. 2d 296, 302 (1968) the Supreme Court stated:

> It is well recognized in this jurisdiction that a litigant has a right by law to have his cause tried before an impartial judge without any expressions from the trial judge which would intimate an opinion by him as to weight, importance or effect of the evidence . . . However, this prohibition applies only to an expression of opinion related to facts which are pertinent to the issues to be decided by the jury, and it is incumbent upon the appellant to show that the expression of opinion was prejudicial to him. (Citations omitted.)

The trial court's remark, "I don't believe that is relevant" goes beyond mere *intimation* of an opinion, it is a *direct expression* of opinion by him as to the weight and importance of the evidence. The pertinency of the facts to which the opinion relates is also clear. The petitioner's line of questioning was not only relevant for the purpose of impeaching the credibility of the expert witness and his testimony regarding factors he considered in arriving at his valuation, but it was also relevant to establish the market value of the property before the subject taking.

In *Barnes v. Highway Commission*, 250 N.C. 378, 387-88, 109 S.E. 2d 219, 227 (1959) the Supreme Court stated:

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for valuable uses?" *Power Co. v. Power Co.*, 186 N.C. 179, 183-4, 119 S.E. 213, quoting from *Boom Co. v. Patterson*, 98 U.S. 403. The jury should take into consideration, in arriving at the fair market value of the land taken, all the capabilities of the property, and all the uses to which it could have been applied or for which it was adapted, which affected its value in the market at the time of the taking and not merely the condition it was in and the use to which it was then applied by the owner.

As the purpose of the trial was to determine the amount of reduction in the fair market value of the repondents' property by the taking of the most recent easement, it follows that the nature of

two prior easements containing three pipelines is important in determining the market value of the property before the subject taking.

The criterion for determining whether the trial judge deprived a litigant of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. *Worrell v. Credit Union*, 12 N.C. App. 275, 182 S.E. 2d 874 (1971). Any remark of the presiding judge, made in the presence of the jury, which has a tendency to prejudice the jury against the unsuccessful party is ground for a new trial. *Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966).

The trial court's remark, which was to the effect that the extent of the previously-granted easements were not relevant to the issue of how much compensation should be awarded to the respondents for the new easement has a clear tendency to prejudice the jury against Colonial's position at trial. The trial court's improper comment upon the weight and importance of the line of questioning petitioner was pursuing thus compounded the court's erroneous limitation of the scope of petitioner's cross-examination of Mr. Flynt. These errors, taken together with the erroneous exclusion of the previous purchase price during cross-examination of Mr. Weaver, were clearly prejudicial and entitle the petitioner to a new trial. In view of our disposition of the case, we will not review petitioner's other assignments of error as they may not recur upon retrial.

New trial.

Judge HILL concurs.

Judge ARNOLD dissents.

JOSEPH E. WARREN, SR., ADMINISTRATOR FOR THE ESTATE OF JOE E. WARREN, JR. v. CANAL INDUSTRIES, INC., KENNETH CAMPBELL, SAMPSON COUNTY MEMORIAL HOSPITAL, INC., MAVIS McLAMB, R.N., CLINTON SURGICAL CLINIC, P.A., AND BRUCE F. CALDWELL, M.D.

No. 824SC375

(Filed 15 March 1983)

1. **Physicians, Surgeons, and Allied Professions §§ 15.1, 17— malpractice action—competency of expert testimony—departing from standard of care**

In a wrongful death action based on alleged negligent treatment by defendant surgeon, the trial court erred in refusing to permit plaintiff's witness, who had been accepted by the trial court as an expert in general medicine and surgery, to answer a hypothetical question in which he was asked to state an opinion as to whether defendant surgeon's installation of a central venous pressure line catheter in decedent's chest and his monitoring thereof met the standard of care for general surgeons in communities similar to the county of treatment where the witness was familiar with central venous pressure line procedures in communities similar to the community in which decedent was treated as they existed at the time of such treatment, and the witness was properly asked to assume the necessary facts to allow him to state his opinion. Furthermore, plaintiff's evidence would have been sufficient for the jury had the witness been permitted to state his opinion where the record shows that the witness would have testified that he was of the opinion that defendant failed to comply with the standard in that he failed to check the position of the catheter as soon as possible after installing it by ordering an x-ray, failed to give appropriate orders for the care of the patient while the central venous pressure line was in place, and failed to leave instructions that he be notified by the intensive care nurses should any irregularities occur during his absence, and where there was other evidence that decedent's death resulted from a cardiac tamponade caused by the infusion of a large quantity of fluid into the pericardial sac through a hole in the right atrium caused by a catheter and that perforation of the atrium wall by a central venous pressure line catheter is a medically recognized, but uncommon, complication in the use of the pressure line. G.S. 90-21.12.

2. **Physicians, Surgeons, and Allied Professions § 11; Torts § 7.5— release of original tort-feasors—malpractice in treating injuries—wrongful death action not barred.**

A release of the original tort-feasors who caused injuries to decedent did not bar a wrongful death action against a physician or surgeon based on negligent treatment of the injuries caused by the original tort-feasors. G.S. 1B-4.

APPEAL by plaintiff from *Lane, Judge.* Judgment entered 20 November 1981 in Superior Court, SAMPSON County. Heard in the Court of Appeals 16 February 1983.

Plaintiff, Joseph E. Warren, Sr., brought this wrongful death action as administrator of the estate of Joe E. Warren, Jr., the decedent. The original tort-feasors, Canal Industries, Inc. and Kenneth Campbell, and plaintiff reached a settlement and plaintiff executed a complete release of the original tort-feasors, expressly reserving his rights to proceed against the remaining (medical) defendants. Thereafter, plaintiff voluntarily dismissed his claims against Canal Industries, Inc., defendant Campbell, Sampson County Memorial Hospital, Inc., and Mavis McLamb, R.N.

The medical defendants moved for summary judgment, arguing that by releasing the original tort-feasors plaintiff had, as a matter of law, lost his right to pursue the medical defendants for damages in wrongful death based on a theory of negligent treatment. Judge Lane denied defendants' motion for summary judgment.

When the case came on for trial, the remaining defendants were Clinton Surgical Clinic, P.A. and Dr. Bruce F. Caldwell, an agent of Clinton Surgical Clinic and the surgeon who cared for decedent. Plaintiff proceeded to trial upon a theory of negligence, seeking to show that Dr. Caldwell and the Surgical Clinic were severally liable because Dr. Caldwell's negligence in treating the decedent was a cause of the decedent's death.

Plaintiff's evidence tended to show the following events and circumstances. Joe, Jr. was seriously injured in a motorbike accident on the property of Canal Industries, Inc. Following Joe's injury, he was hospitalized at Sampson County Memorial Hospital under the care of Dr. Bruce Caldwell, a surgeon.

Dr. Caldwell, a board certified surgeon, has been practicing general surgery in Clinton, North Carolina since 1968. After performing surgery on Joe, Jr. to repair a damaged liver, Dr. Caldwell installed a central venous pressure line (CVP line) to monitor Joe, Jr.'s hemodynamic status. He installed the CVP line by inserting, through the chest wall, a catheter into a vein leading from the heart and through the vein toward the heart, hoping to locate the tip of the catheter at a point just above the opening of the right atrium. He did not order that an x-ray be taken to verify the location of the tip of the catheter. After installation of the CVP line, Joe, Jr. was put in the intensive care unit of the hospital, under the care of intensive care nurses. Dr.

Caldwell left instructions to monitor Joe, Jr.'s hemodynamic status, but gave no specific instructions as to whether or when he should be contacted if changes in Joe's condition occurred. During the night, Joe, Jr. experienced pain and difficulty breathing, sat up in bed, and complained to nurse McLamb. She called Dr. Caldwell and while they were discussing Joe's symptoms, he died.

At the close of plaintiff's evidence, the trial judge granted defendants' motion for directed verdict. Plaintiff appealed.

Holland, Poole & Newman, P.A., by B. L. Poole, and Blanchard, Tucker, Twiggs, Denson & Earls, P.A., by Irvin B. Tucker, Jr., for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and Robin K. Vinson, for defendant-appellees.

WELLS, Judge.

[1] By his assignments of error, plaintiff contends that the trial judge erred in sustaining defendants' objection to a hypothetical question asked to plaintiff's expert medical witness and that, had the witness been allowed to answer the question, plaintiff would have presented sufficient evidence of Dr. Caldwell's negligence to avoid a directed verdict and have his case submitted to the jury. We agree and reverse.

On review of a directed verdict, appellate review is usually limited to those grounds asserted by the movant upon making his motion before the trial judge. *See* G.S. 1A-1, Rule 50(a); *and Feibus v. Construction Co.*, 301 N.C. 294, 271 S.E. 2d 385 (1980). The grounds asserted by defendants in the present case are not included in the record or the transcript filed, but it is apparent from the trial judge's response to defendants' motion and from the briefs of the parties that Judge Lane granted defendants' motion for directed verdict on the ground that plaintiff had failed to present sufficient evidence to allow the jury to find that Dr. Caldwell was negligent in his treatment of Joe, Jr.

Dr. John D. Butts of the office of the Chief Medical Examiner performed an autopsy on Joe. Dr. Butts was of the opinion that Joe's death was due to heart failure; that the heart failure was in

the form of a cardiac tamponade; and that it was caused by the infusion of a large quantity of fluid into the pericardial sac. Dr. Butts further was of the opinion that the fluid entered the pericardial sac through a hole in the right atrium which was caused by a catheter. Dr. Butts explained that such perforation of the atrium wall by a CVP catheter is a medically recognized, but uncommon, complication in the use of CVP lines.

Plaintiff called Dr. Harold W. Glascock, Jr. as a witness. Dr. Glascock testified as to his training and background in medicine, surgery and medical administration. He was tendered as an expert in general medicine and surgery, and upon defendants' request a *voir dire* was conducted. On *voir dire*, Dr. Glascock testified that he was familiar with CVP catheter procedures because between 1973 and 1978 he had inserted several and had supervised others learning the procedures. The trial judge accepted Dr. Glascock as an expert in general medicine and surgery.

Direct examination resumed and Dr. Glascock testified that he had experience in general surgery, and in medical administration and training. He testified that he was familiar with CVP procedures, and that between 1973 and 1978 he had personally installed CVP lines and had trained others in the installation of CVP lines. Dr. Glascock testified that he had patients in Franklin and Halifax Counties; that Franklin and Halifax Counties, like Sampson County, are rural, agricultural counties with several small towns and one hospital; that between 1973 and 1978, as director of admissions for Dix Hospital, he was required to review the case histories of all patients admitted to Dix and that Sampson County is one of the twenty counties from which Dix receives patients; and that he was familiar with the standards of care for physicians and surgeons in communities similar to Sampson County.

Counsel for plaintiff posed a hypothetical question to Dr. Glascock in which the witness was asked whether he had an opinion as to whether Dr. Caldwell's installation and monitoring of the CVP line was in accordance with the standard of care for general surgeons in communities similar to Sampson County. Upon defendants' objection, Dr. Glascock was not allowed to answer this

hypothetical question.[1] Plaintiff's offer of proof tended to show that Dr. Glascock did have an opinion as to whether defendant Dr. Caldwell had complied with the applicable standard of care and that he was of the opinion that Dr. Caldwell failed to comply with the standard in that he failed to check the position of the catheter as soon as possible after installing it by ordering an x-ray; failed to give appropriate orders for the care of the patient while the CVP line was in place; and failed to leave instructions that he be notified by the intensive care nurses should any irregularities occur during his absence.

The import of this excluded evidence is twofold. First, it is direct evidence of what the standard of care was in communities similar to Sampson County at the time of defendants' treatment of the decedent, and second, it is opinion evidence that the treatment rendered by Dr. Caldwell (as portrayed by plaintiff's version of the evidence recited in the assumed facts embodied in the hypothetical question) was not in accordance with that standard of care.

In medical malpractice cases, G.S. 90-21.12 requires that, in order to be entitled to recover, the plaintiff must show that the defendant physician provided the plaintiff with a level of care "not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." G.S. 90-21.12. Generally, expert testimony is necessary to establish this standard of care. *See Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980). It is not necessary for the witness testifying as to the

1. We note that the legislature, by enacting G.S. 8-58.12 has eliminated the requirement that expert opinion testimony be in response to hypothetical questions. Nevertheless, hypothetical questions may still be used, and in instances such as the present case where there had been no foundation laid to show that the witness is familiar with the facts pertaining to the case being tried, *i.e.*, by having been present during the defendant doctor's treatment of the patient, or having reviewed the patient's files, or having listened to the testimony of earlier witnesses as to what treatment the patient received, hypothetical questions may yet be required. *See generally*, Brandis on N.C. Evidence §§ 136 and 137 (1982). We further note that in the particular question posed to Dr. Glascock he was asked to assume facts elicited in the previous testimony of Dr. Caldwell, Dr. Butts, and Nurse McLamb and that the question was sufficient to lay this part of the foundation required to render him competent to give his opinion.

standard of care to have actually practiced in the same community as the defendant as long as the witness is familiar with the standard. *See Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E. 2d 596, *disc. rev. denied*, 305 N.C. 587, 292 S.E. 2d 571 (1982) and cases cited therein. Moreover, as long as the witness is shown to be familiar with the applicable standard of care, the fact that the question asked to the witness does not track the language of G.S. 90-21.12 does not necessarily render the answer inadmissible. *Id.*

When the hypothetical question was posed to Dr. Glascock, he had been accepted by the trial court as an expert in general medicine and surgery. He was familiar with CVP procedures in communities similar to the community in which the decedent was treated, as they existed at the time of the decedent's treatment, and he knew what the standard of care was. While it was not clear that Dr. Glascock was personally familiar with what treatment was rendered the decedent by Dr. Caldwell, he was properly asked to assume the necessary facts and those assumed facts were sufficient to allow him to give his opinion. A physician's opinion need not be based on personal knowledge or observation, but may be based on reliable information supplied to him by others. *See Ingram v. McCuiston*, 261 N.C. 392, 134 S.E. 2d 705 (1964); *and* 1 Brandis on N.C. Evidence § 136 (1982). An expert may give his opinion and his reasons therefore without prior disclosure of the underlying facts or data, absent a request from the opposing party. G.S. 8-58.14. Under these circumstances, it was error to sustain defendants' objection to the question posed to Dr. Glascock.

We are persuaded that had the trial court allowed Dr. Glascock to give his testimony as to the appropriate standard of care for Joe, Jr. and its violation by Dr. Caldwell, directed verdict for Dr. Caldwell and his professional association would have been clearly improper. Dr. Caldwell, himself, testified that the use of x-rays in CVP procedures constituted "optimal" care; that in determining how much of the tube to insert he used " 'old Kentucky windage'—I guess you might say you kind of see where the heart is and where you're putting it in and how long the catheter is and say 'Well, we need about that much;' " that he was aware that perforation of the atrium by the catheter tip was a recognized complication of the procedure; and that although he left instructions to monitor Joe, Jr., he left no instructions as to what

signs hospital personnel should look for to determine when to contact him. Such evidence, taken together with the autopsy evidence establishing the cause of death and Dr. Glascock's excluded testimony, would allow, but not require the jury to find that Dr. Caldwell was negligent in his treatment of Joe, Jr. and that such negligence was the proximate cause of Joe, Jr.'s death.

[2] By cross assignment of error, defendants contend that the trial judge erred in denying their motion for summary judgment based on plaintiff's release of the original tort-feasors. Citing G.S. 1-540.1 and *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E. 2d 480 (1969), defendants contend that plaintiff is barred from pursuing a wrongful death action against physicians, surgeons or other professional practitioners negligently treating an injury caused by a prior tort-feasor who has been released. *Simmons v. Wilder* is clear that while G.S. 1-540.1 allows an injured plaintiff to seek to recover damages from a medical defendant for *personal injury* resulting from the negligent treatment of an injury inflicted by an original tort-feasor who has been released, it does not allow a plaintiff releasing the original tort-feasor from liability in *wrongful death* to then seek to recover in wrongful death from the subsequent medical tort-feasor. Defendants have overlooked that the Court in *Simmons v. Wilder* noted that G.S. 1B-4, which had not yet become effective, would have changed the result in that case.

G.S. 1B-4 applies to the facts of the present case and it provides:

> § 1B-4. *Release or covenant not to sue.*—
>
> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

The original tort-feasors released by plaintiff and the remaining medical defendants are "persons liable in tort for the same . . . wrongful death." The express terms of plaintiff's release reserved his right of action against the remaining defendants. Plaintiff was entitled to seek recovery from the remaining defendants, subject to a reduction as set out in G.S. 1B-4 and Judge Lane correctly denied defendants' motion for summary judgment. Defendants' cross assignment of error is overruled.

For error in the exclusion of expert testimony offered by plaintiff, there must be a

New trial.

Judges HILL and JOHNSON concur.

LEE DERRICK v. CRAIG DWAYNE RAY AND COIT DREWEY RAY

No. 8210SC237

(Filed 15 March 1983)

Automobiles and Other Vehicles §§ 57.1, 79— intersection accident—negligence and contributory negligence—summary judgment improper

In an action to recover damages for injuries received in an intersection accident when plaintiff's car was struck by defendants' car after plaintiff crossed defendants' lane of travel on the dominant street and reached the median between the two lanes of travel of that street, summary judgment was improperly entered for defendants where plaintiff's forecast of evidence would permit an inference that defendant driver was negligent in speeding or in failing to reduce his speed, defendants' evidence did not conclusively show that plaintiff failed to maintain a proper lookout or to see what was in clear view, and there was a material issue of fact as to whether plaintiff exercised due care in stopping her car within four feet of the intersection and then proceeding across the intersection.

APPEAL by plaintiff from *Bailey, Judge.* Order entered 29 October 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 17 January 1983.

Plaintiff instituted this negligence action against defendants seeking to recover $250,000 in damages. She alleged that around midday on 15 January 1981 she was driving her Volkswagen Rab-

bit toward the intersection of East Juniper Street and North Main Street in Wake Forest, North Carolina; that after stopping and checking for northbound traffic on North Main Street she proceeded to cross the intersection and that as she reached the median between the two lanes of North Main Street a car driven by defendant Craig Dwayne Ray and owned by defendant Coit Drewey Ray struck the left side of plaintiff's Volkswagen. She alleged that defendant Craig Ray was negligent in operating his car at a speed greater than was reasonable under the existing circumstances and at a speed greater than that posted; and that he failed to keep a reasonable lookout, to keep his automobile under control and to decrease his speed in order to avoid the collision. Plaintiff further alleged that the manner in which defendant operated his car amounted to willful and wanton negligence.

In their answer defendants pleaded contributory negligence, alleging that plaintiff failed to keep a proper lookout, failed to yield the right-of-way to defendants' vehicle, failed to stop for a duly erected stop sign and failed to see her way clear prior to entering the intersection. Plaintiff replied that the defendant driver had the last clear chance to avoid the collision.

On 7 August 1981 defendants moved for summary judgment on the ground that plaintiff was contributorily negligent. Judge Bailey allowed the motion after considering depositions and an affidavit. In her deposition plaintiff testified that she stopped her Volkswagen Rabbit approximately four feet from the pavement of North Main Street. She carefully looked to the left and did not see a car coming. As her car reached the median, she first observed defendants' car speeding toward her from her left. Dr. Paul Cribbins, a professor of civil engineering at North Carolina State University employed by plaintiff to prepare an accident reconstruction, stated in an affidavit that:

> A. Prior to the accident, Vehicle #2 [driven by plaintiff Derrick] came to a stop on E. Juniper Street at a position where the driver's eye was 10 feet from the eastern curb on N. Main Street and 8 feet from the northern curb of Juniper Street. At this time, Vehicle #1 [driven by defendant Ray] was northbound on N. Main Street approaching the intersection.

B. For the driver of Vehicle #2 to look both ways and accelerate normally across the northbound lanes of N. Main Street to a protected position in the median would require 6.5 seconds.

C. During the 6.5 seconds needed for Vehicle #2 to reach a safe position, Vehicle #1 would have traveled the following distance depending on its speed (assuming that it did not accelerate or brake):

Speed	Distance Traveled (feet)
20	191
25	239
30	287
35	334
40	382
45	430
50	478
55	526
60	573

D. Because of sight distance obstructions caused by a row of tree trunks along the east side of N. Main Street, sight distance of the driver of Vehicle #2 is limited to 315 feet as shown on the attached sketch. Thus, it appears from the table above that any drivers exceeding 33 m.p.h. on N. Main Street could create a hazard for vehicles entering the intersection from Juniper Street.

E. Based upon inspection of Vehicle #2 and review of photographs of Vehicle #1, I would estimate the speed of Vehicle #1 at impact to have been no less than 20 m.p.h. and no more than 30 m.p.h.

F. Using an average impact speed of 25 m.p.h. and a skidding distance of 99 feet (taken from accident report) for Vehicle #1, its speed along N. Main Street at the beginning of its skid would have been at least 49 m.p.h. (For impact speeds of 20 and 30 m.p.h., the travel speed of Vehicle #1 would have been 46.7 m.p.h. and 51.8 m.p.h. respectively.)

G. At 49 m.p.h., Vehicle #1 would need 468 feet of sight distance to avoid hitting Vehicle #2 (only 315 feet provided).

Dr. Cribbins made the following conclusions:

A. A horizontal sight distance problem exists at the intersection of N. Main and Juniper Streets. Because of the trees along N. Main Street, drivers on Juniper may not be able to see northbound cars in time to safely cross to a protected position.

B. Drivers traveling along N. Main Street faster than the speed limit (35 m.p.h.) will travel a distance greater than the available sight distance.

C. Based upon skid marks and impact speed estimates, Vehicle #1 (Ray) was traveling 49 m.p.h.

D. That at a speed of 49 m.p.h. Vehicle #1 (Ray) would be outside of the sight distance of Vehicle #2 (Derrick) when Vehicle #2 (Derrick) began to cross N. Main Street.

E. That any vehicle traveling north on N. Main Street at the speed limit (35 m.p.h.) that was located outside of the sight distance of Vehicle #2 (Derrick) when Vehicle #2 (Derrick) began to cross N. Main Street, would be able to safely stop prior to reaching Vehicle #2 (Derrick) or colliding with Vehicle #2 (Derrick).

F. A vehicle traveling along N. Main Street at the speed limit would need only 3.3 seconds in which to react and brake his vehicle to a safe stop.

Both defendant Craig Ray and a passenger in defendants' vehicle testified in their depositions that plaintiff pulled out in front of them without stopping at the intersection. Defendant indicated that just prior to the collision he was not going over 45 m.p.h. From the order of the trial court allowing defendants' motion for summary judgment, plaintiff appealed.

Kirk, Tantum, Hamrick & Gay, by John E. Tantum, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James K. Dorsett, III, for defendant-appellees.

WELLS, Judge.

Summary judgment under G.S. 1A-1, Rule 56 is awarded to a party if he shows to the court that no genuine issues of material

fact exist and that he is entitled to summary judgment as a matter of law. *Hockaday v. Morse*, 57 N.C. App. 109, 290 S.E. 2d 763, *disc. review denied*, 306 N.C. 384, 294 S.E. 2d 209 (1982).

> It is only in the exceptional negligence case that the rule should be invoked. *Rogers v. Peabody Coal Company*, 342 F. 2d 749 (6th Cir. 1965). This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case . . . .

Robinson v. McMahan, 11 N.C. App. 275, 280, 181 S.E. 2d 147, 150 (1971), *cert. denied*, 279 N.C. 395, 183 S.E. 2d 243 (1971). "[W]hen the facts are such that reasonable men could differ on the issue of negligence courts have generally considered summary judgment improper." *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 174, 249 S.E. 2d 827, 829 (1978), *disc. review denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). In applying this standard to the case *sub judice*, summary judgment for defendants is proper only if the forecast of evidence either fails to show negligence on their part or establishes plaintiff's contributory negligence so clearly that reasonable men could not differ.

Defendants argue that the forecast of evidence clearly established that had plaintiff brought her vehicle forward from the point where she allegedly stopped and looked again before entering the intersection, she would have seen defendants' car. They contend that because of her failure to do so, she was contributorily negligent as a matter of law. Defendants rely heavily upon the testimony of Dr. Cribbins that once a person passes the point where plaintiff stopped her vehicle, the "blocked view no longer exists." Earlier in his deposition, however, Dr. Cribbons had testified, "[T]here is still a blind spot in my judgment when she passes that point." Also in his affidavit, Dr. Cribbins concluded that a "horizontal sight distance problem" exists at the intersection. Defendants' evidence does not conclusively show that plaintiff failed to maintain a proper lookout or failed to see what was in clear view.

Defendants have cited numerous cases to support their position. Careful examination of these cases, where the courts found contributory negligence as a matter of law, reveals distinguishing

characteristics. In *Howard v. Melvin*, 262 N.C. 569, 138 S.E. 2d 238 (1964), the plaintiff believed he stopped 19 feet from the main road before attempting to cross the intersection. In *Edwards v. Vaughn and Mims v. Vaughn*, 238 N.C. 89, 76 S.E. 2d 359 (1953), the plaintiff stopped 15 feet from the intersection at a point where he had an unobstructed view of only 150 feet and where he saw defendant's car approaching. The plaintiff in *Badders v. Lassiter*, 240 N.C. 413, 82 S.E. 2d 357 (1954), stopped 10 to 12 feet from the intersection, saw defendant's car about a block away on the dominant highway and proceeded across the intersection. In *Morrisette v. Boone Co.*, 235 N.C. 162, 69 S.E. 2d 239 (1952), plaintiff stopped 30 feet from the intersection before proceeding across. In the remaining two cases cited by defendants, the Supreme Court upheld findings of contributory negligence as a matter of law even though the plaintiffs stopped within six feet of the intersection. *Warren v. Lewis*, 273 N.C. 457, 160 S.E. 2d 305 (1968) and *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d 361 (1951). The plaintiff in *Warren, supra*, however, pulled onto the main highway from a private driveway and collided with defendant's vehicle when his view from the intersection to his right was unobstructed to the top of a hill 400 to 600 feet west of the intersection and an automobile could be seen an additional 50 feet beyond the crest. The Court noted that plaintiff was not wearing glasses when the officer arrived at the scene even though he was restricted to them. The plaintiff in *Matheny, supra*, pulled out in front of a truck going 30 m.p.h. when he had an unobstructed view of approaching traffic. The Court found that "the over-all picture of the collision is one of negligence on the part of the plaintiff in attempting to cross the highway immediately in front of the approaching truck with its bulk and speed plainly visible." *Id.* at 680-681, 65 S.E. 2d at 367.

The facts as presented in the forecast of evidence now before us do not establish contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom. Reasonable men could differ on the issue of whether plaintiff's stopping her Volkswagen within four feet of the intersection constituted contributory negligence. Pursuant to G.S. 20-158(a)(1), plaintiff was required "to come to a complete stop at the entrance to that portion of the intersection designated as the main traveled or through highway." Her failure to stop, however, is not considered

negligence or contributory negligence per se. G.S. 20-158(d). Under this statute

> [i]t is the duty of the driver of a motor vehicle on such servient highway to stop at such time and place as the physical conditions may require in order for him to observe traffic conditions on the highways and to determine when, in the exercise of due care, he may enter or cross the intersecting highway with reasonable safety.

Edwards v. Vaughn and Mims v. Vaughn, supra, at 93, 76 S.E. 2d at 363. In the case *sub judice,* there was a material issue of fact, upon which reasonable men could differ, as to whether plaintiff exercised due care in crossing the intersection.

In a similar fact situation, the North Carolina Supreme Court upheld judgment in plaintiff's favor. *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17 (1953). In *Hawes,* the plaintiff presented evidence that he was traveling along the servient road and stopped about five feet from the intersection. Plaintiff then looked to the south and saw nothing coming. His view in that direction was about 100 yards. Plaintiff drove halfway into the main road at a speed of 5 m.p.h. before he was struck by defendant's car. Defendant was traveling at a speed of 50 to 55 m.p.h. In upholding the judgment for plaintiff, the Court emphasized:

> [A]pplying mathematics to the rate of speed at which the evidence of plaintiff tends to show the two automobiles were traveling, it is not unreasonable to infer that while plaintiff's automobile was starting and traveling ten feet or more, the automobile of defendant could come from beyond the range of vision of one stopping at the intersection, whereas if traveling at a prudent rate of speed it would not be expected to do so. In other words, the case does not come within the purview of those cases where the evidence tends to show that the driver failed to see what was in clear view.

Id. at 651, 74 S.E. 2d at 22.

When the forecast of the evidence here is viewed in the light most favorable to plaintiff, it shows negligence on defendants' part and raises a genuine issue of material fact as to any contributory negligence on plaintiff's part. We hold that the trial

court erred in granting summary judgment for defendants, since a reasonable inference could be drawn that plaintiff exercised ordinary care in attempting to cross the intersection and that defendant Craig Ray's speeding or failure to reduce his speed was the proximate cause of the collision.

Reversed.

Chief Judge VAUGHN and Judge BRASWELL concur.

STATE OF NORTH CAROLINA v. WILLIAM D. CAPPS AND BARRY EUGENE STATON

No. 8210SC761

(Filed 15 March 1983)

1. **Robbery § 4.2— common law robbery—sufficiency of evidence**

Where a Pizza Hut employee was instructed to throw the night deposit on the roof of a bank and where the evidence tended to show that one palm print and six fingerprints made by defendant Staton were found on the roof of the bank; one palm print and two fingerprints made by defendant Capps were found on the roof of the bank; the prints, which were found the day after the robbery, were probably no older than forty-eight hours; neither defendant had a lawful reason to be on the roof; and defendant Capps had previously worked at the Pizza Hut and had the opportunity to learn the night deposit routine, the evidence was sufficient to withstand defendants' motions to dismiss the charge of common law robbery.

2. **Criminal Law § 91— time limit of Speedy Trial Act complied with**

The trial judge was incorrect in treating defendants' cases as being joined in computing the excluded days pursuant to the Speedy Trial Act; however, under G.S. 15A-701(b)(9), G.S. 15A-701(b)(1), and G.S. 15A-701(b)(7) both defendants' trials began within the 120 days from their indictment as required by G.S. 15A-701(a1). G.S. 15A-926(b)(2)(a). The exclusions relevant to the Speedy Trial Act also brought defendants within the speedy trial provisions of the Interstate Agreement on Detainers Act, G.S. 15A-761.

APPEAL by defendants from *Godwin, Judge.* Judgment entered 2 April 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 19 January 1983.

Defendants were charged with armed robbery of an employee of the Pizza Hut restaurant on Western Boulevard in Raleigh. The State's evidence tended to show the following. Lynn

Davidson, Assistant Manager of the Pizza Hut, testified that, on 22 June 1980, she was working at night. After the Pizza Hut closed she cleaned up and then followed her usual procedure for closing up. She cleared out the register, made out the bank deposit, locked up the building, and drove to the Wachovia Bank on Western Boulevard to deposit the money. When she got out of her car and started to walk up to the night deposit box, she heard a voice on top of the roof of the bank say "throw the money on the roof or I'll shoot." She threw the money on the roof. She did not recognize the voice or see anyone on the roof. She returned to the Pizza Hut and called the police. On cross-examination, Davidson said she had worked with defendant Capps at the Pizza Hut and did not think it was his voice she heard from the roof of the bank.

Mr. Hatley, a manager at Wachovia Bank, testified that, on 22 June 1980, no one had permission to go on the roof of the Wachovia Bank on Western Boulevard.

Philip Robbins, a crime scene specialist for the Bureau of Identification for Wake County, testified that the morning after the robbery he found three palm prints and eleven fingerprints on the roof of the bank. Of these fourteen latent prints, all were identifiable except for one palm print and two fingerprints. One palm print and two fingerprints were made by defendant Capps, and one palm print and six fingerprints were made by defendant Staton. One fingerprint was made by another, unidentified, person. He said the prints were probably no older than forty-eight hours, but could possibly be as old as seventy-two.

Defendants did not present any evidence. They were found guilty of common law robbery and each received a ten-year sentence.

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

Appellate Defender Adam Stein and Assistant Appellate Defender Lorinzo L. Joyner, for defendant Capps.

Savage and Godfrey, by David R. Godfrey, for defendant Staton.

VAUGHN, Chief Judge.

[1] Defendants' first assignment is that the trial court erred in denying their motions to dismiss. They contend the evidence was insufficient to link them to the crime. A motion to dismiss requires the trial judge to consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608 (1971). The question is whether there is substantial evidence, direct, circumstantial, or both, to support a finding that the offense charged has been committed and the accused committed it. *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977). When the State relies on defendant's fingerprint found at the scene of the crime the rule is that "in order to withstand a motion to dismiss, there must be substantial evidence of circumstances from which the jury can find that the fingerprint could have been impressed only at the time the crime was committed." *State v. Berry*, 58 N.C. App. 355, 356, 293 S.E. 2d 650, 651 (1982), *affirmed per curiam*, --- N.C. ---, 298 S.E. 2d 386 (1983). *Accord, State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). In *Berry*, the defendant was tried for breaking or entering and larceny. The Court held that the evidence, one latent print inside the rear kitchen door, was sufficient to withstand defendant's motion to dismiss when the prosecuting witness lived alone and said she did not know defendant and, to her knowledge, he had never been in her house. In *Miller*, the defendant was charged with breaking and entering Williams Launderette. The Court held that the evidence, defendant's thumbprint on the lock of the broken cigarette machine which was inside Williams Launderette, and the fact that defendant said he had never been there, was sufficient to withstand his motion to dismiss.

In this case, the evidence, viewed in the light most favorable to the State, tends to establish the following facts: one palm print and six fingerprints made by defendant Staton were found on the roof of the bank; one palm print and two fingerprints made by defendant Capps were found on the roof of the bank; the prints, which were found the day after the robbery, were probably no older than forty-eight hours; neither defendant had a lawful reason to be on the roof; and defendant Capps had previously worked at the Pizza Hut and had the opportunity to learn the

night deposit routine. This evidence is sufficient to withstand defendants' motions to dismiss.

[2] Defendants' second argument is that the trial court erred in not granting their motions to dismiss for failure to bring them to trial within the time limit required by the Speedy Trial Act. Defendants filed their motions on 29 March 1982. Their trial began on 1 April 1982. G.S. 15A-701(a1) requires defendants' trial begin within 120 days from their indictment. G.S. 15A-701(b) lists various time periods which may be excluded in computing the 120 days. In denying the motion the trial judge found the following facts:

> 3. Both defendants were indicted by the Wake County Grand Jury on November 9, 1981;
>
> 4. Both defendants were transported from the Florida Department of Corrections to Raleigh, North Carolina on November 11, 1981, both defendants being presently incarcerated in Florida for armed robbery;
>
> 5. Both cases were set on a Motions and Arraignment calendar on December 7, 1981, were continued for arraignment until December 14, 1981; and arraignment was completed in each case on December 18, 1981 by the entry of a plea of not guilty;
>
> 6. From December 7, 1981 and thereafter the cases have been, in effect, treated as if formally joined for trial;
>
> 7. Both cases were set for trial on January 29, 1982*, which trial date was continued because Capps' attorney had a conflicting trial calendared in another jurisdiction;
>
> 8. The cases were again calendared for trial on February 25, 1982, which trial date was continued because the Assistant District Attorney assigned to these cases as well as Staton's attorney, were involved in the trial of another matter;
>
> 9. The cases were again calendared for trial on March 30, 1982, on which date the motions for dismissal were filed.

* The correct date, as referred to consistently in the trial transcript, was January 25, 1982.

Based on the findings of fact, the trial judge concluded, as a matter of law:

> 1. The period of eleven (11) days from December 7, 1981 until December 18, 1981 is excludable for purposes of this motion;
>
> 2. A period of twenty-eight (28) days following January 25, 1982 is excludable for purposes of this motion;
>
> 3. A period of seven (7) days following February 25, 1982 is excludable for purposes of this motion;
>
> 4. The State has prosecuted these cases within all time limits required by the North Carolina General Statutes and the Constitutions of the United States and the State of North Carolina;
>
> 5. Defendants have, at any rate, failed to show any prejudice to them arising out of any delays in the prosecution of these cases.
>
> Based upon the foregoing, the Motions of both defendants are, hereby, DENIED.

Defendants did not take exception to any of the findings of fact, only to the denial of their motions to dismiss. "[T]he scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignment of error. . . ." Rule 10(a), Rules of Appellate Procedure. Since defendants did not except to any findings of fact, our review is limited to whether the findings of fact support the conclusions of law. Defendants were indicted on 9 November 1981 and their trial was 1 April 1982, 142 days later. To withstand defendants' motions to dismiss at least twenty-two days must be excluded for each defendant.

The trial judge found that both cases were treated as if they were formally joined since 7 December 1981. The State, however, did not file a motion to join the cases, as required by G.S. 15A-926(b)(2)(a), until 1 April 1982. The motion was allowed over defendants' objections. Had defendants been formally joined in December 1981 the excludable days for each defendant would be excludable against the other. G.S. 15A-701(b)(6) allows excluding: "A period of delay when the defendant is joined for trial with a

codefendant as to whom the time for trial has not run and no motion for severance has been granted." *See State v. Shelton*, 53 N.C. App. 632, 281 S.E. 2d 684 (1981), *review denied*, 305 N.C. 306, 290 S.E. 2d 707 (1982). Since defendants were not formally joined until the day of trial G.S. 15A-701(b)(6) does not apply. Three other G.S. 15A-701(b) exclusions will apply to these defendants, however. G.S. 15A-701(b)(1) excludes: "Any period of delay resulting from other proceedings concerning the defendant. . . . The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until . . . the event causing the delay is finally resolved." G.S. 15A-701(b)(7) excludes: "Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial. . . ." And G.S. 15A-701(b)(9) excludes: "A period of delay resulting from defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried."

The trial judge was correct in finding that the defendants were treated as if their cases had been joined since December, but since he was incorrect in treating the cases as joined in computing the excluded days, because they were not formally joined, we shall recompute the excludable days for each defendant. As mentioned above, twenty-two days must be excludable for *each* defendant to withstand their motions to dismiss under G.S. 15A-703. Both defendants were indicted 9 November 1981 but arrived in North Carolina on 11 November, so two days are excludable for each defendant under G.S. 15A-701(b)(9). On 7 December 1981, both cases were calendared for arraignment. Arraignment was not completed until 18 December, so eleven days are excludable for both defendants under G.S. 15A-701(b)(1). The cases were calendared for 25 January 1982. Mr. Gamble, defendant Capps' attorney, had a case in another jurisdiction at that time and moved for a continuance. Defendants' cases were then set for 25 February which was the earliest they could be on a printed calendar. The judge excluded twenty-eight days for this continuance under G.S. 15A-701(b)(7). Defendant Capps contends that two weeks would have been an adequate continuance, and only fourteen days should have been excluded. Excluding fourteen

days for Capps brings his total of excluded days to twenty-seven, so his motion to dismiss was properly denied. On 22 February, Mr. Godfrey, defendant Staton's attorney, had another case calendared, and he requested a continuance. The judge granted his request and calendared the defendants' cases for 30 March. Because the judge had already excluded 25 January to 25 February, he only excluded 25 February to 3 March for Staton's continuance. Since we find that the 25 January continuance should have only counted as a two week exclusion, we must add the period of 22 February to 25 February to the continuance Staton's attorney requested, since it actually began on 22 February. The exclusion would be ten days, allowable under G.S. 15A-701(b)(7). Defendant Staton's excludable days total twenty-three, so his motion to dismiss was properly denied.

Defendants' third argument is that the trial court erred in failing to grant their motions to dismiss based on the speedy trial provisions of the Interstate Agreement on Detainers Act, G.S. 15A-761. Defendants contend that the charges must be dismissed because of the delay in trial. Article III requires the prisoner brought to trial within 180 days of his request for final disposition, and Article IV requires the trial to begin within 120 days of arrival of the prisoner in this State. The statute, however, expressly provides that any reasonable continuance may be granted. Clearly the exclusions mentioned above under the Speedy Trial Act would also apply here.

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

No error.

Judges WELLS and BRASWELL concur.

Parker v. Barefoot

GERTRUDE B. PARKER, CO-GUARDIAN OF IRENE BEASLEY BAREFOOT, INCOMPETENT, PETITIONER v. HUBERT A. BAREFOOT, CO-GUARDIAN OF IRENE BEASLEY BAREFOOT, INCOMPETENT, RESPONDENT

No. 8211SC361

(Filed 15 March 1983)

1. **Insane Persons § 2.3; Rules of Civil Procedure § 52.1— petition to remove guardian—appeal to superior court—findings not necessary**

A superior court judge was not required to make findings of fact in his order reversing an order of the clerk of court in which the clerk refused to remove respondent as a co-guardian of an incompetent since the superior court had only derivative jurisdiction to hear questions of law and did not try the action upon the facts. G.S. 1A-1, Rule 52(a)(1).

2. **Insane Persons § 2.3— removal of guardian of incompetent—wasting or converting estate or money of ward**

Findings of fact made by the clerk of court supported a superior court judge's conclusion that respondent should be removed as co-guardian of an incompetent pursuant to G.S. 33-9(1) for wasting or converting the estate or money of the ward to his own use where the findings indicated that respondent rented land from his incompetent mother for less than fair market value; respondent profited from this rental at the expense of the incompetent; respondent rented the incompetent's land privately and without showing it would serve the best interest of his ward to do so in violation of G.S. 33-21; and respondent refused to agree with his co-guardian to raise the rent to the fair market value.

APPEAL by respondent from *Britt, Judge.* Order entered 3 March 1982 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 15 February 1983.

This is an appeal from an order of the Superior Court reversing the order of the clerk of Superior Court. Petitioner, Gertrude B. Parker, is the daughter and co-guardian of Irene Beasley Barefoot, who is incompetent. Respondent, Hubert A. Barefoot, is the son and co-guardian of Irene Beasley Barefoot. Petitioner filed a petition with the clerk of Superior Court seeking removal of her brother, the respondent, as co-guardian of their mother. The petitioner alleged that respondent refused to charge a sufficient and fair rent to tenants of real property in which their incompetent mother held a life estate. Petitioner also alleged that respondent, as a tenant of the real property in which the incompetent held a life estate, had individually profited by setting a low rent to be paid to the incompetent's estate.

The clerk made findings of fact which include the following: Gertrude B. Parker and Hubert A. Barefoot were appointed co-guardians of their mother, Irene Beasley Barefoot, after she was adjudged incompetent to manage herself and her affairs due to infirmities of old age and disease. Hubert Barefoot, Gertrude Parker, James Barefoot, Hobert Barefoot, Ova Lee Barefoot, and the children of Sherrill Barefoot, deceased, who are Michael Barefoot, Kathy B. Jackson, and Sandra Barefoot, are all the children and grandchildren of the incompetent, and all own a remainder interest in the property in which the incompetent has a life estate. The co-guardians were advised that the children and grandchildren of the incompetent could rent the "tobacco and farm land" if all the children and grandchildren could agree upon a fair rental price to be paid to the incompetent.

The clerk also found:

. . .

4. That all of the parties agreed upon the figure of $2,100 for each child of Mrs. Irene Beasley Barefoot to be paid for the tobacco and land rental into the estate of Irene Beasley Barefoot for the year 1981.

5. That at the time of the hearing of this action on November 17, 1981, the Co-Guardian defendant, Hubert A. Barefoot, had suggested a price of $2,500 per child for the rental of tobacco and farm land from the Estate of Irene Beasley Barefoot, incompetent, for the year of 1982; Co-Guardian plaintiff, Gertrude Parker, did not agree with this figure and felt that it should be substantially more contending that this is the reason why Hubert A. Barefoot should be removed as Co-Guardian.

6. That Ova Lee Barefoot agrees with Gertrude Barefoot Parker's position that more money should be charged for the rental; that James Garland Barefoot, Hobert V. Barefoot and the children of the deceased son, Sherrill Barefoot, agree with Hubert A. Barefoot's position that $2,500 per child is a sufficient and fair amount for the rental of said property and tobacco.

7. That Hubert A. Barefoot acknowledges that the fair market rental value of said farm land and tobacco would be

higher than $2,500 per child and in fact, each child received more than $2,500 in rent for the year 1981.

8. That Hubert A. Barefoot's family along with the family's [sic] of James Garland Barefoot, Hobert V. Barefoot and Gertrude Barefoot Parker and the family of the deceased son, Sherrill Barefoot, each rotate every weekend to take care of their mother, Irene Beasley Barefoot, without any compensation; that Ova Lee Barefoot who resides in Baltimore does not participate in this weekend rotation with the other brothers and sister.

9. That the incompetent, Irene Beasley Barefoot resides in the home to which Ova Lee Barefoot has a remainder interest and he therefore, does not receive any rent for his home which he considers unfair since some of the other children, Hubert A. Barefoot, Hobert V. Barefoot and the children and spouse of the deceased son, Sherrill Barefoot, each reside in a home which they have restored on their share of the property to which they have a remainder interest.

10. That Ova Lee Barefoot has proposed that each acre of cleared land that each child has a remainder interest in to be rented according to a schedule which he submitted to the Court through Gertrude Parker's attorney and that all the tobacco allotment be rented at $.50 a pound according to this schedule and that Hubert A. Barefoot, the children of the deceased Sherrill Barefoot and Hobert V. Barefoot each pay $1,000 per year rent for the house and structures on their remainder interest which they have restored through their own funds. A copy of this proposal is attached to this Order which would provide the incompetent ward with funds in the amount of $24,626.10.

11. Hubert A. Barefoot submitted a proposal which provided that each child would pay $3,500 for the tobacco and land rent except for Ova Lee Barefoot who would pay $2,600 which would give the incompetent's estate $20,100. This proposal is also attached to this Order which was presented to the Court by Hubert A. Barefoot's attorney.

12. That Hubert A. Barefoot feels that since his father had this property divided up by three independent people in

what he considered equal shares, each child should have to pay the same amount to the estate of Irene Beasley Barefoot without taking into account that some of the children have made improvements to their remainder interest through their own funds since said real property was divided by their father; Gertrude Barefoot Parker contends and feels that each child's share should be rented at the fair market value regardless of the fact that some of the children have put their own money into the farms to make improvements to the real property as well as the structures on the real property since said farm was divided by their father.

13. That Hubert A. Barefoot does not feel that he should charge rent on the houses which have been remodeled and improved at each child's expense since the division was made in the property by their father and that this would be inequitable to those who have put money into their dwelling houses and other structures.

14. Hubert A. Barefoot feels that although Ova Lee Barefoot does not receive rent from his house where his mother is presently residing, the house is being maintained by the estate, whereas all the other dwelling houses and structures are not and Ova Lee Barefoot does not participate in taking care of his mother along with the other children; and therefore, paying an equal share for the farm rental would be fair to Ova Lee Barefoot.

15. Testimony shows that Mrs. Irene Beasley Barefoot is taken care of and does not go without anything that she desires but that there has been conflict between the Co-Guardians about some of the items that have been bought for Mrs. Barefoot or for the house in which she resides. The Co-Guardians have eventually worked out these conflicts, but there is tension between the Co-Guardians.

16. There is around $5,500 in a savings account for Irene Beasley Barefoot and close to $8,000 in a checking account; that during the past year approximately $22,379 has been taken into the estate and approximately $15,644 has been expended from the estate.

17. That Gertrude Parker Barefoot has expressed her concern over the wellbeing of her mother and ward in the

future in case she becomes worse off and must be placed in a nursing home or a rest home, and therefore, feels that every dollar that can be obtained at this time for rent on said real property should be obtained.

18. That Hubert A. Barefoot feels that his mother will be taken care of by all of her children regardless of what happens to her and that funds will be made available to the estate by all the children regardless of the amount of rent charged.

19. That Hubert A. Barefoot and wife, Hobert V. Barefoot and wife, James Garland Barefoot and wife and the children and their spouses of the deceased son Sherrill Barefoot have proposed to give an open-ended Note and Deed of Trust on their remainder interest in said property which would include all improvements and structures made by the children since the division by their father to the estate of their mother, Irene Beasley Barefoot, in order to protect against there not being adequate funds to take care of their mother in the future as part of this proposal they would still be willing to pay $2,100 to $2,500 for rent of the tobacco and farm land to the estate. Gertrude Parker Barefoot and Ova Lee Barefoot have refused to participate in this open-ended deed of trust and are not in agreement with this proposal.

Based on these findings, the clerk concluded that respondent had acted in the incompetent's best interest and had faithfully executed his responsibilities as co-guardian. He also concluded that the real property and tobacco allotment would be put up for public auction pursuant to N.C. Gen. Stat. § 33-21 if the co-guardians could not agree on a rent to be paid to the incompetent. The clerk ordered that respondent remain a co-guardian.

Petitioner appealed to Superior Court, which reviewed the clerk's order for errors of law. The Superior Court judge concluded that N.C. Gen. Stat. § 33-9(1) required removal of respondent as co-guardian. The judge ordered respondent removed, and respondent appealed to this Court.

Morgan, Bryan, Jones & Johnson, by Dwight W. Snow for petitioner, appellee.

Levinson & Berkau, by Thomas S. Berkau for respondent, appellant.

HEDRICK, Judge.

[1] The respondent sets forth three assignments of error on appeal. First, he contends that the Superior Court erred in failing to state findings of fact in its order. Under Rule 52(a)(1) of the North Carolina Rules of Civil Procedure, a judge is required to state findings of fact "[i]n all actions tried upon the facts. . . ." However, in the present case the Superior Court judge was not trying the action upon the facts; instead, the Superior Court judge had only derivative jurisdiction to hear questions of law. *In Re Simmons*, 266 N.C. 702, 147 S.E. 2d 231 (1966). The judge of Superior Court was not required to state findings of fact because he was bound by the clerk of Superior Court's findings.

[2] The respondent next contends there were no findings of fact in the clerk's order to support the judge's conclusion of law that respondent be removed as co-guardian. While we recognize that much of that portion of the clerk's order designated as "findings of fact" is nothing more than a recital of the evidence and contentions of other children and grandchildren, and that many of the clerk's "findings of fact" are irrelevant to the issue raised by the pleadings and evidence, we are of the opinion that the clerk's order does contain sufficient legitimate findings of fact to support the judge's conclusion that the respondent had wasted or converted the estate or money of the ward to his own use, in violation of N.C. Gen. Stat. § 33-9(1). The findings of fact indicate respondent rented land from his incompetent mother for less than fair market value. Respondent profited from this rental at the expense of the incompetent. Respondent rented the incompetent's land privately and without showing it would serve the best interests of his ward to do so, in violation of N.C. Gen. Stat. § 33-21. Finally, respondent refused to agree with his co-guardian, the petitioner, to raise the rent to fair market value. Apparently, the respondent also lived rent-free in a home in which the incompetent had a life estate. These findings of fact by the clerk demonstrate that respondent violated his fiduciary duty and should have been removed as co-guardian pursuant to N.C. Gen. Stat. § 33-9(1), which states:

> The clerks of the superior court have power and authority on information or complaint made to remove any fiduciaries appointed under the provisions of this Chapter . . . and it is their duty to do so in the following cases:

(1) Where the fiduciary wastes or converts the money or the estate of the ward to his own use.

The respondent's last assignment of error is that the Superior Court judge did not limit himself to reviewing questions of law. However, the judge's order states that it is based on the clerk's findings of fact, and that the clerk's error was one of law. Since the clerk's findings of fact squarely support the Superior Court judge's conclusion of law, it is clear the judge did not make new findings of fact but ruled only on matters of law.

Since, as we have already seen, the Superior Court judge's jurisdiction in this matter is derivative only, *In Re Simmons*, 266 N.C. 702, 147 S.E. 2d 231 (1966), we hold the judge's order removing the co-guardian must be reversed, and the cause must be remanded by the Superior Court to the clerk for an order removing the co-guardian. We affirm that portion of the order of the judge of Superior Court which declares that the findings made by the clerk require the removal of the co-guardian pursuant to N.C. Gen. Stat. § 33-9(1).

Affirmed in part, reversed and remanded with instructions in part.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. R. B. BOYD

No. 8226SC799

(Filed 15 March 1983)

1. Criminal Law § 105.1— failure to renew motion to dismiss at close of all evidence

Where defendant assigned as error the denial of his motion to dismiss at the close of the State's evidence but where defendant did not make a similar motion at the close of all the evidence, he waived his right to assert the denial as error on appeal. However, pursuant to G.S. 15A-1227(d) and G.S. 15A-1446(d)(5) the Court could consider the sufficiency of all the evidence.

2. Homicide § 21.9— involuntary manslaughter—sufficiency of evidence

The evidence was sufficient to be submitted to the jury on the charge of involuntary manslaughter where there was evidence that defendant voluntarily drew his gun while involved in an argument.

State v. Boyd

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 11 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 February 1983.

The defendant was indicted by a grand jury for the second degree murder of Loretta Stevens. He pled not guilty and was tried by a jury.

Two men who were present at the scene of the shooting testified for the State. Jesse Stowe said that he was at a house on Kenthill Drive in Charlotte at about one p.m. on 16 June 1981. He talked with Stevens and Terry Lee Davis for awhile. Stevens then went into the kitchen.

Although Stowe could not see the defendant or Stevens, he did hear conversation from the kitchen. Stowe heard one shot and the defendant calling for help.

When Stowe went to the kitchen, he saw the defendant holding Stevens up to him. He described the defendant as hysterical. The defendant put Stevens in his car to take her to the hospital although Stowe said that he would call an ambulance.

Davis testified that he was at the house on the day of the shooting. Although he could not see what was happening in the kitchen, Davis said he heard the defendant holler "Oh God" and "I didn't mean to do it." Davis ran into the room and saw the defendant holding Stevens.

After Davis and the defendant put Stevens in the defendant's car, defendant drove toward the hospital. When Stevens fell off the seat onto the floor, the defendant stopped to put her back on it. Davis got out of the car and went back to the scene of the shooting. The defendant drove to the hospital.

Robert Mattice, an officer with the Charlotte Police Department, went to the hospital about three p.m. on the day of the shooting to talk with the defendant. The defendant told Mattice that Stevens had been cleaning the gun. She was smiling and laughing and told him that she was going to kill him. When the defendant went outside, he heard a shot go off.

Three other police officers met the defendant and Mattice at the scene of the shooting. A search of the house revealed a blue steel handgun and some ammunition.

At the police station, the defendant told Officer Rick Sanders the same story that he had earlier told Mattice. Sanders told the defendant that he did not believe him and left the room.

When Sanders came back into the room, the defendant told him that he and Stevens had been arguing before the shooting. After she grabbed his gun and they struggled over it, the gun went off. Sanders told the defendant again that he did not believe him. The defendant then told a third story that Sanders wrote down and that the defendant signed.

In the written statement, the defendant stated that while arguing with Stevens, he pulled out his gun from his pants and heard shots. The defendant went outside and when he came back in, he realized that he had shot Stevens. He then took Stevens to the hospital. The statement concluded "I shot Loretta but I didn't mean to kill her. If I was going to kill her, I wouldn't have tried to help her."

The doctor who performed an autopsy on Stevens testified that the cause of her death was a gunshot wound to the chest.

Three witnesses testified for the defense. James Burroughs, the defendant's uncle, stated that he was in the backyard behind the house at the time of the shooting. He did not see the defendant walk out of the house and back inside after the shot.

Davis was also called as a witness for the defendant. He identified a written statement that he gave to the police on the day of the shooting. The statement corroborated what Davis said in his testimony for the State. It added that after Davis heard the shot, he heard the defendant say "I didn't mean it. She hit my arm." When Davis was helping put Stevens in the car, he heard defendant say, "I didn't mean to shoot her. She hit my arm."

The defendant testified that on the day of the shooting, Stevens was angry with him because he would not take her to her mother's house at that time. When he started to walk away, Stevens grabbed his gun out of his side holster. The gun went off as they struggled over it.

The defendant denied that the statement read by Sanders to the jury was an accurate reflection of what he said. He testified that he signed the statement because he was scared and because

Sanders told him that he would get him a lawyer and get him out of jail on bond.

The defendant identified the gun that the State introduced into evidence as one that he gave Stevens to protect herself. He said the gun that Stevens was shot with was a different gun than the one that had been presented at trial.

Four possible verdicts were submitted to the jury: second degree murder, voluntary manslaughter, involuntary manslaughter, and not guilty. The jury found the defendant guilty of involuntary manslaughter. He was given the maximum sentence of ten years and ordered to pay restitution to Stevens' estate of $3,500 as a condition of obtaining work release or parole. From this judgment, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for the defendant.

ARNOLD, Judge.

The defendant's first assignment of error is the denial of his motion to dismiss at the close of the State's evidence. He did not make a similar motion at the close of all the evidence.

[1] In *State v. Mendez*, 42 N.C. App. 141, 256 S.E. 2d 405 (1979), the court held that presentation of evidence by a defendant following denial of this motion and failure to renew the motion at the close of all the evidence is a waiver of the right to assert the denial as error on appeal. But we will consider the sufficiency of all the evidence here, pursuant to G.S. 15A-1227(d) and G.S. 15A-1446(d)(5), as the court did in *State v. Alston*, 44 N.C. App. 72, 259 S.E. 2d 767 (1979), *cert. denied*, 304 N.C. 589, 290 S.E. 2d 709 (1981).

[2] In judging the sufficiency of the evidence in a criminal case, we are guided by the words of the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979). The test is 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." 443 U.S. at 319 (emphasis in original). *See also State v. Locklear*, 304 N.C. 534, 537-38, 284 S.E. 2d 500, 502 (1981).

Involuntary manslaughter is defined in North Carolina as "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976).

Because involuntary manslaughter is a felony, G.S. 14-18, and part (1) of the *Redfern* definition of the crime is not applicable to the facts before us, this case turns on if the facts show "a culpably negligent act or omission" by the defendant.

It is a well-accepted tenet of our jurisprudence that "[o]ne who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter." *State v. Moore*, 275 N.C. 198, 212, 166 S.E. 2d 652, 662 (1969); *accord, State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

What is culpable negligence was defined in *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977).

> Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others.

291 N.C. at 702, 231 S.E. 2d at 606.

The evidence here, when considered in the light most favorable to the prosecution, shows that the defendant acted with the requisite culpable negligence. His signed statement contains facts that could be seen by a rational jury as sufficient to meet the elements of the crime.

> Me and Loretta Stevens were arguing. I had got real mad at Loretta, and I had my gun on my side in my pants. The next

thing I knew, I had the gun out. I was real mad and heard the shots. I went outside and came back inside. I then realized I had shot Loretta.

Both of the cases cited by the defendant in support of his argument that the shooting was an accident can be distinguished from this case on the facts. In *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959), the defendant's gun discharged after it hit a porch post. The defendant there had been aiming at a tree.

The only evidence to implicate the defendant in *State v. Church*, 265 N.C. 534, 144 S.E. 2d 624 (1965), was his statement that "It was an accident. I didn't mean to." 265 N.C. at 536, 144 S.E. 2d at 625. Thus, the facts in both cases cited are weaker than those in the case *sub judice* where the defendant voluntarily drew his gun while involved in an argument. Although involuntary manslaughter does not concern intent to kill, it does connote an intentional act, like the defendant voluntarily drawing his gun. *State v. Wilkerson*, 295 N.C. 559, 582, 247 S.E. 2d 905, 918 (1978). *See also State v. Shepard*, 61 N.C. App. 159, 300 S.E. 2d 268 (1983) (upheld an involuntary manslaughter conviction because it found culpable negligence from facts similar to the ones in this case).

The other assignment of error by the defendant is that an instruction to the jury on involuntary manslaughter should not have been given because of the lack of evidence to support a verdict of guilty of that crime. Because involuntary manslaughter is a lesser included offense of the indicted crime of murder, *State v. Hudson*, 54 N.C. App. 437, 283 S.E. 2d 561 (1981), an instruction on its elements was proper only if there was evidence to support it. *See Redfern*, 291 N.C. at 321, 230 S.E. 2d at 153.

Our discussion above shows that we find sufficient evidence of involuntary manslaughter to warrant an instruction on it. Because it was proper to give a jury instruction on the elements of involuntary manslaughter and the evidence supports the conviction, we find

No error.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. ANDRÉ WILLIS AND PAUL FULLER

No. 827SC762

(Filed 15 March 1983)

1. **Criminal Law § 166— filing of stenographic transcript—assignments of error not supported by appendix material or verbatim reproduction in brief**

In an appeal in which defendants filed a stenographic transcript of the trial proceedings in lieu of narrating the testimony in the record on appeal, the appellate court will not consider those assignments of error not supported by an appendix in the brief containing those portions of the transcript necessary to understand the questions raised or a verbatim reproduction of the necessary portions of the transcript in the body of the brief. App. Rule 28(b)(4).

2. **Robbery § 4.3— use of deadly weapon—threatening or endangering life of victim—sufficiency of evidence**

The State's evidence was sufficient to establish that a dangerous weapon was used and that the life of the victim was endangered or threatened by use of this weapon so as to support conviction of defendants for armed robbery where it tended to show that defendants entered the victim's store with stockings over their heads; one defendant came toward the victim with a foot-long object, which was either a club, pipe or wrench, clinched in his upraised hand, grabbed the victim around the neck, and threw her to the floor; although the victim was uncertain whether she was struck by the object, she suffered a broken neck and received 48 stitches for cuts to her face and head; and defendants took a bank bag containing $1,000 and money from the cash register.

3. **Constitutional Law § 48; Criminal Law § 138— sentencing hearing—two defendants represented by same counsel—no denial of effective assistance of counsel**

Defendant was not denied his Sixth Amendment right to the effective assistance of counsel when both he and his codefendant were represented by the same attorney at an armed robbery sentencing hearing on the ground that this joint representation prohibited counsel from mentioning defendant's lesser culpability where defendant raised no objection at the trial to this joint representation, and where defendant was not prejudiced by counsel's failure to argue the issue of disparity in culpability since the trial judge stated at the sentencing hearing that he had a hard time finding both defendants equally responsible because of evidence that the codefendant alone broke the robbery victim's neck and had a weapon in his possession, the court was informed by defendant himself that he had nothing to do with the victim's injury, and the court then sentenced the codefendant to a term of 40 years and defendant to a term of only 25 years.

APPEAL by defendants from *Allsbrook, Judge.* Judgments entered 4 March 1982 in Superior Court, WILSON County. Heard in the Court of Appeals 19 January 1983.

Defendants André Willis and Paul Fuller were indicted for and found guilty of armed robbery. From judgments imposing a 40 year sentence as to Fuller and a 25 year sentence as to Willis, both defendants appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Michael Rivers Morgan, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant-appellant André Willis.

Fitch and Butterfield, by Milton F. Fitch, Jr., for defendant-appellant Paul Fuller.

WELLS, Judge.

[1] We initially note that, in lieu of narrating the testimony in the record on appeal, defendants chose to file a stenographic transcript of the trial proceedings as they may under Rule 9(c)(1) of the Rules of Appellate Procedure. The filing of a transcript mandates that each defendant either attach an appendix to his brief containing those portions of the transcript necessary to understand the questions raised or include a verbatim reproduction of the necessary portions of the transcript in the body of his brief. App. R. 28(b)(4). Both defendants failed to satisfy this requirement for some of their assignments of error brought forward. Failure to observe this requirement is grounds for dismissal. *See State v. Edmonds*, 59 N.C. App. 359, 296 S.E. 2d 802 (1982); *State v. Greene*, 59 N.C. App. 360, 296 S.E. 2d 802 (1982); *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). We, therefore, do not consider those assignments of error not properly supported by appendix material or verbatim reproduction in the briefs. Both defendants have assigned error to the denials of their motions to dismiss the charge of armed robbery. Since this assignment of error raises a question as to the sufficiency of the evidence, an appendix or verbatim reproduction is not required. App. R. 28(b)(4) provides in pertinent part: "It is not intended that an appendix be compiled to show the general nature of evidence or the absence of evidence relating to a particular question presented in the brief."

[2] In separate briefs, defendants argue that the trial court erred in denying their motions to dismiss the charge of armed

robbery on two grounds: first, that the State failed to establish the presence or use of a dangerous weapon and second, assuming the presence of a weapon, that the State failed to show that the victim was endangered or threatened by the use of this weapon.

In ruling upon a motion to dismiss in a criminal case, the trial court must consider the evidence in the light most favorable to the State. *State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980). "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 nonsuit should be denied. (Citations omitted.)" *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 582 (1975). To prove the offense of robbery with firearms or other dangerous weapons set forth in G.S. 14-87, the State must present evidence of three essential elements: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of a dangerous weapon, implement, or means; and (3) danger or threat to the life of the victim. *State v. Joyner*, 295 N.C. 55, 63, 243 S.E. 2d 367, 373 (1978). In applying these principles to the present case, we hold that there was sufficient evidence of each essential element of armed robbery to require submission of the case to the jury.

The State's evidence tended to show that on 19 September 1981 Mildred Duke owned and operated Duke's Grocery in Wilson, North Carolina. Around 3:00 p.m. on that date, Ms. Duke and Sue Jordan, an employee, were working at the store. Two males wearing stockings over their heads entered the store. One of the men came toward Ms. Duke with an object clinched in his upraised hand. Ms. Duke testified: "It was either a piece of pipe, a wrench, or it was in the form of a club. . . . It was approximately a foot long." The man grabbed Ms. Duke around the neck and flung her to the floor. He then grabbed a bank bag containing approximately $1,000.00. This bag was in an old refrigerator that Ms. Duke used as a desk. The second man opened the cash register and took the money out of it. The two then ran from the store. Ms. Duke suffered a broken neck and received 48 stitches from cuts to her face and head. Ms. Jordan testified that one of the men also threw her down and injured her back. Both women positively identified defendant Fuller as Ms. Duke's assailant. Ms.

Duke identified defendant Willis as the second male. The defendants had been customers in Ms. Duke's store prior to the robbery.

In arguing that no weapon was used to endanger or threaten the life of Ms. Duke, defendants rely heavily upon *State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981). In *Gibbons*, the Supreme Court reversed the defendant's conviction for robbery with a firearm and remanded for sentencing for common law robbery, because the State presented evidence of possession of a deadly weapon but no evidence that the victim's life was endangered or threatened by possession of the weapon. The victim testified that someone broke into her home early one morning and knocked her unconscious. When she came to, she observed a teenage boy at her feet. Another person was beating her and indicated he wanted her money. She lost consciousness again and did not awaken until the assailants were gone. A witness for the State testified that he, the defendant and a third man broke the glass in the victim's door with a shotgun, entered the house and then rested the shotgun against the wall. The court reversed the conviction for armed robbery, noting:

> In this case, while the State presented evidence of the element of possession of a deadly weapon, it presented no evidence that defendant endangered or threatened the life of the victim by possession of that weapon, aside from the mere fact of the weapon's presence. The victim did not testify that a weapon was used in the crime. The perpetrators testified that the shotgun was present at the scene, but they did not testify that the gun was pointed at the victim or used to threaten her. On this evidence we hold that the State has not offered any evidence that the life of the victim was endangered or threatened by possession of the shotgun.

Id. at 490, 279 S.E. 2d at 578.

The facts in the case before us are clearly distinguishable. Unlike the victim in *Gibbons*, Ms. Duke saw one of her assailants approach her with a foot-long object, which was either a club, pipe or wrench, clinched in his upraised hand. She was not certain that she was hit with the object. This evidence, combined with the serious nature of the injuries inflicted on Ms. Duke, clearly would support an inference that a dangerous weapon or instrument was used to accomplish the robbery and that Ms. Duke's life

was endangered or threatened by its use. *See State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965). This assignment is overruled.

[3] Defendant Willis contends that he was denied his Sixth Amendment right to effective assistance of counsel when both he and defendant Fuller were represented by the same attorney at the sentencing hearing. He argues that this joint representation led to a conflict of interest, which prohibited counsel from mentioning defendants' unequal culpability. The uncontradicted evidence shows that Willis did not injure Ms. Duke during the robbery. Because of this alleged conflict of interest, Willis requests a new sentencing hearing.

The record on appeal indicates that Willis raised no objection at the trial to this joint representation. In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed. 2d 333, 346-47, 100 S.Ct. 1708 (1980). At the sentencing hearing, the trial judge noted that he had a "hard time" finding both defendants equally responsible and cited the evidence that defendant Fuller alone broke Ms. Duke's neck and had a weapon in his possession as the basis for his dilemma. Immediately prior to the sentencing of defendant Willis, the court was informed by Willis himself that he had nothing to do with Ms. Duke's injury. The court then sentenced Willis to 25 years and defendant Fuller to 40 years, despite defendant Willis' longer criminal record.

Defendant asks us to adopt the holding in *U.S. v. Unger*, 665 F. 2d 251 (8th Cir. 1981), wherein the U.S. Court of Appeals was also confronted with the issue of whether a conflict of interest denied a defendant effective assistance of counsel at the sentencing hearing. In *Unger*, Crystal Unger and her husband Robert pleaded guilty to kidnapping an infant and both received 50 year sentences. At the sentencing hearing the Ungers' attorney argued leniency for Crystal on the grounds of her age and lack of criminal record. The attorney never mentioned her nonparticipation in the injury to the child. Robert had consistently maintained that he was totally responsible for the injury and that Crystal was not present when this injury occurred. The Court of Appeals reversed the judgment denying Crystal's motion to vacate her

sentence and remanded with directions to the district court to conduct a hearing to determine whether her guilty plea was voluntary and whether she waived her right to separate counsel. The Court of Appeals noted, "We can only infer that the severity of the sentence imposed on Crystal resulted from the harm incurred by the child." *Id.* at 255.

Unlike the court in *Unger*, the trial court here heard testimony showing defendant Willis' noninvolvement in the injury to Ms. Duke and sentenced Willis to a shorter term of imprisonment. Under these circumstances, defendant Willis has failed to show that he was prejudiced by counsel's failure to argue the issue of disparity in culpability at the sentencing hearing.

In another assignment of error, defendant Fuller contends that the trial court erred in sentencing him. We have carefully considered defendant Fuller's argument, find that his sentence was supported by the evidence, G.S. 15A-1444(a), and overrule this assignment.

Both defendants received a trial free of prejudicial error.

No error.

Chief Judge VAUGHN and Judge BRASWELL concur.

COLLIER COBB & ASSOCIATES, INC. v. JOHN D. LEAK, III AND JOHN D. LEAK

No. 8215SC320

(Filed 15 March 1983)

Master and Servant § 11.1— covenant not to compete—unenforceable

In an action brought by plaintiff to restrain each defendant from divulging the names of plaintiff's policyholders and accounts and from soliciting the plaintiff's accounts in any territory worked by defendants during their employment with plaintiff, the trial court erred in issuing a preliminary injunction so restraining defendants since the sole purpose of an agreement exacted from each defendant when he was already an employee of plaintiff was to bar by the use of covenants not to compete all plaintiff's existing producing agents from competing with plaintiff; neither covenant was ancillary to a valid affirm-

ative contract; neither was supported by valid consideration since each employee was already employed; and the written contract provided no additional consideration.

APPEAL by defendants from *Martin, Judge.* Judgment entered 26 February 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 10 February 1983.

This is an interlocutory appeal of a preliminary injunction entered by the trial court on 26 February 1982 restraining each defendant from divulging the names of plaintiff's policyholders and accounts and from soliciting the plaintiff's accounts in any territory worked by the defendants during their employment with plaintiff. Defendants gave notice of appeal to this Court, and their appeal was docketed on 31 March 1982. In the interim, on 3 March 1982, defendants filed in this Court petitions to stay the preliminary injunction and for a writ of supersedeas. On 4 March 1982, this Court issued an order *ex parte,* staying the preliminary injunction entered by the trial court pending decision on the petition for writ of supersedeas. Thereafter, this Court granted the writ of supersedeas and continued the stay of the preliminary injunction pending a decision by this Court on this appeal. Plaintiff's petition for a writ of supersedeas seeking to reinstate the preliminary injunction was denied by the Supreme Court of North Carolina on 30 March 1982.

Powe, Porter & Alphin, by E. K. Powe and Eugene F. Dauchert, Jr., for plaintiff-appellee.

Helms, Mulliss & Johnston, by E. Osborne Ayscue, Jr., for defendant-appellants.

HILL, Judge.

Collier Cobb and Associates, Inc. (hereinafter referred to as Collier Cobb) is an insurance agency and surety bond brokerage firm with twelve offices including offices located in Boston, Massachusetts; Washington, D. C.; Chapel Hill, Charlotte, Raleigh, Henderson, Greensboro, North Carolina; Montgomery, Alabama; Dallas, Houston, Texas; and Louisville, Kentucky. The firm writes about one-half of the bond business in North Carolina. In April 1974, Collier Cobb purchased the stock of American Commercial Agency, Inc. (hereinafter referred to as American Commercial) in

Charlotte from NCNB Corporation, changing the name to Collier Cobb/American Commercial Agency, Inc. At the time of the acquisition, John D. Leak (hereinafter referred to as Leak) was executive vice-president in charge of the bond department at American Commercial, having served in this capacity for several years. He had no employment contract with American Commercial at the time of Collier Cobb's acquisition of the company, nor was he asked to enter into one at that time.

John D. Leak III (hereinafter referred to as Leak III) is Leak's son. In June 1974, he was employed under an oral agreement to work in the bond department of Collier Cobb in Charlotte, North Carolina, but subsequently was transferred to Chapel Hill, North Carolina. At the time of his employment with Collier Cobb, he was not asked to sign a written contract of employment or a covenant not to compete.

In the fall of 1974, an employee of Collier Cobb left the company, taking some of the business with him. Thereafter, Collier Cobb required its employees to sign employment agreements containing covenants not to compete, apparently advising them to "sign the agreement or leave." The employment agreements tendered to Leak and Leak III were similar. Each provided that the "contract may be terminated at any time by the Employer or the Agent by mailing or delivering to the other thirty days' written notice of termination" and that any modification of the contract had to be in writing. Each provided that in the event of termination of employment the employee would not compete with Collier Cobb in the insurance or bond business for a period of two years. Each referred to 30 April 1974 as the effective date, although Leak III did not work for the company on that date. No change in duties or compensation of either employee was made at the time. Both Leak and Leak III signed the agreements. At the time of signing, Leak had been employed by the company or its predecessors for 22 years and had been in the bond business nearly all of his adult life. At the time of signing the contract, he was familiar with many of Collier Cobb's clients and methods of doing business as was Leak III. Both men had worked only in the bond department.

Leak continued working until his retirement on 4 January 1982. On 15 January 1982, Leak III submitted a letter of resigna-

tion to the company and informed the chief operating officer that he would stay as long as the officer wanted him to stay. He subsequently was told to leave on 19 January 1982 and was paid through that day.

Both defendants, upon leaving the company, became employees of Leak-Mann and Associates, Inc., working in insurance as bond agents and brokers. Leak is a principal in Leak-Mann and Associates, Inc. Both defendants, in violation of the non-competition clause of the employment agreements, are soliciting business from individuals who formerly were clients of Collier Cobb. The trial court granted plaintiff temporary and permanent injunctions restraining defendants from soliciting business for themselves or Leak-Mann and Associates, Inc., in the territory worked by Collier Cobb for a period of two years after termination of their employment with Collier Cobb, as provided in the employment agreements.

The trial court found the employee agreements were supported by valid consideration. Defendants argue the trial court erred in so finding, and we agree.

We note first that a negative covenant restricting employment will not be enforced unless it is supported by a valid consideration. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1964); *Wilmar, Inc. v. Liles and Wilmar, Inc. v. Polk*, 13 N.C. App. 71, 185 S.E. 2d 278 (1971), *cert. denied*, 280 N.C. 305, 186 S.E. 2d 178 (1972). Plaintiff points to Item 5 of the agreement which states:

> Agent's employment shall terminate upon the death of the Agent. This contract may be terminated at any time by the Employer or Agent by mailing or delivering to the other thirty days' written notice of termination.

Plaintiff contends that this paragraph provides sufficient consideration for the entire agreement because it assures defendants thirty days' employment after written notice of termination, a right they did not enjoy as employees at will.

A careful reading of this paragraph leads us to a different conclusion. The first sentence provides the agent's employment shall terminate upon death—an obvious result. The second sentence provides the contract *may* be terminated by either

Employer or Agent upon mailing or delivering to the other party thirty days' written notice. In using the permissive term "may" rather than such mandatory terms as "shall," "will," or "must," the parties implicitly acknowledge the existence of other acceptable methods of termination. We conclude that this provision is essentially a notice provision.

Plaintiff argues that the provision creates new rights in the employee consisting principally of a guaranteed month's wages before termination which provide consideration for the entire agreement, including the covenant not to compete. We note that the provision did not work in practice as plaintiff contends. Leak's employment terminated upon two weeks' notice. Leak III's employment terminated by his notice of termination coupled with an offer to stay as long as plaintiff wanted him to; he was discharged four days later. Each party was paid only for the days worked. Any consideration that might be supplied by paragraph 5 would consist only in the mutual exchange of promises to give notice of termination. The consideration, however, would support only this particular provision and not the entire agreement.

We see the agreements between Collier Cobb and the defendants as divided effectively into two parts; the agreement is severable. The first three numbered paragraphs summarize the terms of employment under which each party had been working at the time he signed. The fourth paragraph adds the covenant not to compete to the original conditions of employment. No consideration exists to support this negative covenant. The last two paragraphs (paragraphs 5 and 6) provide for termination and modification of the agreement. These final paragraphs being severable, the consideration, if any, provided by the notice provision of the fifth paragraph supports only these final paragraphs.

To be enforceable, a negative covenant restricting other employment must be ancillary to a valid affirmative covenant or contract. *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944). Nor will the negative covenant be enforced if it appears to be the main purpose of the contract. *Wilmar, Inc. v. Liles and Wilmar, Inc. v. Polk, supra; see Mastrom, Inc. v. Warren*, 18 N.C. App. 199, 196 S.E. 2d 528 (1973).

By the uncontroverted evidence of record, the employment agreements sought to be enforced fail these tests. An agreement

was exacted from each defendant when he was already an employee of Collier Cobb. The sole purpose of the agreement was to bar by the use of covenants not to compete all plaintiff's existing producing agents from competing with plaintiff. Neither covenant was ancillary to a valid affirmative contract; neither was supported by valid consideration since each employee was already employed, and the written contract provided no additional consideration.

Because we conclude the written employment agreements to be void for failure of consideration, the remaining issues brought forth by defendants become moot.

The order and preliminary injunction is hereby dissolved.

Judges ARNOLD and JOHNSON concur.

LANDRUM E. CLARY, EMPLOYEE-PLAINTIFF v. A. M. SMYRE MANUFACTURING COMPANY, EMPLOYER-DEFENDANT, LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER-DEFENDANT

No. 8210IC355

(Filed 15 March 1983)

1. **Master and Servant § 93.2— workers' compensation—exclusion of evidence at limited hearing—consideration of such evidence at hearing on the merits**

The exclusion of evidence concerning plaintiff's notice of byssinosis at a limited hearing to determine whether defendants should pay for a medical examination of plaintiff did not preclude the consideration of such evidence in a subsequent hearing to determine the merits of plaintiff's claim for compensation for byssinosis.

2. **Master and Servant §§ 68, 91— workers' compensation—claim for byssinosis not timely filed**

Plaintiff did not file his claim for disability from the occupational disease byssinosis within two years of notification by competent medical authority of the nature and work-related cause of his disease as required by G.S. 97-58(c) where a doctor advised plaintiff in 1975 that he had byssinosis, and plaintiff requested and received forms in January 1976 for filing a workers' compensation claim for byssinosis, but plaintiff failed to file his claim until 15 June 1978.

3. Master and Servant § 91— workers' compensation—claim for occupational disease—knowledge by employer—no estoppel to assert untimely filing

Defendants were not estopped under G.S. 97-92(a) from asserting that plaintiff failed to file his claim for an occupational disease within the time permitted by G.S. 97-58 because defendant employer had prior knowledge of plaintiff's occupational disease.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 1 October 1981. Heard in the Court of Appeals 15 February 1983.

Plaintiff appeals from a decision that his claim for compensation for an occupational disease was barred by untimely filing.

Frederick R. Stann for plaintiff appellant.

Edward L. Eatman, Jr., for defendant appellees.

WHICHARD, Judge.

I.

On 15 June 1978 plaintiff filed a workers' compensation claim for "an occupational disease caused by exposure to cotton dust." The Commission made the following pertinent "findings of fact":

> 13. While the plaintiff was in a Veterans Administration Hospital in 1975 a doctor or doctors in that facility advised the plaintiff that he had byssinosis.
>
> . . . .
>
> 29. The plaintiff was notified by competent medical authority of the nature and work-related quality of his disease (byssinosis) while he was in a Veterans Administration hospital in 1975.
>
> . . . .
>
> 31. The plaintiff's claim for an occupational disease caused by exposure to cotton dust was not filed with the Industrial Commission within two years after he was notified by competent medical authority of the nature [and] work-related quality of his disease (byssinosis).

Based on these findings, it concluded that plaintiff's claim was not filed within two years after he was notified by competent

medical authority of the nature and work-related quality of his disease. It accordingly denied the claim.

Plaintiff appeals.

II.

The evidence on which the foregoing findings and conclusions were based was as follows:

Plaintiff testified that he had been hospitalized in 1975. In response to a question as to whether at that time he had been "advised by the physicians that [he] had byssinosis," he stated: "One doctor said it. Yes, sir." In response to a question as to whether he had written the Industrial Commission in January 1976 "asking for one application for Workmen's Compensation benefits for byssinosis," he stated: "Yes, sir. The doctor from the hospital filled out the application for me." He also testified that in January 1976 he had received claim forms from the Commission.

The form ultimately filed reflects a filing date of 15 June 1978. The record does not reflect an earlier filing, nor does plaintiff contend that such occurred.

III.

[1] The foregoing evidence regarding plaintiff's notice of byssinosis while hospitalized in 1975 was excluded at an 8 November 1978 hearing, presumably on the ground that it was without the scope of the limited purpose of that hearing, *viz.*, to determine whether defendants should pay for a medical examination of plaintiff. The commissioner hearing that matter allowed the evidence solely for the record.

When the matter came before another commissioner for determination of the claim itself, however, that commissioner considered the excluded evidence and made it the basis of his opinion and award, which was adopted by the full Commission. Plaintiff's essential contention is that the commissioner who ultimately determined the claim was "without authority to reverse the previous ruling" and could not "admit testimony that was properly excluded at a previous hearing presided [over] by another Deputy Commissioner."

The evidence had, however, properly been made a part of the record on the claim. Its appropriate exclusion on relevancy

grounds from one hearing, limited in scope, did not preclude its consideration in a subsequent hearing, broader in scope, to determine the merits of the claim itself. The evidence affirmatively disclosed a jurisdictional bar to the claim, which could "be taken advantage of at any stage of the proceedings . . . ." *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 380, 283 S.E. 2d 573, 576 (1981). The commissioner determining the merits of the claim thus did not err in considering it, and the full Commission did not err in adopting its findings based thereon.

IV.

[2] G.S. 97-58(c) provides: "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." "[T]he two-year time limit for filing claims under . . . G.S. 97-58(c) is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim." *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 382, 283 S.E. 2d 573, 577 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982). "[W]ith 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." *Taylor v. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E. 2d 144, 149 (1980) (interpreting G.S. 97-58(b)(c)). *See also McCall v. Cone Mills Corp.*, 61 N.C. App. 118, 300 S.E. 2d 245 (1983); *Payne v. Cone Mills Corp.*, 60 N.C. App. 692, 299 S.E. 2d 847 (1983).

The evidence set forth above, which was uncontroverted, establishes that a competent medical authority advised plaintiff in 1975 that he had byssinosis. It further establishes that in January 1976 plaintiff requested and received forms for filing a workers' compensation claim for byssinosis, thus indicating that at that time he was fully apprised of the work-related cause of his disease. The time for filing his claim begun to run, then, at the latest in January 1976; and the two year period prescribed for filing had expired when the claim was filed on 15 June 1978. This created a jurisdictional bar to the claim, and it thus was properly dismissed "as being time-barred." *Poythress, supra*, 54 N.C. App. at 385, 283 S.E. 2d at 579. *See also Taylor, supra; McCall, supra;* and *Payne, supra.*

V.

[3] Plaintiff contends defendants are estopped from asserting the "defense" of G.S. 97-58 because defendant-employer had prior knowledge of plaintiff's occupational disease. The contention is without merit.

G.S. 97-58(c) does not establish a defense to a claim for workers' compensation, but "is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim." *Poythress*, 54 N.C. App. at 382, 283 S.E. 2d at 577. G.S. 97-92(a), which plaintiff asserts as the basis for his estoppel theory, does not relate to occupational *diseases*. It requires the employer to report occupational *injuries* to the Industrial Commission if the injury causes the employee's absence from work for more than a day. Plaintiff had the burden of timely filing his claim for occupational disease so as to confer jurisdiction on the Commission to consider it. The Commission properly concluded that he failed to carry this burden.

Affirmed.

Judges ARNOLD and BRASWELL concur.

JIMMY ADAMS, PLAINTIFF-EMPLOYEE v. BURLINGTON INDUSTRIES, INC., DEFENDANT-EMPLOYER, AND AMERICAN MOTORISTS INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIER

No. 8210IC389

(Filed 15 March 1983)

Master and Servant § 55.3— workers' compensation—evidence supporting injury by accident

In a workers' compensation proceeding, the evidence before the Commission was sufficient for it to find there was "an interruption of the plaintiff's normal work routine and the introduction of new circumstances not a part of his normal routine" and to support the conclusion that plaintiff's injury resulted from an "accident," where the evidence tended to show that plaintiff's normal job involved taking chairs off a conveyor belt, turning them upside down, putting them in cartons and stapling the carton tops closed but that his job on the date of the injury was to put a cardboard tray on the conveyor belt, place a chair on the tray, and cover the chair with plastic.

Adams v. Burlington Industries

APPEAL by defendants from the North Carolina Industrial Commission Opinion and Award of 12 February 1982. Heard in the Court of Appeals 17 February 1983.

This action involves a claim by plaintiff for disability benefits under the Workers' Compensation Act for injuries to his back as a result of an accident arising out of the course of his employment with defendant-employer (hereinafter "Burlington"). Plaintiff began his employment as a packer-stenciler for Burlington in April 1979. His job involved taking chairs off a conveyor belt, turning them upside down, putting them in cartons and stapling the carton tops closed. On 23 October 1979 plaintiff was asked to work on the "hot box" because the worker who normally operated it was absent that day. The "hot box" job involved putting a cardboard tray on the conveyor belt, placing a chair on the tray and covering the chair with plastic. The conveyor belt transported the chair through the "hot box" which shrank the plastic around the chair. Plaintiff began working on the "hot box" at 7:00 a.m. and worked until 10:30 a.m., when he felt a tingle in his left hip and a sharp pain in his back. He reported the injury to his supervisor but continued working for the remainder of the day. He experienced some pain but returned to his regular job for the remaining three days of the week.

Plaintiff received intermittent medical treatment and continued to work sporadically until he was laid off by Burlington on 16 January 1980. Plaintiff has not worked for Burlington since that date.

In March 1980, plaintiff was diagnosed by Dr. Richard Adams, an orthopedic surgeon, as having a herniated fifth lumbar disc. A hemilaminectomy was performed on plaintiff on 7 July 1980.

Based upon these facts, the Deputy Commissioner concluded as a matter of law that plaintiff sustained an injury on 23 October 1979 arising out of and during the course of his employment with Burlington and that as a result of the injury, plaintiff was temporarily totally disabled from 13 March 1980 to 1 September 1980. Defendants were ordered to pay plaintiff compensation at the rate of $108.54 per week from 13 March 1980 to 1 September 1980. Upon appeal by defendants, the full Commission on 12 February 1982 affirmed the Opinion and Award of the Depu-

ty Commissioner. Defendants appeal to this Court from that decision.

Finger, Park and Parker by M. Neil Finger for plaintiff appellee.

Tuggle, Duggins, Meschan, Thornton & Elrod by Joseph F. Brotherton for defendant appellants.

BRASWELL, Judge.

Under the North Carolina Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if caused by an "accident." G.S. 97-2(6); *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E. 2d 360 (1980). The primary question raised by defendants in this appeal is whether plaintiff's back injury resulted from an "accident."

> "Our Supreme Court has defined the term 'accident' as used in the Workers' Compensation Act as 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.' *Hensley v. Cooperative*, [246 N.C. 274, 278, 98 S.E. 2d 289, 292 (1957)]; *accord, Rhinehart v. Market*, [271 N.C. 586, 157 S.E. 2d 1 (1967)]. The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. [Citations omitted]"

Porter v. Shelby Knit, Inc., supra, at 26, 264 S.E. 2d at 363.

Defendants argue that plaintiff was not injured as the result of an accident in that he was working at his regular job at the time the injury occurred. Plaintiff's supervisor testified that plaintiff was expected to fill in when other employees were absent and had worked at the hot box on previous occasions. Defendants contend that plaintiff's regular job and the hot box job involved the same amount of exertion, but in reverse order.

The findings of fact relating to the accident issue are finding number 1 which states in part that in his regular job, "plaintiff was not required to turn or twist his body in any direction" and finding number 4 which reads as follows:

> "4. That the plaintiff was required to turn and twist his body in order to lift chairs on the occasion complained of was

different from his normal routine of lifting chairs with his upper torso in a straight posture and was sufficiently different from the way plaintiff normally lifted to constitute an interruption of the plaintiff's normal work routine and the introduction of new circumstances not a part of his normal routine. Thus, plaintiff sustained an injury by accident arising out of and during the course of his employment with the defendant employer."

The findings are supported by testimony of plaintiff and his co-worker Bill Edwards that plaintiff's regular job was that of a packer-stenciler, which involved taking chairs from the conveyor belt, turning them upside down, putting them in cartons and then stapling the cartons closed. His duties on the hot box job were to pick up chairs, to place them on the hydraulic box, to reach and twist around, and to pick chairs up and place them on the tray on the conveyor belt. On 23 October 1979 plaintiff was performing the hot box job, twisted around to pick up a chair and felt a sharp pain in his hip. Plaintiff demonstrated the various positions in which he performed his regular and the hot box jobs. He stated that in comparing the two jobs, there was not as much twisting around in his regular job. On the hot box, plaintiff had to pick up all the chairs on the conveyor belt, while in his regular job he picked up every third, fourth or fifth chair.

We find that plaintiff's testimony constituted competent evidence from which the Deputy Commissioner (and the Full Commission by adoption) could have found that there was "an interruption of the plaintiff's normal work routine and the introduction of new circumstances not a part of his normal routine." The findings of fact are conclusive on appeal if there was any competent evidence to support them. *Jackson v. Highway Commission*, 272 N.C. 697, 700, 158 S.E. 2d 865, 867 (1968); *Locklear v. Robeson County*, 55 N.C. App. 96, 284 S.E. 2d 540 (1981). The findings are thus binding on this Court, even though the evidence presented could possibly have supported findings to the contrary. *Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960).

The facts found by the Deputy Commissioner and adopted by the Full Commission support the conclusion that plaintiff's injury resulted from an "accident." Although increased volume of work is not sufficient in itself to constitute an interruption of the nor-

mal work routine or the introduction of new circumstances not part of the usual work routine, *Dyer v. Livestock, Inc.*, 50 N.C. App. 291, 273 S.E. 2d 321 (1981); *Reams v. Burlington Industries*, 42 N.C. App. 54, 255 S.E. 2d 586 (1979), the combined extra exertion and twisting movements required by the hot box job do support the conclusion that plaintiff's injury resulted from an unexpected and unforeseen event not anticipated or designed by the employee. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962). The work routine of plaintiff's lifting chairs with his upper torso in a straight posture was interrupted by the introduction of the turning and twisting movements required by the hot box job. We hold that the Commission properly concluded as a matter of law that plaintiff sustained an injury by "accident." *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 292 S.E. 2d 18 (1982); *Locklear v. Robeson County, supra; Porter v. Shelby Knit, Inc., supra.*

We have carefully examined defendants' other contentions, and we find no basis for reversal. The Opinion and Award of the Industrial Commission is

Affirmed.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, NORTH CAROLINA REINSURANCE FACILITY, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY AND UNITED STATES FIRE INSURANCE COMPANY, APPELLANTS

No. 8210INS284

(Filed 15 March 1983)

Insurance § 79.1— automobile insurance—rate filing—no authority by hearing officer to enter final order

The Commissioner of Insurance had no authority to designate a hearing officer who was a Deputy Commissioner of Insurance as the official to make

the final agency decision on a filing by the N. C. Rate Bureau for a revised safe driver plan, and an order signed by the hearing officer disapproving the filing was null and void *ab initio.* Therefore, where the 90-day deadline of G.S. 58-124.21(a) for the Commissioner of Insurance to make an order of disapproval of a proposal for decision made by a hearing officer has expired, the filing is deemed approved. G.S. 150A-33; G.S. 150A-34(a).

APPEAL by defendants from Order of North Carolina Deputy Commissioner of Insurance entered 29 December 1981. Heard in the Court of Appeals 7 February 1983.

In 1981 the General Assembly amended the language of G.S. 58-30.4. The amendment deals with the apportionment and assignment of points under the Safe Driver Insurance Plan. The North Carolina Rate Bureau in response to the amendment made its Filing with the Commissioner of Insurance on 30 September 1981 for a revised safe driver insurance plan. "Simply put, [say the appellants] the Filing changed the plan of assigning *all* of the points of *all* drivers to a single vehicle and provided a method of apportioning the points to the various cars insured under each policy."

The Commissioner of Insurance, on 30 October 1981, issued his notice of public hearing on the Filing of the Rate Bureau, pursuant to G.S. 58-124.21. The Notice alleges that the Filing did not comply with the 1981 amendment to G.S. 58-30.4.

After an evidentiary hearing, an order was issued by Hearing Officer Thomas B. Sawyer on 29 December 1981. The order disapproved the Filing and required the submission of a revised plan. All defendants appeal.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Isham B. Hudson, Jr., for plaintiff appellee.

Young, Moore, Henderson & Alvis by R. Michael Strickland and Charles H. Young, Jr., for defendant appellants.

BRASWELL, Judge.

This appellate review is governed by the standards set out in G.S. 58-9.6 of the Insurance Law, Chapter 58 of the North Carolina General Statutes and by the provisions of the Administrative Procedure Act, in particular G.S. 150A-51. *See Comr. of Insurance v. Rate Bureau,* 54 N.C. App. 601, 602, 284 S.E. 2d

339, 340 (1981), *disc. rev. denied*, 305 N.C. 298, 290 S.E. 2d 708 (1982).

From among the various questions presented for review, we choose to discuss Assignment of Error No. 9. Our ruling upon it is dispositive of the entire appeal.

Defendants assign as error the action of the Hearing Officer in entering the order of 29 December 1981. The grounds, among others, are that the order "was erroneous as a matter of law," and "was beyond the statutory authority and jurisdiction of the Hearing Officer." The order of 29 December 1981 was signed by Thomas B. Sawyer, with these words following the signature: "Deputy Commissioner of Insurance and Designated Hearing Officer Presiding and Designated to Make the Final Agency Decision." Elsewhere the record is void of any reference or any evidence of Hearing Officer Thomas B. Sawyer's authority to make the final order.

The appellants do not dispute that Thomas B. Sawyer is a Deputy Commissioner of Insurance, nor do they dispute the statutory authority of the Commissioner of Insurance, who himself signed the notice of public hearing, to designate Sawyer as the hearing officer in this case. Indeed, G.S. 58-9.2 provides that, "All . . . hearings . . . may be conducted by the Commissioner personally or by one . . . of his deputies . . . designated by him for the purpose." Since the Department of Insurance is an "agency" subject to the provisions of the North Carolina Administrative Procedure Act, *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh. dismissed*, 301 N.C. 107, 273 S.E. 2d 300 (1980), an agency is also authorized to designate a hearing officer to handle contested cases pursuant to the provisions of the Act, G.S. 150A-32. Although the office of Commissioner of Insurance is one created by Article III, sec. 7(1), of the North Carolina Constitution, his "power and authority . . . emanate from the General Assembly and are limited by legislative prescription. The only power he has to fix rates is such power as the General Assembly has delegated to and vested in him." *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 202, 214 S.E. 2d 98, 104 (1975). A hearing officer is a creature of the statutes, G.S. 150A-32. Because the Commissioner and hearing officer may act only as the legislature has prescribed, we now ex-

amine the powers and duties of each in connection with contested cases of rate hearings.

When a revised classification and rate plan change is filed, the last sentence in G.S. 58-30.4 provides that "the filing, hearing, disapproval, review and appeal procedures before the Commissioner and the courts" shall be subject to the procedures "as provided for rates and classification plans in G.S. 58-124.20, 58-124.21, and 58-124.22." Of these statutes, only G.S. 58-124.21(a) speaks to any duty of the Commissioner relevant to our present subject. The statute declares that once there has been a filing and once there has been notice given by the Commissioner, there must be a hearing. The next part of the statute, very pertinent here, provides that:

> "If *the Commissioner* after hearing finds that the filing does not comply with the provisions of this Article, *he* may issue *his* order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, after which such filing shall no longer be effective. Any *order of disapproval* under this section must be entered within 90 days of the date such filing is received by the Commissioner." (Emphasis added.)

When an agency of state government determines to use the services of a hearing officer, it is G.S. 150A-33 that prescribes his powers. The powers are limited to six categories: administering oaths, signing and issuing subpoenas, taking depositions, regulating the course of hearings, providing for pretrial conferences of parties to simplify issues, and making application to the court for a contempt order. Under the Administrative Procedure Act, when the services of a hearing officer are used, there must be a "proposal for decision" by the hearing officer. G.S. 150A-34(a) clearly states:

> "When the official . . . who [is] to make a final decision [has] not heard a contested case, the decision shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the officials who are to make the decision."

Section (b) of the same statute requires that the proposal for decision contain findings of fact and conclusions of law and be prepared by the person who conducted the hearing.

Thus, reading these various statutes together and applying the law to the facts before us, we find that it was the duty of Hearing Officer Thomas B. Sawyer to go no further than to make a proposal for decision in this case to the Commissioner of Insurance himself (or his Chief Deputy appointed under G.S. 58-7.1). By the specific wording of G.S. 58-124.21(a) it then became the duty of the Commissioner to review the submitted proposal for decision and thereafter to decide for himself "wherein and to what extent such filing is deemed to be improper." The Commissioner has a statutory deadline of 90 days from date of filing in which to make his order of disapproval.

When the Commissioner of Insurance delegated to his appointed hearing officer the power to make the final agency decision, the Commissioner made an unlawful delegation of his powers. *See* G.S. 58-9.6(b)(2) and G.S. 150A-51(2). The record before us shows affirmatively and specifically that the Commissioner of Insurance has not carried out the duties given him by the General Assembly. *See Comr. of Insurance v. Rate Bureau, supra,* 54 N.C. App. 601, 284 S.E. 2d 339; *Comr. of Insurance v. Rate Bureau,* 43 N.C. App. 715, 259 S.E. 2d 922 (1979), *disc. rev. denied,* 299 N.C. 735, 267 S.E. 2d 670 (1980); *Lanier, Comr. of Insurance v. Vines,* 274 N.C. 486, 164 S.E. 2d 161 (1968).

We hold as follows: The Commissioner of Insurance had no statutory authority to designate Thomas B. Sawyer, a Deputy Commissioner of Insurance and Hearing Officer, as the official to make the final agency decision. The Order entered by Thomas B. Sawyer dated 29 December 1981, exceeded his authority; and, therefore, we declare the order null and void *ab initio.* By attempting to do what he has no power to do, the Commissioner of Insurance has abdicated what authority remains his to exercise under G.S. 58-124.21. The 90-day deadline has expired. Therefore, the Order of the Commissioner is vacated, and the Filing of the Bureau, having never been disapproved as provided by the statute, by the very terms of the statute remains in effect. *Comr. of Insurance v. Rate Bureau, supra,* 43 N.C. App. at 721, 259 S.E. 2d at 926. The rates filed are deemed approved. *Comr. of In-*

surance v. Rate Bureau, supra, 54 N.C. App. at 606, 284 S.E. 2d at 343.

Reversed and vacated.

Chief Judge VAUGHN and Judge WELLS concur.

IN THE MATTER OF: DARIYAN BARKLEY, LATERA BARKLEY AND JOHNNY BARKLEY

No. 8212DC265

(Filed 15 March 1983)

1. **Evidence § 34.5— testimony to show witness's state of mind**

In a proceeding to terminate parental rights, the trial court properly admitted testimony as to statements made by respondent's boyfriend concerning punishment for respondent's child since the testimony was not admitted to prove the truth of the matter contained in the statements but rather to show that the statements were made and the child's resulting state of mind.

2. **Parent and Child § 1— termination of parental rights—excluding mother from courtroom while child testified—no error**

There was no error in the court's granting petitioner's motion to exclude respondent from the courtroom while respondent's eleven-year-old son testified in a proceeding to terminate respondent's parental rights since respondent's right to confront the witnesses against her was protected through the court allowing each party's counsel to question respondent's child themselves, in the courtroom, with the questions and answers being recorded.

3. **Parent and Child § 1— proceeding to terminate parental rights—use of unadjudicated acts as evidence for disposition**

In a proceeding to terminate parental rights, the trial court properly allowed testimony as to respondent's lack of contact with her children after they had been removed from her home and as to respondent's failure to use social security payments for the benefit of her children since G.S. 7A-640 permits the use of unadjudicated acts as evidence to be considered for disposition and since the trial court considered the testimony for the purpose of determining an appropriate disposition.

4. **Parent and Child § 1— termination of parental rights—finding that children inadequately clothed**

In a proceeding to terminate parental rights, there was sufficient evidence to support the court's finding that respondent's children were inadequately clothed.

In re Barkley

APPEAL by respondent from *Guy, Judge.* Judgment entered 17 December 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 20 January 1983.

On 8 September 1981 petitioner, Cumberland County Department of Social Services, filed a petition alleging neglect and abuse to terminate the parental rights of Mary Barkley in Dariyan Barkley, age 11, and John Barkley, age 5, her sons, and Latera Barkley, her 8 year old daughter.

Petitioner presented evidence tending to show that Dariyan ran away from home after being beaten by his mother's boyfriend, Lester Whittington. He went to his great-grandmother's home where he told her that Lester Whittington had beaten him because Dariyan was unable to keep the neighbor's children from making noise in the hallway outside the Barkley apartment. He also stated that Whittington had said that he would not punish Dariyan if he could guess from which window Whittington had observed him getting a switch earlier, but if Dariyan guessed wrong, he would "get thirty licks" with a switch. Dariyan guessed wrong and was receiving the switching when he was able to escape by feigning a need to go the the bathroom. While Whittington was out getting another switch, Dariyan ran to his great-grandmother's home.

After hearing his story, Dariyan's great-grandmother, Idella Chance, called the police who in turn contacted petitioner. Jo Anne Roach was sent from the Cumberland County Department of Social Services to investigate. After talking with Dariyan, Ms. Roach went to the Barkley home to talk with his mother. Mary Barkley denied that Lester Whittington had switched Dariyan, but agreed to Ms. Roach's request that Dariyan be allowed to remain outside the Barkley home with Ms. Chance until the investigation was complete. Upon Ms. Roach's request, Mrs. Barkley gathered some clothes to be taken to Dariyan and gave Ms. Roach five dollars with which to buy Dariyan some socks and underwear. After delivering the clothes to Dariyan, Ms. Roach left him at his great-grandmother's.

Later that same day Mary Barkley, Lester Whittington and Whittington's mother arrived at Ms. Chance's to take Dariyan away. Both Dariyan and Ms. Chance resisted, but eventually Dariyan was forcibly removed from Ms. Chance's home to Whit-

tington's mother's home. Ms. Chance immediately notified Ms. Roach who went to the Whittingtons to get Dariyan. Upon her arrival she found that Dariyan had been pinched, bruised and scratched on the underside of his arms thirty to forty times by his mother as punishment for running away. Dariyan also stated that she had thrown a can at him. At this time all three Barkley children were placed in the temporary custody of petitioner.

There was testimony indicating that Lester Whittington had physically abused Dariyan's younger brother and sister by forcing them to hold pennies on their outstretched arms for long periods of time, and beating them when they let their arms drop and the pennies fall off.

Ms. Roach and one other social worker testified that the three children were poorly clothed, even though Mary Barkley was receiving a $600.00 monthly Social Security check. Ms. Roach stated that when she first met Dariyan, he had numerous old scars and fresh wounds on various parts of his body which appeared to be the direct result of beatings. Finally, evidence was presented that Mary Barkley had shown no interest in the welfare of her children from the time they had been removed from her home up until the hearing.

On the basis of this evidence, the judge entered an order granting a termination of Mary Barkley's parental rights over her three children and placing them in the custody of the petitioner. From a judgment entered pursuant to the order, repondent appeals.

Jennie Dorsett, for petitioner-appellee.

Assistant Public Defender Staples Hughes, for respondent-appellant.

EAGLES, Judge.

[1] Respondent initially argues that the court erred when it denied respondent's motion to strike the testimony of Dariyan and Ms. Roach as to statements Lester Whittington made to Dariyan concerning the noise in the hallway and Dariyan's punishment for failing to stop it. We reject respondent's contention that Dariyan's and Ms. Roach's testimony as to the statements was

hearsay and excludable, since the testimony was not admitted to prove the truth of the matter contained in the statements but rather to show that the statements were made and Dariyan's resulting state of mind. *Wilson v. Indemnity Corp.*, 272 N.C. 183, 158 S.E. 2d 1 (1967); Brandis, 1 Brandis On North Carolina Evidence § 141 (2d rev. ed. 1982).

[2] Respondent next assigns as error the court's granting petitioner's motion to exclude her from the courtroom while Dariyan, her eleven-year-old son, testified. We reject respondent's argument that her right to confront the witnesses against her was denied when she was excluded from the courtroom. Although G.S. 7A-631 guarantees respondent the right to confront and cross examine the witnesses, the right to confront witnesses in civil cases is subject to "due limitations." See *Davis v. Wyche*, 224 N.C. 746, 32 S.E. 2d 358 (1944). Where, as here, the excluded party's presence during testimony might intimidate the witness and influence his answers, due to that party's position of authority over the testifying witness, any right under Ch. 7A, Art. 51 to confront the witnesses is properly limited. The present case is easily distinguishable from *Cook v. Cook*, 5 N.C. App. 652, 169 S.E. 2d 29 (1969), where it was held that the trial court had erred when it ordered that the child's testimony would be taken in chambers with only counsel for both parties being present. Unlike *Cook* where the judge did all the questioning in chambers, the trial court here preserved the adversarial nature of the process and protected defendant's right to confront the witnesses by allowing each party's counsel to question Dariyan themselves, in the courtroom, with the questions and answers being recorded. We find that respondent suffered no prejudice as a result of her exclusion from the courtroom during her son's testimony, since the trial court preserved respondent's opportunity to cross examine through her court-appointed counsel.

[3] Respondent next asserts as error the court's decision to allow testimony as to respondent's lack of contact with her children after they had been removed from her home pending the hearing to determine parental rights. Respondent also objected to the admission of testimony that respondent had been receiving $600.00 monthly in Social Security payments, but had failed to spend the money for the benefit of her children during that same period. G.S. 7A-640 permits the use of unadjudicated acts as

evidence to be considered for disposition. See *In re Vinson*, 298 N.C. 640, 260 S.E. 2d 591 (1979). While G.S. 7A-639 provides that "[n]o predisposition report shall be submitted to or considered by the judge prior to the completion of the adjudicatory hearing," there is no evidence in the record indicating that the trial court considered the above testimony for any purpose other than for determining an appropriate disposition. We therefore reject these two assignments of error.

[4] Finally, respondent challenges the court's finding that her children were inadequately clothed. Ms. Roach testified that the respondent could not find any socks or underwear for Dariyan and had to give her money to purchase some for him. Another social worker, Mr. Locklear, said that on all four occasions that he was in respondent's home he observed the children in "raggedy" clothes. He also testified that the five-year-old child was wearing his eleven-year-old brother's pants and had to hold them up with his hand as they were too large and he had no belt. Since our appellate court is bound by the findings of fact made by a trial court where there is some evidence to support those findings, we find no merit in this assignment of error. 1 North Carolina Index 3d, Appeal and Error § 57.2.

For the above reasons, in the hearing to terminate parental rights, we find

No error.

Judges HEDRICK and JOHNSON concur.

STATE OF NORTH CAROLINA v. SCOTT J. GRAHAM

No. 821SC619

(Filed 15 March 1983)

1. Criminal Law § 138— mitigating factor—acknowledgment of wrongdoing at early stage of process

The trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offenses to a law enforcement officer at an early stage of the criminal process where the uncontroverted evidence showed that, while defendant denied involvement in the

crimes *prior to his arrest*, he voluntarily acknowledged wrongdoing in each of the cases while he was being transported to the patrol station immediately after his arrest. G.S. 15A-1340.4(a)(2)l.

2. Criminal Law § 138— sentencing hearing—prior convictions—evidence other than stipulation or court records

Prior convictions could be proved at a sentencing hearing by methods other than a stipulation or court records, and the trial court properly considered defendant's prior convictions as an aggravating factor upon the basis of a deputy's testimony as to what he had learned about defendant's prior convictions from others. G.S. 15A-1340.4(a)(1)o.

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Winberry, Judge.* Judgment entered 25 January 1982 in DARE County Superior Court. Heard in the Court of Appeals 10 January 1983.

Defendant pled guilty to four counts of felonious breaking or entering of beach cottages. At the sentencing hearing, the State presented the testimony of the arresting officer, Deputy Sheriff Eck. Eck testified as to the circumstances of defendant's arrest and defendant's prior criminal record. Stating that he had considered all the statutory factors in aggravation and mitigation, the trial judge found as an aggravating factor that defendant had prior convictions punishable by more than 60 days confinement. He made no findings of factors in mitigation. Upon finding that the factors in aggravation outweighed the factors in mitigation, the trial judge sentenced defendant to four five-year terms, to be served consecutively. The presumptive sentence for felonious breaking or entering is three years. The maximum is ten years. Defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney K. Michele Allison, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant.

WELLS, Judge.

[1] In his brief, defendant contends that the trial judge erred in failing to find as a factor in mitigation that defendant voluntarily acknowledged wrongdoing in connection with the offenses to a law enforcement officer at an early stage of the criminal process.

Deputy Eck testified that he interviewed defendant twice while investigating the crimes and that defendant denied being involved with any wrongdoing. Thereafter, defendant was arrested and, while being transported to the patrol station, defendant admitted to the officer that he broke into all four homes and stole items from them and volunteered to return stolen property that had not yet been recovered. With defendant's aid, some of the stolen property was recovered.

G.S. 15A-1340.4(a) provides that the trial judge must consider each of the enumerated aggravating and mitigating factors. *See also, State v. Davis,* 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied,* 306 N.C. 745, 295 S.E. 2d 482 (1982). G.S. 15A-1340.4(a)(2)l. provides that one of the mitigating factors that must be considered is whether "[p]rior to arrest *or at an early stage of the criminal process,* the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." (Emphasis added.) This part of the statute makes it clear that a criminal defendant has two opportunities to mitigate the sentence that he might be given on a guilty plea or verdict: first, prior to arrest; second, at an early stage of the criminal process. While the evidence in the present case showed that prior to arrest defendant denied involvement with the crimes, the uncontroverted evidence for the State also clearly showed that immediately after his arrest defendant voluntarily acknowledged wrongdoing in each of the cases involved. Thus, the fact that prior to his arrest a defendant denied wrongdoing does not take away the requirement that the trial judge must consider also whether the defendant voluntarily acknowledged wrongdoing "at an early stage of the criminal process." It is implicit in the statute that, for purposes of G.S. 15A-1340.4(a)(2)l., the legislature contemplated that "the criminal process" involves formal legal proceedings and not merely investigation of crimes by law enforcement officers. For purposes of the statute, "the criminal process" is not commenced until the defendant either is arrested, is served with criminal process, waives indictment or is both indicted and has actual notice of the fact of his indictment. We find support for this conclusion in G.S. 15A-701, *et seq.,* the Speedy Trial Act, and G.S. 15A-932 which allows pending proceedings to be dismissed with leave when the defendant fails to appear and cannot be readily found.

Where, as in the present case, the State's own unequivocal evidence clearly establishes the existence of a factor in mitigation which the legislature has included among those which must be considered, it is error for the trial judge to fail to find that factor. We are careful to note that our decision in this case must be distinguished from *State v. Davis, supra,* where this Court held that it was not error to fail to find mitigating factors where the existence of those factors may not have been established by a preponderance of the evidence. In the present case, there being no evidence to the contrary, the mitigating factor was clearly established and we can only conclude that the trial judge either misconstrued the words "criminal process" or that he altogether failed to consider the mitigating factor. While the weighing of the aggravating and mitigating factors is to be left solely to the sound discretion of the trial judge, *State v. Davis, supra,* the balancing process cannot be properly completed if the trial judge fails to consider a factor listed in G.S. 15A-1340(a) which has been established by the evidence.

[2] Defendant also contends that the trial court improperly considered defendant's prior convictions as a factor in aggravation. *See* G.S. 15A-1340.4(a)(1)o.

Deputy Sheriff Eck was allowed, over defendant's objection, to testify as to what he had learned about defendant's record of prior convictions. The record makes it clear that Eck was not referring to or using court records, but was basing his testimony on information he had received from others.

G.S. 15A-1340.4(e), in pertinent part, 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." Defendant contends that the methods referred to in the statute are the exclusive means by which prior convictions may be shown at a sentencing hearing. We reject this contention. Formal rules of evidence do not apply at sentencing hearings. G.S. 15A-1334(b). The means of proof set out in G.S. 15A-1340.4(e) are permissive, not mandatory or exclusive. *See State v. Massey,* 59 N.C. App. 704, 298 S.E. 2d 63 (1982) and *State v. Thompson,* 60 N.C. App. 679, 300 S.E. 2d 29 (1983). We hold that it was not improper for the trial court to hear and consider the evidence given by Deputy Eck. Defendant, of course, was entitled to rebut such

testimony, and we note that the record indicates defendant's counsel did in fact attempt to clarify defendant's record after Deputy Eck's testimony was allowed.

For the reasons stated, defendant's sentences are vacated and these cases are remanded for proper sentencing.

Vacated and remanded.

Judge BRASWELL concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

In my view, the "criminal process" in this case began when the officers proceeded to investigate this defendant's criminal activities. It was for the judge to determine the extent of defendant's cooperation and whether it came at such a time as to compel him to find any cooperation by defendant as a mitigating factor.

CITY OF DURHAM v. CLAIR M. HERNDON AND WIFE, MARY D. HERNDON

No. 8214SC365

(Filed 15 March 1983)

1. **Eminent Domain § 16; Municipal Corporations § 28— attachment of condemnation proceeds to satisfy special assessments proper**

Because personal property can be attached for payment of a property tax lien, and special assessments can be foreclosed under the same procedure as property tax liens, it was proper for the City of Durham to attach a condemnation proceeds check due defendants as partial payment of unpaid special assessments. G.S. 160A-233(c), G.S. 105-366, G.S. 105-368(a), and G.S. 105-366(b).

2. **Municipal Corporations § 28— enforcement of special assessment—notice of attachment of condemnation proceeds**

The notice of attachment of condemnation proceeds to partially satisfy an unpaid special assessment was valid under G.S. 105-368(b) where the notice stated the amount of taxes, penalties, interest, and assessments but did not contain "the year or years for which the taxes were imposed."

APPEAL by plaintiff from *Lee, Judge.* Judgment entered 15 October 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 15 February 1983.

This appeal is the result of the denial of the plaintiff's attempt to satisfy unpaid special assessments by attaching a check for condemnation proceeds that it owed to the defendants.

On 27 August 1981, a jury found that the plaintiff owed the defendants $2,758 plus interest as just compensation for appropriation of their property for street improvements in 1975.

Because the defendants owed the plaintiff for delinquent special assessments, the plaintiff sought to attach the condemnation check. The defendants were served with notice of the attachment on 11 September 1981. On that same date, the city attorney notified the Durham County Clerk of Superior Court of the attachment.

On 18 September, the defendants served the plaintiff with notice of defenses to the attachment. The defendants alleged that the plaintiff could not attach the condemnation proceeds as a matter of law, that the notice of attachment was inadequate, and that special assessments cannot be collected by attachment.

The defendants caused an execution of the condemnation judgment to be issued on 21 September. On 29 September, the plaintiff moved to quash this execution and to uphold its attachment. The plaintiff also filed notice of objection to the defendants' defenses on the same date.

Following a hearing on the matter, the trial judge issued an order denying the plaintiff's motion to quash execution and granting the defendants' motion to dismiss the notice of attachment. From this order, the plaintiff appealed.

Durham City Attorney W. I. Thornton, Jr., by Assistant City Attorney D. Reed Thompson, for the plaintiff-appellant.

Upchurch, Galifianakis & McPherson, by William V. McPherson, Jr., for the defendant-appellees.

ARNOLD, Judge.

[1] The first question presented on this appeal is whether a city can collect delinquent special assessments by attaching its check for payment of a condemnation judgment.

The general rule in North Carolina is that a lien for unpaid special assessments does not make the owner of the burdened

real property personally liable for the assessment. Instead, the land itself is subject to the lien, and any action to collect the assessment may be enforced only by foreclosure against the land. J. Webster, Real Estate Law in North Carolina § 455 (Hetrick rev. 1981) and cases cited therein.

An action to collect unpaid special assessments is in rem, *i.e.*, against the land itself, and a personal judgment cannot be obtained against anyone. *City of Charlotte v. Kavanaugh*, 221 N.C. 259, 20 S.E. 2d 97 (1942); *Guilford County v. Boyan*, 49 N.C. App. 430, 272 S.E. 2d 1 (1980). Although the city acknowledges this general rule, it argues that it has special authority to collect assessments by attachment under the General Statutes, its charter, and an opinion of the North Carolina Attorney General on this subject.

Under G.S. 160A-233(c), an assessment lien may be foreclosed under any procedure prescribed by law for the foreclosure of property tax liens. G.S. 105-366 allows tax collectors to proceed against the taxpayer's personal property to enforce collection of property taxes. G.S. 105-368(a) permits attachment of "other compensation . . . or any other intangible property . . . to the extent prescribed in G.S. 105-366(b), (c), and (d)." G.S. 105-366(b) allows attachment of personal property after taxes are due.

Thus, because personal property can be attached for payment of a property tax lien, and special assessments can be foreclosed under the same procedure as property tax liens, it was proper here to attach the condemnation proceeds check as partial payment of the unpaid assessments.

The Durham Charter, as consolidated in 1975 N. C. Sess. Laws Ch. 671, supports our holding. Section 43 provides that when assessment liens are unpaid, the city revenue collector "shall proceed to collect the same by the same process and in the same manner as he is authorized to collect taxes due upon the property. . . ." As discussed above, G.S. 105-366(b) allows attachment of personal property as a method of collecting property taxes.

Two other provisions of the charter are helpful. Section 77(23) allows the sale of property for unpaid special assessments under the same rules as for the sale of land for unpaid taxes. Section 77(2) states that the procedure in the city charter is not

meant to be the exclusive method for collecting special assessments. Thus, the charter presents no obstacle to attachment as a means to collect special assessments.

The intent of the legislature in this area, as expressed in two sections of G.S. 160A, guides us in our reasoning. G.S. 160A-3(b) provides

> When a procedure for the performance or execution of any power, duty, function, privilege, or immunity is provided by both a general law and a city charter, but the charter procedure does not purport to contain all acts necessary to carry the power, duty, function, privilege, or immunity into execution, the charter procedure shall be *supplemented* by the general law procedure . . . .

(emphasis added). Because section 77(2) of Durham's charter states that it is not the exclusive method to collect unpaid special assessments, the provisions of the General Statutes allowing collection by attachment of personal property supplement the charter. G.S. 160A-4 states that the authority of cities to execute the powers conferred on them by law shall be broadly construed.

Thus, the Durham Charter and the relevant chapters of the General Statutes support our holding. In addition, the 27 January 1976 opinion letter from the Attorney General to the plaintiff on this issue is in accord with this decision.

Our resolution of the case does not ignore the reasoning of the learned trial judge or contrary authority. *See, e.g., Webster, supra,* at § 455; 70 Am. Jur. 2d *Special or Local Assessments* § 171 (1973); Annot., 127 A.L.R. 551 (1940). But because of our construction of the statutes and charter before us, we find any contrary authority inapplicable to this case.

[2] The other question presented is whether the notice of attachment given by the plaintiff was valid under G.S. 105-368(b). Proper notice under this statute is a prerequisite to a valid attachment.

The defendants argue that the requisite notice was not met here. They point specifically to G.S. 105-368(b)(2) which states that the notice shall contain "[t]he amount of the taxes, penalties, in-

terest, and costs (including the fees allowed by this section) and the year or years for which the taxes were imposed."

The notice here states the amount of taxes, penalties, interest, and assessments. This meets the requirement of the statute even though the amount stated is not divided specifically into these categories.

Although the notice does not contain "the year or years for which the taxes were imposed," this omission is not fatal. Giving notice to those whose property is attached, which is the purpose of the statute, was accomplished.

As a result, we reverse the trial court's refusal to quash the writ of execution and its grant of the defendants' motion to dismiss the notice of attachment. Since the attachment of the condemnation check was proper, judgment should be entered for the plaintiff.

Reversed.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. LONNIE DEAN KEATON

No. 8218SC724

(Filed 15 March 1983)

1. Homicide § 20.1— photographs of victim—harmless error

Even if the trial court erred in allowing the introduction of three photographs of a murder victim as he appeared before an autopsy to illustrate a detective's testimony, such error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt.

2. Bills of Discovery § 6— defendant's oral statement—failure to disclose officer's notes

The trial court did not err in failing to suppress defendant's oral statement to a detective because the State did not inform him of the existence or contents of the detective's notes concerning the statement until the day of trial where defendant failed to file a motion to compel discovery pursuant to G.S. 15A-903(a)(2).

3. Criminal Law § 98.2— failure to sequester witness during mother's testimony

The trial court did not abuse its discretion in failing to sequester a 12-year-old witness for the defense during his mother's testimony as a witness for the State where the record contains no evidence that the minor witness's testimony was different as a result of hearing his mother testify.

4. Arrest and Bail § 9.2— denial of bond pending appeal of murder conviction

The trial court did not abuse its discretion in the denial of bond pending defendant's appeal of his second degree murder conviction in light of defendant's past criminal record, the circumstances surrounding the victim's death, and defendant's history of misconduct.

5. Criminal Law § 138— second degree murder—aggravating factor—use of deadly weapon—element of offense

In imposing a sentence upon defendant for second degree murder, the trial court erred in finding as an aggravating factor that defendant used a deadly weapon where there were no facts and circumstances indicating that the victim's death was unusually gruesome other than the fact that he died from gunshot wounds, since the necessary element of malice must have been inferred by the jury from the evidence that defendant intentionally shot the victim with a gun, and G.S. 15A-1340.4(a)(1) prohibits the use of evidence necessary to prove an element of the offense as an aggravating factor.

6. Criminal Law § 138— prior convictions as aggravating factor—necessity for evidence as to counsel or waiver thereof

The trial court erred in finding as an aggravating factor that defendant had prior convictions for criminal offenses punishable by more than 60 days confinement where there was no evidence as to whether defendant was represented by counsel or waived counsel with respect to the prior convictions as required by G.S. 15A-1340.4(e).

Judge HEDRICK concurs in the result.

APPEAL by defendant from *Davis, Judge.* Judgment entered 18 March 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 January 1983.

Defendant was charged with first degree murder in the shooting death of Eddie A. Hawks. The State's evidence tended to show that as Hawks got out of his car and started towards Bob's Gas Town Lounge, the defendant called to him from his car which was parked in an alley beside the lounge, that Hawks turned towards defendant and started moving in that direction and that defendant fired three shots at Hawks, two of which hit him. Two of the State's witnesses, Hawks' girl friend and her twelve-year-old son, testified that Hawks was unarmed when he turned and started walking towards the defendant. The State also presented

testimony that Hawks had nothing in his hands at the time of the shooting. Another witness, a waitress at the lounge, testified that the defendant had left the lounge shortly before Hawks pulled into the lounge parking lot stating that he (defendant) was "going to get some shit straight."

Defendant testified that he had left the lounge so that he would not be there when Hawks came back because defendant was expecting trouble from Hawks. He stated that when he had seen Hawks at the lounge earlier on the same day, Hawks had said to defendant that he was going to cut defendant's head off. Defendant stated that as he was leaving the lounge to avoid Hawks, Hawks called to him and started walking towards him. Thinking that Hawks had something in his hand, defendant fired at him three times.

Defendant was convicted of second degree murder and sentenced to twenty-five years imprisonment. From the judgment entered pursuant to that verdict, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Janine W. Cutcher, for defendant-appellant.

EAGLES, Judge.

[1] During defendant's trial, the State was permitted to introduce into evidence three photographs of the victim as he appeared before the autopsy to illustrate Detective Davis' testimony. Defendant's first assignment of error maintains that this evidence was not relevant to any issue before the court and its introduction prevented defendant from receiving a fair and impartial trial.

Where, as here, neither the photo nor accompanying testimony was necessary to prove the State's case, claims of prejudice have been rejected previously. *See, State v. Temple,* 302 N.C. 1, 273 S.E. 2d 273 (1981); 1 Brandis, Brandis On North Carolina Evidence § 34 (2d rev. ed. 1982). Even if allowing the introduction of these three photographs were error, we hold that it was harmless error beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt presented at trial. *State v. Temple, supra.*

[2] The defendant next argues that the trial court erred in failing to suppress defendant's alleged oral statement to a detective. Defendant maintains that he was denied a meaningful opportunity to prepare his defense because the State did not inform him of the existence or contents of the detective's notes concerning defendant's oral statement until the day of trial.

G.S. 15A-903(a)(2) provides:

> (a) Statement of Defendant.—Upon motion of a defendant, the court must order the prosecutor:
>
> . . .
>
> (2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial.

This court has previously held that defendant has the burden of making a written request for voluntary discovery *and* making a motion to compel discovery where voluntary discovery does not occur, before the State's duty arises to produce oral statements made by defendant. *State v. Lang*, 46 N.C. App. 138, 264 S.E. 2d 821 (1980). Defendant failed to file a motion pursuant to G.S. 15A-903(a)(2). Therefore, we find no merit in defendant's second assignment of error.

Furthermore, we find no prejudice in admission of the complained-of testimony at trial. Defendant had already stipulated, prior to trial, that he had intentionally shot the victim. He suffered little, if any, by the admission of Detective Davis' testimony that defendant had earlier denied that he had shot the victim.

[3] Defendant also assigns as error the failure of the court to sequester a twelve-year-old witness for the defense during his mother's testimony as a witness for the State. A motion to sequester a witness is within the trial court's discretion and is reviewable only upon abuse. *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980). Because the record contains no evidence that the twelve-year-old's testimony was different as a result of his hearing his mother testify, we find no abuse of discretion on the part of the trial court.

[4] Defendant assigns as error the trial court's denial of bond pending appeal of his second degree murder conviction. We reject this assignment based on the language of G.S. 15A-536(a) which permits but does not require a judge to order release of a convicted defendant pending appeal. The matter of granting or denying post-trial bond is within the trial court's discretion. *State v. Sparks*, 297 N.C. 314, 255 S.E. 2d 373 (1979). Considering defendant's past criminal record, the circumstances surrounding Hawks' death, and defendant's history of misconduct, we find no abuse of discretion in the trial court's denial of defendant's request for bond pending appeal.

Finally, defendant maintains that his sentence of twenty-five years imprisonment for second degree murder was not supported by the evidence. The trial court found two aggravating and no mitigating factors and sentenced defendant to an additional ten years imprisonment beyond the presumptive sentence of fifteen years for second degree murder. The aggravating factors which the court considered were 1) the defendant used a deadly weapon at the time of the crime and 2) the defendant had prior convictions for criminal offenses punishable by more than 60 days confinement.

[5] We question the propriety of considering the "deadly weapon" factor in aggravation since G.S. 15A-1340.4(a)(1) provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." *See State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983), *State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983). Here the court had instructed the jury that

> Now, if the State proves beyond a reasonable doubt, or it is admitted that the defendant intentionally killed Eddie Hawks with a deadly weapon, or intentionally inflicted a wound upon Eddie Hawks with a deadly weapon that proximately caused his death, you may infer first that the killing was unlawful; second that it was done with malice.
>
> You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

As there were no facts and circumstances indicating that Hawks' death was unusually gruesome, other than the fact that he died from gunshot wounds, the necessary element of malice

must have been inferred by the jury from the evidence that defendant intentionally shot Hawks with a gun.

[6] In addition, the record is devoid of evidence as to whether defendant was represented by counsel or waived counsel with respect to the prior convictions as required by G.S. 15A-1340.4(e). *Id.* Waiver of counsel may not be presumed from a silent record. *State v. Neeley,* 307 N.C. 247, 297 S.E. 2d 389 (1982). We remand for resentencing based on the statutory prohibition forbidding the trial court to use as aggravating circumstances convictions in which the defendant was indigent and not represented by counsel, and on the apparent use as an aggravating factor evidence necessary to prove an element of the offense charged.

In the trial itself we find no error, but for the above reasons, we remand for resentencing.

Judge JOHNSON concurs.

Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. TONY RICHARDSON AND ERNEST FRED RICHARDSON

No. 826SC794

(Filed 15 March 1983)

Criminal Law § 181.3— accepting plea of no contest without informing of mandatory minimum sentence—vacating defendants' pleas improper

Even though the trial judge accepted defendants' pleas of no contest to the charges of armed robbery without informing them of the mandatory minimum sentence, their ignorance of that fact could not have reasonably affected their decision to plead no contest to the charge of armed robbery and the trial court erred in vacating their pleas where the evidence tended to show that defendants' attorney had obtained information from the trial judge that the likely sentence imposed upon their pleas would be 30-40 years, and the attorney had told the defendants of that probability; that the record revealed that the trial judge questioned each defendant regarding the voluntariness of their pleas, and each stated their plea was given voluntarily; and that each defendant also answered that he understood he could be in prison for life. G.S. 15A-1022(a)(6).

ON Certiorari to review the order of *Morgan, Judge*, entered on 19 February 1982 in Superior Court, HALIFAX County. Heard in the Court of Appeals 8 February 1983.

In October 1977 the defendants were charged in proper bills of indictment with armed robbery. On 10 October 1977 defendants pleaded no contest to the charges of armed robbery, and the trial judge entered judgments imposing prison sentences of thirty-five years.

On 16 October 1981 each defendant filed a Motion for Appropriate Relief alleging his plea had not been voluntarily entered because he was not informed by the trial court of the mandatory minimum sentence applicable to his offense at the time of the commission of his crime. After making findings of fact at a plenary hearing on the defendants' motions, Judge Morgan allowed the motions and vacated defendants' pleas on grounds that N.C. Gen. Stat. § 15A-1022(a)(6) prohibits a superior court judge from accepting a plea of no contest without informing the accused of the mandatory minimum sentence applicable to the offense.

From an order vacating defendants' pleas, the State petitioned for a Writ of Certiorari which was allowed by this Court on 4 May 1982.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Marilyn R. Rich for the State.

Loflin & Loflin, by Robert S. Mahler and Thomas F. Loflin III for the defendants, appellees.

HEDRICK, Judge.

The sole issue before this Court is whether the trial court erred in allowing defendants' motions and vacating their pleas where defendants entered pleas of no contest to charges of armed robbery without having been informed of the mandatory minimum sentence as required by N.C. Gen. Stat. § 15A-1022(a)(6). The defendants argue that the trial court must comply strictly with the statute because a defendant cannot be said to have voluntarily given his plea unless he has knowledge of the applicable mandatory minimum sentence. The State contends that even though the defendants were not informed of the mandatory

minimum sentence the defendants were not prejudiced in any way. We agree.

N.C. Gen. Stat. § 15A-1022(a)(6) states in part:

> (a) . . . a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> (6) Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.

At the plenary hearing the court made the following findings of fact:

> 1. The petitioners were charged with Robbery with a Firearm allegedly occurring on the 25th day of August, 1977, were arrested on August 26, 1977, and were afforded a Preliminary Hearing in the District Court of Halifax County on December 13, 1977.
>
> 2. The petitioners were represented by their court appointed attorney, Honorable H. P. McCoy, Jr., Judge of District Court, then a practicing attorney.
>
> 3. The petitioners were indicted by the Grand Jury of Halifax County on October 10, 1977.
>
> 4. The practice of trial counsel for the plaintiffs was to inform his clients of the minimum and maximum sentences for the offenses with which they were charged; however, trial counsel for the petitioners has no independent recollection of discussing with and advising these petitioners of the mandatory minimum sentence in these cases at any time.
>
> 5. On October 10, 1977, the petitioners entered a plea of no contest to Robbery with a Firearm and were sentenced to thirty-five years in the state's prison by the Honorable Robert L. Gavin, Judge of Superior Court. The petitioners were examined under oath at that Sentencing Hearing as to the voluntariness of their pleas.
>
> 6. Neither the Transcript of Plea nor the trial transcript relating to either of the petitioners indicates that the peti-

tioners were informed of the mandatory minimum sentence of five [seven] years under North Carolina General Statute 14-87 at the time of this offense. Thus the record is devoid of evidence and silent as to whether, in fact, the petitioners were advised by the court or counsel that there was a mandatory minimum sentence in their cases. Neither counsel nor the trial court at the Sentencing Hearing was focusing on the mandatory minimum sentence.

7. The petitioners had no independent knowledge of the provision in the Armed Robbery Statute at that time that five [seven] years was the mandatory minimum sentence.

8. According to the petitioners, if they had known that five [seven] years was then the mandatory minimum sentence, the petitioners would not have given up their right to plead not guilty and be tried by a jury. There is believable evidence that the petitioners knew before their pleas of no contest were entered and accepted that other defendants being tried at the October, 1977 term of Superior Court received lengthy sentences for Armed Robbery and Murder. Petitioner's assertion that they were expecting leniency at sentence of two to three years upon their pleas of no contest to Armed Robbery is inherently incredible. Petitioners were informed by their counsel that the trial judge was likely to impose a sentence of thirty to forty years upon their pleas. This information was obtained from the trial judge and conveyed to the petitioners by their attorney. The State was not willing to discuss a plea of guilty to the lesser included offense of Common Law Robbery which carried a maximum of ten years even though attorney for the petitioners approached the State to discuss such a possible plea.

9. The petitioners were confronted at the Preliminary Hearing by the evidence against them including eyewitness identification and their own statements of law enforcement officers. The evidence against them was strong that they had participated in the robbery of a store utilizing a sawed-off shotgun and such evidence was spread upon the record at the sentencing hearing.

10. The mandatory minimum sentence in effect as of August 25, 1977 did not require that the sentence be served

without benefit of parole, probation, suspended sentence, or any other judicial or administrative procedure except good time. The fact that the petitioners were not told of the mandatory minimum sentence as required under North Carolina General Statute Section 15A-1022(a)(6) did not coerce the petitioners in any way and they were not prejudiced thereby. The omitted information as to the minimum mandatory sentence was not important to these petitioners because the sentence imposed was within the range of sentence which the trial judge indicated to trial counsel might be the sentence. The minimum mandatory sentence does not now nor did it at that time affect parole eligibility of these petitioners.

11. The petitioners did not know, however, the possible consequences if they exercised their right to plead not guilty and did not have a complete understanding of the possible sentence.

We find the recent case of *Bryant v. Cherry,* 687 F. 2d 48 (4th Cir. 1982) instructive in determining whether the Court below was correct in its conclusion that defendants' pleas were not voluntarily given because the sentencing judge failed to inform them of the mandatory minimum sentence. *Bryant* involved a federal habeas corpus action in which the defendant contended that his guilty plea to armed robbery and kidnapping was involuntary and unintelligent solely because the trial court did not comply with N.C. Gen. Stat. § 15A-1022 by failing to advise him of the seven-year mandatory minimum sentence for armed robbery. As part of a plea bargaining arrangement, the defendant Bryant pleaded guilty to kidnapping and armed robbery with the understanding that the State would recommend the maximum penalty of two consecutive life sentences. The trial court accepted the plea after asking whether a factual basis existed for the plea, whether the plea was voluntary and whether he was satisfied with his counsel. Bryant was then sentenced to two consecutive terms of life imprisonment for kidnapping and a thirty to fifty year term for armed robbery. The Fourth Circuit found the defendant's plea to have been voluntarily and intelligently made under the circumstances.

The Court noted that the key to determining whether a plea is voluntary and intelligent is the defendant's awareness of the

direct consequences of his plea. In *Cuthrell v. Director, Patuxent Institution*, 475 F. 2d 1364, 1366 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005 (1973), the Court defined "direct consequences" as those having a "definite, immediate and largely automatic effect on the range of the defendant's punishment," but, as they stated in the *Bryant* case, this definition should not be applied in a technical, ritualistic manner.

Likewise, in this case, this Court refuses to adopt a technical, ritualistic approach. Even though the trial judge accepted the defendants' pleas without informing them of the mandatory minimum sentence, we find that their ignorance of that fact could not have reasonably affected their decision to plead no contest to the charge of armed robbery. The lower court's Finding of Fact No. 8 shows that the defendants' attorney had obtained information from the trial judge that the likely sentence imposed upon their pleas would be thirty to forty years, and the attorney had told the defendants of that probability. The record reveals the trial judge questioned each defendant regarding the voluntariness of their pleas, and each stated their plea was given voluntarily. Each defendant also answered that he understood he could be imprisoned for life. Under these circumstances, we hold the defendants' pleas were voluntarily and intelligently entered and the trial judge's failure to comply strictly to N.C. Gen. Stat. § 15A-1022(a)(6) was not prejudicial error.

Judge Morgan's order, dated 19 February 1982, vacating defendants' pleas of no contest and ordering new trials is reversed, and the causes will be remanded to the Superior Court for the entry of an order reinstating the defendants' pleas and the judgments entered thereon.

Reversed and remanded.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. THOMAS TELTSER

No. 8216SC897

(Filed 15 March 1983)

Searches and Seizures § 15— search of suitcase—relinquishment of reasonable expectation of privacy

The trial court properly concluded that defendant relinquished his reasonable expectation of privacy in a suitcase so that an officer's warrantless search of the suitcase and his seizure of marijuana found therein were lawful where the evidence showed that defendant and his brother were involved in an automobile accident; defendant, in full view of witnesses and without taking any precaution to prevent observation by them, removed the suitcase from the automobile and carried it into a wooded area; defendant placed the suitcase there and returned to the automobile without it, again in full view of witnesses, one of whose questions about the suitcase he did not answer; defendant had no ownership or possessory interest in the wooded area and thus no right to exclude others from access to it; the area was as accessible to the public at large as it was to defendant; and the name on the suitcase was not defendant's and he never made any positive assertion of ownership or possessory interest with regard to it.

APPEAL by defendant from *Smith, Judge.* Judgment entered 10 November 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 17 February 1983.

Defendant appeals from a judgment entered upon his conviction of felonious possession of more than one ounce of marijuana.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Page & Baker, P.A., by H. Mitchell Baker, III, for defendant appellant.

WHICHARD, Judge.

I.

The sole issue is whether the court erred in denying defendant's motion to suppress evidence obtained from a warrantless search of a suitcase. We find no error.

II.

Evidence at the hearing on the motion to suppress showed the following:

Defendant and his brother, students in Florida, while travelling through Robeson County en route to their mother's house in New Jersey, had an automobile accident. The brother went to the hospital for treatment of injuries sustained in the accident. Defendant then took a suitcase from the trunk of the automobile, ran across the highway, jumped a fence, crossed over a service road, and ran about thirty or forty feet into an adjacent wooded area. He took no precaution to prevent anyone from seeing the suitcase.

Within the wooded area defendant located a "blown over" tree with a large hole underneath. There he buried the suitcase, covering it with dirt, rocks, leaves, and branches. He planned to regain possession of the suitcase, and did not want anyone to find it. He did not believe anyone would be able to find it.

Defendant did not own the land on which he buried the suitcase. In fact, he owned no land in Robeson County.

When defendant returned to the automobile, a man directing traffic asked what had happened to the suitcase. Defendant did not reply.

Two witnesses advised a highway patrolman that defendant had left the accident scene, gone into the woods with the suitcase, and returned without it. The patrolman investigated, but found nothing. A second patrolman made a subsequent investigation, but also found nothing. He returned twice and finally located a suitcase which fit the description of the one defendant reportedly had taken into the woods.

The suitcase, which was completely covered with leaves, dirt, and limbs, contained "[s]omewhere under four pounds" of marijuana. It bore a tag with an address which corresponded with that on the identification defendant displayed to one of the officers. The name on the tag, however, was not defendant's.

III.

Judge Britt made findings of fact which reflect, and are fully supported by, the foregoing evidence. These findings "are conclusively binding on appeal." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E. 2d 618, 619 (1982).

He concluded, based thereon, "that the defendant had no reasonable expectation of privacy; that he was not on property owned by him; that he had, in effect, abandoned the property to the extent that he had no reasonable expectation of privacy; and that he could reasonabl[y] expect that anyone finding it was going to open the suitcase and take charge of it." On the basis of these conclusions, he denied the motion to suppress.

IV.

The determinative inquiry is "whether governmental officials violated any legitimate expectation of privacy held by [defendant]." *Rawlings v. Kentucky*, 448 U.S. 98, 106, 65 L.Ed. 2d 633, 642, 100 S.Ct. 2556, 2562 (1980). It is resolved "by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched." *United States v. Salvucci*, 448 U.S. 83, 93, 65 L.Ed. 2d 619, 629, 100 S.Ct. 2547, 2553 (1980). *See also Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978), *rehearing denied*, 439 U.S. 1122, 59 L.Ed. 2d 83, 99 S.Ct. 1035 (1979).

The result "depends upon whether the place invaded was an area in which [the defendant had'] a reasonable expectation of freedom from governmental intrusion.' " *State v. Alford*, 298 N.C. 465, 471, 259 S.E. 2d 242, 246 (1979) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 368, 20 L.Ed. 2d 1154, 1159, 88 S.Ct. 2120, 2124 (1968)).

> The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

United States v. Colbert, 474 F. 2d 174, 176 (5th Cir. 1973). "In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein." *City of St. Paul v. Vaughn*, 306 Minn. 337, 346, 237 N.W. 2d 365, 371 (1975).

V.

In *Rawlings, supra*, the defendant had placed illegal drugs in a friend's pocketbook. A police search thereof disclosed the drugs

and resulted in defendant's arrest. The United States Supreme Court upheld refusal to suppress evidence of the drugs on the ground that defendant did not have a reasonable expectation of privacy in the area searched. The pocketbook was subject to access by persons other than defendant, and defendant had no "right to exclude other persons from [such] access." 448 U.S. at 105, 65 L.Ed. 2d at 642, 100 S.Ct. at 2561.

In *State v. Jordan*, 40 N.C. App. 412, 252 S.E. 2d 857 (1979), this Court held that the defendant did not have a reasonable expectation of privacy in the pocketbook of a passenger in his car. The trial court had refused to suppress evidence of illegal drugs found in the pocketbook. This Court held that defendant had no "reasonable expectation that the place searched would remain private," *id.* at 415, 252 S.E. 2d at 859, and found no error in the ruling. "When one voluntarily puts property under the control of another, he must be viewed as having relinquished any prior legitimate expectation of privacy with regard to that property, as it becomes subject to public exposure upon the whim of the other person." *Id.*

In *State v. Cromartie*, 55 N.C. App. 221, 284 S.E. 2d 728 (1981), defendant threw an aspirin box on the ground while an officer was searching him. Another officer picked up the box; and when the two officers opened it, they found that it contained heroin. This Court affirmed denial of the defendant's motion to suppress. It relied, in part, on *City of St. Paul, supra*, in which the defendant had, when stopped by an officer, run to a nearby business and placed an eyeglass case under a counter. The officer retrieved the case and found that it contained drug paraphernalia. The Supreme Court of Minnesota upheld the warrantless seizure, stating:

> The defendant discarded the eyeglass case in a location to which any member of the public had equal access—underneath the counter of a drycleaning establishment. He argues, however, that his intention was merely to hide the case, not to relinquish his right of ownership. That is not the test.
>
> . . . [T]he question is whether the defendant has, in discarding the property, relinquished his reasonable expecta-

tion of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment.

Id. at 346, 237 N.W. 2d at 370-71.

VI.

Application here of the principles set forth in the foregoing cases clearly permits the result reached by the trial court, to which our Supreme Court has said we must accord due deference. *State v. Cooke, supra*, 306 N.C. at 134, 291 S.E. 2d at 619-20.

The defendant here, in full view of witnesses, and without taking any precaution to prevent observation by them, removed the suitcase from the automobile and carried it into a wooded area. Defendant had no ownership or possessory interest in the wooded area, and thus no right to exclude others from access to it. *Rawlings*, 448 U.S. at 105, 65 L.Ed. 2d at 642, 100 S.Ct. at 2561. The area was as accessible to the public at large as it was to defendant. *City of St. Paul, supra.*

Defendant placed the suitcase there and returned to the automobile without it, again in full view of witnesses, one of whose questions about the suitcase he did not answer. The name on the suitcase was not his, and he never made any positive assertion of ownership or possessory interest with regard to it.

Under these circumstances we have no basis for overruling the conclusion that defendant "had no reasonable expectation of privacy" in the suitcase, and "could reasonabl[y] expect that anyone finding it was going to open . . . and take charge of it." *See Cromartie*, 55 N.C. App. at 223, 284 S.E. 2d at 730. Like the Court in *City of St. Paul*, we reject defendant's contention that a different result should obtain because he was attempting to hide the suitcase, not to relinquish any rights therein. To repeat what that Court stated: "That is not the test. . . . [T]he question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment." 306 Minn. at 346, 237 N.W. 2d at 370-71. The court properly concluded that the requisite relinquishment had occurred here.

No error.

Judges HEDRICK and BRASWELL concur.

STATE OF NORTH CAROLINA v. RICHARD TIMOTHY LEGGETT

No. 822SC825

(Filed 15 March 1983)

1. **Constitutional Law §§ 46, 65— same counsel representing defendant and girlfriend—removal as counsel for girlfriend during defendant's trial**

In a prosecution for receipt and possession of stolen property, defendant's Sixth Amendment right to confrontation was not denied by the trial court's removal of defendant's trial counsel as counsel for defendant's girlfriend, who had also been indicted for the same crimes, and the court's appointment of another attorney to represent the girlfriend so as to prevent a conflict of interest when defendant's counsel sought to elicit testimony during defendant's trial concerning statements made by the girlfriend to an officer which tended to inculpate her and exculpate defendant.

2. **Receiving Stolen Goods § 5.1— dishonest purpose—sufficiency of evidence**

The evidence was sufficient to warrant an inference of dishonest purpose and to support defendant's conviction of felonious receiving of stolen guns where the evidence showed that the stolen guns were found at defendant's home, and defendant's own evidence showed that three guns of suspicious origin were being kept in his home on the night in question and defendant did nothing about them, and that after he was informed by the owner that his guns had been stolen, defendant told the owner that he would get them back to the owner if he saw them.

3. **Criminal Law § 139— impropriety of indeterminate sentence**

The trial court erred in imposing an indeterminate sentence of not less than five nor more than seven years for crimes which occurred after 1 July 1981, since G.S. 15A-1351(b) prohibits the imposition of a minimum term of imprisonment after such date.

APPEAL by defendant from *Lane, Judge.* Judgment entered 30 March 1982 in Superior Court, MARTIN County. Heard in the Court of Appeals 9 February 1983.

Defendant was found guilty of felonious receipt of stolen goods and felonious possession of stolen goods. The stolen goods—three firearms—were valued at $605.00. From a judgment imposing a sentence of five to seven years, and restitution in the amount of $700.00, defendant appeals to this Court.

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

Brandon & Cannon, by Glen E. Cannon, for defendant appellant.

BECTON, Judge.

I

The State introduced evidence tending to show that during the evening of 19 September 1981, David Edmondson reported the theft of three of his firearms—a .3006 bore rifle, a 20-gauge pump shotgun, and a .22 automatic rifle. Gregory Rogerson, a mutual friend of Edmondson and defendant, visited defendant's home that same evening. While he was there, defendant showed Rogerson three guns stored in a bathroom closet, later identified as Edmondson's guns. Rogerson contacted Edmondson, told him where his guns were, and the two of them reported the theft to the Sheriff's Department. Armed with a proper search warrant, Martin County Deputy Sheriff Jerry Beach went to defendant's house and found guns, matching the description given by Edmondson, under the porch of defendant's home. Defendant was arrested.

The defendant's evidence tended to show that his girlfriend, Melba Wright, borrowed his car on the evening of 19 September 1981 without saying where she was going. She returned with three guns and put them in the bathroom closet. Defendant attempted to find out where Melba Wright had obtained the guns, but was unsuccessful. Upon learning about the theft of Edmondson's guns, defendant discussed them with Wright but did nothing about the guns at that time. Deputy Sheriff Beach came to his home and arrested him about 2:00 p.m. on 20 September 1981. Defendant neither stole the guns nor placed them under the porch.

II

Defendant makes three arguments on appeal. He contends (1) that the trial court erred when it denied his motion for appropriate relief; (2) that the trial court erred when it denied his motion made at the end of the State's evidence to dismiss the charges against him; and (3) that the sentence imposed, not less than five nor more than seven years, contravened the express provisions of the North Carolina General Statutes.

III

[1] Defendant's first argument, raised by his second assignment of error, concerns the denial of his motion for appropriate relief

(new trial). Both defendant and his girlfriend, Melba Wright, were indicted; both were represented by defendant's trial counsel, Glen Cannon. Defendant complains that the trial court erred when it, *ex mero motu*, removed Cannon as counsel for Wright and appointed another lawyer to represent her and that the mid-trial removal prejudiced defendant's Sixth Amendment right to confrontation. Because the trial court acted to prevent a conflict of interest between the co-defendants, we reject defendant's contentions.

The removal was occasioned by defendant's cross-examination of State's witness, Deputy Jerry Beach, and was ordered during a conference at the bench and out of the hearing of the jury. The following colloquy took place:

> Q. Mr. Beach, did you talk to anyone concerning this matter other than Mr. Edmondson, Mr. Rogerson and Mr. Leggett?
>
> A. Yes sir, I have.
>
> Q. With whom had you had conversation?
>
> A. Melba Wright.
>
> Q. Did she give you a statement concerning this incident?
>
> A. Yes sir.
>
> Q. Would you tell the Court what she said?
>
> MR. NORTON: Objection, if Your Honor please.
>
> COURT: Counsel approach the bench.

Before ruling on the State's objection, and while counsel was still at the bench, the court became aware of the fact that defendant's counsel was also counsel for Melba Wright. The court properly sustained the State's objection to the question as an invitation to violate the rule against hearsay. *Wilson v. Indemnity Co.*, 272 N.C. 183, 158 S.E. 2d 1 (1967). It then made this inquiry:

> COURT: You represent both defendants, do you not?
>
> MR. CANNON: Yes, Your Honor, that's correct.
>
> COURT: All right. So you represent . . . so you have an obligation to both defendants?

MR. CANNON: Yes, Your Honor.

COURT: Well, they may, but of course, the Court has an obligation to see as to whether or not each person at the time of trial is properly represented so that later on, I mean, later on if somebody comes back and says, "Well, now . . ." they'll say that this happened before, "I told him I didn't want him, and he sold me down the river." It's happened before. It may not happen, you know, and it happens in the best of families, but now as to what conversation took place with Miss Wright at a time apparently which was not in the presence of the defendant, of course, I sustained that, but I am raising . . . I think that it might be wise to have somebody represent the defendant, Wright, if you perceive that your primary responsibility is to defend the defendant Leggett.

MR. CANNON: Well, Your Honor, I'm already in this trial. I feel like that I have a responsibility at this point to defend Mr. Leggett.

Unquestionably, a defendant has a constitutional right to the undivided loyalty of his counsel. *State v. Arsenault*, 46 N.C. App. 7, 264 S.E. 2d 592 (1980), *citing Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 2d 680, 62 S.Ct. 457 (1942) and *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974). When an attorney serves as counsel for co-defendants with *conflicting* interests, a division of loyalties is inevitable. *Cf., id.* (concerning law partners representing co-defendants with conflicting interests).

In the case *sub judice*, defense counsel admitted to the trial court that he felt a greater responsibility to defendant's cause than to that of Melba Wright. Counsel also agreed with the court that the statement he sought to bring out contained portions that tended to inculpate Melba Wright, and exculpate his other client, the defendant. It is difficult to imagine a clearer case of conflicting interests than this one. The trial court here acted prudently and properly when it removed Mr. Cannon as counsel for Wright. We note further that defendant was in no way prejudiced by the court's actions since he was given the opportunity to consult with Melba Wright's counsel concerning her appearance as a witness and chose not to do so. Defendant's argument is thus unpersuasive.

IV

[2] Defendant next argues that the trial court erred when it refused to grant his motion, made at the close of the State's evidence, to dismiss the felonious receiving of stolen goods charges against him. The rules governing motions to dismiss are familiar. As we opined in *State v. James*, 60 N.C. App. ---, --- S.E. 2d --- (filed 1 February 1983): "The trial court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. The weight and credibility of the testimony are matters for the jury." [Citations omitted.] The elements of the offense of feloniously receiving stolen goods are: (1) receiving or aiding in the concealment of goods; (2) of a value of more than $400.00; (3) stolen by someone else; (4) the receiver knowing or having reasonable grounds to believe the goods had been stolen; (5) the receiver acting with a dishonest purpose. N.C. Gen. Stat. § 14-71 (1981); *State v. Haywood*, 297 N.C. 686, 256 S.E. 2d 715 (1979). Defendant contends that the State presented evidence which was insufficient to prove the existence of the fifth element, "dishonest purpose." Defendant's own, uncontradicted evidence was that three guns of suspicious origin were being kept in his house on the night in question, and he did nothing about them. After having been informed by Edmondson that his guns had been stolen, defendant told him "if I [see] them I [will] get them back to you." We find that defendant's own evidence was sufficient to warrant an inference of his dishonest purpose and submission of the case to the jury.

V

[3] Defendant's final argument is that the concurrent sentences imposed, "not less than 5 nor more than 7 years" on both convictions, are indeterminate and violate the provisions of N.C. Gen. Stat. § 15A-1351(b) (1981). That statute provides, in pertinent part, that: "Sentencing of a person convicted of a felony that occurred on or after the effective date of Article 81A of this Chapter is subject to that Article; a minimum term of imprisonment shall not be imposed on such a person." Because the crimes took place after 1 July 1981, defendant's convictions are subject to the Article.

We are aware that the trial court found aggravating factors and that those factors outweighed any in mitigation. He was thus, assuming the findings were properly supported by the evidence, justified in imposing a sentence greater than the presumptive term. Nevertheless, the Legislature has mandated that the term chosen must be a definite number of years, and this the trial court did not do.

Accordingly, we vacate that portion of the judgment imposing sentence and remand for sentencing not inconsistent with this opinion and Article 81A of the General Statutes.

Vacated and remanded.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIAM PAUL MARLOW

No. 8223SC621

(Filed 15 March 1983)

1. **Criminal Law § 91— statutory speedy trial—absence of formal joinder for trial—exclusion of time for co-defendant—time not excluded for defendant**

Where cases against defendant and a co-defendant had not been formally joined for trial during a time when the co-defendant was unavailable for trial because of pregnancy, the trial judge erred in excluding such time from the statutory speedy trial period for the commencement of defendant's trial. G.S. 15A-701(b)(6).

2. **Criminal Law § 92— statutory speedy trial—exclusion of delay for co-defendant—denial of motion for joinder to protect defendant's rights**

If it was correct for the trial court to exclude delay caused by a co-defendant's pregnancy from the statutory speedy trial period, it would have been necessary for the court to deny the State's motion for joinder of the cases against defendant and the co-defendant in order to protect defendant's rights to a speedy trial. G.S. 15A-927(c)(2)a.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 12 February 1982 in WILKES County Superior Court. Heard in the Court of Appeals 17 January 1983.

On 18 March 1981, defendant was arrested under a warrant charging him with the murder of Dennis Wyatt. On 14 September

1981, defendant was charged in an indictment for the murder of Wyatt. Defendant remained in custody until his trial, which began on 8 February 1982.

When defendant's case was called for trial, on 8 February 1982, the following pertinent events took place. Defendant's pending motion to have the charges against him dismissed for lack of a speedy trial was brought to the attention of the trial court. Defendant asserted both constitutional and statutory grounds. Defendant then presented evidence showing that his trial was delayed beyond 12 January 1982, the last day of the 120 day period required under G.S. 15A-701(a1)(1), that none of the delay was caused by defendant and that there had been five weeks of criminal court in the Superior Court for Wilkes County between 14 October 1981 and 8 February 1982, the last one of which terms began on 14 December 1981. Following defendant's evidence on the motion, the following exchange took place between the trial court, defendant's counsel, Mr. Evans, the District Attorney, Mr. Ashburn, and Mr. Freeman, counsel for Tena Marion,

> The Court: Of course, this client—this defendant's case was a companion case to the motion I just heard on the continuance of Ms. Marion and two other co-defendants; is that correct?
>
> Mr. Evans: Yes, sir; that is correct.
>
> The Court: Now, this defendant is charged along with three other co-defendants; is that correct?
>
> Mr. Ashburn: Yes, sir, your Honor, correct.
>
> The Court: And, of course, one of the co-defendants had a baby the 1st of January and was not able to be tried in December.
>
> Mr. Evans: Your Honor, I object to that.
>
> Mr. Freeman: We contend that we were ready to try it in December.
>
> The Court: What do you say to that Mr. District Attorney?
>
> Mr. Ashburn: Yes, sir, I talked to counsel for defendants who—at sometime prior to that I believe—that we talked also about her being pregnant and I told them that I wasn't

> going to try a pregnant woman in front of a jury on accessory after the fact and be responsible for what might happen to her. The indications were that it was not long off that she would be delivering a child. I did that—well.

Following further exchanges and arguments by defendant's counsel, the trial court found, in pertinent part, "that one of the co-defendants, Tena Lynn Marion, was pregnant and expecting to give birth to a child sometime in January, 1982, and did deliver the child January the 1st, 1982; that the District Attorney did not feel that the pregnant defendant was able to stand trial during the week of December 14th and did not place the case on the trial calendar . . ." and later concluded, in pertinent part, "that since the date of the indictment, September 14, 1981, that inasmuch as the co-defendant, Tena Marion, was expecting to deliver childbirth, that the time from December 14, 1981 to February the 8th, should be excluded for the reason that the co-defendant was not physically able to appear in court; and the Court further concludes by excluding this time from the date of the indictment the defendant has not been denied his statutory right to a speedy trial. Therefore, the defendant's motion to dismiss is denied."

There then ensued an exchange between Mr. Evans and the Court as to discovery matters, and the sequestering of witnesses, and other matters affecting expected testimony from other "co-defendants." The following exchange then took place:

> Mr. Evans: Your Honor, I have a motion to sever, but I'll not argue that motion.
>
> The Court: All right.
>
> Mr. Freeman: I have a motion that I will argue.
>
> The Court: All right. Wait just a minute. Any other motions, Mr. Evans.
>
> Mr. Evans: No, sir.
>
> The Court: I assume the State has made a motion to join them, consolidate them for trial?
>
> Mr. Ashburn: Your Honor, the State does make that motion to join them and consolidate them for trial.

Over defendant's objection, the Court ruled as follows: "I'll grant the State's motion to consolidate the two cases for trial." Upon another motion by the State to also consolidate for trial charges against Ricky Marion, over defendant's objection, the trial court ruled: "Let the three cases be joined for trial and consolidated."

At trial, the State's evidence tended to show that defendant murdered Wyatt by shooting him at the home of Ricky and Tena Marion, and that after the murder of Wyatt, the Marions and another person present at the murder scene aided and assisted in disposing of Wyatt's body in a remote mountain stream.

The jury returned a verdict of guilty of second degree murder. From judgment and sentence entered on the verdict, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Kucharski, for the State.

Doughton & Evans, by Samuel C. Evans, for defendant.

WELLS, Judge.

Defendant contends he was denied his statutory right to a speedy trial and that his trial was improperly joined for trial with defendant Tena Marion.

[1] G.S. 15A-701(a1)(1) required that defendant's trial begin within the 120 days of the date of his indictment. G.S. 15A-701(b)(6) allows the trial court to exclude from the 120 day period, "[a] period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted." The period may not be excluded unless the co-defendants were formally joined. *State v. Capps and Staton*, 61 N.C. App. 225, 300 S.E. 2d 819 (1983). Since defendant Marlow and Tena Marion were not formally joined as co-defendants between 14 December 1981 and 8 February 1982, the trial judge erred in excluding that period from the 120 days that the State had in which to commence defendant's trial and defendant was entitled to a dismissal under G.S. 15A-703.

[2] While it is not necessary for us to address defendant's joinder argument, under the facts in this case, we deem it appropriate.

G.S. 15A-927(c)(2)a, in pertinent part, is as follows:

(c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.—

(2) The court, . . . on motion of the defendant . . . must deny a joinder for trial or grant a severance of defendants whenever:

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial . . .

While ordinarily the decision as to severance or joinder of defendants lies within the sound discretion of the trial judge, *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978), in this case the trial court's findings of fact show that, if it had been correct for the trial court to exclude defendant Marion's delay days, it would have been necessary to deny the State's motion to join co-defendant Tena Marion's trial in order to protect defendant's rights to a speedy trial.

Upon remand, the trial court shall determine whether to order that the charges against defendant be dismissed with or without prejudice. G.S. 15A-703.

Because of the result we have reached, we deem it unnecessary to reach or determine defendant's remaining assignments of error.

For the reasons stated, the judgment entered is vacated and the cause is remanded.

Vacated and remanded.

Chief Judge VAUGHN and Judge BRASWELL concur.

H. MARK McNEAL v. FRANK BLACK

No. 8226SC350

(Filed 15 March 1983)

Arbitration and Award § 9— participation in arbitration hearing—absence of objection—waiver of right to object to arbitration process

Respondent stockbroker's consent to submission of a claim against him to arbitration by the National Association of Securities Dealers and his participation in the arbitration hearing without making any objection, demand for a jury trial or motion to stay the proceedings constituted a waiver of his right to object to the arbitration process. G.S. 1-567.3(b); G.S. 1-567.13(a)(5).

APPEAL by respondent-appellant from *Grist, Judge.* Judgment entered 18 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 February 1983.

This case involves allegations by appellee (hereafter "McNeal") that appellant (hereafter "Black"), a stockbroker, sold "naked" stock options (*i.e.*, options for which McNeal did not own the underlying stock) in McNeal's name, causing damages to McNeal. Rather than filing suit for the losses he had sustained, McNeal agreed to submit his claim to arbitration under the auspices of the National Association of Securities Dealers, Inc. ("NASD"), a voluntary national association of brokerage firms and dealers registered with the Securities and Exchange Commission.

On 28 April 1980 McNeal signed a Uniform Submission Agreement, a form provided by NASD. Respondents in the arbitration were Black and two of his employers, E. F. Hutton & Company, Inc. and Merrill Lynch, Pierce, Fenner & Smith, Inc. On 23 June 1980, Black also signed a Uniform Submission Agreement and submitted it and his answer to NASD's Director of Arbitration. Arbitration hearings were held in Charlotte on 20 and 21 August 1981 before a panel of three arbitrators. By award dated 17 September 1981 the arbitrators awarded McNeal $12,500 against Black and dismissed McNeal's claims against Hutton and Merrill Lynch.

On 29 October 1981 McNeal filed an Application and Motion to Confirm Arbitration Award, pursuant to G.S. 1A-1, Rule 7, and G.S. 1-567.12, -.15 and -.16. In response, Black filed a Motion to Dismiss, Answer and Demand for Jury Trial, challenging the ar-

bitration award. A hearing was held on 5 January 1982. After hearing argument of counsel and reviewing the pleadings and affidavits, Judge Grist denied Black's motions and entered judgment on 18 January 1982, confirming the arbitration award. Black appealed from entry of the judgment.

Helms, Mulliss & Johnston by N. K. Dickerson, III, for movant-appellee.

Weaver & Bennett by F. Lee Weaver for respondent-appellant.

BRASWELL, Judge.

Black argues in his brief that the court erred in refusing to grant his motion for a jury trial and his motion to have NASD's Rules of Fair Practice and Code of Arbitration Procedure declared unconstitutional. Black contends that he was compelled to submit to arbitration since he was subject to disciplinary action had he refused to arbitrate. He urges this Court to regard the arbitration agreement as coercive, compelling him to choose arbitration rather than risk termination of his employment and the loss of his license.

We do not agree with Black that his submission to arbitration was forced. Black voluntarily signed the Uniform Submission Agreement and expressly consented to arbitration. It is true that this dispute was required to be submitted to arbitration by the NASD Code of Arbitration Procedure:

> "Sec. 2.
>
> (a) *Required Submissions*
>
> Any dispute, claim or controversy subject to arbitration under this Code arising on or after the effective date of the relevant section or subsection hereof shall be submitted to arbitration pursuant to this Code at the instance of:
>
> * * * *
>
> (2) a public customer against a member and/or a person associated with a member;"

However, Black had a choice of whether to accept employment with an NASD member firm and could have chosen a non-member

brokerage firm if he objected to the arbitration procedures concerning customer disputes; as for the disciplinary sanctions to be imposed had Black refused to submit to arbitration, such sanctions are not mandatory but are simply possible recourse that may be taken by NASD. The Resolution of the Board of Governors states:

> "It *may* be deemed conduct inconsistent with just and equitable principles of trade and a violation of Article III, Section 1 of the Rules of Fair Practice for a member or a person associated with a member to fail to submit a dispute for arbitration under the Code of Arbitration Procedure as required by that Code, . . ." (Emphasis added.)

At the same time he filed the agreement to arbitrate, Black also filed his answer to McNeal's claim. He did not make any objection to the arbitration or make any demand for jury trial. Black and his attorney participated in the arbitration hearings and never made any objection to arbitration. At the conclusion of the hearings Black's counsel stated affirmatively that all of his evidence had been presented and that he had had an equal opportunity to be heard. No demand for jury trial or objection to the arbitration process was made by Black until a month and a half after McNeal had moved to have the arbitration award confirmed.

We believe that by his participation in the arbitration without making any protest or demand for jury trial Black waived any right to object to the award later on these grounds. Pursuant to G.S. 1-567.3(b) of the Uniform Arbitration Act, rather than submitting to arbitration, Black could have brought an action in superior court to have the arbitration proceeding stayed and to have a determination of the issues of the demand for jury trial and the constitutionality of NASD's arbitration proceedings. In the alternative, under G.S. 1-567.13(a)(5), Black could have moved to vacate the award once it was entered. However, in order to make such a motion, he must have raised an objection to the arbitration proceeding at the time of the hearing. This he failed to do.

A party may waive a constitutional as well as a statutory benefit by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *Development Co., Inc. v. Phillips*, 278 N.C. 69, 76, 178 S.E. 2d 813, 817

(1971); *Cotton Mills v. Local 578*, 251 N.C. 218, 228, 111 S.E. 2d 457, 463 (1959), *cert. denied*, 362 U.S. 941, 4 L.Ed. 2d 770, 80 S.Ct. 806 (1960); 3 Strong's N.C. Index 3d *Constitutional Law* § 4.2 (1976). In *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E. 2d 743 (1981), the court held that the defendant waived his right to complain about the partiality of one of the arbitrators by failing to challenge the selection of the arbitrator until defendant made a motion to vacate the award. The evidence showed that defendant knew of the extent and nature of the relationship between the arbitrator and plaintiff at the time he entered into the agreement to arbitrate.

> "The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award."

Thomas v. Howard, supra, at 352, 276 S.E. 2d at 745. *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 255 S.E. 2d 414 (1979).

If Black had prevailed at the arbitration hearing, it is clear that he would not be challenging the procedure at this time. He cannot be allowed to participate in arbitration, raising no objections, and then refuse to be bound by an adverse award. This type of conduct would serve to defeat the purpose of arbitration.

We hold that Black's consent to submission of the matter to arbitration and his participation in the arbitration hearing, without making any objection, demand for jury trial or motion to stay the proceedings, resulted in a waiver of the right to subsequently challenge the arbitration process. *Thomas v. Howard, supra; Fashion Exhibitors v. Gunter, supra*; Annot., 33 A.L.R. 3d 1242 (1970). Black failed to assert his objections in a timely manner and also, by his active participation in the arbitration hearing, indicated conduct inconsistent with a purpose to insist upon a jury trial. *Development Co., Inc. v. Phillips, supra.*

We have carefully considered Black's other assignments of error and find them to be without merit.

For the foregoing reasons, we hold that the trial court properly denied Black's motions and confirmed the award of the arbitrators.

Affirmed.

Judges HEDRICK and WHICHARD concur.

JACQUELINE U. SNEED v. CAROLINA POWER & LIGHT COMPANY

No. 8210SC386

(Filed 15 March 1983)

Husband and Wife § 9; Master and Servant § 87— injuries compensable under Workers' Compensation Act—loss of consortium action by spouse prohibited

When an employee's injuries are compensable under the Workers' Compensation Act, the employee's spouse is prohibited from maintaining an action for loss of consortium resulting from such injuries by the statute which excludes "all other rights and remedies of the employee, his dependents, next of kin or representative as against the employer at common law or otherwise on account of such injury or death," G.S. 97-10.1. Furthermore, the statute does not constitute a taking of property without due process in violation of Art. I, § 18 of the North Carolina Constitution.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 1 March 1982. Heard in the Court of Appeals 16 February 1983.

Plaintiff's husband, Richard Sneed, who was an employee of defendant, was injured on the job when a load of coal with which he was working became dislodged, crushing and pinning him and causing him serious disabling injuries. While Richard Sneed had a Workers' Compensation Act claim pending before the North Carolina Industrial Commission, plaintiff sought damages, through a civil action in superior court, for loss of consortium caused by defendant's alleged negligence which resulted in personal injury to plaintiff's husband.

Plaintiff requested actual and punitive damages from defendant for loss of consortium caused by injuries to her husband which included periods of depression and sexual impotence. Defendant answered admitting the on-the-job injury to plaintiff's husband but denying negligence on its part and denying that the complaint stated a claim upon which relief could be granted. Defendant moved to dismiss pursuant to Rule 12(b)(1), (6) and (7)

and for summary judgment. From the court's order dismissing the action, plaintiff appeals.

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn, II, for plaintiff-appellant.

Fred D. Poisson for defendant-appellee.

EAGLES, Judge.

Plaintiff challenges the granting of defendant's Rule 12(b)(1), (6) and (7) motions to dismiss contending that the claim of a wife for loss of consortium, where her injured husband is entitled to compensation under the Workers' Compensation Act, is not barred by the provisions of G.S. 97-10.1. We disagree.

Jurisdiction lies in the trial court for "all actions for personal injuries due to negligence, except insofar as it has been deprived of such jurisdiction by statute." *Bryant v. Doughterty*, 267 N.C. 545, 549-50, 148 S.E. 2d 548, 552 (1966). Here the trial court has been deprived of jurisdiction by the clear language of G.S. 97-10.1:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

Appellant contends that the statute's enumeration of "the employee, his dependents, next of kin, or personal representative" does not include his wife and that her claim therefore survives. We do not agree. Numerous cases from other jurisdictions with similarly phrased statutes have held that a spouse's claim for loss of consortium is barred. *Napier v. Martin*, 194 Tenn. 105, 107, 250 S.W. 2d 35, 36 (1952) (construing Williams Code, Sec. 6859 "his personal representative, dependents, or next of kin, at common law or otherwise. . . ."); *Massey v. Thiokol Chemical Corp.*, 368 F. Supp. 668, 676 (S.D. Ga. 1973) (construing Georgia Code § 114-103 "his personal representative, parents, dependents or next of kin at common law or otherwise. . . ."); *Coddington v. City of Lewiston*, 96 Idaho 135, 137, 525 P. 2d 330, 332

(1974) (construing Indiana Code § 72-203 "his personal representatives, dependents or next of kin at common law or otherwise"); *England v. Dana Corp.*, 428 F. 2d 385, 386 (7th Cir. 1970) (construing Burns Annotated Indiana Statutes § 40-1206 "his personal representative, parents, dependents, or next of kin, at common law or otherwise"). See also Annotated 36 A.L.R. 3d 900, 929 § 7 (1971).

The statute is clear and unambiguous and requires the result that plaintiff cannot maintain an action for loss of consortium resulting from injuries to plaintiff's spouse when those injuries are compensable under the Workers' Compensation Act.

We reject appellant's contention that the provisions of Chapter 97 are violative of the Constitution of North Carolina, Article I, Section 18, as a taking of property without due process of law. The constitutionality of Chapter 97 has been upheld by our Supreme Court and similar acts have been upheld by the Supreme Court of the United States. *Lee v. American Enka Corporation*, 212 N.C. 455, 193 S.E. 809 (1937); *R. E. Sheehan Co. v. Shuler*, 265 U.S. 371, 44 S.Ct. 548, 68 L.Ed. 1061 (1924).

Furthermore, it is clear that the General Assembly may abolish common law remedies and create statutory remedies in their place to attain permissible legislative objectives. *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929).

In response to the Rule 12(b)(7) motion to dismiss, appellant argues that compulsory joinder of the plaintiff's claim with her husband's claim before the Industrial Commission is not mandated by *Nicholson v. Hugh Chatham Memorial Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980). *Nicholson* dealt with the problem of potential double recovery for the same injuries by victim and spouse and required mandatory joinder of claims for loss of consortium with pending claims of the injured spouse through whom loss of consortium is claimed. Although joinder of this action with the pending Workers' Compensation Act claim of the plaintiff's spouse would be impossible as the statute is now written, dismissal pursuant to *Nicholson* is appropriate.

To hold as plaintiff contends would effectively circumvent the purpose of the Workers' Compensation Act to assure injured employees compensation without proof of negligence, while

limiting employers' total liability for the injury suffered by the employee. We hold that a claim for consortium by the spouse of an employee injured on the job, where the employee's injury is compensable under Chapter 97, cannot be maintained.

For the reasons stated, we hold that the trial court's order dismissing the complaint is affirmed.

Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

MARTHA McCALL v. DANIEL McCALL

No. 8229DC286

(Filed 15 March 1983)

Divorce and Alimony § 19— modification of order for alimony and child support pendente lite—insufficient findings

Where an order modifying a prior order for alimony and child support *pendente lite* contained no findings as to the employment status, income or other financial resources of the parties or as to the needs of the child, and the modification order was unclear as to whether the court intended mortgage payments to be made as alimony or as child support, the case is remanded to the district court for more definite findings as to the needs and resources of the parties and what the court intended to set out as appropriate child support.

APPEAL by defendant from *Greenlee, Judge.* Order entered 6 January 1982 in District Court, HENDERSON County. Heard in the Court of Appeals 8 February 1983.

This is a civil action in which defendant seeks relief from an order modifying a prior order for child support, custody, and alimony pendente lite.

On 29 October 1980 the District Court made findings of fact and entered an order granting plaintiff custody of the minor child of the parties, $422.00 per month in alimony and $160.00 in child support. The Court also ordered that the plaintiff wife make mortgage payments on the marital home and that she have the use of the home until modified by further order.

Defendant filed a motion on 3 November 1981 for an order modifying the above order. In his motion, the defendant requested custody of the minor child and elimination of the requirement to pay alimony. On 20 November 1981 defendant also moved the court to amend its findings, make additional findings and amend its order or direct entry of a new order. Defendant's second motion requested an order denying plaintiff alimony as a matter of law and decreeing that the house be sold with the proceeds divided equally between plaintiff and defendant.

After consolidating the motions, the court heard the matter and found that the plaintiff was no longer in need of alimony, that the mortgage payments were in arrearage, and defendant husband owed plaintiff wife $422.00 in alimony.

The court then entered an order dated 4 January 1982, which reads in part:

> It is further ordered that previous orders in this matter are not fabrigated [sic] and shall remain in full force and effect except that the supporting parent, Daniel McCall shall pay the sum of $422.00 on the mortgage payments which are in arrearage which constitutes the alimony that he has owing to Martha McCall and that he shall continue to pay the mortgage payments on the home owned by the parties and that said home is a suitable resident [sic] for the child born of the marriage and he will make up any arrearages on said mortgage payments. Said home is set over for the use and benefit of said child until further orders of this court and that Martha McCall the mother therein, is entitled to live in the home with the child and that she will be subjected and ordered to pay all utilities bills on said home. Daniel McCall shall further provide Martha McCall with a copy of the payment of mortgage payments to indicate that same are current.

From the foregoing order, defendant appealed.

No counsel for plaintiff, appellee.

Atkins & Craven, by Lee Atkins for defendant, appellant.

HEDRICK, Judge.

Defendant argues that the District Court's order on 6 January 1982 did not contain sufficient findings of fact and conclu-

sions of law to sustain its award under N.C. Gen. Stat. § 50-13.4. The pertinent sections of the statute, N.C. Gen. Stat. § 50-13.4(c), (d) and (e), read as follows:

> (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.
>
> (d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.
>
> (e) 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 any interest therein, or a security interest in or possession of 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.

Under the above statutory language, a court when entering an order for support, should take into account the needs of the child, the resources of the parties and any other facts relevant to the case. In the present case, the District Court, before entering the original order for support on 29 October 1980, made these pertinent findings:

> . . .
>
> 3. That the Defendant is the supporting spouse and the Plaintiff is the dependent spouse, based on the current position of the parties, with the Plaintiff pursuing her education full time; that said education will be finished by September 1981 at the latest;
>
> 4. That the Defendant is employed full time at Dupont, earning a salary of $1,320.00 month take home pay.
>
> . . .

The court then ordered defendant husband to pay plaintiff wife $422.00 per month in alimony and $160.00 per month for the support of their minor child. The court also ordered that the plaintiff wife should maintain the mortgage payments on the marital home.

Without any additional findings as to the parties' employment status, their incomes or other financial resources or as to the needs of the child, the court found on 4 January 1982 that the plaintiff was no longer in need of alimony. However, the court proceeded to order that the defendant "pay the sum of $422.00 on the mortgage payments which are in arrearage *which constitutes the alimony that he has owing to Martha McCall* and that he shall continue to pay the mortgage payments on the home owned by the parties. . . ." (Emphasis added.) As allowed by N.C. Gen. Stat. § 50-13.4(e), the court granted possession of the home to the child for support and entitled the plaintiff mother to reside therein.

From our examination of the District Court's order, the relevant statute and the remainder of the record, we are unable to determine whether the lower court intended to order payment on the mortgage as alimony or as child support. On one hand, the court terminated alimony payments. On the other hand, it reinstituted those payments as payable toward the mortgage on the marital home, which it set over for the support of the child. However, it does seem clear that the original order's provision for $160.00 per month in child support was intended to stand since the subsequent modification stated that all previous orders should remain in full effect.

We hold the findings of the court were not sufficient to support the conclusions and the award ordered. Therefore, we remand the case to the District Court for more definitive findings as to the needs and resources of the parties affected as well as what the court intended to set out as appropriate child support.

Remanded.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. JAMES LEE MEBANE

No. 8218SC896

(Filed 15 March 1983)

1. **Criminal Law § 76.5— voir dire hearing on confession—findings of fact not necessary**

It was not error for the trial court to admit defendant's confession without making specific findings where the police officer to whom the confession was made was the sole witness on voir dire and none of the testimony concerning the confession was contradictory, and the trial court's late filing of findings of fact several months after the trial was of no significance.

2. **Burglary and Unlawful Breakings § 4.1; Larceny § 6.1— cigarette lighters similar to those sold by a store where crimes occurred—admissibility in evidence**

In a prosecution for breaking or entering of a store, larceny and safecracking in which the evidence showed that defendant had three disposable cigarette lighters in his pocket when arrested, the trial court properly admitted a packet which had contained three disposable lighters and which bore a sales tag identified as the type used on identical lighters being displayed inside the store.

3. **Burglary and Unlawful Breakings § 5.9— sufficiency of evidence that defendant was inside store where crimes occurred**

In a prosecution for breaking or entering, larceny and safecracking which allegedly occurred at a Bestway Store, the State's evidence was sufficient to show that defendant had been present inside the store so as to support his conviction of the crimes charged where it tended to show that the store had been broken into shortly before defendant was discovered on the roof of the building; cigarette lighters in defendant's pockets had been taken from inside the store; and defendant made a statement to the police in which he admitted using a wrecking bar to pry open the vent area on the roof to let himself inside the store building.

4. **Criminal Law § 112.1— reasonable doubt—failure to give requested instructions**

The trial court did not err in refusing to give defendant's requested instruction on reasonable doubt where the jury was instructed to consider and weigh all the evidence, as well as the lack of evidence, in determination of whether a reasonable doubt of defendant's guilt existed.

5. **Burglary and Unlawful Breakings § 7— felonious breaking or entering—refusal to instruct on lesser included offense**

The trial court in a prosecution for felonious breaking or entering of business premises did not err in refusing to instruct on the lesser included offense of nonfelonious breaking or entering.

State v. Mebane

APPEAL by defendant from *Davis, Judge.* Judgments entered 30 April 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 February 1983.

This is a criminal action wherein defendant was charged in proper bills of indictment with breaking or entering, larceny, and safecracking, all felonies.

Upon defendant's pleas of not guilty, the State offered evidence tending to show the following: On 1 February 1982, Greensboro City police officers were summoned to a Bestway store on Phillips Avenue to investigate a break-in. Markings on a safe inside the store indicated someone had attempted to pry it open from the top, its hinges had been sawed off, and a meat saw, a hammer, and a screwdriver were lying on the floor beside the safe. In furtherance of their investigation, the officers found defendant on the roof of the building. He was wearing gloves and had in his pockets three disposable cigarette lighters, later identified as a product sold at the Bestway store. A crowbar and a flashlight were found on the roof next to a ventilation fan. After his arrest, defendant made a statement to police in which he admitted scaling the wall of the Bestway store and using a "wrecking bar" to pry open the vent area on the roof to let himself inside the building.

Defendant offered no evidence.

Defendant was found guilty as charged. On the breaking or entering and larceny charges, the court entered a judgment sentencing defendant to three years in prison. Defendant was sentenced to three years in prison on the safecracking charge, with the sentences to run consecutively. Defendant appealed.

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

Mary K. Nicholson for defendant, appellant.

HEDRICK, Judge.

[1] Defendant's first and second assignments of error relate to the court's failure to make findings of fact and conclusions of law at the time of the voir dire hearing regarding defendant's confession, when the judge denied defendant's motion to suppress the

confession evidence. The voir dire hearing was held on 27 April 1982, the day before defendant's trial, but the judge's written findings of fact were not filed until 10 August 1982. Defendant contends, first, that the confession was improperly admitted into evidence before the findings were made and, second, that it was error for the trial judge "to ex post facto correct errors in the actual proceeding" by filing written findings 105 days subsequent to trial, after the record on appeal had already been served on the District Attorney.

The question raised by these assignments of error is whether the trial judge erred in failing to make findings of fact following a voir dire hearing to determine the voluntariness of the defendant's confession. While it is always the better practice for the court to find the facts upon which it concludes any confession is admissible, it is not error to admit a defendant's incriminating statements without making specific findings when no conflicting testimony is offered on voir dire. If conflicting testimony bearing on the admissibility of a confession is brought out on voir dire, then it is error for the judge to admit the confession upon a mere statement of his conclusion that the confession was made freely and voluntarily, for in such a situation specific findings are necessary in order for the appellate court to determine whether the facts found will support the trial judge's conclusions. *State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Harris*, 46 N.C. App. 284, 264 S.E. 2d 790 (1980). In the present case, Detective J. W. Crabtree, the police officer to whom the confession was made, was the sole witness on voir dire and none of the testimony concerning the confession was contradictory. Thus, Judge Davis was not required to make specific findings about the facts alleged because there was no conflict to resolve. When Judge Davis denied the motion to suppress, he had properly concluded that the confession was voluntarily and understandingly made and was admissible. Furthermore, the late filing of findings of fact, several months after trial, is insignificant in light of the earlier-noted authority holding that no findings of fact were necessary. We find no prejudicial error.

[2] Defendant's third argument is that the trial judge erred in admitting testimony linking the three cigarette lighters found in defendant's pocket with similar lighters sold by the Bestway

store involved. Several hours following defendant's arrest, an investigating police officer returned to the roof of the building where defendant had been arrested earlier and discovered a packet which had contained three disposable lighters and bore a sales tag, later identified by store personnel as the type used on identical lighters being displayed inside the Bestway store. Defendant contends the court erred in admitting this evidence because it was insufficient to show that the lighters in defendant's possession had been taken from the store or that defendant had left the lighter packaging on the roof. We find this contention to be feckless. The trial judge was correct in admitting this evidence. The weight to be given that evidence was a matter for the jury to decide. *See generally,* 1 BRANDIS ON NORTH CAROLINA EVIDENCE § 8 (2d Rev. Ed. 1982).

[3] Defendant argues by Assignment of Error Nos. 6 and 9 that the court erred in denying his timely motions to dismiss, to set aside the verdict, and for a new trial. The charges against him should have been dismissed, defendant contends, because the State presented insufficient evidence that he was ever present inside the Bestway store. He further maintains the State's evidence was insufficient to support the jury verdict and that he should be awarded a new trial.

We find, however, that defendant's confession, accompanied by evidence that the Bestway store had been broken into shortly before defendant was discovered on the roof of the building, and by the evidence indicating cigarette lighters in the defendant's pockets had been taken from inside the store, was sufficient for the court to overrule each of these motions. These assignments of error are meritless.

[4] The defendant's fifth contention is that the trial judge committed prejudicial error in refusing to give the instruction he requested on reasonable doubt. The general rule in North Carolina is that a jury charge must be construed in its entirety. A contextual reading of the charge in the present case discloses that the jury was instructed to consider and weigh all of the evidence, as well as the lack of evidence, in determination of whether a reasonable doubt of defendant's guilt existed. The trial judge is not required to give the instructions in the exact language of the request but must give the instruction only in substance. *State v.*

Monk, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Brown*, 56 N.C. App. 390, 289 S.E. 2d 142 (1982). We find this assignment of error without merit.

[5] Finally, defendant assigns error to the denial of his request for instructions on the lesser included offense of nonfelonious breaking or entering. The necessity of charging on lesser included offenses arises only when evidence is presented upon which the jury could find that a lesser included offense was committed. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954); *State v. Crowe*, 25 N.C. App. 420, 213 S.E. 2d 360, *cert. denied*, 287 N.C. 665, 216 S.E. 2d 908 (1975). None of the evidence in the present case supports a charge from which defendant might be found guilty of a lesser included offense. We find no merit in this assignment of error.

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

No error.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. WILLIAM CARROLL DAUGHTRY

No. 824SC848

(Filed 15 March 1983)

1. Automobiles and Other Vehicles § 125— driving under influence of beer—change of citation in statement of charges to allege "alcoholic beverage"—absence of prejudice

Where defendant was originally charged with a second offense of driving under the influence of an intoxicating liquor on 13 September 1981, defendant was convicted in district court on a citation in which the words "intoxicating liquor" were stricken at some unknown time and replaced with the phrase "alcoholic beverage," a misdemeanor statement of charges upon which defendant was tried in the superior court was amended by substituting "alcoholic beverage" for "intoxicating liquor" but was changed back to read "intoxicating liquor" upon motion of the prosecutor at trial, and the evidence showed that defendant had been drinking beer prior to his arrest, defendant was not prejudiced by the modifications in the citation and misdemeanor statement of charges, although beer was an intoxicating liquor but was not an alcoholic beverage under G.S. 20-138(a) until amendment of that statute effective 1

January 1982, since driving under the influence of beer was a misdemeanor offense under G.S. 20-138(a) as it was worded either prior to or after the 1 January 1983 amendment, defendant clearly was on notice that he had been charged with driving under the influence of beer, and the nature of the offense never varied.

2. **Criminal Law § 138.11— trial de novo in superior court—imposition of more severe sentence**

Defendant's rights were not violated by the superior court's imposition of a more severe sentence for a second offense of drunk driving upon trial *de novo* than the sentence imposed in the district court where there was no evidence in the record that the sentence was increased to penalize defendant for exercising his rights.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 31 March 1982 in Superior Court, SAMPSON County. Heard in the Court of Appeals 11 February 1983.

Defendant was charged in a misdemeanor statement of charges with operating a motor vehicle while under the influence of an intoxicating liquor, second offense, in violation of N.C. Gen. Stat. § 20-138 (1981). Defendant pled not guilty but was found guilty as charged. From a judgment imposing a split sentence of nine months in prison, 30 days active, the remainder to be served under supervised probation, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

William M. Bacon, III, for defendant appellant.

BECTON, Judge.

I

The issues on appeal are whether the trial court erred in denying defendant's motion to dismiss, in entering a judgment imposing a sentence harsher than that given defendant in district court, and in the jury instructions on the offense charged. We have considered each of these issues, and, for the reasons that follow, find no error.

The State offered evidence tending to show the following. On 13 September 1981, Highway Patrolman Larry Harrington observed defendant's automobile on a state highway weaving back and forth, running onto the shoulder of the road and back across the centerline. Trooper Harrington knew defendant and recog-

nized him as the driver of the weaving car. When he was pulled over by Trooper Harrington, defendant stepped out of his car and staggered forward. Defendant had bloodshot eyes, smelled of alcohol, and spoke with a thick tongue. Trooper Harrington then observed two open, partially emptied cans of beer sitting on the floorboard of the car between the driver's seat and a passenger seated in defendant's car. After defendant was arrested for driving under the influence of intoxicating liquor, he said to Trooper Harrington, "I have drank some beer, but I ain't saying how much." Defendant was then taken to the magistrate's office, where he refused, upon the advice of his lawyer, to take a breathalyzer test.

Several witnesses testified for defendant that he did not appear to be intoxicated on the night in question.

II

[1] Defendant first assigns error to the trial judge's denial of his motion to dismiss on grounds that defendant was originally charged with driving under the influence of an intoxicating liquor and was convicted of that offense, although the words "intoxicating liquor" were stricken on the citation and replaced with "alcoholic beverage." The terms "intoxicating liquor" and "alcoholic beverage" were not synonymous on 13 September 1981, the date of the alleged offense, defendant argues, because N.C. Gen. Stat. § 20-138(a) (1981) was amended effective 1 January 1982 to substitute the words "alcoholic beverages" for "intoxicating liquor." Thus, defendant maintains he was tried under an *ex post facto* law. We find no merit in this argument.

At the time of defendant's arrest in September 1981, driving under the influence of intoxicating liquor was against the law in North Carolina. Thus, defendant's *ex post facto* law argument is misplaced. The definition of "intoxicating liquor" under N.C. Gen. Stat. § 18A-2(4) (1981) included beer, while the definition of "alcoholic beverage" under N.C. Gen. Stat. § 18A-2(1) (1981) was any kind of beverage containing more than 14 percent alcohol by volume. Thus, beer was not an alcoholic beverage in September 1981, even though it was an intoxicating liquor. G.S. § 18A-2(1) defining "alcoholic beverage" was also repealed effective 1 January 1982, and replaced with N.C. Gen. Stat. § 18B-101(4) (1981), which defined "alcoholic beverage" as "any beverage con-

taining at least one-half of one percent (0.5%) alcohol by volume," a definition clearly including beer.

The record in the present case does not disclose when the words "intoxicating liquor" were marked through on defendant's citation and replaced with "alcoholic beverage." Apparently the misdemeanor statement of charges drawn by the Assistant District Attorney, dated 29 March 1982, also was amended with this wording, although it was changed back to read "intoxicating liquor" upon motion of the Assistant District Attorney at trial. While the changes appear to be related to the statutory amendments reviewed above, the State's motivation for making these changes is unclear. The modifications in the citation and misdemeanor statement of charges are irrelevant, however, because the substance of the charge remained unchanged. Defendant clearly was on notice that he had been charged with driving under the influence of beer, a misdemeanor offense under either wording of the statute, and the nature of the offense charged never varied. Defendant has not shown he was prejudiced in any way by this changed wording. The record is replete with evidence of each essential element of the offense charged. The trial court properly denied defendant's motion to dismiss.

For the reasons stated, defendant's additional argument that the trial court erred in charging the jury on the elements of driving under the influence of intoxicating liquor, instead of alcoholic beverages, also must be rejected.

III

[2] Defendant next contends the trial court improperly sentenced him to a greater punishment than that given him in the district court. His sentence in district court was six months, suspended on condition that he pay a $200.00 fine and costs and surrender his driver's license. Following his trial *de novo* in superior court, he received a nine-month sentence, with 30 days active time, to be served for 15 consecutive weekends, with the remaining time suspended on supervised probation, including a $350.00 fine, costs, jail fees, and surrender of his license. Defendant argues that the differences in the two sentences reflect the trial court's vindictiveness toward defendant and effectively chill his rights to a trial by jury and due process.

This assignment of error is meritless. A defendant's rights are not violated by the imposition of a more severe sentence by the superior court upon trial *de novo* from district court. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970). The imposition of a longer sentence than was given in district court is not an unreasonable condition absent an indication the second sentence was increased to penalize a defendant for exercising his rights. The burden is on the defendant to overcome the presumption that a court acted with proper motivation in imposing a more severe sentence. *State v. Stafford*, 274 N.C. 519, 164 S.E. 2d 371 (1968); *State v. Butts*, 22 N.C. App. 504, 206 S.E. 2d 806 (1974). The record in the present case discloses no evidence of vindictiveness in light of the fact that the increased sentence was clearly within statutory limits set out in N.C. Gen. Stat. § 20-179 (1981) for a second offense. Defendant has failed to overcome the presumption that the trial court acted properly in sentencing him.

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

No error.

Judges WEBB and PHILLIPS concur.

ALTIA LOU COMER v. THOMAS COMER

No. 8225DC318

(Filed 15 March 1983)

Parent and Child § 6; Infants § 6.3— child custody—award to aunt and uncle rather than to mother

The record amply supported the trial court's decision to award custody of an 11-year-old child to its paternal aunt and uncle rather than to its natural mother after the death of the father who had exclusive custody of the child.

APPEAL by petitioner from *Tate, Judge*. Order entered 16 December 1981 in District Court, CALDWELL County. Heard in the Court of Appeals 10 February 1983.

An action for custody of Stephen Comer was instituted on 25 November 1981 by plaintiff, the natural mother of Stephen.

Stephen's natural father, Thomas Comer, had exclusive care, custody and control of Stephen until the father's death on 6 November 1981. During the time when the child was in his natural father's care, custody and control, the child spent a great amount of time in the home of his paternal aunt and uncle. From the date of the father's death until a temporary order gave custody to the plaintiff, the child's custody was assumed by Stephen's paternal aunt and uncle.

At a custody hearing on 16 December 1981, the court heard evidence and found the following facts:

> The plaintiff married Robert McRary in October, 1980. Since the marriage to Robert McRary the minor child Stephen Comer has not visited overnight with his mother the plaintiff herein.
>
> Robert McRary has a minor child Bobby McRary who is approximately the same age as the child Stephen Comer who resides with him at the aforementioned address. There exists a very poor relationship between the child Bobby McRary and the minor child Stephen Comer.
>
> The child Stephen Comer testified that he did not feel welcomed within the residence of his mother and Robert McRary and that he very strongly desired to reside with the defendants herein Randall Comer and wife Cleta Comer the paternal uncle and aunt of the child Stephen Comer.
>
> Prior to the death of Thomas Comer the minor child spent virtually everyday [sic] at the residence of Randall Comer and wife Cleta Comer during the summer months of vacation and visited within the home of the defendants herein from three to five times per week during the school year.
>
> There exists between the minor child Stephen Comer and his uncle and aunt Randall Comer and wife Cleta Comer, a very strong relationship as is evidenced by the love and affection that the minor child exhibits for them as well as the love and affection exhibited by the defendants for the minor child.
>
> Due to the veritable dearth of contact between the minor child and his natural mother during the past fourteen

months there is at best a very tenuous relationship existing between them.

Plaintiff is a person of excellent character and reputation within the community. The residence within which the Plaintiff lives is a three bedroom, ranch style, brick home which is "suitable and adequate for the minor child." The Plaintiff has both the means and the ability to provide the necessary monetary support for the minor child.

The defendants Randall Comer and wife Cleta Comer are in all respects fit and proper persons to have the exclusive care, custody, control and supervision of the minor child Stephen Comer and it is in best interest that his custody be placed in and with them.

It is not within the best interest of the minor child that his custody be placed in and with the plaintiff, his natural mother.

The minor child Stephen Comer has within the residence of Randall Comer and wife Cleta Comer his separate and exclusive bedroom which has been furnished from his former bedroom at the residence of his deceased father.

The child is in all respects confortable [sic] within the residence of Randall Comer and wife Cleta Comer and his emotional well-being will be best served by his custody being placed in and with them.

Based on these findings of fact the court made conclusions of law including:

3. The defendants are in all respects fit and proper persons to have the exclusive care, custody, control and supervision of the minor child and it is in his best interests that his custody be placed in and with them.

The court then ordered that custody of the minor child Stephen Comer was "in and with Randall Comer and Cleta Comer."

From the custody order, plaintiff appeals.

Wilson, Palmer & Cannon by Bruce L. Cannon for the plaintiff.

William W. Respess, Jr., for the defendant.

EAGLES, Judge.

This appeal raises the sole issue of whether the trial judge erred in granting custody of plaintiff's minor child to the child's paternal aunt and uncle upon the death of the child's father. Appellant argues that the custody rights of the biological mother should control and the wishes of the eleven year, eleven month old child should not govern.

G.S. 50-13.2(a) sets the standard for awarding custody of a minor child as follows:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child. An order awarding custody must contain findings of fact which support the determination by the judge of the best interest of the child.

Brooks v. Brooks, 12 N.C. App. 626, 184 S.E. 2d 417 (1971) stated that:

> The guiding principle to be used by the court in a custody hearing is the welfare of the child or children involved. While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

Id. at 630, 184 S.E. 2d at 420.

Where one parent is dead, the surviving parent has a natural and legal right to custody and control of their minor children. This right is not absolute, but it may be interfered with or denied "only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E. 2d 759, 761 (1955).

The Supreme Court has dealt with the traditional preference for biological parents thus:

> [T]he welfare of the child is the paramount consideration to which all other factors, including common-law preferential rights of the parents must be deferred or subordinated. . .

Griffith v. Griffith, 240 N.C. 271, 278, 81 S.E. 2d 918, 923 (1954).

Furthermore, our court has held that the trial judge's discretion is such that he is "not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person." *In re Kowalzek*, 37 N.C. App. 364, 368, 246 S.E. 2d 45, 47 (1978).

The trial court's order includes the determination that the award of custody of the child to defendants "is in his best interests," that the child's "emotional well being will best be served by his custody being placed in and with them," and that "it is not in the best interests of the minor child that his custody be placed in and with the plaintiff, his natural mother."

The trial court in child custody cases is vested with broad discretion. The trial judge's decision will not be upset in the absence of a clear abuse of discretion, if the findings are supported by competent evidence. *Sheppard v. Sheppard*, 38 N.C. App. 712, 248 S.E. 2d 871 (1978).

Here the court's decision is amply supported by the record. It is clear that the court carefully considered all the evidence, including the desires of the child, and found that the best interests of the child were best served by custody being awarded to the child's paternal aunt and uncle. There is no evidence of an abuse of discretion. Therefore, the decision of the trial court is

Affirmed.

Judges HEDRICK and JOHNSON concur.

J. THOMAS BROWN, JR., ADMINISTRATOR OF THE ESTATE OF RANDOLPH HENDRICKS, DECEASED v. RANDY SHERWOOD OVERBY

No. 828SC395

(Filed 15 March 1983)

Rules of Civil Procedure § 4— alias and pluries summons unserved—action discontinued—service by publication—no revival of action

Where the last alias and pluries summons, issued on 23 April 1981, was not served within 90 days, the action was discontinued pursuant to G.S. 1A-1, Rule 4(d) and (e), and plaintiff's service of process by publication beginning on 16 September 1981 did not revive the action.

APPEAL by defendant from *Llewellyn, Judge.* Order entered 1 March 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 17 February 1983.

This is a civil action wherein plaintiff, the administrator of the estate of Randolph Hendricks, seeks to recover damages for the wrongful death of his intestate. Following entry of default against defendant, a trial was held and judgment was entered setting damages at $10,000.00.

The record discloses the following chronology of events: On 27 September 1979, Randolph Hendricks, a 63-year-old pedestrian,was struck by an automobile allegedly operated by the defendant. Hendricks sustained severe injuries from the collision and died three days later. Plaintiff filed this wrongful death action against defendant on 12 September 1980. The summons issued that same day was returned unserved by the sheriff bearing the notation "Randy Sherwood Overby has moved." Alias and pluries summonses were issued thereafter on 30 October 1980, 15 December 1980, and 23 April 1981, and each was returned unserved because the sheriff was unable to locate the defendant. Service of process by publication then was attempted by notices appearing in the Goldsboro News-Argus on 16 September, 23 September, and 30 September 1981. Plaintiff's attorney filed an affidavit on 6 November 1981 showing that "service by publication was necessary due to the fact that the plaintiff did not know defendant's whereabouts; that a publisher's affidavit has been filed." An entry of default was made by the Clerk of Superior Court of Wayne County on 6 November 1981 because of the defendant's failure "to plead." Thereafter the case was duly calendared for

trial and a default judgment awarding plaintiff $10,000 in damages was entered against the defendant. On 9 and 10 February 1982, the defendant filed the following motions: (1) to quash the "purported" service of process by publication on grounds that the action had been discontinued before the attempt to serve him by publication and that the defendant's "usual place of abode . . . could, with due diligence, be ascertained"; (2) to dismiss the action for insufficiency of service of process on the same grounds; (3) to set aside the entry of default for lack of jurisdiction "for the reason that process was not served on Randy Sherwood Overby [the defendant] in accordance with Rule 4 of the Rules of Civil Procedure"; and (4) to set aside the entry of default, entry of judgment, and default judgment for lack of jurisdiction, because the plaintiff failed to file a bond as required by Rule 55(c), and because the defendant was unaware the plaintiff had attempted to serve him by publication.

From an order denying all of these motions, defendant appealed.

Duke and Brown, by John E. Duke, for the plaintiff-appellee.

Dees, Dees, Smith, Powell & Jarrett, by William W. Smith and Tommy W. Jarrett, for the defendant-appellant.

HEDRICK, Judge.

All of defendant's assignments of error raise the one question of whether service by publication on 16 September 1981 revived an otherwise discontinued action. The chronology of events heretofore set out discloses that the last alias and pluries summons, issued on 23 April 1981, was not served within 90 days, so the action was discontinued pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(d), (e). Stated differently, the only question raised on this appeal is whether the commencement of service by publication pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) is sufficient to satisfy the requirements of N.C. Gen. Stat. § 1A-1, Rule 4(e), which allows that, "the action shall be deemed to have commenced on the date of such issuance . . ." after the original action has been discontinued.

We are constrained to hold that the present case is controlled by *Byrd v. Watts Hospital*, 29 N.C. App. 564, 225 S.E. 2d

329 (1976), wherein the facts are practically identical. In *Byrd*, service by publication was made on one defendant over 90 days after the previous summons to him had been issued and returned unserved. Default judgment was entered against that defendant when he did not appeal. The Court of Appeals reversed for insufficiency of service of process. In writing for a unanimous panel of this Court, Judge Britt stated:

> . . . here, the action had abated at the time plaintiff attempted service by publication. Before plaintiff here could obtain service by publication he first had to revive the action, and that revival could be accomplished only by the issuance of alias or pluries summons or endorsement of the last valid summons.
>
> . . . We think Rule 4(e) mandates that something be done in the clerk's office to *revive* a discontinued action—obtain an alias or pluries summons or an endorsement to the original summons. (Emphasis in original.)

29 N.C. App. at 569, 225 S.E. 2d at 331-332.

The order appealed from is reversed.

Judges WHICHARD and BRASWELL concur.

E. F. HUTTON AND COMPANY, INC. v. WILLARD C. STANLEY

No. 8221SC203

(Filed 15 March 1983)

Rules of Civil Procedure § 50.2— directed verdict for party with burden of proof— evidence manifestly credible

In an action to recover the unpaid balance in defendant's commodity futures account, plaintiff's evidence was manifestly credible, and the trial court properly directed a verdict in favor of plaintiff where the only doubts as to the credibility of plaintiff's evidence arose solely because plaintiff's witnesses were employed by it and thus were latent doubts; defendant presented no evidence and cross-examination was limited to an explanation of the orders defendant made with plaintiff; and defendant did not attempt to impeach plaintiff's witnesses or point out contradictions in their testimony.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 7 October 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 January 1983.

Plaintiff, a brokerage firm, sued to collect $20,042.50, the unpaid balance in defendant's commodity futures account. Defendant, a potato farmer, admitted selling potato futures contracts but alleged, as a defense, that plaintiff was negligent in failing to inform him of the increase in market prices, and the negligence resulted in defendant having to buy contracts on the market at a higher price.

Plaintiff presented the following evidence. Mr. Scales, who was a commodity specialist with plaintiff in 1979, said defendant contacted him in July 1979 about hedging potato contracts. Hedging, Scales explained, is taking the opposite position in the futures market from the cash position to protect against a decline in the harvest prices. Scales said when a client opens a commodities trading account the usual procedure is to get a financial statement and a record of the client's experience. He obtained these forms from defendant. Defendant also signed a risk disclosure statement and a financial declaration. The financial declaration indicated that defendant had a net worth in July 1979 of 1.5 million. Scales said defendant also signed a hedging agreement to allow him to get a lower margin on his commodity trades. He said defendant ordered twenty-five contracts. Each contract consists of 50,000 pounds of potatoes. Potatoes were at eleven cents per pound, so the contracts were about $5,500.00 each. The margin required was $300.00 per contract. Subsequently, the price of potatoes increased, and on 12 July 1979, Scales told defendant that he needed to put up more margin. Defendant promised to send a check, but failed to do so. According to Scales:

> He told me to liquidate when we had tried to get him on the morning of the 20th and he was not in his office. We finally called his home and said we needed to speak to him about 12:00 and he came to the phone and said you know—you have scared my wife, she's acting in a panic—liquidate the position and send me a bill.

Scales said that in liquidating the contracts they went to the exchange and bought the contracts which plaintiff held a short posi-

tion. Since the market price had increased to twelve cents per pound, defendant lost money on the transaction.

Benjamin Ward, resident manager of the Greensboro E. F. Hutton office, testified that defendant still owed $20,045.50.

Defendant did not present any evidence. Plaintiff's motion for a directed verdict was granted.

Weston P. Hatfield, by Weston P. Hatfield and Carol L. Allen, for plaintiff appellee.

Finger, Park and Parker, by M. Neil Finger and Raymond A. Parker II, for defendant appellant.

VAUGHN, Chief Judge.

The sole issue is whether the trial judge erred in granting plaintiff's motion for a directed verdict. Defendant's argument is that the directed verdict was improperly granted because plaintiff had the burden of proof. This question was addressed by our Supreme Court in *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). In *Burnette*, the Court said "there are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where *the credibility of movant's evidence is manifest as a matter of law.*" The Court then gave three examples of situations where credibility is manifest:

(1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. [Citations omitted.]

(2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. [Citations omitted.]

(3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradiction." [*Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976).]

North Carolina National Bank v. Burnette, 297 N.C. at 537-38, 256 S.E. 2d at 396.

Plaintiff contends that the directed verdict was appropriate because this case falls squarely within the latent doubts category mentioned above. We agree. The only doubts as to the credibility of plaintiff's evidence arise solely because plaintiff's witnesses were employed by it, an interested party, and thus are latent doubts. *Kidd v. Early,* 289 N.C. 343, 222 S.E. 2d 392 (1976). In this case, defendant presented no evidence. Cross-examination was limited to an explanation of the orders defendant made with plaintiff. Defendant did not attempt to impeach plaintiff's witnesses or point out contradictions in their testimony. Since credibility was manifest as a matter of law, the trial judge did not err in directing verdict for plaintiff.

Affirmed.

Judges WELLS and BRASWELL concur.

WILLIAM P. BOYD, JR. v. MARGARET B. BOYD

No. 8230DC319

(Filed 15 March 1983)

Divorce and Alimony § 2.1— divorce action—verification of complaint—necessity at time filed

G.S. 50-8 requires that a complaint for divorce be verified in accordance with G.S. 1A-1, Rule 11 when it is filed in order to be valid, and it is not sufficient to obtain verification after it is filed but before it is served on the defendant. G.S. 1A-1, Rule 3.

APPEAL by plaintiff from *Snow, Judge.* Judgment entered 26 January 1982 in District Court, HAYWOOD County. Heard in the Court of Appeals 10 February 1983.

Plaintiff filed an unverified complaint for divorce based on a one-year separation on 21 October 1980. A summons was issued on that same day.

On 27 October 1980, the plaintiff verified his complaint. The verified complaint and the summons were served on the defendant on 28 October 1980.

In her answer, the defendant denied that the parties had lived separate and apart for one year and moved to dismiss for lack of jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(1). The trial judge granted her motion. He found that the complaint was inoperative because it was not accompanied by the proper affidavit and verification when filed on 21 October 1980.

From this judgment, the plaintiff appealed.

Russell L. McLean, III, for plaintiff-appellant.

Brown, Ward, Haynes & Griffin, by H. S. Ward, Jr., for defendant-appellee.

ARNOLD, Judge.

G.S. 50-8 states in part: "In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148." The defendant argues that this requirement was not satisfied when the plaintiff verified his complaint after it was filed but before it was served upon the defendant.

G.S. 1-148 requires verification before certain persons, *e.g.*, a notary public, before it will be valid. This factor is not contested by the defendant.

Instead, the defendant contends that the verification requirements of G.S. 1A-1, Rule 11 were not met. Although that rule does not state at what time a complaint must be verified, the defendant argues that it must be verified when the complaint is filed to be valid. She reaches this conclusion by reading G.S. 1A-1, Rule 3, which says that a civil action is not commenced until the complaint is filed, in conjunction with G.S. 50-8, which requires verification for a valid divorce complaint.

In interpreting paragraph one of G.S. 50-8, which contains the verification requirement, our Supreme Court stated: "[T]he allegations required by G.S. 50-8 are indispensable, constituent elements of a divorce action and must be established either by the verdict of a jury or by a judge, as the pertinent statute may permit." *Eudy v. Eudy*, 288 N.C. 71, 74, 215 S.E. 2d 782, 785 (1975). Although *Eudy* did not involve verification, we find its rationale persuasive.

Other authorities support our holding. "In a divorce action a verification is required as an essential part of the complaint. . . . The want of a proper verification is a fatal defect, and is a cause for dismissal of the action." 1 R. Lee, N.C. Family Law § 50 (4th ed. 1979). Verification of a divorce complaint is required in most jurisdictions and is mandatory for jurisdiction when so required. 24 Am. Jur. 2d *Divorce and Separation* § 314 (1966).

We note the plaintiff's argument that because G.S. 1A-1, Rule 11 does not state a time period in which verification must occur that it is sufficient to obtain verification before the complaint and summons are served. But when G.S. 50-8 is read in conjunction with G.S. 1A-1, Rule 11 and G.S. 1A-1, Rule 3, this argument fails. Because a cause of action is not commenced until a valid complaint is filed and the complaint here was not valid because it did not meet the verification requirement, the court never obtained jurisdiction over the case.

As a result, we hold that G.S. 50-8 requires that for a complaint for divorce to be valid, it must be verified in accordance with G.S. 1A-1, Rule 11 when it is filed. It is not sufficient to obtain verification before the complaint and summons are served on the defendant. Thus, the defendant's motion to dismiss for a lack of jurisdiction under G.S. 1A-1, Rule 12(b)(1) was properly granted by the trial judge.

Although we affirm the trial judge's granting of the motion to dismiss, we note that nothing prevents the plaintiff from refiling this action for divorce. No statute of limitations is applicable here and because the plaintiff is out of court on a G.S. 1A-1, Rule 12(b)(1) motion to dismiss, our decision will have no *res judicata* effect on the merits of the case.

The plaintiff might have been better advised to take a voluntary dismissal without prejudice under G.S. 1A-1, Rule 41(a)(1) as soon as the defendant moved to dismiss for improper verification. That would have avoided this appeal and expedited the entire divorce proceeding.

Affirmed.

Judges HILL and WHICHARD concur.

ROGER BROWER, TRADING AS BROWER ELECTRONICS LABORATORIES v. SORENSON-CHRISTIAN INDUSTRIES, INC.

No. 8210SC371

(Filed 15 March 1983)

Contracts § 26.2— action on oral contract—relevancy of evidence

In an action to recover the balance due on an alleged oral contract to build on a cost of materials and services basis a back-up scoreboard console for a console installed by plaintiff in Portland, Maine or, alternatively, the reasonable value of materials and services furnished by plaintiff, testimony by plaintiff concerning maintenance work he had previously done for defendant on a scoreboard in Richmond on a "time basis" without a limit as to the total amount for such work and concerning cost overruns and losses sustained by plaintiff on the contract for construction of the original scoreboard console and the fact that plaintiff had borrowed money personally to keep his business going was relevant to show the existence and terms of an express oral contract, the reasonable value of services rendered on the project, and plaintiff's motive in insisting on certain terms in the contract.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 3 December 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 15 February 1983.

This is an action seeking the recovery of the balance due on an alleged oral contract or, alternatively, the fair and reasonable value of the cost of materials supplied and services performed.

Plaintiff presented evidence tending to show that he orally contracted with defendant to build, on a cost and materials basis, a back-up scoreboard console to a console installed in a coliseum in Portland, Maine that he had originally constructed. Defendant has paid him $12,300 but still owes $13,648.20 on the project. In plaintiff's opinion, the reasonable value of the materials and services amounted to $25,948.20.

Defendant presented evidence tending to show that the parties orally contracted on a fixed price basis, with the price not to exceed $12,500.

The jury found that there was no express oral contract; however, it found that plaintiff did provide goods and services to the defendant under circumstances that the defendant should be required to pay for them and that plaintiff was entitled to recover $12,977.20 from defendant. Judgment was entered accordingly.

Defendant appeals.

Skvarle, Boles, Wyrick & From, by Samuel T. Wyrick, III and Robert A. Ponton, Jr., for plaintiff-appellee.

Johnson and Johnson, by Sandra L. Johnson and W. A. Johnson, for defendant-appellant.

ARNOLD, Judge.

Defendant brings forward two related assignments of error. First, defendant contends that the trial court erred in allowing plaintiff to testify that he previously had done some work for defendant on a scoreboard in Richmond on a "time basis," and that there had been no limit on the amount he could recover for work done on that project. Defendant argues that the testimony was not relevant since there was no showing that the Richmond contract was substantially identical to the present contract. In fact, plaintiff testified on cross-examination that the Richmond contract only involved scoreboard maintenance. Defendant argues that the admission of this testimony was prejudicial because it tended to confuse the jury. Second, defendant contends that the court erred in admitting testimony by the plaintiff regarding the existence and the amount of cost overruns and losses sustained by plaintiff on the contract for the original construction of the scoreboard console in Portland, Maine, and the fact that plaintiff had borrowed money personally to keep his business going. Defendant argues that this testimony lacked sufficient probative value to overcome its inflammatory effect upon the jury. We disagree.

Ordinarily, evidence of all the facts and circumstances surrounding the parties at the time of the making of a contract which are necessary to be known to properly understand their conduct and motives is relevant and admissible. *McCorkle v. Beatty*, 226 N.C. 338, 38 S.E. 2d 102 (1946). Evidence is relevant if it has any logical tendency, however slight, to prove or disprove the existence of a material fact in the case. *Martin v. Amusements of America, Inc.*, 38 N.C. App. 130, 247 S.E. 2d 639, *disc. rev. denied*, 296 N.C. 106, 249 S.E. 2d 804 (1978). Relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy with the jury for the cause of the party offering it. 1 Brandis, North Carolina Evidence Sec. 80 (2d Rev. Ed. 1982).

Applying these principles, we conclude that the challenged portions of plaintiff's testimony were relevant and admissible since they had a logical tendency to prove the existence and terms of an express oral contract and the reasonable value of the services rendered on the project in question, and to show plaintiff's motive in insisting on certain terms in the contract. Plaintiff's failure to prove an express oral contract on an unlimited price basis should have no effect upon the determination of relevance; however, it does tend to show that the jury was not influenced by the admission of the testimony to defendant's prejudice.

No error.

Judges BECTON and PHILLIPS concur.

CITY OF WINSTON-SALEM v. VERA S. HEGE (WIDOW); RAYMOND G. HEGE AND WIFE, ALICE HEGE; EDITH HEGE CROOK AND HUSBAND, EDWARD J. CROOK; ELSIE HEGE KINNEY AND HUSBAND, DANIEL KINNEY; AND NANCY HEGE PARR AND HUSBAND, JOHN A. PARR

No. 8221SC390

(Filed 15 March 1983)

1. Appeal and Error § 31.1— assignment of error to failure to charge—necessity for objection at trial

Defendants could not properly assign as error the trial court's failure to give certain instructions where the record shows that all parties were afforded ample opportunity to object to the instructions out of the presence and hearing of the jury before the jury began its deliberations but that defendants made no request for instructions and did not object in any way. App. Rule 10(b)(2).

2. Eminent Domain § 6.2— evidence of value—comparable sales of land

The trial court in a condemnation proceeding did not abuse its discretion in the admission of testimony about comparable sales of land from two expert witnesses for the condemnor where the record disclosed that the court conducted a voir dire examination of the two witnesses before deciding that some of the properties were sufficiently similar to the property in question to admit evidence about their sales for comparison, and differences in the tracts being compared were brought out in detail during cross-examination when the evidence was heard before the jury.

APPEAL by defendants from *Walker (H.H.), Judge.* Judgment entered 7 December 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 February 1983.

This is a civil action wherein the city sought to take by eminent domain for purposes of public water storage a tract of land owned by the defendants. The property, 5.94 acres located south of the city limits of Winston-Salem, was zoned Residential-5 (R-5) at the time of the taking. Prior to trial, all issues were resolved between the parties except the amount of compensation to be paid to the defendants.

The following issue was submitted to and was answered by the jury as indicated:

> What amount are the landowners entitled to recover from the City of Winston-Salem?
>
> ANSWER: $46,200.

From a judgment entered on the verdict, defendants appealed.

Ronald G. Seeber, City Attorney and Ralph D. Karpinos, Assistant City Attorney for City of Winston-Salem, plaintiff-appellee.

Booe, Mitchell, Goodson and Shugart, by William S. Mitchell for the defendant-appellants.

HEDRICK, Judge.

[1] The defendants argue by Assignment of Error Nos. 1, 2, and 4, based on Exception Nos. 8-16, that the trial judge erred in failing to instruct the jury to consider the potential value of the property prior to taking based on the possibility of future rezoning. N.C. App. R. 10(b)(2) provides in part:

> 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 demonstrates that before the judge instructed the jury a conference was held with the attorneys representing the City and the landowners where the judge advised the attorneys as to how and what he was going to instruct the jury on the issue of damages. The parties were told specifically that the jury would be instructed that they would consider the highest and best use of the property at the time of its taking by the City, and that the jury would *not* consider "any future or speculative use" in relation to zoning. The parties were advised specifically that the jurors would be instructed to consider the property as it was zoned at the time of the taking (R-5). No objection was given by the landowners' attorneys at the time of the conference.

The record discloses that after the jury had been instructed, the trial judge, with specific reference to N.C. App. R. 10(b)(2), had another conference with the attorneys before the jury was sent out to deliberate. There is absolutely nothing in the record to indicate that the defendants raised any objection at that time with respect to the instructions.

The defendants' argument has no merit. The record affirmatively discloses that all parties were afforded ample opportunity to object to the "jury charge" out of the presence and hearing of the jury before the jury began its deliberations. The defendants made no request for instructions nor did they object in any way.

The defendants' contention that they were not afforded an opportunity to object when the jury came in for additional instructions is meritless. Obviously, N.C. App. R. 10(b)(2) has no application once the jury has begun its deliberations. Even so, the defendants' objection at the time (by the attorney's shaking his head) appears to have been directed to whether the property was zoned R-5 at the time of the taking. These assignments of error are not sustained.

[2] The defendants next assign error to the trial judge's admission of testimony about comparable sales of land from two expert witnesses for the City. The properties being compared to the condemned property, the defendants contend, were grossly dissimilar and incapable of comparison. The record discloses that the trial judge conducted a voir dire examination of these witnesses before deciding that some of the properties were sufficiently similar to

the property in the present case to admit evidence about their sales for comparison. When the evidence was heard before the jury, differences in the tracts being compared were brought out in detail during cross-examination.

> Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion.

Highway Commission v. Coggins, 262 N.C. 25, 28, 136 S.E. 2d 265, 267 (1964), cited in *Redevelopment Comm. v. Panel Co.*, 273 N.C. 368, 371, 159 S.E. 2d 861, 863 (1968). *See also, Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959). We find no abuse of discretion upon the part of the trial judge in admitting the evidence challenged by these exceptions.

No error.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. ERIC WILLIAMS OWENS

No. 8226SC861

(Filed 15 March 1983)

Criminal Law § 163— court's failure to summarize evidence—failure to object at trial—waiver of right to assign as error

Defendant waived his right to assign error to the failure of the trial court to summarize the evidence by failing to object to this omission before the jury retired where defense counsel responded in the negative when asked if he had further requests for instructions, although this opportunity may have been given in the presence of the jury, and where the record does not suggest that counsel was denied the opportunity to present matters out of the presence of the jury. G.S. 1A-1, Rule 10(b)(2); Rule 21, General Rules of Practice for the Superior and District Courts.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 10 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 February 1983.

Defendant appeals from a judgment of imprisonment entered upon his conviction of armed robbery.

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

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Judge.

G.S. 15A-1232 provides, in pertinent part: "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 [thereto]." Defendant argues that the court here failed to give any summary of the evidence and that "no summary of the evidence at all is insufficient to explain the application of the law [thereto]."

Defendant, however, did not object to this omission before the jury retired. He thus has waived his right to assign error thereto. Rule 10(b)(2), Rules of Appellate Procedure.

He argues, nevertheless, that "[b]ecause [he] was not provided sufficient opportunity to make such an objection at trial, . . . the waiver rule should not be applied . . . ." While the record establishes that defense counsel responded in the negative when asked if he had further requests for instructions, defendant argues that this opportunity to object "was apparently given while the jury was present," in violation of Rule 21, General Rules of Practice for the Superior and District Courts.

The record does not expressly state whether the jury was present or absent at the time. Because defendant had no objection to offer, however, presence or absence of the jury was immaterial.

> 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 [he was] denied opportunity to present matters out of the presence of the jury. The court [thus] complied in every respect with the requirements of Rule 21.

State v. Thompson, 59 N.C. App. 425, 429, 297 S.E. 2d 177, 180 (1982).

Defendant contends that failure to give any summary of the evidence "involves a substantial right . . . and should be considered under the 'plain error' doctrine," despite his failure to object at trial. Cases from other jurisdictions applying this doctrine "excuse the failure to object at trial where the error affects a 'fundamental right' or is of constitutional dimensions." *Id.* at ---, 297 S.E. 2d at 181. The error assigned here did not affect fundamental or substantial rights. The evidence clearly established that the victim was the subject of an armed robbery. The only significant question was whether defendant was the perpetrator. Even before advent of the Rule 10(b)(2) contemporaneous objection requirement, our Supreme Court held that where defense counsel responded negatively to a request for further instructions, and "[t]he evidence was simple and direct and without equivocation and complication," a charge which briefly applied the law to the evidence but failed to state the evidence sufficed to comply with the requirements of G.S. 1-180, the predecessor to G.S. 15A-1232. *State v. Best*, 265 N.C. 477, 480, 144 S.E. 2d 416, 418 (1965). The evidence here was sufficiently uncomplicated that failure to summarize it could not have affected defendant's fundamental or substantial rights. We thus 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. It does bar review of the matter affecting less than fundamental or substantial rights to which error was assigned here.

Defendant contends the court erred by allowing the State to cross-examine him as to inadmissible details regarding offenses for which he had previously been convicted. *See State v. Finch*, 293 N.C. 132, 141-42, 235 S.E. 2d 819, 824-25 (1977). Because he failed to object to this testimony at trial, he cannot assert these exceptions on appeal. Rule 10(b)(1), Rules of Appellate Procedure; *see State v. Bryant*, 56 N.C. App. 734, 736, 289 S.E. 2d 630, 631 (1982).

No error.

Judges HEDRICK and BRASWELL concur.

PELOQUIN ASSOCIATES, P.A., A NORTH CAROLINA CORPORATION v. JOSEPH AND ALFRIEDE POLCARO

No. 8215SC328

(Filed 15 March 1983)

Appeal and Error § 6.2— interlocutory order staying arbitration—no right of immediate appeal

Plaintiff had no right under G.S. 1-567.18(a)(2) to appeal an interlocutory order staying arbitration in this case pending a determination by the court of an issue raised by defendants as to whether plaintiff procured the contract between the parties by fraud and misrepresentation. G.S. 1-277(a); G.S. 1-567.3(b).

APPEAL by plaintiff from *Battle, Judge.* Judgment entered 5 November 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 February 1983.

Cooper, Williams & Bryan, by Robert E. Cooper, for plaintiff appellant.

Haywood, Denny & Miller, by James H. Johnson, III and Stewart W. Fisher, for defendant appellees.

BECTON, Judge.

I

This controversy involves a claim by plaintiff, a North Carolina professional association, for fees for architectural and professional services, due under a contract entered into between plaintiff and defendants. That contract contained extensive and specific provisions for arbitration in the event of a dispute between the parties. Pursuant to the arbitration remedy provision plaintiff applied to the American Arbitration Association for resolution of its claims. Plaintiff later filed a claim of lien against the property on which the architectural and professional design services were allegedly performed and brought this action in the Orange County Superior Court to enforce the lien pursuant to N.C. Gen. Stat. § 44A-13 (1981). Defendants first filed a motion to stay the arbitration, relying on N.C. Gen. Stat. § 1-567.3(b) (1981), and later filed an Answer and Counterclaim alleging, among other things, that plaintiff procured the execution of the contract by fraud and misrepresentation.

The matter came on for hearing before the Honorable F. Gordon Battle, Superior Court, Orange County. He entered an order, the pertinent portion of which provides:

> NOW, THEREFORE, and pursuant to the provisions of G.S. § 1-567.3(b) it is hereby ordered that the arbitration proceeding as commenced by Plaintiff against Defendants in the Office of the American Arbitration Association be and the same as [sic] hereby in all respects stayed, enjoined, and restrained pending determination by the Court of the fraud issue as raised in Defendants' Answer, *with the Court expressly reserving the right to make a final determination of the Motion of Defendants for stay of arbitration after such determination.* [Emphasis added.]

Plaintiff objected and gave notice of appeal to this Court.

II

Plaintiff argues that N.C. Gen. Stat. § 1-567.18(a)(2) (1981) guarantees its right to appeal the order granting the application to stay arbitration in this case. However, the right to appeal from an order staying arbitration has no greater latitude than the right to appeal from any other civil judgment or order. G.S. § 1-567.18(b). We thus turn to the rules governing appeals from judicial orders. N.C. Gen. Stat. § 1-277(a) (1981) provides:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

The Order in the instant case comports with none of those requirements. By its own terms the Order is not a final determination of the merits of defendants' motion. Further, neither party's substantial rights were prejudiced by the judge's order since, in this case, if the contract itself is found free of fraud, then the merits of the Motion can at that point be determined. If the contract is rendered a nullity because of fraud in the inducement, the

arbitration provisions fall as well, and the question raised here would be rendered moot.

We therefore find this appeal interlocutory and subject to dismissal.

Dismissed.

Judges WEBB and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MARCH 1983

BROWN v. BROWN No. 8226DC396	Mecklenburg (76CVD605)	Affirmed
IN RE GATTIS No. 8215SC379	Orange (81E97)	Affirmed
MEEKINS v. PIPKIN No. 821SC148	Dare (80CVS24)	Affirmed
NORTH HICKORY DYEING & PROCESSING CO. v. WESTERN SPORTSWEAR, INC. No. 8225SC293	Catawba (81CVS159)	Dismissed
PLEMMONS v. HUFFSTICKLER No. 8227SC426	Gaston (82CVS22)	Dismissed
STATE v. ADAMS No. 823SC926	Craven (80CRS15070)	No Error
STATE v. BENFIELD No. 8225SC582	Burke (81CRS5960)	No Error
STATE v. CHERRY No. 822SC955	Beaufort (82CRS0286)	No Error
STATE v. GARRIS No. 8219SC870	Randolph (81CRS7406)	No Error
STATE v. HUNT No. 8212SC1031	Cumberland (81CRS28451)	No Error
STATE v. KING No. 828SC941	Lenoir (82CRS1819)	No Error
STATE v. KNIGHT No. 821SC902	Pasquotank (80CRS378)	No Error
STATE v. LINKER No. 8226SC908	Mecklenburg (81CRS70534) (81CRS70535)	No Error
STATE v. MIDYETTE No. 822SC997	Beaufort (81CRS7212)	No Error
STATE v. NIXON No. 825SC1004	New Hanover (81CRS19454)	No Error
STATE v. OLIVER No. 8228SC871	Buncombe (81CRS28094)	No Error

STATE v. OLIVER No. 8228SC1032	Buncombe (81CRS28064)	No Error
STATE v. PREVETTE No. 8223SC837	Wilkes (78CR67)	Dismissed
STATE v. ROGERS No. 8216SC788	Scotland (81CRS2552) (81CRS2553) (81CRS2554)	No Error
STATE v. TART No. 824SC847	Sampson (81CRS12743)	No Error
STATE v. WHITE No. 825SC735	New Hanover (81CRS19621) (81CRS19622) (81CRS19623) (81CRS19624) (81CRS19625) (81CRS19626)	No Error

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, PLAINTIFF v. ODELL ASSOCIATES, INC.; NELLO L. TEER COMPANY; LIBBEY-OWENS-FORD COMPANY; GENERAL SPECIALTIES, INC.; AND UNITED STATES FIDELITY AND GUARANTY COMPANY, DEFENDANTS AND NELLO L. TEER COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. HARTFORD ACCIDENT AND INDEMNITY COMPANY, THIRD PARTY DEFENDANT AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, THIRD PARTY PLAINTIFF v. GENERAL SPECIALTIES COMPANY, INC., AND EDWIN H. SMITH, THIRD PARTY DEFENDANTS

No. 8215SC412

(Filed 5 April 1983)

1. **Limitation of Action § 4.1; Sales § 22— damages for defective products—statute of limitations**

Plaintiff's action to recover damages for defects in glass panels manufactured by one defendant and used by defendant general contractor and defendant subcontractor in the construction of a curtainwall constituting the outside of plaintiff's building was barred under the provisions of former G.S. 1-15(b) and the three-year statute of limitations of G.S. 1-52(5) where plaintiff discovered the defects more than three years before it filed the lawsuit against defendants. Furthermore, defendant manufacturer was not estopped to assert the statute of limitations because of its assurances to plaintiff that the glass panel failures were within industry standards and nothing to worry about.

2. **Architects § 3; Limitation of Actions § 4.3— action against architects—statute of limitations**

The provisions of G.S. 1-15(c) relating to the time for commencement of a professional malpractice action override the 10-year statute of limitations of G.S. 1-47(2) for actions upon sealed instruments, and plaintiff's claims against defendant architectural firm for breach of contract and negligence were barred by G.S. 1-15(c) where the last relevant act of defendant occurred more that four years before the institution of plaintiff's action.

3. **Seals § 1— corporate seal on contract—no sealed instrument**

The affixation of a corporate seal to defendant corporation's contract to provide architectural services to plaintiff did not create an instrument under seal to which the 10-year statute of limitations of G.S. 1-47(2) applied where it is apparent that the corporate seal was used only to indicate that the officers who executed the contract were duly authorized to do so.

4. **Principal and Surety § 10— action on performance bond not timely**

Plaintiff's action on a surety bond executed by defendant general contractor and defendant surety for the construction of a building was barred by a provision of the bond requiring any suit thereon to be instituted within two years from the date on which final payment under the contract fell due where the evidence on motion for summary judgment did not present a question as to whether final payment had been made but showed that plaintiff had accepted

the building as complete and had in fact made final payment more than two years before the suit was instituted.

5. **Principal and Surety § 10— action on construction contract barred—no right of action on performance bond**

There was no merit to plaintiff's contention that even if its action against a general contractor under the construction contract was barred by the statute of limitations, it could nevertheless maintain a separate action against the general contractor and its surety under the performance bond signed by both the general contractor and surety.

PLAINTIFF Blue Cross and Blue Shield of North Carolina (hereinafter Blue Cross or plaintiff) appeals from the order and judgment of *Battle, Judge,* entered 24 September 1981 in Superior Court, ORANGE County, granting the motion for partial summary judgment of defendant Libbey-Owens-Ford Company (hereinafter LOF), dismissing plaintiff's action and granting the motions for summary judgment of defendant Odell Associates, Inc. (hereinafter Odell), Nello L. Teer Company (hereinafter Teer), General Specialties Company, Inc. (hereinafter General Specialties), and United States Fidelity and Guaranty Company (hereinafter USF&G).

Hartford Accident and Indemnity Company (hereinafter Hartford) appeals from the order and judgment of *Battle, Judge,* entered 25 September 1981 in Superior Court, ORANGE County, denying Hartford's motion for summary judgment against Teer and USF&G.

Heard in the Court of Appeals 18 February 1983.

Womble, Carlyle, Sandridge & Rice, by Jimmy H. Barnhill and Joseph T. Carruthers, for plaintiff-appellant Blue Cross and Blue Shield of North Carolina.

Young, Moore, Henderson & Alvis, by Joseph C. Moore, Jr. and Joseph C. Moore, III, for defendant-appellee Odell Associates, Inc.

Nye, Mitchell, Jarvis & Bugg, by John E. Bugg, for defendant-appellee and third-party plaintiff-appellee Nello L. Teer Company, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, by C. T. Leonard, Jr., James T. Williams, Jr., and Reid L. Phillips, for defendant-appellee Libbey-Owens-Ford Company.

Spears, Barnes, Baker & Hoof, by Alexander H. Barnes, of counsel, for defendant-appellee Libby-Owens-Ford Company.

Maupin, Taylor & Ellis, by Charles B. Neely, Jr., and Nancy L. Rendleman, for defendant-appellee United States Fidelity & Guaranty Company.

Wade & Carmichael, by R. C. Carmichael, Jr., for defendant-appellee and third-party defendant-appellee General Specialties Company, Inc.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison, by O. William Faison and Joel M. Craig, for third-party defendant and third-party plaintiff-appellant Hartford Accident and Indemnity Company.

HILL, Judge.

PARTIES AND RELATIONSHIPS

We first identify the parties to this lawsuit:

1. Plaintiff Blue Cross is a nonprofit corporation with its registered and principal office in Orange County, North Carolina, near the City of Chapel Hill.

2. Odell is a North Carolina corporation engaged in architecture and engineering. On or about 5 December 1969, Blue Cross entered into a contract with Odell in which Odell agreed to prepare plans and specifications for the construction of a building to be used as a service center for Blue Cross. Under the contract, Odell was to prepare plans, drawings, and specifications and provide architectural services incident to the general administration of the construction contract. For its services Odell was to be paid $500,000.

3. On or about 16 February 1971, Blue Cross entered into a contract with defendant Teer, engaging Teer as general contractor and providing that Teer was to be fully responsible for construction.

4. On or about 16 February 1971, the defendant USF&G entered into a contract with Teer in which USF&G as surety and Teer as principal became bound to Blue Cross in the sum of $8,000,000 conditioned upon Teer's prompt and faithful performance of the construction contract.

5. On or about 29 December 1970, the defendant subcontractor General Specialties undertook in conjunction with Odell to design a glass curtainwall that in substance would constitute the outside area of the building, and in conjunction with Teer to build the curtainwall. General Specialties promised as follows: "For two years from the date of acceptance by owner, we guarantee the entire curtainwall against structural failure and water penetration to the building interior."

6. On or about 6 April 1972, Hartford executed a performance bond under which General Specialties as principal and Hartford as surety became bound to Teer.

7. LOF manufactured and supplied the glass panels used in construction of the curtainwall. It also assisted defendants Odell and General Specialties in the design and preparation of plans for the curtainwall and glazing procedures, by reviewing the drawings and specifications prepared by Odell and General Specialties, by conducting tests, and by meeting with Blue Cross and giving assurances regarding the performance of the glass panels comprising the curtainwall.

By this lawsuit, Blue Cross seeks to recover damages to compensate the cost of replacing glass panels that have failed and the cost of remedial measures that will be necessary to eliminate further failure of the panels.

As to the defendant Odell, Blue Cross has asserted claims for breach of contract and negligence; as to Teer, for breach of contract and breach of warranty; as to General Specialties, for negligence and breach of express warranty; as to LOF, for breach of implied warranty, negligence, breach of express warranty and strict liability; and as to USF&G and Teer, for breach of contract and of the performance bond executed by Teer and USF&G; Blue Cross further alleges that all the defendants are jointly and severally liable for the damages sustained by plaintiff.

Each defendant filed responsive pleadings, asserting, among other things, absence of liability and that in any event Blue Cross's claims were barred by the statute of limitations. Various cross claims were asserted among the defendants; and, in addition, defendant Teer filed a third party complaint against Hartford, General Specialties' bonding company, asserting Teer's right

to recover from Hartford should Teer be found liable to plaintiff. An order was entered severing the part of the case dealing with the curtainwall.

The trial judge entered an order and judgment granting LOF's motion for partial summary judgment and granting the motions for summary judgment of Odell, Teer, General Specialties and USF&G from which Blue Cross appeals. The trial judge entered an order and judgment denying Hartford's motion for summary judgment against Teer and USF&G, and Hartford appeals.

THE BUILDING

The four walls of the building, called the curtainwall, are composed primarily of approximately 4800 glass panels and rise three stories above a ground level lobby area. The four sides of the building are sloped, the north and east sides facing the sky at a 45° angle, and the south and west sides facing the ground at a 45° angle. The glass panels consist of two glass panes one-fourth inch thick with one-half inch vacuum space between the panes. These panels are supported on metal frames. As designed, the panels have superior insulating qualities if the seals separating the two panes of glass are intact. Seals on a substantial number of units have failed, depriving the panels of their insulating quality; have become clouded because of vapor between the panes which has impaired visibility; and have become a threat to the safety of employees who work in the building. Conceivably, almost all the panels in the north and east sides are defective and will need to be replaced soon.

The following dates will aid in a general understanding of the lawsuit:

1. Blue Cross-Odell Contract—27 October 1969.

2. Blue Cross-Teer Contract—16 February 1971.

3. Teer-General Specialties Subcontract—28 January 1972.

4. Building Occupied—Summer, 1973.

5. First unit observed to have failed because of fogging and condensation—29 April 1975.

6. Inspection visit by Mr. Coleman of LOF—last week of September, 1975.

7. First letter from Mr. Coleman of LOF to Blue Cross—2 October 1975.

8. Meeting between representatives of Blue Cross, Odell, Teer and LOF to discuss the problem—16 March 1976.

9. Second letter from Mr. Coleman of LOF to Blue Cross—12 April 1976.

10. Suit instituted—16 March 1979.

Although all parties deny responsibility, there is evidence in the record that some of the panels failed because of one or more of the following reasons:

1. The panels were so designed and constructed that the perimeter seals did not prevent moisture and water from penetrating around and through the dividers into the area between the glass panes. This occurred because the sealing material was not uniformly applied, and/or the sealant over the metal was not waterproof, permitting water to reach the metal and cause it to rust. Water then entered between the panes.

2. The "leak and weep" system did not work properly so as to permit the water to run off.

3. The mullion covers—even if properly designed—were not affixed and sealed properly.

Initially, LOF attempted to cancel its twenty-year warranty to furnish the panels for replacement, but in the course of discovery agreed to reinstate the warranty and furnish the panels for a one-time replacement. LOF, therefore, did not move for summary judgment on plaintiff's claims of express warranty.

LIBBEY-OWENS-FORD (LOF)

[1] Blue Cross first argues that Judge Battle erred in granting LOF's motion for summary judgment because:

1. LOF is liable for its negligent acts.

2. LOF is liable to Blue Cross for breach of warranty.

3. Blue Cross claims against LOF are not barred under the statute of limitations, because the action was brought within three years of discovery and because LOF is estopped to assert the statute of limitations.

We conclude the three year statute of limitations [G.S. 1-52(5)] bars any claim of Blue Cross against LOF and do not find it necessary to address the remaining two arguments of Blue Cross.

Statutes of limitations are "inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action." *Shearin v. Lloyd,* 246 N.C. 363, 370, 98 S.E. 2d 508, 514 (1957). Where the statute is properly pleaded and all facts are admitted or established, the question of limitations becomes a matter of law, *Little v. Rose,* 285 N.C. 724, 208 S.E. 2d 666 (1974), and summary judgment is appropriate. *Brantley v. Dunstan,* 10 N.C. App. 706, 179 S.E. 2d 878 (1971).

On the record, two questions arise: (1) whether Blue Cross "discovered or ought reasonably to have discovered" the alleged defects more than three years before it commenced this action on 16 March 1979, and (2) whether LOF is estopped to plead the statute of limitations. We conclude that Blue Cross discovered or ought to have discovered the defects more than three years prior to filing the lawsuit, and that LOF is not estopped to plead the statute of limitations.

In 1974, Philip Alford became building and maintenance supervisor for the Blue Cross building. On 29 April 1975, he first noted that a glass panel had "failed," and began keeping a chronological record of glass failure on the building. He discovered four more defective panels in early September 1975 and reported them to his superior, W. Albert Graham, who, in turn, reported them to Blue Cross Vice-President Frank W. Shelton. In his memorandum to Shelton, Graham stated, "Philip is very concerned about this, and rightly so . . . ." In a letter to Nello Teer dated 12 September 1975, Philip Alford said, "We seem to have an epidemic of fogged glass units with condensation trapped between interior and exterior sheets." In the same letter he requested that General Specialties replace four units under its contractual warranty and identified locations of the damaged units. On 12 September 1975, Alford also wrote to the architect,

Odell Associates, saying, "We are seriously concerned that subject glass is exhibiting deterioration, i.e.; fogging/condensation between interior/exterior sheets, uneven darkening of coloration and an initial release of varitran coating. Recent correspondence records that four (4) total units currently require replacement . . . ." This letter noted that the curtainwall warranty would expire on 12 October 1975 and requested a conference with representatives from Odell and LOF to assess the situation.

Thereafter, on 26 September 1975, representatives of Blue Cross met with Mr. Turner of Odell, LOF personnel, and Mr. Clark of Teer, at which time the "failures" in the glass were discussed. Vice-President Shelton of Blue Cross wrote to Mr. Dubose of Teer thereafter "to formally establish" the claim of Blue Cross "for defects in some of the curtainwall glass . . . ."

During the last week of September 1975, Mr. Coleman of LOF made an inspection visit to the premises, and on 2 October 1975 in a letter to Blue Cross wrote: "The fact that four of the units have experienced seal failure is certainly not something to be concerned about."

On 16 March 1976, representatives of Blue Cross met with representatives of Teer, General Specialties, LOF and Odell. Mr. Alford of Blue Cross noted that twelve units had either shattered or had the seal broken to that date, and a "certain percentage" of the units could not be observed from the interior of the building because the area between the ceiling and the floor above obscured vision. Mr. Coleman of LOF stated that usually any shattering of this type of glass would occur in the first two or three years after installation and should decrease over the years. He noted there were 4,720 units and that failures from the time of installation to date totaled less than one-half of one percent. Mr. Shelton of Blue Cross indicated that management was concerned that failure would continue at an accelerated rate and asked Mr. Coleman if LOF would share the cost of labor and materials for the now defective glass panes and others that may appear in future years. Mr. Coleman advised he would not be able to accept any financial responsibility for LOF beyond the replacement of the glass units required by the original contract documents.

Thereafter, on 12 April 1976, Mr. Coleman wrote Mr. Shelton that there was no reason to believe the rate of seal failures would increase over the next few years. Although failures continued, LOF expressed interest only in the cause of failure and not in sharing liability for replacement. On 16 March 1979—exactly three years after Mr. Coleman specifically refused to accept liability beyond replacement of the glass units—Blue Cross filed suit.

G.S. 1-15(b) [repealed by Session Laws 1979, Ch. 654, § 3, effective October 1, 1979; now governed by G.S. 1-52(5)] provides in pertinent part as follows:

> [A] cause of action . . . having as an essential element . . . a defect in or damage to property which originated under circumstances making the injury, defect, or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs . . . .

From the facts set out, it is apparent that Blue Cross discovered the defects in the curtainwall units more than three years before it filed the lawsuit. However, Blue Cross argues that LOF is estopped to plead the three-year statute of limitations. Blue Cross cites the assurances given by Mr. Coleman that the damage was a simple maintenance problem and that there was nothing to worry about. Moreover, the architect, contractor, and subcontractor never expressed any concern or reservations about statements made by LOF.

The argument of Blue Cross is without merit. Without question, the management of Blue Cross knew the glass panels were failing as early as 25 April 1975. Subsequent failure of the units was ample evidence that the problem was a recurring one. The maintenance supervisor, Alford, was diligent in reporting the glass panel failures. Assurances that the glass failures were within industry standards and nothing to worry about fade in the face of repeated failures of the glass panels over the next few months. Mr. Coleman of LOF never offered to replace the units beyond LOF's obligations under the twenty-year warranty. Blue Cross slept on its rights until the opportunity to bring suit had expired.

The case of *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967), is instructive. In that case, plaintiff alleged that defendant had negligently failed to inspect his furnace. As in this case, the plaintiff "knew some defect existed and therefore could not have been misled by the alleged representations of the defendants." *Id.*, at 216, 152 S.E. 2d at 340. The court thus concluded that Piedmont Natural Gas Company, which had consistently denied that Matthieu's furnace was defective, was not estopped to plead the statute of limitations. The same rule applies to the case before us.

This assignment of error is overruled.

AS TO ODELL ASSOCIATES, INC.

[2] Plaintiff assigns as error the entry of summary judgment for Odell.

It is undisputed that on 27 October 1969 Odell and Blue Cross entered into a standard AIA contract. The signature block for Odell appeared as follows:

ARCHITECT: A. G. Odell, Jr. and Associates, Inc.

/s/ A. G. Odell, Jr.

ARCHITECTS REGULATIONS NO. 387

ATTEST: /s/ Helen M. Collins

(Corporate seal embossed here)

No mention of the seal appeared in the body of the contract. Mr. Odell submitted an affidavit stating the Odell corporate seal was placed "for the purpose of indicating that execution of the contract was duly authorized by the corporation and to confirm the fact that the undersigned, as an individual, was not a party to the contract." He denied any intention of creating a sealed instrument. The contract was executed on behalf of Blue Cross by Mr. McMahon, who submitted an affidavit stating that no one ever questioned Mr. Odell's authority to sign for the corporation and that he fully understood the contract was with the corporation and not with Mr. Odell personally.

Plaintiff contends that the seal in these circumstances invokes a ten-year statute of limitations under the provisions of

G.S. 1-47(2). Plaintiff concedes that the last relevant act of Odell occurred more than four years before the institution of this action, and that if, as Odell contends, G.S. 1-15(c) is applicable, plaintiff's claims against Odell are barred.

Initially, we note that G.S. 1-15(c) was declared constitutional by this Court in *Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 289 S.E. 2d 875 (1982), *aff'd* --- N.C. ---, --- S.E. 2d --- (No. 273PA82, Jan. 11, 1983). We address two questions: (1) whether G.S. 1-15(c) applies, and (2) if G.S. 1-15(c) is inapplicable, whether G.S. 1-47(2) controls.

G.S. 1-15(c) states in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

Citing the opening phrase of this statute, "[e]xcept where otherwise provided by statute," Blue Cross argues that G.S. 1-15(c) is inapplicable and the ten-year statute of limitations, G.S. 1-47(2), governs. We disagree. Section 1-15(c) pertains to statutes running from the accrual of an action. There are two kinds of statutes of limitations: (1) "simple" statutes of limitations which concern a limitation period only, and (2) "compound" statutes of limitations which concern a "time of accrual" and a "limitation period," *e.g.*, G.S. 1-50(5) and G.S. 1-52(9). *See* Lauerman, *The Accrual and*

Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina, 8 Wake Forest Law Review 327 (1972). *See Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981); *Johnson v. Podger*, 43 N.C. App. 20, 257 S.E. 2d 684, *disc. rev. denied*, 298 N.C. 806, 261 S.E. 2d 920 (1979). The introductory portion of G.S. 1-15(c), "[e]xcept where otherwise provided," modifies the verb "accrue." The phrase refers us to other accrual statutes, not to a "simple" statute such as G.S. 1-47(2) which contains no accrual provision. We find that the phrase "in no event" refers to the fact that no professional malpractice action may be commenced "more than four years from the last act of the defendant giving rise to the cause of action." We conclude that G.S. 1-15(c) overrides G.S. 1-47(2). The interpretation suggested by Blue Cross would severely limit the application of G.S. 1-15(c), since all statutes of limitations are either "compound" or "simple," and all statutes of limitations might therefore be included in the "except as otherwise provided" language.

We do not quarrel with applying G.S. 1-15(c) to architects. The statute does not limit the professions to which it applies, but covers "malpractice arising out of the performance or failure to perform professional services." Architecture is undoubtedly a profession.

[3] We find no merit in plaintiff's argument that affixation of the corporate seal to a document automatically raises it to the status of an instrument under seal. In certain areas of the law an instrument under seal is required, *e.g.*, a valid conveyance of land. Indeed, parties may desire to extend the statute of limitations by adding a seal to a document, or by adopting an existing seal by use of language such as "signed, sealed, and delivered." In such instances, the intent of the parties to create a specialty may be shown from the instrument or testimony outside the instrument, nothing else appearing.

> The chief value of the corporate seal now is as prima facie authentication that the document is the act of the corporation and that the officers who have executed it have been thereunto duly authorized. This function of the corporate seal, however, must be distinguished from its use as a general seal. For example, the mere fact that the corporate

> seal appears on the instrument other than in the usual place of the private seal would not make the instrument a deed or specialty in the absence of a recital of affixing the seal or of extrinsic evidence showing an intention to have it serve the function of a general seal.

2 S. Williston, *A Treatise on the Law of Contracts* § 271A at 168 (3d ed. 1959 & Supp. 1982). Because the routine use of a corporate seal is merely to demonstrate authority to execute a document, the mere presence of a corporate seal, without more, does not convert the document into a specialty. A document is not considered a specialty unless there is evidence of intent to create an instrument under seal in the document itself such as a recital that the instrument would be under seal, or the words "corporate seal" or "affix corporate seal." *Simonson v. International Bank of Washington*, 312 F. 2d 887 (D.C. Cir. 1963) (*per curiam*); *Sigler v. Mt. Vernon Bottling Company*, 261 F. 2d 378 (D.C. Cir. 1958) (*per curiam*).

The evidence before the court on motion for summary judgment clearly shows no intention to create a specialty. It is apparent that the corporate seal was used as authentication of the officers' authority to act on behalf of the corporation.

Summary judgment in favor of Odell is affirmed.

TEER AND USF&G

[1] We reach the same conclusion respecting Teer and USF&G as we reached regarding LOF and Odell: Plaintiff's claim is barred by the statute of limitations. For that reason, we find it unnecessary to address the remaining arguments of Blue Cross against these defendants. As to Teer, we incorporate by reference our reasoning set forth in the argument concerning LOF.

[4] The performance bond for construction was executed by Teer as principal and USF&G as surety and delivered to Blue Cross as beneficiary. One of the conditions of the bond is as follows:

> Any suit under the bond must be instituted before the expiration of two (2) years from the date on which final payment under the contract falls due.

The record reveals: (1) all but $3,000 of the contract price was paid; (2) all work under the contract was completed in 1975 or

1976, in the sense that Teer had finished its work and left the premises; (3) all of the retainage was paid; (4) a representative of Blue Cross testified he believes the $3,000 had probably been paid.

Blue Cross contends the following conditions of its contract with Teer were not fulfilled, and no final payment was made:

1. Teer must submit to Odell written notice that the work is ready for final inspection and acceptance; and

2. Teer must submit a final application for payment. Under Article 9.7.3, the following must also occur before final payment falls due:

   a. Teer must submit to Odell an affidavit that all payrolls, bills for materials and equipment and other indebtedness connected with the work for which the owner or his property might in any way be responsible, have been paid or otherwise satisfied; and

   b. Teer must submit to Odell the consent of USF&G to final payment.

Blue Cross argues that under the above state of the record, summary judgment was improvidently granted because there was a question about whether final payment was made. We do not agree.

The record shows the building was accepted by Blue Cross for beneficial occupancy on 14 July 1973, and the substantial completion date was designated by Odell as 1 August 1973; the curtainwall was complete and accepted 12 October 1973; all general building warranties or guaranties expired as of 14 July 1974, and the curtainwall warranty from the curtainwall subcontractor expired as of 12 October 1975; and no later than 1975 plaintiff had accepted the building as complete and undertaken its obligation as the owner to maintain it accordingly. In addition, plaintiff's corporate counsel wrote Teer's counsel by letter dated 10 January 1978 and acknowledged plaintiff's final acceptance of the building. While Blue Cross may contend no final acceptance occurred prior to this date, the actions between the parties belie any such contention.

Furthermore, by letter dated 7 January 1975, Teer sent to Odell request for payment no. 37 with the following statement:

> Enclosed is our Request for Payment No. 37 which brings us up to date on the amount due with the exception of $3,000 which I have not claimed. This $3,000 represents work yet to be completed on the sign and the associated landscaping problems which I am in the process of trying to get resolved.

The application for payment attached to such letter shows Teer was applying for payment of the remaining balance of the full contract sum less $3,000. The application further shows that the amount of Teer's fixed fee being retained by plaintiff under the contract had been reduced to zero as of the date of application. Thus, with payment of the amount due on this application Blue Cross had fully paid all of Teer's fixed fee due under the contract, which was to be paid to Teer at the time of completion of the work. There is evidence the remaining work was done later in 1975. On 18 July 1975, Teer wrote Odell requesting final payment of the remaining $3,000, indicating the landscaping in question and the front entrance sign had been completed. Although the record is silent about the affidavit that bills for labor and material are paid and about a consent by USF&G that final payment be made, these ministerial acts become immaterial in face of final payment in fact.

We find it unnecessary to discuss again the question of whether the printed form word "seal" next to Teer's typed name and the impression of the corporate seal in the absence of the phrase "witness my hand and seal," or "signed and sealed," indicates that the bond was to be executed under seal. (See that portion of this opinion dealing with Odell, *supra.*)

[5] We are unimpressed with Blue Cross's argument that even if its action against Teer under the construction contract is barred, it nevertheless may maintain a separate action against Teer and USF&G under the performance bond issued by USF&G and signed by both USF&G and Teer. This contention is without merit.

The liability of a surety is measured in terms of the principal's agreement. *Lumber Co. v. Surety Co.*, 12 N.C. App. 641, 184 S.E. 2d 399 (1971), *cert. denied*, 280 N.C. 180, 185 S.E. 2d 704 (1972). The obligation of the surety under the performance

bond is to be read in light of the contract it secures. *Realty Co. v. Batson*, 256 N.C. 298, 123 S.E. 2d 744 (1962). Obviously, Teer signed this bond not for the benefit of Blue Cross but for the benefit of USF&G, its surety, to preserve USF&G's right of indemnification against Teer under applicable suretyship law.

We affirm the decision of the trial judge regarding Teer and USF&G.

GENERAL SPECIALTIES

[1] We do not reach the question of negligence on the part of General Specialties but conclude that the claim of Blue Cross is barred by the three-year statute of limitations for the same reasons set out in the section of this opinion dealing with LOF. We affirm the decision of the trial judge allowing the motion for summary judgment of General Specialties.

THE CROSS ACTION BY HARTFORD ACCIDENT AND INDEMNITY COMPANY AGAINST USF&G AND TEER

Because of our disposition of the matters previously discussed, the questions raised in the cross action by Hartford against USF&G and Teer become moot.

The judgments of the trial judge are

Affirmed.

Judges WELLS and JOHNSON concur.

ENGLISH W. SHIELDS v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 8217SC280

(Filed 5 April 1983)

1. Insurance § 121— fire insurance claim—overvaluation by insured

Whether the insured has willfully misrepresented a material fact in a fire insurance claim is generally for the jury, and mere overvaluation by the insured, absent a showing of bad faith, does not constitute willful misrepresentation so as to avoid the policy.

2. Insurance § 121— fire insurance claim—misrepresentation or false swearing—jury question

Although the evidence in an action to recover under a fire insurance policy showed that plaintiff frequently and without satisfactory explanation contradicted himself regarding the total value of the burned building, estimated the value of his refurbishing without records to prove his expenditures when by his own admission he did not know the amount spent, and offered a version of his dealing with another insurance company which directly contradicted that of the agent involved, the evidence did not establish as a matter of law that plaintiff willfully concealed or misrepresented a material fact or committed any false swearing in his claim so as to avoid the policy but presented a jury question on that issue.

3. Evidence § 56— expert appraisal testimony—survey of damages conducted by employees

In an action to recover under a fire insurance policy, an appraiser's testimony and a written appraisal were properly admitted in evidence where the appraiser testified that his employees conducted a survey of damages under his supervision and control, that he reviewed their work for accuracy and completeness, and that he had visited the site at some point and was personally familiar with the damages to the property, and where the written appraisal was compiled by the appraiser and his employees based on the survey of damages which the appraiser supervised and by reference to an appraisal publication used throughout the appraisal industry, since the evidence established that the appraiser's information was within his personal knowledge though not entirely derived from matters personally observed.

4. Witnesses § 5.1— unexecuted promissory note—competency for corroboration

In an action to recover under a fire insurance policy, the admission of a photocopy of an unexecuted promissory note by which plaintiff agreed to pay the balance of the purchase price for the insured building to his predecessor in title merely corroborated the testimony of plaintiff and his predecessor in title and could not, in itself, constitute prejudicial error.

5. Witnesses § 8.3— source of opinion testimony—refusal to permit cross-examination—absence of prejudice

In an action to recover under a fire insurance policy, defendant was not prejudiced by the trial court's sustention of an objection to a question asked plaintiff on cross-examination, after plaintiff had given his opinion of the fair market value of his building before the fire, as to who told plaintiff "to testify to that," since the unexplained discrepancies in plaintiff's pretrial and trial opinions of the value of his building were fully exposed by rigorous cross-examination.

6. Witnesses § 8.3— fire insurance—authorization to stipulate that fire was set—refusal to permit cross-examination

In an action to recover under a fire insurance policy, the trial court did not abuse its discretion in refusing to permit defendant to ask plaintiff on cross-examination whether he had authorized his attorney to stipulate "that the fire was a set fire" where defendant did not contend that plaintiff set the

fire himself and the relevance of the information sought as to his authorization of his attorney was thus marginal.

7. Rules of Civil Procedure § 43; Witnesses § 6.3— impeachment of hostile witness—failure to ask court to rule that witness was hostile

When a witness in a civil case is "unwilling or hostile" within the meaning of G.S. 1A-1, Rule 43(b), counsel has a right to ask leading questions and to impeach the witness, but the determination of who falls within the coverage of Rule 43(b) is for the court. Therefore, where defendant did not ask the court to rule that a witness was "unwilling or hostile" and he was not such as a matter of law, there was no error in the trial court's refusal to permit defendant to impeach the witness with questions regarding prior criminal convictions.

8. Witnesses § 6— questions about insurance—admissibility to show bias

In an action to recover under a fire insurance policy, cross-examination of the agent who placed the policy as to whether he had errors and omissions coverage and the amount of the deductible thereon was admissible to show bias or financial interest on the part of the witness.

APPEAL by defendant from *Albright, Judge.* Judgment entered 12 November 1981 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 20 January 1983.

Plaintiff brought this action, pursuant to a fire insurance policy issued by defendant, seeking to recover for a loss sustained from a fire on the insured property. The issues, and the jury's answers thereto, were as follows:

1. Did the plaintiff willfully conceal or misrepresent any material fact or circumstance or commit any false swearing concerning his claim under the policy of insurance issued by the defendant?

ANSWER: NO

2. Did the plaintiff burn or procure the burning or willfully increase the risk of the hazard of fire to the building insured by the defendant?

ANSWER: NO

3. What amount, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $93,408.22

Defendant appeals from a judgment for plaintiff in the amount of the verdict plus interest.

Griffin, Deaton & Horsley, by William F. Horsley, for plaintiff appellee.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by W. Thompson Comerford, Jr., Grover G. Wilson, and Michael L. Robinson, for defendant appellant.

WHICHARD, Judge.

I.

Defendant assigns error to denial of his motions for directed verdict and judgment notwithstanding the verdict. The jury found that "plaintiff [did not] willfully conceal or misrepresent any material fact or circumstance or commit any false swearing concerning his claim under the policy of insurance issued by the defendant." Defendant argues that the evidence establishes such misrepresentation as a matter of law, and that this issue thus should not have been submitted. We disagree.

A.

The policy included the following clause:

> This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

This clause is included in the statutory form for standard fire insurance policies, G.S. 58-176(c), and is read into every such policy even if not expressly stated therein. *Dale v. Insurance Co.*, 40 N.C. App. 715, 716-17, 254 S.E. 2d 41, 42, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979).

In construing such a clause, the Fourth Circuit Court of Appeals, in *Globe & Rutgers Fire Ins. Co. v. Stallard*, 68 F. 2d 237 (4th Cir. 1934), said:

> The policy is avoided not only for fraud, but also for false swearing by the insured touching any matter relating to the insurance or the subject thereof . . . . [T]he condition against false swearing is broken when a false oath is knowingly and

> willfully made by the insured as to any matter material to the insurance or the subject thereof. It is said in some of the cases that same must be made with intent to deceive or defraud. [Citations omitted.] But, . . . the intent to deceive and defraud is necessarily implied in the intentional and willful making of a false statement as to a material matter.

Id. at 240.

Mere overvaluation by the insured, without more, will not avoid the policy.

> [T]here can be no question but that . . . knowing and intentional overvaluation in the sworn proofs of loss avoids the policy under the clause against false swearing. [Citations omitted.] Of course, honest mistake will not avoid the policy; and to preclude recovery the overvaluation must be of a material character and must have been knowingly and intentionally made. . . . [O]rdinarily, where there is evidence from which intentional overvaluation may be inferred, the question whether it was intentional and with intent to deceive or defraud is . . . for the jury.

Id. at 240-41.

> It is clear that to deny the recovery of the amount solely on account of an overvaluation of the building when it only represented [the plaintiff's] *bona fide* opinion or estimate would constitute a forfeiture of his right—a very dangerous and severe penalty to inflict in the absence of satisfactory proof that he knew that he was filing a false claim with a bad motive.

Fraylon v. Royal Exchange Assurance, 131 F. Supp. 676, 679 (M.D.N.C.), *modified on other grounds*, 228 F. 2d 351 (4th Cir. 1955).

Although criminal actions under G.S. 14-214 cannot establish the standard for judging misrepresentation in civil actions, they do provide guidance. In *State v. Fraylon*, 240 N.C. 365, 82 S.E. 2d 400 (1954), the defendant-insured "made various contradictory statements as to the value of his property." *Id.* at 372, 82 S.E. 2d at 405. The Court noted that

> [w]here the facts are available to all parties, the question as to the value of a damaged building at the time of a fire resolves itself largely into a matter of opinion by qualified witnesses. "Value is necessarily a matter of judgment, and, furthermore, a matter of judgment in which each person is prone to err in overestimating his own. Of course, overvaluation is an evidence of fraud, but it does not amount to fraud where it expresses the *bona fide* opinion of the insured."

Id.

[1] The foregoing establishes that whether the insured has wilfully misrepresented a material fact is generally for the jury; and that mere overvaluation, absent a showing of bad faith, does not constitute wilful misrepresentation. Defendant contends, however, that plaintiff's wilfullness and bad faith is conclusively established by his pattern of conduct in exaggerating the value of the insured building. It relies in part on *Lykos v. American Home Ins. Co.*, 609 F. 2d 314 (7th Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 1079, 100 S. Ct. 1030, 62 L.Ed. 2d 762 (1980), where the Court held the evidence established plaintiff's fraud and false swearing as a matter of law. *Id.* at 315. Applying Illinois law of fraud, the Court said that

> "[o]rdinarily, fraud and false swearing is a question of fact for the jury, but it becomes a question of law when the insured's misrepresentations cannot in any way be seen as innocent."
>
> . . . .
>
> . . . [T]he evidence conclusively established a consistent pattern of inordinately excessive claims. After . . . giving all reasonable allowance for the possibility of innocent mistake, we are compelled to conclude that the claims were deliberately false. The misrepresentations can in no way be seen as innocent and no reasonable jury could find otherwise.

Id. at 315-16.

B.

[2] Defendant argues that plaintiff made wilful misrepresentations as a matter of law in the following three areas, all of which affect the material issue of value: (1) the fair-market or replacement value of the property, (2) the extent of renovations com-

pleted before the fire, and (3) the willingness of another insurer to write a policy on the property in an amount exceeding plaintiff's claim against defendant. The pertinent evidence in these areas was as follows:

(1) Plaintiff testified that when he bought the property for $75,000, the building was "in good shape all of the way around." He did not know how much his predecessor had paid for it. He was of the opinion that the value at the time of the fire was $80,000 to $95,000 because of "the way it would rent and the big project coming up." After the fire plaintiff filed a sworn proof of loss stating that the value at the time of fire was $130,000. He claimed $110,000, the full value of the policy.

In documents attached to answers to interrogatories plaintiff alleged that the actual cash value was about $94,000, and the full replacement cost was about $132,000. When questioned regarding the discrepancy between the value he asserted at trial and that in his sworn proof of loss, he explained that the property was worth $85,000 to $90,000 when purchased, but that it "would be worth" $130,000 "when [he] finished with it."

Three or four months after the fire plaintiff told defendant's attorney that the fair market value before the fire was $140,000 to $150,000. When asked to explain his different opinion at trial, he said "maybe it was worth that."

Plaintiff said he did not think he had intentionally misrepresented the value, and "if [he] did [he did not] remember nothing about it," and that his figures "represent [his] best recollection and honest opinion."

The agent who wrote the policy testified that plaintiff requested $110,000 in coverage, and he agreed to that amount. The agent inspected the premises and consulted guidelines provided by defendant before issuing the policy. He signed a pre-trial affidavit in which he stated that he appraised the building at $140,000, offered to insure it for $126,000, and agreed to insure it for $110,000. At trial he testified that he could not remember stating these figures to plaintiff, but that he signed the affidavit because plaintiff insisted that he did so state. He said he was not coerced to sign the affidavit, but that the affidavit figures were not consistent with his opinion of the building's actual cash value.

He felt that he could insure the building for $87,000 plus the amount to be added by plaintiff for renovations.

A real estate appraiser and licensed fire insurance agent testified that the actual cash value of the building at the time of the fire was $12,500. The "estimated reproduction cost new" was listed as $104,788 in his written appraisal. Another insurance appraiser estimated the cost to repair the building at $93,408.

(2) Plaintiff testified that when he purchased the property he planned to spend $16,000 to $18,000 on renovations to convert it into apartments. He never told any representative of defendant that he had actually spent that amount, and it was a mistake or misunderstanding if defendant's representative so understood.

Plaintiff hired four or five men who worked on the building for several weeks before the fire. He paid them in cash and made no record of the payments. He kept receipts of materials he purchased on a nail in the building's foyer, but they were destroyed in the fire. He "could have" spent $10,000 to $12,000 on pre-fire renovations, but did not know since he had no records.

Although plaintiff told defendant's attorney in a pre-trial sworn statement that he had completely rewired the building, at trial he stated that much new wiring had been completed before he purchased it, but that he was going to begin additional new wiring to convert from gas to electric heat. A man began working on the plumbing as soon as plaintiff purchased the building, and plaintiff also hired workers who painted, plastered, sheetrocked, and paneled the walls. In a pre-trial sworn statement plaintiff said he had spent "somewhere in the neighborhood of" $12,000 on painting, sheetrocking, paneling and plastering.

An adjustor for defendant testified that plaintiff told him after the fire that he had spent $18,000 to $20,000 in renovating the building.

A fire investigator testified that if records had been kept in the foyer he could have found remnants of them, since there was relatively little burning in the foyer; and that no nails were found on which the receipts could have been kept.

The agent who wrote the policy testified that, when he toured the building prior to issuing the policy, it "was being com-

pletely remodeled," there was "a small amount" of building materials on the inside but none outside, and workmen were present. Plaintiff told him at that time that he was going to spend about $67,000 on new materials. This played a significant part in his determination of the policy amount, since "it would be added to what [he] felt . . . the value of the building would be at that time before anything was added to it." After the fire plaintiff told the agent the building was ninety per cent complete, but the agent thought little had been done since his pre-fire inspection.

A carpenter hired by plaintiff stated he worked for three weeks and then was told not to return until the plumbing and wiring was completed. He put up sheetrock and paneling, but could not remember how much; and he painted three rooms. While he worked there, he observed old radiators and pipes being removed, and wiring and plumbing work in process. He saw receipts nailed to the walls, although he did not know to whom they belonged.

A junkyard owner testified that he paid plaintiff to be allowed to remove old steam heat radiators and pipes.

A man hired by plaintiff to do plumbing and electrical work testified that when he began all wiring and plumbing had to be redone. At the time of the fire, the wiring and plumbing in four of the nine apartments was at least eighty to ninety per cent complete, and the basement and second floor was stripped and ready to be renewed. Some walls had been painted, paneled and sheetrocked in one apartment.

Plaintiff's grantor testified that "a little bit of work [had been done] all over" at the time he purchased the building. He had several people work on structural roof repairs, wiring, paneling, painting, and sheetrocking. When he finished, a "good portion" of the building had been completely remodeled.

An insurance appraiser testified that he could not tell how much plumbing or wiring was done before the fire; that the wiring was being renewed; that the plumbing was of "below normal" value; and that the building was obviously undergoing repairs, although it appeared that "very little" had been done.

(3) Plaintiff testified that no agent or company had ever refused to issue an insurance policy on his property. He stated

that an agent of one agency offered to write a policy on the building for $200,000 with two different companies. The agent testified that she never offered to write a policy on the property in any amount, and that she specifically refused plaintiff's request to write a policy for $100,000.

C.

In ruling on a motion for directed verdict, G.S. 1A-1, Rule 50(a), plaintiff's evidence must be taken as true and considered in the light most favorable to him. *E.g., Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974); *Clark v. Bodycombe*, 289 N.C. 246, 250, 221 S.E. 2d 506, 509 (1976). All conflicts must be resolved in plaintiff's favor, and he must be given the benefit of every reasonable inference. *E.g., Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978). The same standard applies to a motion for judgment NOV, G.S. 1A-1, Rule 50(b). *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E. 2d 549, 554 (1973).

Applying these principles to the evidence here, we find no misrepresentation or false swearing by plaintiff as a matter of law. Although plaintiff frequently and without satisfactory explanation contradicted himself regarding the total value of the building, estimated the value of his refurbishing without records to prove his expenditures when by his own admission he did not know the amount spent, and offered a version of his dealings with another insurance company which directly contradicted that of the agent involved, the evidence does not "conclusively [establish] a consistent pattern of inordinately excessive claims." *Lykos, supra.* Conflicts in the testimony of the various witnesses, and contradictions within plaintiff's own testimony, were for the jury to resolve; and reasonable jurors could find that any misrepresentations were innocent. *Lykos, supra.*

Resolving all contradictions and drawing all inferences in plaintiff's favor, as we must, we hold that defendant's motions for directed verdict and judgment NOV were properly denied.

> The evidence offered by the [plaintiff], if believed by the jury, may have recast [defendant's] . . . evidence in such light as to have diluted its probative force before the jury . . . . Obviously, . . . the jury in its composite wisdom, after hearing the testimony and observing the demeanor of the witnesses,

disbelieved the defendant['s] evidence and resolved the issues against [it]. The record amply sustains the [decision] . . . .

State v. Hedrick, 236 N.C. 727, 731, 73 S.E. 2d 904, 906 (1953) (criminal action for violation of G.S. 14-214).

II.

[3] Defendant assigns error to admission of testimony by an insurance appraiser on the grounds that (1) the appraiser had no personal knowledge of the actual physical damage to the building, but based his appraisal on inspections by his employees, assumptions about the pre-fire condition of the building, and appraisal publications; and (2) a written appraisal prepared by the appraiser's employees was introduced as his exhibit.

"It is well established that the value of the use of property may be proved by the opinion evidence of witnesses acquainted with the property and the facts bearing upon its use." *Perkins v. Langdon*, 237 N.C. 159, 176, 74 S.E. 2d 634, 647 (1953). "A witness is not competent to testify to a fact beyond his personal knowledge or to base an opinion upon facts of which he has no knowledge." *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E. 2d 884, 886 (1960). However, "facts and information within the personal knowledge of an expert [are not limited] to knowledge *derived solely* from matters personally observed. . . . [A]n expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible." *State v. DeGregory*, 285 N.C. 122, 132, 203 S.E. 2d 794, 801 (1974) (emphasis in original).

The appraiser testified that his employees conducted a survey of damages "under [his] supervision and control," that he "review[ed] their work for accuracy and completeness," and that he had visited the site at some point and was "personally familiar with the damages to the property." The written appraisal was compiled by the appraiser and his employees based on the survey of damages which the appraiser supervised, and by reference to an appraisal publication "used throughout the appraisal industry" which was also used by an appraiser testifying for defendant. The foregoing establishes that the appraiser's information was "within [his] personal knowledge," though not entirely derived "from matters personally observed." *DeGregory, supra.* We thus find no er-

ror in admission of the testimony and written appraisal.

Defendant also contends the appraiser's direct testimony was in improper, narrative form. Although it is customary to ask specific questions, *inter alia*, to give opposing counsel an opportunity to object, 1 *Brandis on North Carolina Evidence* § 25, p. 90 (2d rev. ed. 1982), the conduct of the examination is largely in the control of the trial judge, *id.*, and "[we] will not interfere with the exercise of the trial judge's duty to control the conduct and course of a trial absent a showing of manifest abuse." *State v. Covington*, 290 N.C. 313, 335, 226 S.E. 2d 629, 644 (1976). The record here reveals no manifest abuse.

III.

[4] A photocopy of an unexecuted promissory note, by which plaintiff agreed to pay the balance of the purchase price for the building to his predecessor in title, was admitted over defendant's objection. Defendant contends this instrument was "incompetent to prove that plaintiff had bound himself by a written agreement to pay" his grantor the sum stated therein, and that its admission "prejudiced defendant's case by giving credence and weight to plaintiff's contention that an arm's length transaction had occurred in the purchase of this property."

Defendant's theory was that the transaction was a civil conspiracy to defraud it by raising the property's value artificially pursuant to a "pyramiding" scheme. Both plaintiff and his grantor testified without objection that a document was executed by which plaintiff agreed to pay the grantor about $15,000 as part of the sales transaction. Therefore, admission of the photocopy of the unexecuted instrument merely corroborated their testimony and could not, in itself, constitute prejudicial error.

We find it unnecessary to consider defendant's further argument that admission of the photocopy violated the best evidence rule because (1) both parties to the note acknowledged its existence and terms, thereby negating any prejudice from its admission; and (2) defendant stipulated in the pre-trial conference order that each of plaintiff's proposed exhibits, including the copy of the promissory note from plaintiff to his grantor, "is genuine and, if relevant and material, may be received in evidence without further identification or proof."

IV.

[5] On cross-examination, after plaintiff had given his opinion of the fair market value of his building before the fire, the court sustained an objection to the following question: "Who told you to testify to that?" It also sustained an objection to a question as to whether plaintiff had authorized his attorney to stipulate "[t]hat this was a set fire." Defendant assigns error to these exclusions.

While opposing counsel has wide latitude in the cross-examination of witnesses, "[t]he wide latitude accorded the cross-examiner 'does not mean that all decisions with respect to cross-examination may be made by the cross-examiner.' [Citation omitted.] Rather, the scope and duration of cross-examination rest largely in the discretion of the trial judge." *State v. Satterfield*, 300 N.C. 621, 627, 268 S.E. 2d 510, 515 (1980). "It is well recognized . . . that the trial judge, who sees and hears the witnesses and knows the background of the case, has a wide discretion in controlling the scope of cross-examination." *State v. Daye*, 281 N.C. 592, 596, 189 S.E. 2d 481, 483 (1972).

The unexplained discrepancies in plaintiff's pre-trial and at-trial opinions of the value of his building were fully exposed by rigorous cross-examination. *See* Part I.B.(1), *supra*. We thus perceive no prejudice from sustention of the objection to the question as to the source of his opinion testimony.

[6] Defendant has not contended that plaintiff set the fire himself. The relevance of the information sought by the question as to his authorization to his attorney thus was marginal, and the trial judge "has discretion to ban . . . inquiry into matters of only tenuous relevance." *Satterfield, supra*, 300 N.C. at 627, 268 S.E. 2d at 515.

We find no abuse of discretion in the rulings complained of.

V.

Plaintiff, over objection, gave his opinion regarding "whether . . . it would have been possible to get into [the] building without a key," and whether he could have hauled bales of hay into the building. He also stated, over objection, that he had problems with his sense of smell due to emphysema and asthma.

These matters related to the issue of whether plaintiff was responsible for the fire. The jury answered this issue in the negative, and defendant does not contend that its finding is not supported by competent evidence. The errors assigned to admission of this testimony relate, then, to an issue not before us. Further, we perceive no prejudice in the admission.

Plaintiff was asked on direct examination, "Have you been charged with anything in connection with that fire?" Defendant's objection was sustained, and the jury was immediately instructed to disregard plaintiff's negative response. "The court properly instructed the jury not to consider the . . . evidence . . ., and the law presumes the jury followed the judge's instructions." *State v. Long*, 280 N.C. 633, 641, 187 S.E. 2d 47, 52 (1972). The error assigned to this testimony is thus overruled.

VI.

[7] Defendant called as a witness the predecessor in title to plaintiff's grantor. It contends that, because part ot its trial theory was that plaintiff, his grantor, and this witness conspired to inflate the property's price artificially, the witness "was clearly . . . adverse"; and the court therefore erred in refusing to allow it to impeach him with questions regarding prior criminal convictions.

G.S. 1A-1, Rule 43(b), provides that "[a] party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party." When a witness is "unwilling or hostile" within the meaning of Rule 43(b), counsel has a right to ask leading questions and impeach the witness. Contrary to criminal procedure, in a civil case the right to lead and impeach hostile witnesses does not depend upon the discretion of the trial judge. *See Ingram, Comr. of Insurance v. Insurance Agency*, 303 N.C. 287, 290-91, 278 S.E. 2d 248, 251 (1981).

Determination of who falls within the coverage of Rule 43(b) is, however, for the court. *"When the judge finds that a witness falls within this provision,* impeachment is a matter of right rather than discretion." 1 *Brandis on North Carolina Evidence* § 40, p. 154 (2d rev. ed. 1982) (emphasis supplied). Defendant did not ask the court to rule that the witness was "unwilling or

hostile," and we decline to hold that he was such as a matter of law. Under these circumstances we find no error in the exclusion complained of.

VII.

[8] Defendant assigns error to the following from cross-examination of the agent who placed the policy:

Q. Now Mr. Zanetti, I think that it is fair to say that you have something of a financial stake in this law suit, don't you?

A. Yes, sir.

MR. COMERFORD: Objection.

COURT: Overruled.

EXCEPTION NO. 41

Q. In fact there is a gentleman back here that is a counsel for your errors and [omissions] carrier isn't there?

MR. COMERFORD: Objection.

COURT: Sustained.

Q. Have you been told there is going to be a claim following this one in the event Mr. Shields recovers?

MR. COMERFORD: Objection.

COURT: Sustained.

EXCEPTION NO. 42

Q. Do you have errors and [omissions] coverage?

A. Yes, I do.

Q. What is the deductible amount on that?

MR. COMERFORD: Objection.

COURT: Overruled.

EXCEPTION NO. 43

A. Now or then?

Q. Then?

A. Two hundred and fifty.

Q. So the first two hundred and fifty dollars comes out of your pocket, is that right?

MR. COMERFORD: Objection.

COURT: Overruled.

EXCEPTION NO. 44

A. Yes, sir.

Defendant argues (1) that by analogy to liability insurance in a negligence action, the mention of errors and omissions coverage led the jury to believe ultimate responsibility would fall on some entity not a party to the action; and (2) that any personal liability of the agent was entirely speculative since the questions assumed that the errors and omissions carrier would be sued and would be liable.

Evidence of insurance coverage is generally inadmissible in negligence suits. *E.g., Fincher v. Rhyne*, 266 N.C. 64, 68-69, 145 S.E. 2d 316, 318-19 (1965). It is admissible, however, "if it has some probative value other than to show the mere fact of its existence." *Siedlecki v. Powell*, 36 N.C. App. 690, 697, 245 S.E. 2d 417, 422 (1978); *see* 1 *Brandis, supra*, § 88.

This is not a negligence action, and the above rule of exclusion is thus inapplicable. Further, the evidence was admissible to show bias or financial interest on the part of the witness. *See Bryant v. Furniture Co.*, 186 N.C. 441, 445, 119 S.E. 823, 825 (1923); *Siedlecki, supra;* 1 *Brandis, supra*, § 88.

No error.

Judges ARNOLD and HILL concur.

BEN LLOYD v. CARNATION COMPANY, GARY WILLIER, AND WARREN MANUEL

No. 8215SC391

(Filed 5 April 1983)

1. **Appeal and Error § 6; Rules of Civil Procedure § 41.1— voluntary dismissal of claims—no right to appeal summary judgment on one count**

When plaintiff took a voluntary dismissal without prejudice of his claims against defendant on 21 January 1982, he destroyed his right to appeal an adverse ruling of 1 January 1981 allowing summary judgment on one count of the complaint.

2. **Appeal and Error § 14— voluntary dismissal against codefendant—question of earlier summary judgment against defendants**

The question of the propriety of summary judgment entered in favor of defendants was before the appellate court where the trial court on 1 January 1981 allowed summary judgment for defendants on all claims against them, plaintiff excepted in open court to the entry of summary judgment, plaintiff took a voluntary dismissal without prejudice of his claims against a codefendant on 21 January 1982, and following entry of the voluntary dismissal, plaintiff gave notice of appeal in open court.

3. **Unfair Competition § 1— unfair trade practices—application of Virginia law**

Summary judgment was properly entered in favor of defendants in plaintiff's action to recover damages for conspiracy to commit unfair trade practices by attempting to force plaintiff out of marketing territories in the sale of bull semen for a codefendant where the forecast of evidence and discovery established that the acts about which plaintiff complains were performed entirely within the State of Virginia, the substantive law of Virginia must therefore be applied to plaintiff's claim, and it appears that Virginia has not adopted an unfair or deceptive trade practices statute similar to G.S. 75-1.1.

4. **Contracts § 32— wrongful interference with contract rights—application of Virginia law—summary judgment under North Carolina law**

Summary judgment was properly entered for defendants in plaintiff's action to recover damages for wrongful interference with plaintiff's contract rights to act as an exclusive territorial distributor of bull semen for a third party by inducing the third party to remove plaintiff from his marketing territory where the forecast of evidence and discovery established that the acts about which plaintiff complains were performed entirely within the State of Virginia, the law of Virginia must therefore be applied to plaintiff's claim, and no statute or case law of Virginia recognizes this purported cause of action. Even if the law of North Carolina were applicable, summary judgment was properly entered for defendants where the forecast of evidence showed that the decision to terminate plaintiff's distribution rights originated with the third party and not with the defendants.

Judge BECTON concurring in the result.

APPEAL by plaintiff from *Brewer, Judge.* Order entered 1 January 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 17 February 1983.

Powe, Porter and Alphin by Charles R. Holton and Edward L. Ball for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Jack Floyd, Frank J. Sizemore, III, and Jeri L. Whitfield for defendant appellees.

BRASWELL, Judge.

The focal point of the facts concerns a verbal contract of 1967 vintage through which the plaintiff allegedly became an exclusive territorial distributor of bull semen for Carnation Company. It is crucial, given the history of the case, that we examine procedure before substance in our analysis.

When the complaint was filed on 18 April 1979, there were three defendants: Carnation Company, Gary Willier and Warren Manuel. The complaint contains seven counts for relief. The first five counts are designated as against defendant Carnation only: (1) Unfair Trade Practice, (2) Unlawful Price Maintenance, (3) Breach of Contract, (4) Unjust Enrichment, and (5) Fraud. Counts Six and Seven are against the defendants Willier and Manuel only. Count Six is for Conspiracy to Commit Unfair Trade Practices. Count Seven is for Unlawful Interference With Contractual Rights.

Defendants filed a joint Answer on 22 June 1979, which alleges eleven defenses and which was amended to include a twelfth defense on 19 December 1980. Defendants moved for summary judgment on all counts on 4 September 1979, and plaintiff filed cross-motion for partial summary judgment on 23 October 1980.

By order dated 1 January 1981, filed 12 January 1981, the trial judge having held evidentiary hearing, allowed defendants' motion for summary judgment on Counts Five, Six and Seven, but denied it as to Counts One, Two, Three, and Four. There was no appeal.

On 21 January 1982, the record shows that "Pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, the plaintiff,

Ben Lloyd, hereby gives notice of voluntary dismissal without prejudice of his claims against Carnation Company." No mention is made of the defendants Willier or Manuel.

The record contains no formal notice of appeal or appeal entries. However, on page one of the record we find the following language: "Order entered January 1, 1981, dismissing counts 5, 6, and 7 of the Complaint from which Plaintiff excepted in open Court. Upon voluntary dismissal of the remaining Counts of the Complaint, Plaintiff gave Notice of Appeal in open Court to the North Carolina Court of Appeals." The record was certified by the Clerk of Superior Court on 20 April 1982.

In the plaintiff's grouping of exceptions and assignments of error the record shows but one assignment of error and one exception. The one assignment of error is designated as follows: "The Plaintiff assigns as error the Court's decision in its Order dated January 1, 1981, to allow the Defendant's Motion for Summary Judgment as to Counts 5, 6, and 7 of the Complaint; error is assigned on the basis that there are factual issues sufficient in said counts to be decided by a jury . . . ."

Upon this quagmire of conduct, basic procedural questions arise as to the defendant Carnation Company singly and as to defendants Willier and Manuel jointly. The problem will be discussed separately.

I.

PLAINTIFF'S APPEAL AS TO CARNATION COMPANY

[1] The act of plaintiff taking a voluntary dismissal without prejudice by filing a notice of dismissal at any time before the plaintiff rests his case is authorized by Rule 41(a)(1) of the Rules of Civil Procedure. Pursuant to that rule, on 21 January 1982, plaintiff gave "notice of voluntary dismissal without prejudice of *his claims* against Carnation Company" (emphasis added). Only then does plaintiff "appeal." By his assignment of error plaintiff now wants us to review the decision of the trial judge entered on 1 January 1981, more than one year prior to the dismissal, when summary judgment was granted on Count Five of the complaint in favor of Carnation Company.

We hold that when plaintiff took a voluntary dismissal without prejudice as to his claims against Carnation Company, he

destroyed his right to appeal the adverse ruling of 1 January 1981 allowing summary judgment on Count Five of the Complaint. There was nothing left on which to appeal after the voluntary dismissal.

Our research has led us to the case of *Pipeliners Local Union No. 798, Tulsa, Okl. v. Ellerd*, 503 F. 2d 1193 (10th Cir. 1974), which we choose to use for comparative purposes. The Tenth Circuit was confronted with the procedural situation wherein on 9 February 1972 the trial court had entered a formal order granting all defendants' motions to dismiss the Complaint for failure to state a claim upon which relief could be granted. The existence of a counterclaim kept the case alive. On 26 September 1973, the plaintiffs took an oral voluntary dismissal in open court of "all actions 'as to all parties with the exception of the parties to the counterclaim.' " *Id.* at 1199.

The decision of *Pipeliners, Id.* at 1200, declares: "It is significant, we believe, that appellants' (*i.e.*, the plaintiffs') supplemental memorandum on appeal refers to the dismissal order of September 26, 1973, as one 'voluntarily' agreed upon by plaintiffs-appellants. The voluntary dismissal constituted a bar to appellants' attack upon the Order of Dismissal of February 9, 1972." Of like import is 5 Moore's Federal Practice ¶ 41.02[6] at 41-43 (2d ed. 1982): "Where plaintiffs' notice of voluntary dismissal under Rule 41(a)(1) is not disturbed by the trial court or where plaintiff knowingly and willingly agrees to a stipulation of dismissal, he has no standing to appeal."

In his discussion of the effect of dismissal with and without prejudice, Moore, *Id.*, ¶ 41.05[2] at 41-76, states that "A dismissal without prejudice leaves the situation so far as procedures therein are concerned the same as though the suit had never been brought." This text is cited with approval in *Covey v. C.I.T. Corp.*, 71 F.R.D. 487, 489-90 (E.D. Okla. 1975). However, as provided in our Rule 41(a)(1) "a new action based on the same claim may be commenced within one year after such dismissal . . . ."

The case of *McGoff v. Rapone*, 78 F.R.D. 8 (E.D. Pa. 1978), discussed the dismissal procedures under federal practice. The court stated that a voluntary dismissal by stipulation "is not 'final' in the sense that, being without prejudice, the plaintiff is free to refile. Similarly, since it does not even require an order

. . . then by definition it cannot be an 'appealable' order, and in that technical sense it is 'nonfinal.' . . . However, . . . a Fed. R. Civ. P. 41(a)(1) dismissal is 'final' for purposes of a 60(b) motion [relief from judgment], which requires a 'final judgment, order or proceeding.' " *Id.* at 22.

Athough we have found no North Carolina case directly on point, we believe that the fundamental principles of law concerning standing to appeal in these federal citations are fully applicable to the factual situation before us. The appeal of the plaintiff against Carnation Company is dismissed.

II.

PLAINTIFF'S CLAIMS AGAINST DEFENDANTS WILLIER AND MANUEL

[2] The only party-defendants in Counts Six and Seven of the complaint are Willier and Manuel. Plaintiff sought no relief against these defendants within any other Count or claim. Count Six alleges a Conspiracy to Commit Unfair Trade Practices. Count Seven alleges an Unlawful Interference With Contractual Rights. After a December 1980 evidentiary hearing on defendants' motion for summary judgment as to all claims, the trial judge entered an order dated 1 January 1981, filed 12 January 1981, dismissing Counts Five, Six and Seven in their entirety. To the entry of summary judgment plaintiff excepted in open court but did not appeal.

On 21 January 1982, plaintiff took a voluntary dismissal without prejudice of his claims against the defendant Carnation Company. No mention is made of the defendants Willier and Manuel. Following entry of the voluntary dismissal, plaintiff gave notice of appeal in open court. A full year passed between the granting of the motion for summary judgment and the giving of notice of appeal. There are no appeal entries in the record.

Immediately before the taking of the voluntary dismissal, the case was alive as to the four remaining counts against defendant Carnation Company. By brief and oral arguments the parties tell us that a jury trial of several days' duration was in progress in January 1982 as to Carnation Company, and that plaintiff's dismissal came before plaintiff rested his case. In open court after

the voluntary dismissal of Carnation, plaintiff gave his only notice of appeal.

Is the plaintiff "in court" as to the defendants Willier and Manuel? We answer yes and will examine the merits of the granting of summary judgment.

The losing party has no absolute right to appeal immediately from an interlocutory order. As to defendant Carnation Company, the summary judgment against it on Count Five was interlocutory in that the ruling disposed of fewer than all claims, and in that there was no certification by the judge as to substantial need for immediate review on appeal without delay. As to defendants Willier and Manuel, since plaintiff sought no relief against them except as pleaded in Counts Six and Seven, when these two counts were dismissed by summary judgment, the result was that all claims against Willier and Manuel were dismissed.

Plaintiff could have immediately appealed from this interlocutory order, considering that the ruling on summary judgment disposed of all parties and all claims, by virtue of the ruling being final as to all claims of the plaintiff as to each of these two defendants. Plaintiff could have had these two claims certified for appeal by the trial court under Rule 54(b) of the Rules of Civil Procedure. The exception to the court's ruling of 1 January 1981 kept alive the issue of the correctness of the trial judge's decision on summary judgment while the plaintiff proceeded with the case against Carnation Company. When during the trial and before resting its case plaintiff took a voluntary dismissal without prejudice as to Carnation Company, and thus terminated the case in the trial division (unless refiled within one year), and when plaintiff gave notice of appeal on 21 January 1982, this provided the plaintiff the first opportunity to appeal without the trial judge's certification under Rule 54(b). On 21 January 1982 the plaintiff gave notice of appeal within 10 days (*i.e.*, the same day) of a final judgment. Prior to 21 January 1982 there was no procedural occasion which made it mandatory for the plaintiff to exercise his otherwise interlocutory right of appeal.

By not exercising his procedural right to immediately appeal on 1 January 1981, plaintiff had to go on to trial as to one defendant only. He ran the risk, if successful on this appeal to have sum-

mary judgment reversed, of having to go to trial twice on similar subject matter claims. Plaintiff lost his right to have all three party-defendants tied together in one lawsuit.

If the voluntary dismissal of 21 January 1982 had included these two defendants, then we would have held against plaintiff on procedural grounds as in Part I of this opinion. Because these two defendants are not included in the voluntary dismissal, and because the plaintiff has minimally preserved for appeal the issue of summary judgment as to Willier and Manuel, we now turn to the merits of plaintiff's appeal.

A motion for summary judgment will be granted if the movant can show "by the use of pleadings, depositions, answers to interrogatories, admissions on file and affidavits that (1) there is no genuine issue as to any material fact, and (2) that [he] is entitled to judgment as a matter of law." *Bell v. Martin*, 299 N.C. 715, 718, 264 S.E. 2d 101, 103, *rehearing denied*, 300 N.C. 380 (1980); G.S. 1A-1, Rule 56(c). The burden is on the moving party to establish, positively and clearly, the absence of a triable issue of fact. *See Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E. 2d 375, 379 (1976). The movant can successfully carry this burden when he demonstrates the nonexistence of an essential element of the opponent's claim, or when he proves the nonexistence of evidence, through discovery, to supply an essential element of the stated claim. *Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 4, 249 S.E. 2d 727, 729 (1978), *affirmed*, 297 N.C. 696, 256 S.E. 2d 688 (1979). *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795, 76 A.L.R. 3d 1004 (1974).

The defendants were the moving parties for summary judgment. The plaintiff's one assignment of error is "that there are factual issues sufficient in said counts [*i.e.*, Six and Seven] to be decided by a jury."

[3] Count Six of the complaint alleges a conspiracy between Willier and Manuel with Carnation to commit unfair trade practices and force plaintiff out of the marketing territories of Virginia, North Carolina, and South Carolina in the purchase and sale of bull semen from Carnation by plaintiff. The unfair acts or practices were alleged to be as defined in G.S. 75-1.1(a), and the entire claim purports to be based on North Carolina law. However, the forecast of all the evidence and discovery

establishes that if the defendants did the acts and practices, the acts were done entirely within the State of Virginia.

The evidence shows that plaintiff has continued to sell bull semen in the States of North Carolina, South Carolina and also a small territory in Virginia. Plaintiff did not stop his general selling activities in Virginia until he had confirmed that the defendant Manuel was selling in Virginia. The last wrongful act upon which plaintiff relies for this claim took place in Virginia: the selling by Carnation of semen to Manuel in Virginia only. It is not disputed that all of plaintiff's meetings with Manuel took place in Virginia. All discussions between Manuel and Willier and plaintiff took place in Virginia. Of the three marketing states, Virginia is undisputedly the State covered by plaintiff's alleged contract with Carnation and in which Carnation allegedly has sold semen to a would-be competitor of plaintiff.

Under the principles of conflict of laws, the North Carolina trial and appellate courts must apply the substantive law of Virginia to Count Six. *See Shaw v. Lee*, 258 N.C. 609, 129 S.E. 2d 288 (1963); *Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126 (1943); and *Chewning v. Chewning*, 20 N.C. App. 283, 201 S.E. 2d 353 (1973). It appears to us that Virginia had not adopted an unfair or deceptive trade practices act comparable to our G.S. 75-1, *et seq.*, *cf.* 4 Virginia Code § 18.2-499 and 18.2-500 (1982). Because Virginia has not adopted a similar statute, the plaintiff's allegations of wrongful acts and injuries committed in the State of Virginia which allegedly are based on the North Carolina statutes are of no avail. The North Carolina statute cannot be constitutionally applied in Virginia. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 74 L.Ed. 926, 50 S.Ct. 338, 74 A.L.R. 701 (1930).

We hold that the trial court was correct in dismissing Count Six and in granting summary judgment on this count for defendants Willier and Manuel.

[4] As to Count Seven, plaintiff alleges that defendants Willier and Manuel unlawfully interfered with plaintiff's contract rights with defendant Carnation Company and induced Carnation to remove plaintiff from his marketing territory. For the same reasons as discussed in our consideration of Count Six, we hold that the law of the State of Virginia applies to Count Seven. We are unaware of any statute or case law of Virginia which

recognizes this purported cause of action. Thus, summary judgment on Count Seven was properly granted by the trial judge.

Even if it were argued that North Carolina law should be applied, our law does not rescue the plaintiff. Upon a further review of the facts, all of the evidence shows that it was Carnation who first contacted Manuel. Manuel in turn unsuccessfully negotiated with plaintiff and went his own way in Virginia until once again Carnation contacted him. Manuel pursued his own personal business interest with the plaintiff in a contact he did not originate. The forecast of the evidence does not establish any inducement by Manuel of Carnation to do anything against the plaintiff.

The complaint alleges that Willier and Manuel had once been employees of American Breeders Service and that Willier and Manuel were close personal friends. Willier introduced Manuel to plaintiff. According to the complaint, in 1977 it was "stated by Willier in the presence of the Plaintiff and Manuel that any new marketing arrangements for the State of Virginia would have to be done under the authority and with the consent of the Plaintiff." The defendant Carnation Company on 19 January 1978 terminated "all distribution arrangements with [plaintiff] because of 'unsatisfactory sales.' "

The undisputed facts show that any oral or written agreements which plaintiff had with Carnation were terminated in writing by Carnation on 19 January 1978. The forecast of the evidence shows that this decision originated with Carnation and not with the defendants Willier or Manuel. In addition, Carnation continued to sell to plaintiff in spite of the termination of all contracts. Willier, at most, was attempting to be helpful to both Manuel and plaintiff, to help each of them in their own prospective business adventures, which never worked out and which died aborning.

Regardless of whether it is the law of Virginia or North Carolina that should be applied, plaintiff loses on yet another defect. Count Seven of the complaint is fatally defective for failure to allege that plaintiff's contract with Carnation would have been continued *but for* the acts and practices of Manuel and Willier; and plaintiff failed to allege any facts to support his conclusion that Manuel and Willier acted maliciously. Even assuming

these two allegations were in the complaint, there is in the record no forecast of evidence to support an inference that Carnation would have renewed the contract with plaintiff after his record of poor sales or any evidence that any defendant acted maliciously.

We hold that the trial judge correctly allowed summary judgment on Count Seven.

We hold that the entry of summary judgment in favor of defendants Willier and Manuel was proper; and that the voluntary dismissal without prejudice as to defendant Carnation Company precludes us from any consideration of plaintiff's subsequent appeal of the prior granting of summary judgment in favor of Carnation Company.

Assuming arguendo that the plaintiff has preserved his right to appeal after the taking of the voluntary dismissal as to Carnation Company, and assuming it is proper to reach the merits as to Count Five of the complaint, then we would hold that summary judgment was properly granted to Carnation Company.

Affirmed.

Judge HEDRICK concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

I fully concur in this Court's resolution of plaintiff's claims against defendants Willier and Manuel. I do not believe, however, that plaintiff "destroyed his right to appeal" the trial court's summary judgment order dismissing plaintiff's fraud claim against Carnation. I, nevertheless, concur in the result reached by this Court since, in my view, the trial court properly granted summary judgment for defendant Carnation.

I

Considering the record before us, plaintiff could not have immediately appealed from the 12 January 1981 order granting Carnation's motion for summary judgment on the fraud count. That order adjudicated fewer than all of the claims and did not terminate the action. It was interlocutory and not immediately appealable. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1969). When plaintiff went to trial approximately one year later on the remaining four

counts, his attorney apparently decided, either because things were not going well on those counts or for other tactical reasons, to take a voluntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (1969) as to those four counts in an effort to make count five, dismissed a year earlier, immediately appealable since it contained the only remaining claim. The practical effect of plaintiff's voluntary dismissal was to render the 1981 partial summary judgment a full summary judgment, leaving nothing else to be determined in the case. The 1981 order granting summary judgment on the fraud count is therefore appealable under N.C. Gen. Stat. § 7A-27(b) (1981).

I am aware that the record shows that plaintiff gave notice of voluntary dismissal pursuant to Rule 41 of the North Carolina Rules of Civil Procedure "without prejudice of his claims against Carnation Company." Considering the facts that the Rule 41 voluntary dismissal was taken during the course of the 1982 trial on the four remaining counts, and considering further the following entry on page 1 of the Record, which was certified by the Clerk of Superior Court, plaintiff was clearly not taking a voluntary dismissal on the fraud count, which the court had already dismissed by way of summary judgment in 1981:

> Order entered January 1, 1981, dismissing counts five, six, and seven of the Complaint from which plaintiff excepted in open court. Upon voluntary dismissal of the remaining counts of the Complaint, plaintiff gave Notice of Appeal in open Court to the North Carolina Court of Appeals.

Pipeliner Local Union No. 798 v. Ellerd, 503 F. 2d 1193 (10th Cir. 1974) is therefore inapposite.[1]

If plaintiff had not taken a voluntary dismissal in 1982, he could have, within ten days following a judgment on the remain-

1. In *Pipeliner*, the plaintiff's Complaint was dismissed for failure to state a claim. At a subsequent trial on one of the defendant's counterclaim, plaintiff "did, in open court, explicitly and unqualifiedly stipulate that *all actions* 'as to all parties with the exception of the parties to the counterclaim' were dismissed *with prejudice*, each party to pay his own costs." (Emphasis added.) Plaintiff later tried to appeal the earlier order of dismissal for failure to state a claim, and the *Pipeliners* Court said, "Appellants cannot now be heard on their contention that the Trial Court erred in entering its order . . . dismissing Union's Complaint on the ground that it 'does not state a claim . . . upon which relief can be granted' in light of their subsequent voluntary dismissal of their respective complaints and causes of action."

ing four counts, appealed the 1981 summary judgment order dismissing count five of his Complaint. Plaintiff's action disposing of the remaining four counts by a Rule 41 voluntary dismissal is not qualitatively different from the trial court's disposition of those four counts as it affects the appealability of count five. To hold otherwise would give plaintiff an inchoate right of appeal only—a right without a remedy on the facts of this case. Procedurally, then, I agree with plaintiff. Plaintiff did not, by taking a Rule 41 voluntary dismissal, destroy his right to appeal.

II

With regard to the substance of his claim, plaintiff contends that Carnation, in 1968 through 1970, misrepresented its intent not to establish any other semen distributors in Virginia. The trial court correctly concluded, however, that the essential elements of fraud did not exist.

> The essential elements of actionable fraud are as follows: (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that there resulted in [sic] damage to the injured party. [Citations omitted.]

Rosenthal v. Perkins, 42 N.C. App. 449, 451-52, 257 S.E. 2d 63, 65 (1979). Further, "[a]s a general rule, a mere promissory representation will not be sufficient to support an action for fraud. [Citations omitted.] A promissory misrepresentation may constitute actionable fraud when it is made with intent to deceive the promisee, and the promisor, at the time of making it, has no intent to comply." [Citations omitted.] *Johnson v. Insurance Co.*, 300 N.C. 247, 255, 266 S.E. 2d 610, 616 (1980).

Even assuming that Carnation told plaintiff that plaintiff would be granted an exclusive distributorship in Virginia, the representation regarding future conditions and facts cannot form the basis for an action in fraud. In order for a misrepresentation to constitute the basis for fraud, it must be shown that the representation was untrue at the time it was made or at the time

it was acted upon. *Childress v. Nordman*, 238 N.C. 708, 78 S.E. 2d 757 (1953).

Simply put, I find no genuine issue as to any material fact with regard to plaintiff's contentions under count five. The trial court therefore properly granted summary judgment to defendant Carnation, and I vote to affirm on this basis.

JOHN T. McKENZIE, JR., WILLIAM B. BLOMER, ALTON D. SEAMAN, PEARL SEAMAN, MARY W. BLOMER, JERRY R. NEWTON, ROBIN W. NEWTON, JEWEL J. SIKES, PHILLIP D. SHACKELFORD, VICKIE B. SHACKELFORD, CHARLES O. TUCKER, NANCY P. TUCKER, CLARL M. PIERCE, CAROL L. PIERCE, PHILIP H. PRICE, LINDA S. PRICE, ANTHONY D. SMITH, DIANE D. SMITH, CARL W. SKINNER, DOROTHY T. SKINNER, ROBERT L. TEAGUE, BARBARA J. TEAGUE, BENJAMIN E. KESLER, HAZEL M. KESLER, DAVID L. FRANK, CANDICE H. FRANK, DONALD G. WHITAKER, SHEILA L. WHITAKER, GUARAD CRAWFORD, HENRY BRUCE JACKSON, RICHARD CRAIG, LINDA T. BARE, ROBERT RUSCOE, IV, SUSAN LEIGH RUSCOE, ALAN DEAN AND MARY C. KEMP, LAURIANO F. GONZALEZ, JEAN GONZALEZ, DAVID A. MORTON, JR., HAZEL E. MORTON, LONNIE D. JONES, DAPHNE J. JONES, DONALD PARKER AND LINDA W. EVERHART, HARVEY M. WILLIAMSON, BRENDA C. WILLIAMSON, JAMES ROBERT COFFEY, ALICE ROBBINS COFFEY, BENNIE A. ROOK, JR., VIVIAN B. ROOK, RICHARD C. NEIHAUS, MARGUERITA D. NIEHAUS, L. EUGENE COOK, MINERVA O. COOK, PAUL SHINN, WALTER R. GREEN, JR., LYNDA H. GREEN, WALSA E. CORNELISON, FRANCES CORNELISON, JOHN G. COONEY, CAROLINE B. COONEY, GLADYS E. BLAIR, W. G. ALLRED, OLLIE MAY ALLRED, HAROLD G. MORRIS, BETTIE JARVIS MORRIS, JAMES A. HOUGHTALING, VERENA H. HOUGHTALING, NANCY W. LINER, FRANK LINER, MARGARET ROSE, ROBERT V. ROSE, LOUISE C. TUTTLE, CHARLES T. TUTTLE, PAUL D. MONROE, GEORGE B. HUGHEY, JUANITA S. HUGHEY, KATHLENE F. BROOKS, STEPHEN B. BROOKS, RAY J. WHITTINGTON, DOROTHY S. WHITTINGTON, BARBARA K. HUGHES, FRED C. HUGHES, GRENDA S. JOYCE, LOIS R. WALLACE, JAMES A. WALLACE, PATSY K. KIMSEY, ARNOLD E. KIMSEY, ROSALIE F. ARNOLD, GORDON B. ARNOLD, HAROLD T. MURRAY, MARCIA M. MURRAY, JR., MELVIN E. WHITLEY, SHIRLEY S. WHITLEY, PAUL M. MORGAN, LINDA S. MORGAN, BOBBY P. PORTER, SYLVIA L. PORTER, SAMUEL T. MILLER, CAROLYN S. MILLER, DARRELL L. WARREN, SUDIE M. WARREN, S. R. WALTON, E. BRANSON, BONNIE GREY BLAIR, GARLAND A. BLAIR, JR., JOHN C. BLAIR, E. BRANSON BLAIR, RONALD BLAIR, PANSY M. BLAIR, SANDY T. FORD, MARIE SMITH FORD, BRINK J. SIRMONS, PENNY N. SIRMONS, RICHARD E. RUNION, PATRICIA C. RUNION, MEARL J. COLLINS, MARTHA F. COLLINS, W. C. MYERS, WANDA B. MYERS, ROBERT

R. BRENDLE, ANN H. BRENDLE, KENNETH W. DODSON, CYNTHIA W. DODSON, JOE S. SECHREST, CATHY D. SECHREST, J. M. MORGAN, KENNETH D. GARNER, LORRINE O. EURE, WAYNE T. BRAY, PERCY G. CREECH, MURIEL S. CREECH, CLAUDE A. BOWERS, ALICE T. BOWERS, JACK LEON DAVIS, BETTY S. DAVIS, LARRY T. ROWE, MARY A. ROWE, GRADY W. LEONARD, LOUISE LEONARD, VERNA S. PEACE, MINNIE G. PEACE, JOHN W. SWAIM, RICHARD G. WELKER, LORETTA WELKER, CHRIS P. ANDREWS, NORMA T. ANDREWS, ERWIN R. DAVIS, SHIRLEY L. DAVIS, JOHN W. HARRINGTON, RACHAEL B. HARRINGTON, ARLINE D. HICKS, WINIFRED C. DAVIS, HOMER V. HEDGECOCK, JR., JOYCE A. HEDGECOCK, GEORGE EDWARD FREEMAN, MARY PETH FREEMAN, BLANCHE H. OWEN, ROBERT C. METTERS, SHIRLEY L. METTERS, JUNE A. OSTRANDER, DONALD H. HORNE, MARY LOU S. HORNE, JAMES E. KEARNS, DESMA L. KEARNS, JAMES RYAN ALLISON, SHIRLEY L. ALLISON, JAMES EDWARD JARRETT, PEGGY H. JARRETT, TRAVIS H. BLAKLEY, MINNIE BROWN BLAKLEY, JOSEPH LEE KAYKENDALL, GEORGIE BELL KAYKENDALL, WILLIAM B. REID, OPAL L. REID, RICHARD LEE COOK, SANDRA COOK, D. WAYNE SMITH, MRS. D. WAYNE SMITH, J. L. McRAE, STEPHEN W. BLIZZARD, HELLEN GAYE BLIZZARD, GEORGE W. GOLD, ETHEL G. GOLD, HOWARD D. CORN, SHIRLEY F. CORN, AGNES GREER JONES, JAMES BELVIN DAVIS, WILMA JEAN DAVIS, WALTER LEWIS FREEMAN, CATHERINE F. FREEMAN, DARLENE MARTIN SNOW, NINA BRIGGS MARTIN, JAMES H. BARNES, MADELINE T. BARNES, T. JACK EMBLER, BETTY EMBLER, BOYCE H. BODENHEIMER, SYLVIA P. BODENHEIMER, ROBERT WILEY STOCKTON, MARTHA HONEYCUTT STOCKTON, JAMES B. ALLRED, HELEN B. ALLRED, GRADY ALLRED, LARRY C. BULLIN, BARBARA B. BULLIN, BRADY W. FELTS, KATHLEEN R. FELTS, ELTON D. MILLER, KATHY W. MILLER, EDWARD J. PIACENTINO, BONNIE R. PIANCENTINO, ROBERT LEE SKIDMORE, R. L. THOMAS, HAZEL R. THOMAS, DONALD H. HEDGECOCK, CATHY JEAN D. HEDGECOCK, CHARLES PERCY HEDGECOCK, RUBY JOYCE HEDGECOCK, J. E. YOUNG, W. E. YOUNG, JAY ELLIS YOUNG, HENRIETTA JOYCE YOUNG, JAMES H. BARNES, MADELINE T. BARNES, SYLVIA S. RIDGE, PRESTON L. RIDGE, JAMES FREDRICK KURST, DONNA PRINCE KURST, KEITH BENTON FIELD, LUCILLE BARBARA FIELD, MRS. E. JUDSON RUTH, MICHAEL LEE BEAVERS, WANDA MANN BEAVERS, ROMULUS PINKNEY TAYLOR, GARY L. FOLSON, LINDA A. FOLSON, CHARLES J. MANN, WILMA MESSICK MANN, ODIS F. STAMEY, LETA S. STAMEY, RUFUS ALEXANDER, JOSEPHINE ALEXANDER, BOBBY D. CURTIS, BETTY CURTIS, GEORGE R. FRAZIER, T. PAUL JONES, GENEVA JONES, GROVER N. FOLSOM, GENEVIEVE FOLSOM, MACK O. MILES, OLLIE WILLIAMS CHIPMAN, ROBERT W. GLIDEWELL, ROSE A. GLIDEWELL, HENRY BRITT JOHNSON, JANIE WRIGHT JOHNSON, W. KEITH ARMSTRONG, DIANNE C. ARMSTRONG, THOMAS M. WARTH, ELLEN M. WARTH, LEO CORPORATION, JOSEPH E. HUTTON, DAVID STANTON HORNE, JOHN W. CARROLL, JANIE T. CARROLL, GLENN A. SEWARD, FERNAND SCHLAEPPI, JOAN A. SCHLAEPPI, TOMMIE LEE

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WELBORNE, WADE H. PRUITT, VICKI C. PRUITT, BORDEN W. DAUGHTRIDGE, PATRICIA C. DAUGHTRIDGE, JESSE L. MOSER, FAITH P. MOSER, ANNE H. STILLWELL, JOHN J. STILLWELL, III, JOAN R. HAGGAI, JEROME C. THOMPSON, KATHLEEN B. THOMPSON, JAMES A. DAVIS, CANDANCE A. DAVIS, GAY M. STEVENS, DOMENICK PENNISI, MARIA PENNISI, JAMES M. BAILEY, NELLE L. BAILEY, SHERRY T. REID, C. DENZEL RUSSELL, BRENDA B. RUSSELL, BOBBY L. BUTLER, GLENDA G. BUTLER, RONNIE G. ASHBY, HILGA W. ASHBY, DANIEL W. MELLINGER, DEBORAH P. MELLINGER, JERRY R. GROCE, SANDRA K. GROCE, CALVIN E. LOFLIN, RUBY I. LOFLIN, HAROLD R. RIDGE, MARY K. RIDGE, THOMAS ARTHUR ALLRED, GLENN P. McVICKER, MARCIA H. McVICKER, GOLDIE MARTIN MATNEY, GREGORY D. CURLEE, JANET H. CURLEE, JESSE D. KENNEDY, BILLIE M. KENNEDY, TONY DRAPER, EDWARD V. SAUDE, VIVIAN R. SAUDE, T. E. SHOEMAKE, ESTHER SHOEMAKE, LENA M. SECHREST, CALHOUN H. CAMPBELL, CHRISTINE CAMPBELL, RACHEL S. ZIMMERMAN, MAX SURRATT, MILDRED SURRATT, WINFRED D. YOKLEY, VIRGINIA N. YOKLEY, CATHERINE L. PERRYMAN, ARTHUR J. MATTHEWS, J. D. HOLLAND, ESTHER M. HOLLAND, EDWIN S. BROWN, RICHARD A. PARKER, MARIE W. PARKER, JIMMY D. ALLRED, REBECCA T. ALLRED, WILLIAM B. ELDRETH, BETTY W. ELDRETH, HAYNE L. KOON, MARY F. G. KOON, DANNY W. WHITE, SHELBY S. WHITE, CARL COOK, JR., MADGE G. COOK, LANA GAIL HARRIS, MILDRED T. HUTCHENS, BELVIN R. DAVIS, EULA A. DAVIS, HARLIE C. RIPPEY, JOSIE WARD RIPPEY, ROGER LEE DAVIS, CYNTHIA DIANE TURNER, ALFRED J. POOLE, MAE C. POOLE, GLEN M. WELBORN, SARAH G. PHIPPS, C. W. ARRINGTON, ESTELLE J. ARRINGTON, BENVENIDO RODRIQUES, LOUISE MARIE RODRIQUES, JAMES LEE LAX, BARBARA N. LAX, JAMES ELTON LAX, MRS. GRACE LAX, JAMES D. CAMPBELL, JESSIE M. CAMPBELL, CLYDE W. PRIDDY, MARY E. PRIDDY, VIRGIE L. AUSTIN, DANIEL A. TALLEY, PATSY WELCH TALLEY, RUFUS R. STRICKLAND, PATRICIA CLARK STRICKLAND, WARD S. OSTRANDER, DELPHENE T. SURRATT, ARTHUR SNEED, BEULAH SNEED, ARTHUR DANIEL SNEED, RENNIE J. TERRY, MARYLENE A. ROUNTREE v. CITY OF HIGH POINT

No. 8218SC407

(Filed 5 April 1983)

1. Municipal Corporations § 2.3— annexation—"adjacent or contiguous" requirement—attack on earlier annexation

There was no merit to petitioners' contention that an annexation ordinance was invalid on the ground that the areas annexed failed to meet the "adjacent or contiguous" requirement of G.S. 160A-48(b) because the area of the city adjacent and contiguous to the areas annexed by the ordinance were unlawfully annexed where (1) the earlier annexation ordinance was never mentioned in the petition for review of the present ordinance; (2) petitioners failed

to show that they were residents of the area earlier annexed and thus had standing to attack such annexation; (3) there was no appeal from the enactment of the earlier ordinance and petitioner's attempted attack on that ordinance is collateral in nature; and (4) the evidence before the trial court clearly established that the areas annexed by the ordinance in question were adjacent and contiguous to the city's existing municipal boundaries.

2. Municipal Corporations § 2— annexation of more than one area by same ordinance

Under G.S. 160A-49(g), any number of separate qualifying areas may be annexed in a single ordinance.

APPEAL by petitioners from *Wood, Judge.* Judgment entered 11 December 1981 in GUILFORD County Superior Court. Heard in the Court of Appeals 18 February 1983.

On 2 April 1981, the City of High Point enacted an ordinance annexing the lands of petitioners, to be effective 31 March 1982. Pursuant to the provisions of G.S. 160A-50, petitioners filed their petition for review, in which they prayed that the annexing ordinance be declared null and void, or, in the alternative, that the court declare the area annexed not eligible for annexation. High Point filed a response to the petition in which it denied petitioners' essential allegations, and prayed that the petition be dismissed.

The matter was heard before Judge Wood, without a jury. Following a trial on the merits, Judge Wood entered his judgment in which he made extensive findings of fact. Upon his findings, Judge Wood entered conclusions of law adverse to petitioners, and decreed that the annexation ordinance was valid. From that judgment, petitioners have appealed.

Herbert L. Hyde for petitioner-appellants.

Knox Walker for respondent-appellee.

WELLS, Judge.

Part Three of chapter 160A of the General Statutes deals with annexation by cities of 5,000 or more people of areas adjacent or contiguous to existing municipal boundaries. *See* G.S. 160A-45 through 56. Section 46 provides the authority to annex; section 47 sets forth the prerequisites to annexation; section 48 establishes the character of areas which may be annexed; section 49 establishes the procedure for annexation; and section 50 provides the basis upon which property owners in an annexed area

may seek judicial review of an annexation ordinance. Thus, the General Assembly has established detailed criteria and guidelines for annexation under Part Three. The General Assembly has also provided for limited judicial review of annexation ordinances. Section 50 provides that a property owner in the annexed area "who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the [statutory] procedure . . . or to meet the [statutory] requirements . . . as they apply to his property" may seek judicial review of the ordinance. Upon such review, the Superior Court may consider only whether (1) the statutory procedure was not followed, or (2) the provisions of G.S. 160A-47 were not met, or (3) the provisions of 160A-48 have not been met. *See In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224 (1981); *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980); *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971). Upon such review, petitioner must carry the burden of showing both non-compliance with statutory requirements and procedure and material injury flowing from such non-compliance. 303 N.C. 220, *supra*, and 278 N.C. 641, *supra*.

[1] The only substantial question presented in this appeal is whether the areas annexed in the contested ordinance meet the "adjacent or contiguous" requirement of the statute. G.S. 160A-48(b) provides:

> (b) The total area to be annexed must meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> . . .

Petitioners' attack on contiguity is primarily based upon their assertion that the area of High Point adjacent and contiguous to the areas annexed in the ordinance under attack here was unlawfully annexed, that the prior annexation was void, and that therefore this annexation fails to meet the contiguity test.

Petitioners' argument cannot prevail. First, G.S. 160A-50 requires that on appeal to the Superior Court,

> (b) [The] petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks . . .

In the petition under consideration here, the earlier annexation was never mentioned. Second, in their evidence, petitioners failed to show that they had standing (residency in the area) to attack the earlier annexation. Third, as the record clearly shows, there was no appeal from the enactment of the earlier ordinance and petitioners' attempted attack in this appeal is collateral in nature.[1] The evidence before Judge Wood clearly established that the areas annexed under the 2 April 1981 ordinance were adjacent and contiguous to High Point's existing municipal boundaries and that more than one eighth of the external boundary of the areas annexed coincided with High Point's existing boundary.

[2] Petitioners also contend that no more than one area may be annexed in an ordinance and that since two areas were annexed in the contested ordinance, it must fall. We disagree. G.S. 160A-49(g) provides:

> (g) *Simultaneous Annexation Proceedings.*—
>
> If a municipality is considering the annexation of two or more areas which are all adjacent to the municipal boundary but are not adjacent to one another, it may undertake simultaneous proceedings under authority of this Part for the annexation of such areas.

We hold that under the foregoing statute, any number of separate qualifying areas may be annexed in a single ordinance.

Petitioners also contend that the ordinance failed to comply with the requirement set out in G.S. 160A-49(e)(1) that the external boundaries of the area to be annexed be described by metes and bounds. We have examined the descriptions used in the or-

1. We note that the judgment entered by Judge Wood contains a finding of fact with respect to the prior annexation ordinance of 29 December 1980. As that matter was not properly before him, that portion of his order is surplusage and without legal consequence, except to the extent that Judge Wood "found" that these petitioners could not contest that ordinance.

dinance and hold that they are in substantial compliance with the statutory requirement. Absolute and literal compliance with the statute is unnecessary; only substantial compliance is required. *In re Annexation Ordinance*, 278 N.C. 641, *supra*.

We have carefully examined the record of evidence in this case, the trial court's judgment, and petitioners' contentions, and conclude that the judgment below must be

Affirmed.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. THOMAS EARL CARR

No. 825SC564

(Filed 5 April 1983)

1. Searches and Seizures § 11— probable cause for seizure of vehicle—removal to another county

An officer of Pender County had probable cause to believe that defendant's automobile contained firearms taken in a breaking and entering in such county at the time he observed it in New Hanover County, and his seizure and removal of the automobile to the Pender County Sheriff's Department were reasonable and authorized under the Fourth Amendment, where the officer had been advised that a home had been broken into two days earlier, that 21 firearms were stolen therefrom, and that when the owner arrived home and confronted defendant, defendant hurriedly drove away; the officer was given a description of the defendant and the automobile he was driving; and the automobile defendant was operating in New Hanover County fit the description.

2. Searches and Seizures § 40— search pursuant to a warrant—discovery of items not listed in warrant

An officer's testimony concerning his observation of a wallet and a mustard jar containing coins and a church envelope during his search of defendant's automobile pursuant to a warrant which listed 21 firearms, including a small handgun, as the items to be seized was admissible under the "plain view" doctrine where the officer observed the wallet and mustard jar while searching boxes in the trunk of the automobile; the officer testified that a small handgun could be concealed in the boxes; and the officer inadvertently discovered the wallet and mustard jar while searching in an area he was clearly authorized to search.

3. Criminal Law § 173— invited error

Where defense counsel agreed during his cross-examination of an officer to have the officer read a search warrant and accompanying affidavit in their entirety, defense counsel invited any error in the officer's reading of a portion of the affidavit which recited that defendant had previously been convicted of breaking or entering and larceny, and defendant cannot complain thereof on appeal.

4. Criminal Law § 128.2— absence of alibi witness—denial of mistrial

In a prosecution for felonious breaking or entering and larceny, the trial court did not abuse its discretion in the denial of defendant's motion for mistrial because of the absence from the trial of a subpoenaed alibi witness where the witness's testimony could not reasonably have affected the outcome of the trial in light of the substantial evidence presented by the State placing defendant at the scene of the crimes.

5. Burglary and Unlawful Breakings § 5.8— breaking or entering and larceny at residential premises—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for breaking or entering of a home and larceny of firearms therefrom.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 14 January 1982 in Superior Court, PENDER County. Heard in the Court of Appeals 6 December 1982.

Defendant was indicted for felony breaking and entering and felony larceny. A jury returned a guilty verdict on each count. From judgment imposing an active sentence of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.

Ernest B. Fullwood, for defendant appellant.

JOHNSON, Judge.

Evidence for the State tended to show the following: Around 5:25 p.m., 3 August 1981, Elmon Hollis was returning to his home in Pender County when he observed defendant pulling away from the Hollis' carport in a 1970 blue Dodge, license number WLC580. At that time, Elmon Hollis' car blocked defendant's departure. Defendant stuck his head out of his car window and asked Elmon Hollis if he knew of any Hollises in the area. When Elmon Hollis said he did because he was a Hollis, defendant replied, "Yes. I know you are one, but I'm looking for another one." Defendant

then stated that the Hollis he was looking for lived further south. Because of the way defendant was acting, Hollis pulled his car forward in order to talk further with defendant. As he pulled forward, defendant drove away in a hurry. Hollis observed that defendant's car was sitting low in the rear. Hollis entered his house, discovered that the inside carport door was open and the lock broken off. A total of twenty-one guns consisting of rifles, shotguns, and one pistol were missing. In addition, three jars of silver coins, an old wallet, and some other items were missing. One of the jars was a mustard jar containing coins and a white envelope with the inscription, Ogden Baptist Church. The missing items were valued at approximately $6,000. Mr. Hollis had not given permission to anyone to enter the premises or to take the property. Hollis reported the incident to the Pender County Sheriff's Department and gave a description of the defendant and the automobile he was operating.

On 5 August 1981 defendant, while operating the automobile described by Hollis, was stopped in New Hanover County by Officer W. H. Chipps of the Pender County Sheriff's Department. Officer Chipps seized the vehicle, drove it from New Hanover County to the Pender County Sheriff's Department, and after obtaining a search warrant to search for the twenty-one firearms searched the entire automobile. In the trunk of the automobile Officer Chipps found an old brown wallet and what he described as a French's mustard jar containing coins and a white envelope with the inscription Ogden Baptist Church. At the time of the search Officer Chipps was not aware that a wallet and jar containing coins were also taken from the Hollis residence. Officer Chipps released the vehicle and its contents to defendant after failing to discover any weapons during the search. Through cross-examination of defendant's witness, Linda Lamb, it was established that defendant did not attend Ogden Baptist Church.

Defendant did not testify, but through Linda Lamb presented evidence which tended to show that he was at her house in New Hanover County, Wilmington, N.C., on 3 August 1981 until 4:30 p.m.

Defendant contends the trial court erred (1) in its denial of defendant's motion to suppress Officer Chipps' testimony regarding his discovery of the wallet and mustard jar; (2) in admitting

evidence of defendant's prior record; (3) in its denial of defendant's motion for a mistrial and; (4) in its denial of defendant's motion to dismiss at the close of all the evidence.

By his first assignment of error defendant contends that the seizure of his automobile was (a) unconstitutional because of the lack of probable cause and was illegal because the officer seizing it was beyond his territorial jurisdiction and; (b) that the search conducted exceeded the scope of the search warrant. Based upon these contentions, defendant argues that trial court erred in admitting into evidence, over defendant's objection and motion to suppress, Officer Chipps' testimony concerning the wallet, the mustard jar and its contents.

Where there is probable cause to search an automobile, the officer may (1) seize and hold the automobile before presenting the probable cause issue to a magistrate or (2) the officer may seize the automobile and conduct an immediate search without a warrant where exigent circumstances make it impracticable to obtain a search warrant.[1] *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Johnson*, 29 N.C. App. 534, 225 S.E. 2d 113 (1976). For constitutional purposes there is no difference between seizing and holding the vehicle before presenting the probable cause issue to a magistrate on the one hand and on the other, carrying out an immediate search without a warrant; given probable cause to search, either course is reasonable under the Fourth Amendment. *State v. Ratliff, supra; State v. Johnson, supra.*

In *State v. Johnson* the State's evidence showed that two men entered a store and robbed the proprietor. After the men left the store, the proprietor went to the door in order to obtain aid and saw four males leaving in a white Ford. Thereafter, an officer observed four men in a 1965 white Ford. The automobile was stopped and seized and the four occupants arrested. The automobile was taken to the Sheriff's Department and searched without a warrant. Defendants' motions to suppress evidence obtained from the search were denied. In holding that probable cause existed for the search, this Court stated:

1. A warrantless seizure and search for an automobile may also be made when it is incident to a valid arrest. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969); *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970).

"[T]he totality of the circumstances gave the officer reasonable grounds to believe that defendants had committed a crime and that the automobile in which they were riding contained evidence pertaining to the crime. Probable cause to search existed at the time of the arrest and continued to exist when the automobile was searched at the Sheriff's office."

29 N.C. App. at 539, 225 S.E. 2d at 116.

[1] The facts establishing probable cause for the search of the defendant's vehicle in the present case at the time it was observed by Officer Chipps on 5 August 1981 are as follows: Officer Chipps had been advised that on 3 August 1981 the home of Elmon Hollis had been burglarized and that twenty-one firearms were stolen therefrom; that after Hollis arrived home and confronted defendant, defendant hurriedly drove away from the Hollis residence. Officer Chipps was also given a description of the defendant and the automobile he was driving. Two days after the break-in, Officer Chipps observed defendant operating an automobile in New Hanover County that fit the description.

As in *State v. Johnson, supra*, the totality of the circumstances gave Officer Chipps reasonable grounds to believe that the defendant committed the crimes and that the automobile defendant was operating contained firearms taken from the Hollis residence on 3 August 1981. Given probable cause to search defendant's automobile at the time he observed it in New Hanover County, Officer Chipps was authorized to either seize and hold the automobile before presenting the probable cause issue to a magistrate or to seize the automobile and conduct an immediate search because exigent circumstances presented a "fleeting opportunity" which made it impracticable to secure a search warrant. Here, where the exigent circumstances consisted of the mobility of the vehicle, the defendant having been alerted, and the risk that the vehicle's contents might never be found again if a warrant were to be obtained, Officer Chipps chose the former alternative. The seizure of the vehicle and Officer Chipps' action in removing the vehicle to the Pender County Sheriff's Department were reasonable and authorized under the Fourth Amendment.

Next, defendant argues that the seizure of his automobile was illegal because Officer Chipps was outside his territorial

jurisdiction. In support of his argument defendant cites G.S. 15A-402(b) which states:

> Territorial Jurisdiction of County and City Officers.— Law-enforcement officers of cities and counties may arrest persons within their particular cities or counties and on any property and rights-of-way owned by the city or county outside its limits.

The State contends that the territorial jurisdiction of county officers to arrest is extended by G.S. 15A-402(e) which states:

> County Officers, Outside Territory, for Felonies.— Law-enforcement officers of counties may arrest persons at any place in the State of North Carolina when the arrest is based upon a felony committed within the territory described in subsection (b).

We note that the seizure of the vehicle was not incidental to the arrest of the defendant. Defendant was arrested six hours after the seizure of the vehicle. We also note that the cited statutory provisions explicitly pertain to the territorial jurisdiction of an officer to make an arrest. The arguments presented raise the issue of whether the statute extending the officer's territorial jurisdiction to make an arrest applies to the situation where the officer has made a seizure of personal property beyond his jurisdictional authority. However, we do not reach the issue of whether the seizure of personal property is equivalent to the seizure of the person referred to by the term "arrest" in G.S. 15A-402(b) and (e) so as to render the seizure legally valid, in light of our holding that the seizure of the automobile was constitutionally valid.

[2] The next argument defendant presents is that the search conducted by Officer Chipps exceeded the scope of the search warrant. Evidence regarding this issue shows that Officer Chipps searched the entire automobile pursuant to a validly issued warrant which listed twenty-one firearms as the items to be seized (a total of twenty rifles and shotguns and one small handgun). In the trunk of the automobile were several boxes which contained an assortment of neckties, bow ties, and scarves. In searching the boxes, Officer Chipps discovered a wallet and a mustard jar. The glass jar was transparent and without removing the cap of the jar

he observed that it contained coins and a white envelope with the inscription Ogden Baptist Church. At the time of the search Officer Chipps was not aware that a wallet and mustard jar containing coins and a white envelope bearing the inscription Ogden Baptist Church had been taken from the Hollis residence. Officer Chipps did not find any weapons and released the automobile and its contents.

The scope of a search warrant is defined by the object of the search and the places in which there is probable cause to believe that it may be found. G.S. 15A-253; *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 2d 572 (1982). In *Ross* the United States Supreme Court stated:

> [A] warrant that authorize an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.

456 U.S. at 821, 102 S.Ct. at 2170, 72 L.Ed. 2d at 591.

In the case *sub judice* Officer Chipps testified that one of the weapons was a small handgun that could be concealed in the boxes. Officer Chipps searched those places of the vehicle, including the boxes, where there was probable cause to believe that a weapon might reasonably be found. While searching in an area he was clearly authorized to search, he inadvertently discovered the wallet and mustard jar and he was able to observe the contents of the jar without removing its cap. While Officer Chipps did not seize and hold the wallet and mustard jar as evidence, had he done so, they would have been admissible under the "plain view" doctrine as set forth in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. den.*, 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971) and as applied by our Supreme Court in *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978) and *State v. Williams*, 299 N.C. 529, 263 S.E. 2d 571 (1980). It therefore follows that Officer Chipps' testimonial evidence regarding the discovery of these items is also admissible under the "plain view" doctrine.

The United States Supreme Court, in discussing the rationale behind the plain view doctrine stated:

> "Where, once an otherwise lawful search is in progress, the police inadvertently came upon a piece of evidence, it would

> often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it."

403 U.S. at 467-68, 29 L.Ed. 2d at 584, 91 S.Ct. at 2039. In *State v. Williams* the officers, pursuant to a valid search warrant, searched a mobile home for heroin. During the course of the search the officers searched a dresser and saw some photographs and letters. Later, during the course of the search they found heroin in another area of the mobile home. After seizing the heroin the officers seized the photographs and letters as evidence to prove ownership of the mobile home. The trial court denied defendants' motion to suppress. In holding that the seizure was constitutionally valid under the "plain view" doctrine the Supreme Court stated:

> Having seen the letters and photographs in a place where he was clearly authorized to search for heroin, Deputy Parin was not required thereafter to forget or ignore the fact that he had seen them.

299 N.C. at 532, 263 S.E. 2d at 573.

Likewise, Officer Chipps was conducting a search pursuant to a valid warrant. He was searching an area that he was authorized to search by the scope of the warrant when he inadvertently discovered the wallet and mustard jar. Under the plain view doctrine, Officer Chipps was not required to forget the fact that he had seen this evidence. His testimonial evidence regarding the wallet, the mustard jar, and the jar's contents was correctly admitted as the physical evidence itself would have been had Chipps seized it and the State tendered it for admission. Therefore, the testimony objected to was properly admitted into evidence.

[3] Defendant next contends the trial court erred in admitting evidence of defendant's prior criminal record when defendant did not take the stand and testify on his own behalf.

On cross-examination defense counsel questioned Officer Chipps about the contents of the search warrant and accompanying affidavit. During this cross-examination defense counsel agreed to have Officer Chipps read the search warrant and accompanying affidavit in their entirety. After Officer Chipps had read

most of the affidavit, defense counsel objected to that portion of the affidavit which recited that defendant had previously been convicted of breaking or entering and larceny. The testimony was admitted over defendant's objection.

By agreeing to have these documents read in their entirety, defense counsel invited any error that may have occurred by the admission of the testimony regarding the prior convictions. Defendant may not now complain of the admission of this testimony brought out by his counsel in the cross-examination of the State's witness. *State v. Satterfield*, 27 N.C. App. 270, 218 S.E. 2d 504 (1975).

Even if we were to hold that the trial court erroneously admitted this testimony over defendant's subsequent objection, its admission did not constitute prejudicial error. An error is only prejudicial if there is a reasonable possibility that a different result would have occurred at trial if the error had not been committed. G.S. 15A-1443(a).

Defendant relies upon *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972) in arguing that admission of the evidence was prejudicial error. However, in contrast to the case *sub judice*, the evidence presented in *Spillars* was much weaker against that defendant and there was no direct evidence at all placing him at the scene of the crime. In *Spillars* the trial court admitted into evidence a search warrant and the accompanying affidavit which contained hearsay statements indicating defendant's complicity in another crime. The Supreme Court held that the admission of the exhibits containing statements indicating defendant's complicity in another crime allowed the State to strengthen its case, and under the circumstances of the case, the erroneous admission resulted in error prejudicial to defendant. Given the weight of the evidence against defendant Carr, admission of the evidence of defendant's prior convictions did not prejudicially strengthen the State's case and could not reasonably have affected the outcome of the trial. This assignment of error is without merit.

[4] Defendant's next assignment of error concerns the trial court's denial of his motion for mistrial. Although defendant did not testify, he produced evidence that he was with Linda Lamb in Wilmington until 4:30 p.m. on 3 August 1982. Defendant had subpoenaed another alibi witness, Leroy Moore, to testify on his

behalf. Moore appeared in court on the first day of the session, but failed to appear the next day at defendant's trial. In support of his motion for mistrial defense counsel stated that it was his information that the witness would testify that at the time of the alleged crime, defendant was with Moore at his residence in Pender County some ten miles away from the Hollis home. Further, that as soon as counsel for defendant learned there might be a problem with Moore's attendance at trial, a diligent effort was made to locate him. Yet, despite their efforts the Pender County sheriff and defense counsel had been unable to locate Moore in time for the trial. The motion for mistrial was denied and defendant now argues that this denial was a violation of his constitutional right to compel the attendance and testimony of witnesses for his defense.

The trial judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings resulting in substantial and irreparable prejudice to the defendant's case. G.S. 15A-1061.

Even when it is error to deny defendant's motion for mistrial, it is incumbent upon an appellant not only to show error but also to show that the error was prejudicial to him. *State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981). Where the error claimed could not have made the difference between a guilty verdict and an acquittal, no prejudice results to the defendant. *Id.* at 697, 272 S.E. 2d at 855. *See also* G.S. 15A-1443(a).

Defendant's motion for mistrial was based upon his inability to present the testimony of his alibi witness. Defense counsel admitted that every effort had been made to locate the witness, but without success. In light of the substantial evidence presented by the State placing defendant at the scene of the crime, the evidence complained of could not reasonably have affected the outcome of the trial. *State v. Smith, supra.*

Further, as to the motion for mistrial itself, the decision whether mistrial is warranted due to the occurrence of substantial and irreparable prejudice to defendant lies within the sound discretion of the trial judge, and absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. *State v. Mills*, 39 N.C. App. 47, 249 S.E. 2d 446

(1978), *cert. denied*, 296 N.C. 588, 254 S.E. 2d 33 (1979). Defendant has demonstrated no abuse of discretion in the present case.

[5] By his final assignment of error, defendant contends the trial court erred in denial of defendant's motions to dismiss at the close of all the evidence and to set aside the verdict.

It is well established that in determining whether there is evidence sufficient for the judge to submit a case to the jury, all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Fletcher*, 301 N.C. 709, 272 S.E. 2d 859 (1981); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977); *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971).

After a thorough review of the record we are of the opinion there was sufficient competent evidence of every essential element of the offenses charged and sufficient competent evidence for the jury to find that defendant committed those offenses. Therefore, we conclude that the verdicts are supported by the evidence and the judgments and commitments are supported by the verdicts.

In defendant's trial we find

No error.

Judges ARNOLD and BRASWELL concur.

DAVID COLEMAN CARTER v. JAMES F. PARSONS AND BETTY N. PARSONS

No. 8221SC410

(Filed 5 April 1983)

Fraud § 12; Damages § 11.1— sufficient evidence of fraud—punitive damages

Plaintiff's evidence was sufficient to support his claim of fraud and a jury verdict awarding him punitive damages where it tended to show that the parties orally agreed to purchase a tract of land with the expectation of reselling the land for a profit; defendant falsely represented to plaintiff that she was in possession of a deed to the tract of land executed by the owners thereof; such representation was made to induce plaintiff to pay defendant money for an in-

terest in the land; after such false representation plaintiff bought a third party's interest in the project and paid money to defendant for the project; and plaintiff reasonably relied on defendant's representations and suffered injury as a result thereof.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 9 October 1981 in FORSYTH County Superior Court. Heard in the Court of Appeals 18 February 1983.

Plaintiff has appealed from an order of the trial court allowing in part (and denying in part) defendants' motion for Judgment N.O.V. Plaintiff seeks to have the jury verdict reinstated.

Plaintiff's evidence tended to show the following events and circumstances.

Betty Parsons (hereinafter defendant) is a licensed real estate broker. In August of 1976, plaintiff, defendant, Neil Finger and Jim Felts orally agreed to jointly purchase a 158 acre tract of land for investment purposes. The land was owned by Woodrow and Edna Burgess of Orange City, Florida, who had listed the land with defendant to sell for $60,000.00. Pursuant to the oral agreement, Felts was to provide $12,000.00 for down payment, defendant Parsons was to effect the purchasing and financing, Finger was to do any necessary legal work, and plaintiff was to do the "leg work." Ultimately, each party to the agreement would pay one-fourth of the purchase price and finance costs and would own a one-fourth interest in the tract.

On 19 August 1976, Felts gave the $12,000.00 for down payment to defendant and she gave Felts a receipt for the payment. In November of 1976, Parsons got the Burgesses to sign a sale ageement. Some time before April of 1977, defendant Parsons told plaintiff that she had effected the purchase of the 158 acre tract. Plaintiff believed that defendant had purchased the land and, relying on her statement that she had, plaintiff attempted to sell the tract to a real estate broker named Jester for $850.00 per acre. Plaintiff borrowed defendant's four-wheel drive truck to show Jester the land, and after viewing the land, plaintiff, Jester, and defendant Parsons met in defendant's office and discussed the price that Jester would have to pay to buy the tract. Jester testified that during the course of these dealings, plaintiff represented that plaintiff and defendant presently owned the tract.

Relying on defendant's repeated oral assurances that she had purchased the land, plaintiff saw Finger and Felts, individually, in April of 1977 and bought out their "interests" in the land deal. On 12 April 1977, plaintiff gave Finger $25,000.00, half of which was for Finger's "interest" in the 158 acre tract, the other half of which was for an unrelated obligation. On 25 April 1977, plaintiff gave Felts $14,100.00 for his "interest" in the 158 acre tract, $12,000.00 of which represented a reimbursement for the down payment money that Felts had given defendant Parsons, the $2,100.00 balance being interest on Felts' eight month investment. Plaintiff's acts were based on defendant's statements and he did not search the title to the tract before acting. Plaintiff conceded that defendant Parsons never knew that he intended to buy out Finger or Felts.

In August of 1977, defendant Parsons, having not yet effected the purchase of the land, went to see the Burgesses in Florida. Defendant carried with her documents for the Burgesses to sign to culminate the sale and financing, but was unable to reach an agreement with the Burgesses.

Between August of 1976 and April of 1977, plaintiff confronted defendant Parsons on various occasions asking for a deed to the land. Every time, defendant told plaintiff that the deed was in her lock box. Plaintiff later told Parsons that he had bought out Finger and Felts and she responded that she was disappointed, that she had hoped to buy out Felts' interest so that she could have a one-half interest in the tract. On one occasion when plaintiff asked defendant for a deed, she drew up a deed purporting to give plaintiff a three-quarters interest in the property and gave it to him. Plaintiff left the deed lying on defendant's desk because defendant had agreed to get it recorded for plaintiff. Sometime after defendant had returned from Florida, plaintiff confronted her and told her that he did not believe that she had purchased the property. At that point, defendant produced the documents she had carried to Florida, a note and a deed of trust for $48,000.00. Plaintiff looked at the documents and noticed that they had a Florida address on them and that they had the names of defendant Parsons and her husband on them. Defendant explained to plaintiff that, since no one was in Florida when the deal was finalized except her and her husband, that the property was put in the Parsons' names and that they were going to transfer

plaintiff's interest to plaintiff when they returned to North Carolina.

In February of 1978, defendant told plaintiff that a payment was due on the 158 acre tract and, referring to her calculations, defendant told plaintiff that he had to pay $3,340.00. Plaintiff paid defendant in cash and defendant made a receipt as follows: "2-24-78. Received from Coleman Carter $3,340.00 as payment on 158 acres in Ashe County. s/Betty N. Parsons. 2-24-78." After giving the $3,340.00 to defendant Parsons, plaintiff went to the courthouse and checked the records on the property, discovering that the property had never been deeded to James and Betty Parsons.

Other pertinent evidence adduced at trial was as follows.

Jim Felts testified that he approached plaintiff to sell his "interest" in the land and that plaintiff paid him $13,000.00 principal and $1,100.00 interest. Felts testified that he did not know who else was a party to the land deal but that both plaintiff and defendant told him that he would get a one-fourth interest.

Neil Finger denied that he had been a party to the land deal. Defendant Parsons also stated that Finger was not a party. Finger admitted that he visited the tract with plaintiff, defendant and Felts in August of 1976. He also admitted that he and plaintiff had had other dealings and that plaintiff paid him $25,000.00, but he denied that any part of the money had to do with the 158 acre tract.

Charles Broadus Renegar, plaintiff's brother-in-law, testified that he was with plaintiff in defendant's office when defendant told plaintiff that she had bought the land and that she had the deed. Renegar testified that he and plaintiff went to the courthouse and checked the records and discovered that the property was still owned by the Burgesses.

Defendant Parsons' evidence tended to show that she agreed only to try to buy the land; that she received $12,000.00 from Felts and deposited it in a business escrow account; that when she got the Burgesses to sign the purchase agreement she began investigating the status of the title to the tract and discovered that a prior owner had reserved mineral rights to the tract, thus encumbering the tract; that she hired an attorney to seek legislative removal of this encumbrance and that the legislation

was in fact passed; that she then went to Florida and met with the Burgesses who would not agree to sell at terms satisfactory to her; and that plaintiff was aware of these facts all along. Plaintiff had given defendant a power of attorney that empowered Parsons to act on behalf of plaintiff with regard to plaintiff's real estate dealings. Defendant applied the $3,340.00 that plaintiff gave her to an obligation that she and plaintiff jointly had pertaining to another tract of land and plaintiff had authorized this use of the money in the event that the 158 acre tract did not come available.

Plaintiff pled two theories of recovery: breach of contract and fraud. Plaintiff alleged that he bought out Finger's "interest," that he paid Felts $12,000.00 for his "interest" and that he paid $3,300.00 to defendant Betty Parsons. In his prayer for relief, plaintiff sought $15,300.00 in actual damages, $30,000.00 for loss of bargain damages, $50,000.00 in punitive damages for the fraud, and "such other and further relief as the Court may deem just and proper."

The trial judge granted partial summary judgment for plaintiff as to the $12,000.00 that Felts had paid to defendant Betty Parsons.

At trial, plaintiff proceeded on both tort and contract theories.

At the close of plaintiff's evidence, the trial judge granted defendant James Parsons' motion for directed verdict. At the close of all the evidence, on defendant Betty Parsons' oral motion for directed verdict, the trial judge decided to "dismiss the issue of breach of contract" and to "allow defendant's motion to dismiss on the damages issue of loss of bargain."

The judge instructed the jury on the law of fraud and instructed the jury that it could award plaintiff actual damages in fraud for the $3,340.00 that was paid by plaintiff to defendant, for the $12,500.00 that plaintiff paid to Neil Finger, and for the $2,100.00 that plaintiff paid to Felts as interest. He instructed the jury to award no damages for the $12,000.00 paid to Felts, explaining that plaintiff was to receive that money under earlier summary judgment. The jury was next instructed that if it found fraud and awarded actual damages and if it further found that

defendant's conduct was sufficiently aggravated, it could award a reasonable amount of punitive damages in its discretion.

The jury returned its verdict as follows:

ISSUES:

1. Did Betty N. Parsons defraud David C. Carter?

Yes	No
Yes	

2. What amount of damages, if any, is David C. Carter entitled to recover from Betty N. Parsons?

   $17,940.00

3. What amount of punitive damages, if any, is David C. Carter entitled to recover from Betty N. Parsons?

   $25,000.00

Thus, the jury awarded all of the actual damages that the trial judge had instructed plaintiff could recover, plus $25,000.00 in punitive damages.

After the verdict, defendant submitted a written motion for Judgment N.O.V. The trial judge granted defendant's motion as to $12,500.00 of the $17,940.00 verdict on actual damages and as to the entire $25,000.00 verdict on punitive damages. As to the remaining $5,400.00 in actual damages the trial judge denied defendant's motion. Plaintiff appealed.

Steven P. Pixley for plaintiff-appellant.

Craige, Brawley, Liipfert & Ross, by William W. Walker, for defendant-appellee.

WELLS, Judge.

Plaintiff's only assignment of error is based on his exception taken to Judge Freeman's order partially granting defendant's motion for Judgment N.O.V. Thus, the only question properly

before us is whether the trial judge erred in allowing defendant's motion.[1]

To preserve the right to move for a Judgment N.O.V., the party must first have moved for a directed verdict at the close of all the evidence. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E. 2d 851 (1970). "The motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict." *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

In her motion for directed verdict, defendant asserted that plaintiff's evidence failed to show a breach of contract; that loss of bargain damages were not recoverable on the evidence presented; that plaintiff's evidence was insufficient to allow recovery in fraud; that if there was fraud, it was only for the $3,340.00; that, as a matter of law, defendant was entitled by the power of attorney to use the $3,340.00 to pay off plaintiff and defendant's joint obligation; and that plaintiff was not entitled to punitive damages.[2] Defendant's asserted grounds pertaining to plaintiff's failure to show breach of contract and to plaintiff's right to loss of bargain damages were dealt with by the trial judge when he ruled that those issues could not go to the jury.

1. We note that defendant argues as cross assignments of error that the trial judge erred in partially denying her motion for Judgment N.O.V. and in denying her motion for a new trial. Although these assignments are based on exceptions duly set out in the record, defendant has improperly designated them as cross assignments of error. *See* Rule 10(d) of the Rules of Appellate Procedure. Defendant should have raised these questions by a cross appeal. *Cf.* Rule 28(c). The record does not indicate that defendant gave notice of appeal in this case and defendant has not submitted an appellant's brief. Plaintiff has not—and under the Rules he could not have—responded to defendant's "cross assignments." *See* Rule 28(c). We do not address these questions because they have not been properly presented.

2. Defendant's written motion for Judgment N.O.V. asserts a new ground not raised in the directed verdict motion in that it asserts that plaintiff may not recover the $12,500.00 that he paid to Finger because his complaint did not allege that as damages. That issue is not before us. Moreover, since the issue of whether plaintiff was induced by defendant's representations to give $12,500.00 to Finger was tried by the consent of the parties and since defendant made no timely objection to evidence admitted pertaining to that issue, the pleadings must be deemed amended to conform to the evidence and to entitle plaintiff to a recovery based on his proof. *See* G.S. 1A-1, Rule 15(b).

Plaintiff has not taken exception to that ruling and, thus, those grounds are not before us. Defendant has not appealed from the denial of her motion as to the $3,340.00 that plaintiff gave her. Thus, the grounds asserted pertaining to the power of attorney are not before us.

Defendant's motion, therefore, presents questions of whether the evidence, in the light most favorable to plaintiff, constituted any evidence more than a scintilla to support plaintiff's claim of fraud in all its constituent elements and the jury verdict awarding plaintiff punitive damages. *See Shreve v. Combs*, 54 N.C. App. 18, 282 S.E. 2d 568 (1981). The constituent elements which must be established to make out a *prima facie* case of actual fraud were set out by our Supreme Court in *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965), as follows:

> " '[T]he representation, its falsity, *scienter*, deception, and injury. The representation must be definite and specific; it must be materially false; . . . it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss.' " (Citations omitted.)

See also Terry v. Terry, 302 N.C. 77, 273 S.E. 2d 674 (1981); *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974); *Shreve v. Combs, supra.* Defendant contends that plaintiff's evidence fails to establish all the elements of fraud with respect to the money plaintiff paid Finger for Finger's interest in the Ashe County property. We disagree.

Plaintiff's evidence clearly is sufficient to establish that at the time plaintiff bought Finger's interest defendant had falsely represented to plaintiff that she was in possession of a deed to the property, executed by the owner; that such representation was made to induce plaintiff to pay defendant money for an interest in the property; and that plaintiff thereby was deceived and suffered injury. The only real questions as to fraud are (1) whether, under all the circumstances, plaintiff reasonably relied on defendant's representations, and (2) whether defendant's fraudulent intent renders her answerable for plaintiff's loss incurred in buying Finger's interest. In response to the first of these questions, we can find no better statement than that made by Justice (later Chief Justice) Sharp in *Johnson v. Owens, supra:*

"We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries which would have disclosed the falsehood." *See also Kleinfelter v. Developers, Inc.*, 44 N.C. App. 561, 261 S.E. 2d 498 (1980), and cases discussed therein. As to the second question, we hold that defendant's liability to plaintiff is not limited to only those losses of plaintiff by which defendant directly benefited, but also includes such losses to plaintiff as "might foreseeably be expected to follow from the character of the misrepresentation itself." Prosser, *Law of Torts* § 110; *see also* Restatement of Torts 2d §§ 548A and 549; *compare Restatement* §§ 435B and 435B Comment. Plaintiff's evidence to the effect that the parties entered into the transaction with the expectation of reselling the property for a profit and to the effect that defendant herself had hoped to buy Felts' interest was sufficient to allow the jury to find that defendant should have reasonably foreseen that plaintiff might buy out Felts and Finger. Plaintiff's evidence was sufficient to entitle him to a verdict against defendant based on fraud.

Having decided that plaintiff's evidence was sufficient to support the jury's verdict as to compensatory damages for defendant's fraudulent conduct, the remaining question to be resolved is whether defendant's conduct was of a sufficiently aggravated nature to allow an award of punitive damages. Prior to the decisions of our Supreme Court in *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976), and *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), it had been the rule in this State that actionable fraud alone was insufficient to support an award of punitive damages; that the fraudulent acts must be accompanied by "actual malice, oppression, gross and willful wrong, insult, indignity or a reckless disregard of plaintiff's rights." Sharp, Chief Justice, concurring in *Newton, supra. See also Murray v. Insurance Co.*, 51 N.C. App. 10, 275 S.E. 2d 195 (1981). In both *Newton* and *Oestreicher*, however, the Court weakened those previously adhered to requirements, indicating that the fraud itself might support an award of punitive damages. In *Terry v. Terry, supra*, the Court, in holding that the plaintiff's fraud claim was sufficient grounds to withstand a Rule 12(b)(6) challenge to the claim for punitive damages, put the question to rest by adopting language from *Newton* as follows: " 'In North

Carolina actionable fraud *by its very nature* involves intentional wrongdoing . . . [and] is well within North Carolina's policy underlying its concept of punitive damages.' " Plaintiff's entitlement to punitive damages having been established by the evidence, the decision to award such damages and the amount awarded were matters for the sound discretion of the jury. *Harris v. Queen City Coach Co.*, 220 N.C. 67, 16 S.E. 2d 464 (1941). Thus, the trial court erred in granting defendant's motion for Judgment N.O.V. as to the $25,000.00 verdict of punitive damages.

For the reasons stated, the order of the trial court granting Judgment N.O.V. for defendant must be reversed and the case must be remanded for entering judgment on the jury's verdict.

Reversed and remanded for judgment on the verdict.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. JOHN IVEY SANDLIN

No. 828SC1044

(Filed 5 April 1983)

1. Homicide § 21.7— second degree murder—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of second degree murder of his wife where it tended to show that the cause of death was mechanical strangulation; the victim was last seen in the presence of the defendant on the day she disappeared; defendant's car was seen backed into the carport with the trunk lid open shortly after defendant's neighbors last saw the victim alive; a cloth binding, similar in color and texture to defendant's bathrobe belt, was found wrapped tightly around the victim's neck; defendant had asked the local cemetery operator about a road running behind the cemetery to a row of pine trees where the body was eventually discovered; defendant had previously slapped and kicked the victim and once held a knife to her neck and threatened her life; and defendant had a motive to kill the victim in that the victim was troubled by defendant's earlier marriage to another woman from whom he had never received a divorce, the victim had discussed the matter with defendant and had also sought an attorney's advice, and the other woman had indicated an unwillingness to agree to a divorce because of the medical benefits she received as a military dependent.

2. **Constitutional Law § 31— refusal to appoint investigator and expert witness for indigent defendant**

The trial court did not abuse its discretion in the denial of an indigent defendant's request for a court appointed investigator and expert witness where there was no showing that any evidence other than that presented at trial was reasonably available or that it would have assisted in preparation of a defense. G.S. 7A-454.

3. **Criminal Law § 51— qualification of witness to testify as expert**

Even had defendant properly objected to the admission of a State's witness as an expert in the field of dyestuffs, a sufficient foundation was laid for qualification of the witness as an expert to permit him to express an opinion about the original color of a binding found around a homicide victim's neck.

4. **Criminal Law § 87; Witnesses § 1— permitting interpreter to translate testimony of witness**

The trial court in a homicide case did not err in permitting an interpreter to translate the trial testimony of the victim's Vietnamese mother where the witness testified through the interpreter that she spoke very little English, and where the qualifications of the interpreter were properly shown by the State.

5. **Criminal Law § 122.2— additional instructions urging jury to agree**

The trial court, after being informed that the result of the jury's vote was nine to three, did not err in instructing the jury that they should do everything they could to reach a verdict where the court also instructed that no juror should surrender his or her honest convictions solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict. G.S. 15A-1235(c).

6. **Criminal Law § 138— second degree murder—aggravating and mitigating factors**

In imposing a sentence for second degree murder, the trial court did not err in finding that murder by strangulation was an especially heinous and cruel crime which outweighed defendant's lack of a criminal record, and the court properly imposed a sentence in excess of the presumptive sentence.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 14 May 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 17 March 1983.

Defendant was charged in a proper bill of indictment with the murder of Linda Nguyen Sandlin. Defendant pleaded not guilty to the charge of first degree murder, but was convicted of second degree murder. From a judgment imposing a prison sentence of thirty-five years, defendant appealed.

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

Marcus, Whitley and Coley, by Robert E. Whitley, for the defendant, appellant.

HEDRICK, Judge.

[1] The defendant first assigns error to the trial court's denial of his motion to dismiss at the conclusion of all the evidence. The evidence presented at trial tended to show the following. The defendant and the victim, Linda Nguyen Sandlin, were married in Vietnam in the early 1970's. The couple left Vietnam in 1973 and eventually settled in Las Vegas. In April of 1981 they moved to Pink Hill, North Carolina.

On or about 28 May 1981, Linda Sandlin visited an attorney to find out if her husband, the defendant, had been properly divorced from his earlier marriage to Mildred Sandlin. Mildred Sandlin and the defendant were married in 1947. They separated in 1967, but they had never obtained a divorce. As a result of Linda Sandlin's visit, her attorney wrote Mildred Sandlin asking if the defendant had ever obtained a divorce from her, but Mildred Sandlin never responded to the letter. On 10 July 1981 the defendant called Mildred Sandlin concerning a possible visit to see her. During that conversation Mildred Sandlin brought up the subject of the attorney's letter. Defendant replied, "That's something Linda's started." Later in the day, Mildred Sandlin called the defendant's sister and told her that because of her military dependent status she had been receiving "medication" and she did not want to lose that. The defendant testified he and Linda had discussed often the idea of getting a divorce from Mildred Sandlin and "what might happen in the case I passed away." Also, the decedent had expressed to the defendant's niece, Joann Stroud, her fear of losing her savings "in a home that would not be hers if something happened to John [Sandlin] because she had reason to believe that he had a legal wife living."

The State's witness, Jeff L. Moody, Sr., who lived next door to the defendant and the decedent, testified that he last saw Linda Sandlin on 21 July 1981 between 9:30 a.m. and 11:00 a.m. hanging a dress on her clothesline. Another witness, Lawton Earl Howard, testified he passed the defendant's home several times

on 21 July 1981 while transporting tobacco to his barn. He testified that he was driving by at approximately 9:00 a.m. or 9:30 a.m. and saw the defendant with a small woman whom he described was of a nationality other than American. On this occasion the defendant's car was parked in the carport with the front end facing in. When Mr. Howard passed by again at approximately 11:30 a.m. he noticed the defendant's car was backed into the carport. The trunk was about even with the doorsteps and the trunk lid was open. Two days later, on 23 July 1981, the defendant reported the victim as missing and stated he had last seen her at 1:45 or 2:00 p.m. on 21 July 1981.

On 14 September 1981 the victim's body was found in a grave located near a group of pine trees behind Oak Ridge Memorial Cemetery in Pink Hill, North Carolina. The owner and operator of the cemetery, James Clifton Tyndall, testified that sometime during July the defendant had asked him if there was a road that went back to the cemetery to a row of pine trees. That conversation, along with the defendant's inquiries into the purchase of burial plots at the cemetery and the county sheriff's comments to Mr. Tyndall that foul play was suspected in connection with the victim's disappearance, prompted Mr. Tyndall's search of the area which resulted in locating the body.

In the medical examiner's opinion, the victim was dead when placed in the ground and had been buried for approximately two months. The cause of death was determined to be mechanical strangulation. A cloth ligature or binding was wrapped tightly around the decedent's neck. Expert testimony revealed the cloth ligature was a dull blue or dull heavy blue velour fabric.

Defendant's neighbor, Jeff Moody, Sr., testified that during visits to defendant's home he had seen the defendant wearing a dark blue bathrobe made of "the type of material that a regular downy towel is made of." The bathrobe had a belt of the same color and material that was about three feet long and an inch and a half wide.

On 16 September 1981 an S.B.I. agent told the defendant his wife had been found and read a search warrant to him. The defendant stated to the agent that he sensed they were "building a case, a murder case against him and that anything he would say would be incriminating if he said it." A couple of weeks before

Christmas, 1981, defendant visited a friend in Florida "checking on some information he had as to who was responsible . . ." for his wife's death. He remained in Florida until February.

Prior to Linda Sandlin's murder, her mother had seen the defendant hold a knife to Linda's neck and threaten to cut her throat in February 1979. On other occasions the mother had seen the defendant hit her daughter and kick her in the back. The defendant himself admitted he had slapped Linda before, and she had threatened to leave him "a hundred times." A long-time friend of the defendant, Anthony W. Shaw, testified that during a conversation with the defendant in Las Vegas the defendant stated: "The best way that you could do away with a person would be to get a piece of wire and put [it] around their neck and strangle them. . . ."

The standard for determining whether the evidence is sufficient to withstand a motion to dismiss is whether the evidence raises a reasonable inference of the defendant's guilt. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Considered in the light most favorable to the State, the evidence does support a reasonable inference that the defendant murdered Linda Sandlin. The evidence demonstrates the defendant's motive, an opportunity to commit the crime and a connection between the murder weapon and the defendant. Furthermore, the defendant's trip to Florida, his delay in reporting his wife's disappearance and his comment that the best means of committing a murder was by strangulation all add to the reasonableness of a conclusion that the defendant committed the crime.

The victim was last seen in the presence of the defendant on the day she disappeared. The defendant's car was seen backed into the carport with the trunk lid open shortly after the defendant's neighbors last saw Linda Sandlin alive. A cloth ligature similar in color and texture to the defendant's bathrobe belt, was found wrapped tightly around the decedent's neck. The defendant had also asked the local cemetery operator about a road running behind the cemetery to a row of pine trees where the body was eventually discovered.

The evidence showed past instances of violence by the defendant toward his wife. He had slapped and kicked her and once held a knife to her neck and threatened her life. By his own

admission, the defendant had slapped the victim before. He also testified she had threatened to leave "a hundred times."

The victim was troubled by the defendant's earlier marriage to Mildred Sandlin, from whom he had never received a divorce. She was concerned about her financial security and her interest in the marital home if the defendant predeceased her without having divorced Mildred Sandlin. Linda Sandlin had discussed the matter with the defendant, her husband, and had also sought an attorney's advice. Despite a letter from Linda Sandlin's attorney, Mildred Sandlin indicated an unwillingness to agree to a divorce because of the medical benefits she received as a military dependent. The defendant told Mary Ann Sanderson that he and Linda had planned a trip to Maryland to see Mildred Sandlin, presumably to discuss a divorce. From this evidence, a jury could reasonably infer that the defendant, caught between the competing interests of his two wives, had a motive to kill Linda Sandlin.

Even though the evidence presented was entirely circumstantial, the combination of circumstances and coincidences allows a reasonable inference of defendant's guilt. The evidence did more than simply cast suspicion on the defendant. It supplied a motive, demonstrated past hostility toward the victim, connected the murder weapon to the defendant and connected the defendant to the place where the body was buried. Therefore, the trial court did not err in denying defendant's motion to dismiss on grounds of insufficient evidence.

[2] The defendant next argues the trial judge erred in denying his motions for funds to hire an investigator and expert witness. He contends such a request should have been granted under N.C. Gen. Stat. § 7A-454 which provides:

> The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State.

Thus, the grant or denial of motions for appointment of associate counsel or expert witnesses lies within the trial court's discretion and a trial court's ruling should be overruled only upon a showing of abuse of discretion.

Our Supreme Court noted the applicable standard for appointment of expert assistance to indigent defendants in *State v. Johnson*, 298 N.C. 355, 362-363, 259 S.E. 2d 752, 758 (1979) (citations omitted):

> As in the case of providing private investigators or other expert assistance to indigent defendants, we think the appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial.

The basis for the statute is to provide a fair trial, but the defendant must show that "specific evidence is reasonably available and necessary for a proper defense." *State v. Tatum*, 291 N.C. 73, 82, 229 S.E. 2d 562, 568 (1976). The defendant in this case has failed to make such a showing.

The defendant points to the State's use of twenty-six different witnesses, some of whom lived out of state, the prosecutor's not calling all the witnesses interviewed by officers in Las Vegas, the State's use of four expert witnesses and his own use of thirteen witnesses as the reasons necessitating the court's appointment of an investigator and expert witnesses. There is no showing that any evidence other than that presented at trial was reasonably available or that it would have assisted in preparation of a defense. We hold the trial court did not abuse its discretion in refusing to grant defendant's request for a court appointed investigator and expert witness.

[3] The defendant also assigns error to the trial court's finding Dr. Frank Gaunt to be a qualified expert witness in the field of dyestuffs. He contends the witness only had experience in handling customer complaints for National Spinning Company and had never examined a piece of material to determine its original color after its piling was gone and it had been treated with a solvent as the ligature had been in this case.

Our examination of the record reveals the defendant failed to object to the court's admission of Dr. Gaunt as an expert and therefore the defendant's objection is deemed to have been

waived. *State v. Edwards and State v. Nance*, 49 N.C. App. 547, 272 S.E. 2d 384 (1980). Even had the defendant properly objected, there was sufficient foundation for Dr. Gaunt's being admitted as an expert. Dr. Gaunt was the director of technical services at National Spinning Company and studied dyestuff chemistry at the University of Leeds in England where he received his doctorate in 1942. Since that time he has worked in the field of dyestuffs and fabrics. He had experience working with all types of natural and man-made fibers and conducted "many types of investigations of returns of materials from customers where it was necessary to decide how the item looked before being subjected to unknown treatment. . . ." Because the defendant did not object, and because the witness had sufficient expertise to aid the jury and from which to express an opinion about the color of the ligature, the defendant's argument is without merit.

[4] We also find to be without merit the defendant's contention that the trial court erred in permitting an interpreter to translate the trial testimony of Nhu Thi Ngo, the victim's mother. The defendant argues that no showing was made that the witness could not speak English. Yet, the record does indicate that Nhu Thi Ngo was asked, "Do you speak English," to which she responded through the interpreter, "Very little."

As to the qualifications of the interpreter, Tran Thi Nguyet, testimony during the court's voir dire showed she was a graduate of North Carolina State University, a citizen of Vietnam and fluent in Vietnamese and English. Ms. Nguyet had taught Vietnamese to American military personnel at Fort Bragg and previously testified in other Superior Court trials. She was not related to any of the principal parties and was instructed that her translation be literal, truthful and impersonal. The interpreter's competence is borne out by the record and the defendant has not brought forward any evidence of bias on the interpreter's part or any prejudice to the defendant.

[5] We also find no error in the trial judge's instruction to the deliberating jury that they should do everything they could to reach a verdict. The defendant argues that the jury was brought back into the courtroom at the trial judge's request so they could recess for dinner. At that time the jury foreman informed the court the result of their vote was nine to three. The court ar-

ranged for the jury's transportation to a local restaurant for dinner. When the jury returned, the trial judge gave the following instruction:

> Now, ladies and gentlemen of the jury, before you resume your deliberations, as your foreman stated, it seems you've been thus far unable to agree upon a verdict. And I want to emphasize to you the fact that it is your duty to do whatever you can to reach a verdict. You should reason this matter over together as reasonable men and women and reconcile your differences, if you can, without the surrender of conscientious convictions. But no juror should surrender his or her honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. It is your duty to do whatever you can to reach a verdict.

N.C. Gen. Stat. § 15A-1235(c) provides:

> If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

There is nothing on the face of the trial judge's instructions which indicates a violation of the defendant's rights. There is also no showing of prejudice to the defendant or any demonstration that the trial judge coerced a verdict by overemphasizing the jury's duty to reach a decision. We hold the trial judge did not commit prejudicial error through his subsequent instruction to the jury before it resumed deliberation.

[6] The defendant's final contention relates to the thirty-five year prison sentence the defendant received for his conviction of second degree murder. The defendant argues there should have been a sentencing hearing to insure a fair sentence. We disagree.

Even though the presumptive sentence for second degree murder under N.C. Gen. Stat. § 15A-1340.4(f)(1) is fifteen years, the trial judge complied with his statutory duties. Under our system of presumptive sentencing, the judge may impose a greater or lesser sentence than the presumptive sentence upon a

finding of aggravating or mitigating circumstances. Pursuant to N.C. Gen. Stat. § 15A-1340.4(a)(1)(f), the trial judge found as an aggravating factor the especially heinous, atrocious or cruel nature of the crime. He found the defendant's lack of a criminal record to be a mitigating factor. In accordance with N.C. Gen. Stat. § 15A-1340.4(b), the trial court then found that the aggravating factor outweighed the mitigating factor. As N.C. Gen. Stat. § 15A-1340.4(a) allows, the court is free to emphasize one factor more than another, and the discretionary weighing of mitigating and aggravating factors does not lend itself to a simple mathematical formula. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658 (1982). We hold the trial court complied with the statute and did not abuse its discretion in finding that murder by strangulation was an especially heinous and cruel crime which outweighed defendant's lack of a criminal record.

We find the defendant had a fair trial free from prejudicial error.

No error.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. WAYNE EURE

No. 828SC1018

(Filed 5 April 1983)

1. **Criminal Law § 66.16— pretrial photographic identifications—competency of in-court identification**

Discrepancies in testimony by a victim of an attempted robbery concerning the relative heights of the defendant and an accomplice go to the weight rather than the competency of his identification testimony, and the victim was properly permitted to make an in-court identification of defendant where the trial court found upon supporting voir dire evidence that pretrial photographic identification procedures were not unnecessarily suggestive and that the in-court identification was of independent origin and not tainted by any pretrial photographic showing.

2. **Robbery § 4.4— attempted common law robbery—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for attempted common law robbery where it tended to show that defendant entered

the store where the victim was working, jumped over the counter and began beating the victim, unsuccessfully tried to open the cash register, took the victim by the arm and threatened to kill him unless he opened the register, and then ran out of the store before the victim could open the register.

3. Criminal Law § 138— sentence for attempted common law robbery—improper findings of aggravating factors

In imposing a sentence for attempted common law robbery, the trial judge erred in finding as an aggravating factor that defendant "brutally, unmercifully and without cause, beat [the victim] with his fist" since the same evidence necessary to support it was also necessary to prove the violence element of attempted common law robbery; furthermore, the trial judge also erred in finding as an aggravating factor that "at the time of the beating and attempted robbery of the business cash register, [the victim] was threatened by defendant" since this factor incorrectly considers the same evidence necessary to prove the element of attempted common law robbery that the victim was put in fear. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Stevens, Judge.* Judgment entered 5 May 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 March 1983.

This appeal by the defendant results from a conviction of attempted common law robbery.

The State's chief witness was Herbert Dantzler, the proprietor of a Friendly Mart in Mount Olive. He testified on voir dire and in the presence of the jury that on the early morning of 30 December 1981, he was attacked.

According to Dantzler, two black men came into the store. One was taller than the other and both were dressed similarly in a toboggan and long overcoat.

The taller man approached Dantzler and ordered two hot dogs. After Dantzler prepared the hot dogs, the man indicated that he did not have any money. Both men then left the store.

The tall man reentered the store a few minutes later and indicated that he now had money. He then jumped over the counter and began beating Dantzler.

When Dantzler told him to take what he wanted, the tall man got up and unsuccessfully tried to open the cash register. He took Dantzler by the arm and threatened to kill him unless he opened the register. Before Dantzler could open the register, the man ran out of the store.

On the night of the beating, Dantzler told police that his assailant was tall, black, and in his early twenties. While in the hospital on the following day, Dantzler viewed a photo lineup of four or five men presented by Officer Larry Riggle. Dantzler recognized no one in the lineup.

After Dantzler left the hospital, Riggle showed him a photo lineup with six pictures. He recognized the defendant in it.

A third photo lineup occurred about one week later. Dantzler again picked out the defendant.

Dantzler described the tall man as 6'1" or 6'2" and the short man as 5'10" or 5'11". He testified that although both men were in the store the first time for a few minutes, he did not give much attention to the shorter man.

When Dantzler saw Henry Durham in court, he said that Durham appeared similar to the man who was with the defendant on the night of the alleged crime. Although he earlier had described Durham as the short man, Dantzler acknowledged that Durham was taller than the defendant when he saw them stand together in court.

The trial judge denied the defendant's motion to suppress the in-court identification of him at the conclusion of voir dire.

Durham, who was given immunity by the District Attorney for his testimony, testified that on the night of the crime he came out of the store and met the defendant. The two of them went into the store at the defendant's suggestion and the defendant ordered two hot dogs. When the defendant leaped over the counter, Durham left the store. As Durham walked away from the store, the defendant ran by him. Durham saw the defendant grab Dantzler but did not see him hit Dantzler.

Durham saw the defendant about fifteen or twenty minutes later and asked him what was happening. The defendant did not answer.

Mitchell Anderson testified that on the night of the crime, he and two friends saw two men running about fifty or sixty yards from the store. They saw that Dantzler had been beaten when they entered the store. Anderson could not identify the two men.

Officer Riggle testified that he investigated this incident. Riggle's testimony about Dantzler's statement on the night of the crime and the three photo lineups was consistent with Dantzler's testimony.

Wayne County Deputy Sheriff Glenn Odom testified that Durham gave a statement on 15 January 1982 that was consistent with his trial testimony.

At the close of the State's evidence, the trial judge dismissed the armed robbery charge.

The defendant testified on his own behalf. He stated that Durham suggested going to the store on the night of the crime. According to the defendant, Durham ordered the hot dogs, approached the counter, and left when he could not find any money. The defendant left with him.

Durham went back in the store alone. When the defendant entered a few minutes later, Durham and Dantzler were struggling on the floor. The defendant ran from the store at about the same time as Durham.

When the defendant saw Durham about thirty minutes later, he told him that he did not like what was going on. Durham asked him to keep a .38 caliber gun, which the defendant later lost.

The defendant testified that he never got closer to Dantzler than the other side of the counter and that Durham did all the talking in the store. The defendant added that his testimony was consistent with a statement that he earlier gave to two officers.

At the close of all the evidence, the trial judge decided to submit only the charge of attempted common law robbery to the jury. Both sides agreed that this was the only proper possible jury verdict. The charge of assault inflicting serious injury was not submitted because it might confuse the jury.

The defendant's motions for a mistrial and to dismiss were denied.

The jury returned a guilty verdict to attempted common law robbery. After the verdict, the defendant's motions to set aside the verdict as being against the greater weight of the evidence and for a new trial were denied.

The trial judge gave the defendant a sentence of ten years after finding certain aggravating and mitigating factors. From the verdict and the sentence imposed, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

John P. Edwards, Jr., for defendant appellant.

ARNOLD, Judge.

I. *In-court identification*

[1] The defendant first argues that the in-court identification of him by Dantzler should have been suppressed. He contends that because Dantzler said that Durham was the shorter of the two men who came into the store on the night of the crime, when Durham is actually taller than the defendant, his testimony is unreliable. We disagree.

First, we note that the three showings of photographs to Dantzler were proper. The trial judge conducted an extensive voir dire hearing on the defendant's motion to suppress and concluded that the photographic identification procedure was not so unnecessarily suggestive and conducive to irreparably mistake identity as to violate the defendant's right to due process of law.

Second, he also concluded that based on clear and convincing evidence, the in-court identification was of independent origin of any taint in the photographic showing. Because we find competent evidence to support both of his conclusions, they are conclusive on appeal. *State v. Thompson*, 303 N.C. 169, 172-73, 277 S.E. 2d 431, 433-34 (1981).

As for any discrepancies in Dantzler's testimony about the relative heights of the defendant and Durham, those inconsistencies go to the weight rather than the competency of his testimony and are thus a matter for the jury. *State v. Satterfield*, 300 N.C. 621, 630, 268 S.E. 2d 510, 517 (1980).

II. *Motions to dismiss*

[2] The defendant next argues that his motions to dismiss should have been granted. In passing on a motion to dismiss, it is the court's duty to ascertain if there is substantial evidence of each

essential element of the offense charged. *State v. Hutchins*, 303 N.C. 321, 344, 279 S.E. 2d 788, 803 (1981). "Substantial evidence" is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Fletcher*, 301 N.C. 709, 712, 272 S.E. 2d 859, 860-61 (1981).

The evidence must be interpreted in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Porter*, 303 N.C. 680, 685, 281 S.E. 2d 377, 381 (1981). Applying these standards to the facts before us, we hold that the motions to dismiss were properly denied.

Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will by violence or putting him in fear. *State v. Rogers*, 273 N.C. 208, 211, 159 S.E. 2d 525, 527 (1968). It is not necessary to prove both violence and putting him in fear—proof of *either* is sufficient. *State v. Moore*, 279 N.C. 455, 458, 183 S.E. 2d 546, 547 (1971) (emphasis in original).

Before a defendant can be found guilty of an attempt to commit a crime, two things must be shown. First, the intent to commit the substantive offense, and second, an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Smith*, 300 N.C. 71, 79, 265 S.E. 2d 164, 169-70 (1980).

There is substantial evidence here of each essential element of attempted common law robbery. The testimony of Dantzler and Durham shows the defendant's intent to take money from Dantzler by violence. Both of those witnesses also testified that the defendant jumped over the counter and struggled with Dantzler, which is an overt act toward the commission of robbery.

III. *Sentence*

[3] Finally, the defendant attacks his sentence as excessive. G.S. 14-87.1 provides that attempted common law robbery is punishable as a Class H felony. The presumptive sentence for a Class H felony under G.S. 15A-1340.4(f)(6) is three years. But the trial judge gave a ten-year sentence, the maximum under G.S. 14-1.1, based on certain aggravating factors.

The trial judge made the following comments as an aggravating factor:

16. Additional written findings of factors in aggravation.

That the Court has considered each of the aggravating and mitigating factors specifically listed in the statutes and in addition, has considered the aggravating and mitigating factors that are reasonable [sic] related to the purposes of sentencing. Therefore, the Court finds by a preponderence [sic] of the evidence that the victim Herbert Dantzler, age 54, who appears to be frail and aged beyond his years, has suffered severe personal injury by the defendant, Wayne Eure, age 28, a person who appears to be strong and in excellent physical condition, and who brutally, unmercifully and without cause, beat Dantzler with his fist. That as a result, Dantzler suffered broken bones and injury to his eye for which he was hospitalized for a week. That because of these injuries he has not been able to return to his employment and from which he may never recover. That at the time of the beating and attempted robbery of the business cash register, Dantzler was threatened by the defendant. That the foregoing constitutes an aggravating factor in that it relates to punishment commensurate with the injury of the offense caused, taking into account factors that may diminish or increase the defendant's culpability. That in addition, it provides a general detearent [sic] and criminal behavior, there having been a rash of robberies, break-ins, and the like in this particular area having become a problem to the community in general.

The fact that the defendant has no record of criminal convictions was found to be the one mitigating factor.

The propriety of this sentence is determined by application of G.S. 15A-1340.1 to -1340.7, the Fair Sentencing Act. G.S. 15A-1340.4(a) requires a trial judge who imposes a sentence other than the presumptive term to 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." To impose a sentence greater than the presumptive term, the trial judge must find that the factors in aggravation outweigh those in mitigation. G.S. 15A-1340.4(b).

The defendant argues that the factor in aggravation stated by the trial judge was primarily a reiteration of one of the

necessary elements of attempted common law robbery, i.e., the attempt to take money or valuable goods by violence. This is expressly proscribed by G.S. 15A-1340.4(a)(1). He also contends that part of the aggravating factor was based on the trial judge's personal observation and not supported by evidence introduced at the trial or sentencing hearing.

We find that the trial judge incorrectly found as an aggravating factor that the defendant "brutally, unmercifully and without cause, beat Dantzler with his fist." This factor is erroneous because the same evidence necessary to support it was also necessary to prove the violence element of attempted common law robbery.

It was also error to find as an aggravating factor that "at the time of the beating and attempted robbery of the business cash register, Dantzler was threatened by the defendant." This factor incorrectly considers the same evidence necessary to prove the element of attempted common law robbery that the victim was put in fear.

Although most of what the trial judge found as aggravating was correct, we must remand for resentencing even if only one factor was incorrectly considered. Our Supreme Court recently addressed this problem.

In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), the Court held that in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing. *Ahearn* rejected the holding of a number of Court of Appeals cases that required the defendant to show prejudice from any improper consideration of factors.

A court on appeal cannot know what relative weight a trial judge gave to the proper and improper factors. Because the weight of each factor contributes to the severity of the sentence, the sentencing judge is in the best position to reevaluate the severity of the sentence in light of the adjustment.

As *Ahearn* stated, "Certainly there will be many cases where, on remand, the trial judge will properly reach the same result absent the erroneous finding. We repeat that the weight to

be given any factor is within the sound discretion of the sentencing judge." 307 N.C. at 602, 300 S.E. 2d at 700-01. *See also, State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (1982).

We note with approval the learned trial judge's quotation from the statute in the aggravating factor. But in light of *Ahearn*, we are forced to remand this case for resentencing under this relatively new sentencing procedure.

No error in the trial. Remanded for resentencing.

Judges BECTON and PHILLIPS concur.

DIANE D. EVANS v. JERALD G. CRADDOCK

No. 821DC401

(Filed 5 April 1983)

1. Divorce and Alimony § 24.9— child support order—remand for proper findings and conclusions

A child support proceeding is remanded for appropriate findings of fact and conclusions of law on issues of defendant father's income and expenses and the reasonable needs of the child where the trial court's finding as to defendant's net monthly income and his reasonable monthly expenses was not supported by the evidence, and where the trial court's finding as to the reasonable needs of the child was based upon the mother's financial affidavit which used an impermissible mathematical formula to calculate the child's needs by totalling the expenses for herself, her current husband and the child and then dividing by three.

2. Divorce and Alimony § 24.1— child support—credit for amounts spent during child visitation

The trial court did not err in failing to give defendant credit on child support payments for the time the child spends with him some four to five weeks each year.

3. Divorce and Alimony § 24.1— child support—evidence as to reasons for separation

Evidence as to why plaintiff left defendant and took the child when the parties separated had no bearing on the child support issue and was properly excluded by the trial court.

4. Divorce and Alimony § 24.1— child support—necessity for private school tuition—remand for findings

A child support proceeding is remanded for a determination as to whether private school tuition is a reasonable need of the child and whether defendant father should be required to pay such tuition.

5. Divorce and Alimony § 27— child support proceeding—attorney fees—amendment of complaint

The trial court in a child support proceeding erred in refusing to permit plaintiff to amend her complaint to include allegations concerning attorney fees in order to conform the complaint to the evidence and in denying attorney fees to plaintiff because there was no allegation or prayer for them in her complaint, and the cause is remanded for a determination as to whether plaintiff is entitled to attorney fees because she has insufficient means to defray the costs of the action and the defendant has refused to provide adequate support. G.S. 1A-1, Rule 15(b); G.S. 50-13.6.

APPEAL by both parties from *Chaffin, Judge.* Judgment entered 21 January 1982 in District Court, CHOWAN County. Heard in the Court of Appeals 17 February 1983.

Both parties appeal from an order requiring the defendant to pay $500 per month to the plaintiff for the support of their minor child, and to pay all of the child's medical, dental, and educational expenses until emancipation of the child. The plaintiff appeals only from the part of the award that denied her attorney's fees.

One child was born of the marriage of the parties in 1973. She lived with both parents until February, 1977 when they separated. The child has lived with the plaintiff since the separation.

The parties were divorced in March, 1978. The plaintiff remarried in December, 1979. The defendant is single.

No separation agreement was executed by the parties. Although there was never a written child support agreement, the defendant paid the plaintiff $150 per month in child support from the separation of the parties in 1977 until this action was filed in 1981.

The defendant noted exceptions to a number of findings of fact in the order below. Among them were that the minor child's needs were $725 per month, that the plaintiff is limited in her ability to contribute to the support of the child, that the defend-

ant's reasonable monthly expenses do not exceed $1,200 per month, and that the defendant is able to pay the amount ordered.

W. T. Culpepper, III, for plaintiff-appellee.

Earnhardt & Busby, by Charles T. Busby, for defendant-appellant.

ARNOLD, Judge.

Defendant's Appeal

The defendant first attacks the reasonableness of the trial court's award. G.S. 50-13.4(c) states the standard for setting the amount of child support:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

The conclusions of the court must

> "be based upon factual findings specific enough to indicate to the appellate court that the judge below took . . . [the factors listed in the statute into consideration] . . . ."
>
> It is not enough that there may be evidence in the record sufficient to support findings which *could have been made.* The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Coble v. Coble, 300 N.C. 708, 712-13, 268 S.E. 2d 185, 189 (1980) (emphasis in the original).

An order for child support is a question of fairness to all parties involved. *Walker v. Walker,* 38 N.C. App. 226, 228, 247 S.E. 2d 615, 616 (1978). It will not be disturbed on appeal absent an abuse of discretion by the trial judge, *Wyatt v. Wyatt,* 32 N.C. App. 162, 164, 231 S.E. 2d 42, 43 (1977), or if there is competent

evidence to support it, even if there is conflicting evidence. *Crosby v. Crosby*, 272 N.C. 235, 238, 158 S.E. 2d 77, 80 (1967).

[1] Our examination of the record leads us to conclude that a number of the findings of fact and conclusions of law are unsupported by competent evidence.

First, finding of fact 10 states that the defendant's net monthly income is $1910 and that his reasonable monthly expenses do not exceed $1200. These figures are not supported by the evidence.

The defendant's affidavit of financial standing listed his net monthly wages as $1626 and expenses at $1620. In fact, a certified statement of the defendant's salary by the Coast Guard, plaintiff's exhibit four, listed defendant's net wages as $1625.66.

Second, the plaintiff's amended financial affidavit uses an impermissible mathematical formula to calculate the child's needs. The trial judge found as a fact that the child had reasonable needs of $725 per month, which is the figure in the plaintiff's affidavit.

In arriving at that figure, the plaintiff totaled the expenses for herself, her current husband and the child and then divided by three. This is unfair to the defendant because it requires him to pay for the support of others than the child.

The trial judge should have made findings about the reasonableness of the plaintiff's figures in her affidavit. As *Coble* stated, a mere showing in an affidavit that expenses are greater than income does not mean that they are reasonable. "While a lack of a specific conclusion as to reasonableness will not necessarily be held for error, the better practice is for the order to contain such a conclusion." 300 N.C. at 714, 268 S.E. 2d at 190.

[2] The evidence showed that the child resides with the defendant for four to five weeks each year. The defendant argues that he should be given credit on any child support payments for time that the child spends with him.

In *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981), the court considered this question. In upholding a reduction in child support for time spent with a supporting spouse, *Jones* said "The trial court has a wide discretion in deciding initially

whether justice requires that a credit be given under the facts of each case and then in what amount the credit is to be awarded." 52 N.C. App. at 109, 278 S.E. 2d at 264.

Jones relied on *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977), a case which considered this issue. According to *Goodson*, "the better view allows credit when equitable considerations exist which would create an injustice if credit were not allowed." 32 N.C. App. at 81, 231 S.E. 2d at 182.

Although the defendant argues that the facts here justify credit for the time the child spent with him, we find no abuse of discretion by the trial judge in not giving him that credit. As *Goodson* stated and as *Jones* repeated, "Credit is not likely to be appropriate for frivolous expenses or *for expenses incurred in entertaining or feeding the child during visitation periods.*" 32 N.C. App. at 81, 231 S.E. 2d at 182; 52 N.C. App. at 108, 278 S.E. 2d at 263 (emphasis added).

[3] The defendant makes two additional arguments. He first contends that he should have been allowed to present evidence on why the plaintiff left him and took the child when the parties separated in 1977. This contention has no bearing on the child support issue and it was proper not to consider it.

[4] Finally, the defendant argues that he cannot be required to pay his child's private school expenses. The evidence shows that the defendant paid the tuition for the semester prior to the hearing and that he paid the enrollment fee of $150 for the previous year.

G.S. 50-13.4(c) does not directly address this issue. But it does provide that child support payments shall "meet the reasonable needs of the child for . . . education . . . having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties . . . and other facts of the particular case."

The evidence to support an award of private school tuition is not clear from the record before us. Although there is evidence to show that the defendant voluntarily paid part of the tuition in the past, the defendant's financial affidavit does not show clearly that he can pay the entire tuition in the future.

In addition, the trial judge found as a fact that the child has been hyperactive since birth in the same finding in which he

stated the cost of the private school. By implication, this indicates that the private school education is a reasonable need of the child.

But the only evidence supporting the finding that the child was hyperactive was an unsupported statement by the plaintiff that the child "was classified as super hyperactive when she was born." This is insufficient evidence upon which a finding of hyperactivity can be based and that such hyperactivity requires a private school education for the child.

On remand, the G.S. 50-13.4(c) factors should be considered to determine if the defendant should pay private school tuition. The trial judge should also determine if the defendant agreed to pay the tuition and if public schools in the area could provide any special needs of the child. *See also* Annot., 56 A.L.R. 2d 1207, 1215 § 4 (1957) (lists the factors to consider in this decision).

In conclusion, we reverse and remand this case for the trial judge to determine if there is competent evidence to support the new order. Although trial judges in these support cases must tread with the angels to find the correct words to put in the orders, the basic rule remains: "Evidence must support findings; findings must support conclusions; conclusions must support the judgment." *Coble*, 300 N.C. at 714, 268 S.E. 2d at 190.

Plaintiff's Appeal

[5] The plaintiff's only argument is that it was error for the trial judge to deny her attorney's fees because there was no allegation or prayer for them in her complaint. The plaintiff moved to amend her complaint to include this allegation before the close of her evidence. The motion was denied at the end of the defendant's evidence.

G.S. 50-13.6 governs the award of attorney's fees in child support cases. It states:

> In an action or proceeding for . . . support . . . of a minor child, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is ade-

> quate under the circumstances existing at the time of the institution of the action. . . .

The trial court's determination under this statute is binding absent an abuse of discretion. *Wyche v. Wyche*, 29 N.C. App. 685, 225 S.E. 2d 626, *disc. rev. denied*, 290 N.C. 668, 228 S.E. 2d 459 (1976).

The facts required by the statute must be alleged and proved to support an order for attorney's fees before the abuse of discretion question is reviewable, however. In addition, there must be a finding of fact supported by competent evidence that the supporting spouse has not furnished adequate support. *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E. 2d 719, 723-24 (1980).

As a result, the trial judge's refusal to allow the plaintiff to amend her complaint prevented her from alleging the facts required under the statute. The plaintiff argues that this refusal was error because the issues not raised by the pleadings were tried by express or implied consent so as to be treated as if they were in the original pleadings under G.S. 1A-1, Rule 15(b).

G.S. 1A-1, Rule 15(b) states:

> 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. . . . If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

For amendment to be proper under this rule, "there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded." *Eudy v. Eudy*, 288 N.C. 71, 79, 215 S.E. 2d 782, 788 (1975). The burden is upon the party objecting to the amendment to set forth the grounds for objection and to establish that he will be prejudiced if the motion is allowed. *Vernon v.*

Crist, 291 N.C. 646, 231 S.E. 2d 591 (1977). The court's ruling on amendment is not reviewable on appeal absent a showing of abuse of discretion. *Rogers v. Rogers*, 39 N.C. App. 635, 251 S.E. 2d 663 (1979).

It was error not to allow the amendment here. Any evidence offered by the plaintiff on her financial status was relevant to the attorney's fee issue. The defendant has not shown any prejudice except that he did not know that a claim for the fees would be made.

One commentator has pointed out that "the rule favors the proponent" of amendment and concludes that the amendment should be granted in all cases except "where the evidence fails to support a right of recovery under any theory." W. Shuford, N.C. Civil Practice and Procedure § 15-6 (2d ed. 1981).

Because it was error to deny the plaintiff's amendment, the attorney's fee issue must also be considered on remand. As G.S. 50-13.6 provides, the trial judge should determine if the defendant has refused to provide adequate support and if the plaintiff has insufficient means to defray the costs of the action. Based on these facts, any award of attorney's fees is in the trial judge's discretion.

In conclusion, this case is reversed and remanded for appropriate findings of fact and conclusions of law on the issues of 1) the defendant's income and expenses, 2) the child's reasonable needs, 3) the reasonableness of the plaintiff's figures in her financial affidavit, 4) if private school tuition is a reasonable need of the child, and 5) if the plaintiff is entitled to attorney's fees because she has insufficient means to defray the costs of the action and the defendant has refused to provide adequate support.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIAM DOUGLAS WOOD, JR.

No. 826SC745

(Filed 5 April 1983)

1. **Homicide § 21.7— no self-defense as matter of law—sufficiency of evidence of second degree murder**

The evidence did not establish as a matter of law that defendant acted in self-defense and was sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder where it tended to show that the victim was sitting in his parked car talking to friends when defendant drove up in a van and stopped close to the victim's car; defendant's girlfriend was unsuccessful in her struggle to keep defendant from getting out of the van; defendant walked to the victim's car and asked the victim if he had his gun; the victim, who had been target shooting earlier in the day, raised his .410 shotgun so defendant could see it and then lowered the weapon back into his lap; at that time, defendant told the victim that he was going to need the gun, reached into his back pocket, pulled out his pistol and fired three shots at the victim in rapid succession; and two gunshot wounds were found in the victim's head and neck. Furthermore, there is no merit to defendant's contention that the evidence was insufficient to show that he provoked the affray with the intent to take human life and that the case should have been submitted to the jury only on a charge of voluntary manslaughter.

2. **Criminal Law § 118.2— instructions on defendant's contentions—disbelief of State's witnesses**

In a second degree murder prosecution in which defendant contended that he acted in self-defense, the trial court's instruction that defendant contended "that you should not believe what the State's witnesses have said about it" was not erroneous on the ground that defendant's contentions were consistent with much of the testimony of the State's witnesses, since the effect of the instruction was to tell the jury that defendant contended it should not believe the State's evidence which suggested that defendant did not act in self-defense.

3. **Criminal Law § 138— mitigating factors—voluntary acknowledgment of wrongdoing—good reputation in community**

In imposing a sentence for second degree murder, the trial court erred in failing to find as mitigating factors that defendant voluntarily acknowledged wrongdoing prior to arrest and that defendant had a good reputation in the community in which he lived where there was evidence at the sentencing hearing that defendant, who claimed self-defense, turned himself in at the police station minutes after the shooting and stated that he did the shooting, and there was evidence at the sentencing hearing showing that defendant had a good reputation in the community in which he lived. G.S. 15A-1340.4(a)(2)(l) & (m).

4. Criminal Law § 138— mitigating factor—strong provocation or extenuating relationship—necessity for finding by court

The fact that defendant's claim of self-defense was rejected by the jury in a second degree murder case did not prohibit defendant from claiming that strong provocation existed for the shooting in order to lessen his sentence. Therefore, the trial court should have determined whether the mitigating factor that defendant acted under strong provocation or that the relationship between defendant and the victim was otherwise extenuating had been proven by a preponderance of the evidence where defendant testified at the sentencing hearing that he and the victim were both dating the same woman and had argued at her house the night before the shooting, and defendant further testified that he was carrying a pistol in his pocket when he approached the victim because the victim had threatened him at the fight the previous night "with his hands in his pockets and [defendant] didn't know what he had in there."

APPEAL by defendant from *Tillery, Judge.* Judgment entered 3 March 1982 in Superior Court, HERTFORD County. Heard in the Court of Appeals 19 January 1983.

At approximately 7:30 on the evening of 21 September 1981, defendant, William Douglas Wood, Jr., shot and killed Allen Lee Dickerson on a dirt road on the outskirts of Murfreesboro, North Carolina. At trial, the jury rejected defendant's self-defense claim and found defendant guilty of second degree murder. From a judgment imposing an eighteen-year prison sentence, defendant appeals.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

BECTON, Judge.

Three questions are presented for review: (i) whether the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant did not act in self-defense; (ii) whether the trial court's summary of defendant's contentions was prejudicially erroneous; and (iii) whether the defendant is entitled to a new sentencing hearing because the sentencing judge failed to find mitigating factors which were supported by the evidence. For the reasons that follow, we find no error in the trial but remand the case for a new sentencing hearing.

I

[1] Defendant first argues that the trial court erred in denying his motion to dismiss at the close of the evidence because the evidence was insufficient to carry the case to the jury on the second degree murder charge. Stated differently, defendant argues that the evidence established, as a matter of law, that he acted in self-defense. We are not persuaded.

First, we state the familiar law. The standard used in determining whether the State's evidence is sufficient to withstand a motion for nonsuit is whether there is sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant is guilty of the offense charged. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781, *reh. denied*, 444 U.S. 890, 62 L.Ed. 2d 126, 100 S.Ct. 195 (1979); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). And, as we all know, the evidence must be considered in the light most favorable to the State in making this determination. *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). Further, in self-defense cases, the burden is upon the State to prove beyond a reasonable doubt the existence of malice and the absence of self-defense. *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979).

Second, we review the evidence in the light most favorable to the State. While Allen Dickerson was sitting in his parked car talking to friends, defendant drove up in a van and stopped close to Dickerson's car. Defendant's girlfriend was unsuccessful in her struggle to keep defendant from getting out of the van and in her apparent effort to restrain defendant from committing a violent act upon Dickerson. Defendant walked to Dickerson's car and asked Dickerson if he (Dickerson) had his gun. Dickerson, who had been target shooting earlier in the day, raised his .410 shotgun so defendant could see it, and then lowered the weapon back into his lap. "[H]e still had his hand on it but not on the trigger." At that time, defendant told Dickerson, "You're going to need it [the gun]," then reached for his back pocket, pulled his pistol, and fired three shots in rapid succession. Two gunshot wounds were found in Dickerson's head and neck.

This evidence does not establish that defendant acted in self-defense as a matter of law. Rather, the evidence was sufficient for the jury to find that the State proved beyond a reasonable

doubt that the defendant did not act in self-defense. Thus, defendant's motion for a directed verdict or nonsuit at the close of the evidence was properly denied. *See, State v. Clay,* 297 N.C. 555, 256 S.E. 2d 176 (1979), *overruled on other grounds,* 305 N.C. 400, 290 S.E. 2d 574 (1982); *State v. Dial,* 38 N.C. App. 529, 248 S.E. 2d 366 (1978).

On the basis of the evidence outlined above, we also reject defendant's alternative argument that, if the jury found that he acted in self-defense but nevertheless convicted him because he was the aggressor in provoking Dickerson's response, the evidence was insufficient to show that he provoked the affray with the intent to take human life, and, therefore, the second degree murder charge should have been dismissed and the case should have been submitted to the jury only on the voluntary manslaughter charge. The evidence was sufficient for the jury to find that defendant entered the affray with the intention of taking a human life.

II

[2] Defendant presented no evidence. Because he bases his self-defense claim on statements made by the State's witnesses on direct and cross examination, defendant takes exception to the following part of the trial court's instructions, summarizing the contentions of the parties:

> The State of North Carolina says and contends that you should be satisfied from the evidence and all of it beyond a reasonable doubt of his guilt, and that you should so find him. The defendant, on the other hand, says and contends that you should not so find; (that you should not believe what the State's witnesses have said about it,) and that, at the very least, you should have a reasonable doubt as to his guilt, and that you should give him the benefit of that doubt and acquit him.

Defendant argues that this summary was prejudicially erroneous because (1) "it told the jurors that defendant's contention that he was not guilty was predicated on the untruthfulness of the State's witnesses when in fact defendant's contentions were consistent with much of the testimony of the State's witnesses and were based totally on the testimony of those witnesses;" and (2) the

summary made no mention that defendant was contending he acted in self-defense.

Although there may have been slight conflicts in the evidence presented through the State's witnesses, we find no prejudicial error in that part of the charge to which defendant took exception. In our view, the jurors could not have understood, from the trial court's statement, that defendant was contending that they were to disbelieve whatever inconsistencies and discrepancies that were shown to exist in the State's evidence. Rather, the trial court, in setting forth the contentions of defendant told the jury that defendant contends that you should not believe the State's evidence which suggests that defendant did not act in self-defense. Consequently, *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234, *death penalty vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976), although factually distinguishable since defendant therein raised no self-defense claim, is controlling. In *Hunt*, our Supreme Court said:

> After reviewing the evidence and stating the contentions of the State, the Court instructed the jury, 'On the other hand the defendant says and contends that you ought not to find her guilty from all the evidence in the case, and that you ought not to believe what the State's witnesses have said about it, and at the very least you should have a reasonable doubt in your mind as to her guilt, and that you ought to find her not guilty.' At the time, no objection was interposed to this statement of the contentions of the defendant by her trial counsel. In this Court, she contends that it was error for the trial Judge to instruct the jury that the defendant contended that the jury ought not to believe what the State's witnesses have said about the matter, the defendant not having testified at all. As Justice Huskins, speaking for this Court, said in *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970): 'Upon his plea of not guilty Lee could hardly contend otherwise than that the testimony of the State's witnesses should not be believed. He could not very well contend that their testimony represented the truth of the matter. . . .'

289 N.C. at 410-11, 222 S.E. 2d at 240.

With regard to defendant's further contention that the trial court, during the portion of the charge to which defendant took

exception, did not mention self-defense, we have reviewed the charge and we find a full and fair treatment of this defense given elsewhere in the charge. Thus, we find no error. We point out further that although the transcript reveals that the trial court conducted a detailed instruction conference prior to charging the jury and further asked counsel at the conclusion of the charge if there was anything else they wanted called to the jury's attention, defendant never broached the subject to which he now takes exception.

III

[3] After finding no mitigating factors and one aggravating factor (prior convictions punishable by more than sixty days confinement), the trial court sentenced defendant to eighteen years in prison for his conviction of second degree murder.[1] The presumptive sentence for this offense, a Class C Felony, is fifteen years. N.C. Gen. Stat. § 14-17 (1981); N.C. Gen. Stat. § 15A-1340.4(f)(1) (1981). Because the defendant's sentence exceeded the presumptive term, the defendant appealed from the judgment imposing the sentence as a matter of right. N.C. Gen. Stat. § 15A-1444 (1981). Defendant contends he is entitled to be resentenced because the trial court failed to find the following statutorially listed mitigating factors set forth in G.S. 15A-1340.4(a)(2):

i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

l. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

m. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

1. Defendant had originally been given a twenty-five year prison sentence but "the Court during the lunch recess [gave] further consideration to the magnitude or lack of magnitude of the aggravating factor and amend[ed] its announced judgment" and sentenced defendant to a term of eighteen years. The reduced sentence was apparently based on the fact that defendant had served less than a year on each of his three prior convictions and had no conviction for approximately six years preceding the charge pending before the court.

The trial court, in imposing a sentence under the Fair Sentencing Act, is required, first, to consider each of the aggravating and mitigating factors listed in G.S. § 15A-1340.4. *State v. Melton*, --- N.C. ---, ---, 298 S.E. 2d 673, 678 (1983). And, when the trial court imposes a term that differs from the presumptive term, the trial court must list in the record all the factors in aggravation and mitigation it finds proved by preponderance of the evidence. G.S. § 15A-1340.4(a) and (b).

That defendant voluntarily acknowledged wrongdoing prior to arrest and had a good reputation in the community in which he lived was clearly shown by a preponderance of the evidence. Undisputed evidence was presented both at trial and at the sentencing hearing that defendant immediately went to the police station following the shooting, handed an officer the gun, and told the officer that he was the man they were looking for "on account of the shooting." The trial court, without even considering whether this factor had been proved by a preponderance of the evidence, expressly refused to consider this evidence as a mitigating factor, stating, "I can see balancing reasons why he might have felt like that was an appropriate thing for him to do, some of which would not tend to mitigate against the offense . . .; but, for the record, I don't find that that was a mitigating factor."

The trial court erred; it substituted its judgment for that of the legislature. The legislature knew well that the trial judge's reasoning can be applied every time a defendant turns himself in or confesses to a crime, since there is always a possibility that a defendant's motive may be lenient treatment as opposed to remorse for wrongdoing. It is to be remembered that the defendant, who claimed self-defense, turned himself in at the police station minutes after the shooting and stated that he did the shooting. The legislature clearly mandated that this uncontradicted evidence be considered as a mitigating factor. The trial court therefore erred in failing to consider this as a mitigating factor before imposing sentence. *See, State v. Graham*, --- N.C. ---, --- S.E. 2d --- (filed 15 March 1983).

Likewise, there was evidence at the sentencing hearing showing that defendant had a good reputation in the community in which he lived. Therefore, the trial court erred in failing to find the existence of this mitigating factor.

[4] We also hold that the trial court must determine if the following statutorily listed mitigating factor was proved by a preponderance of the evidence—"that defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating." Defendant testified at the sentencing hearing that he and the victim were both dating the same woman and had argued at her house the night before the shooting. Defendant further testified that he was carrying a pistol in his pocket when he approached the victim because the victim had threatened him at the fight the previous night "with his hands in his pockets and [the defendant] didn't know what he had in there." This evidence may suggest strong provocation or the existence of an extenuating relationship between defendant and the victim since the two were antagonists in an emotional battle for the affections of the same woman. And, it does not matter that the self-defense issue was resolved against defendant. First, "strong provocation," as used in G.S. 15A-1340.4(a)(2)(i) and as we apply it to this case, is not synonymous with that "legal provocation" necessary to establish a defense and reduce a second degree murder to manslaughter. Ample support for this conclusion is found in that portion of G.S. 15A-1340.4(a)(2)(i) which states that the existence of an extenuating relationship between the defendant and the victim is a mitigating factor. Second, our Supreme Court in *State v. Melton* held that all circumstances, unless they are essential elements of the crime charged, which are transactionally related to the charge before the court and which are reasonably related to the purposes of sentencing must be considered during sentencing.

In *Melton*, the defendant was indicted for first degree murder but was allowed to plead guilty to second degree murder. At the sentencing hearing the trial court found two mitigating circumstances and found one aggravating factor (that the killing occurred after the defendant premeditated and deliberated the killing). Finding that the aggravating factor outweighed the mitigating factors, the court sentenced Melton to life imprisonment, a term in excess of the presumptive sentence of fifteen years for murder in the second degree. Concluding that deliberation and premeditation are not essential elements of murder in the second degree, our Supreme Court upheld the imposition of a life sentence in *Melton*.

If Melton's plea of guilty to second degree murder did not preclude the State from using evidence of premeditation and deliberation at the sentencing hearing to enhance Melton's sentence, then the fact that defendant Wood's self-defense plea was rejected does not prevent him from claiming that strong provocation existed for the shooting in order to lessen his sentence.[2] We are controlled by the broad language of *Melton*—"all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." --- N.C. at ---, 298 S.E. 2d at 679.

For the foregoing reasons, defendant is entitled to a new sentencing hearing. In defendant's trial we find

No error.

For errors committed during the sentencing hearing, the case is

Remanded.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. EDWARD ALSTON

No. 8214SC496

(Filed 5 April 1983)

1. Kidnapping § 1.2— sufficiency of evidence

There was sufficient evidence of a restraint or asportation for the purpose of facilitating the commission of the felony of rape to support conviction of defendant for kidnapping where the evidence tended to show that defendant blocked the victim's path as she approached a school; he held her arm tightly and told her she was going with him; when she protested, he pulled her to the

2. The *Melton* Court raises but does not answer "the interesting question . . . whether the trial judge could find by the *preponderance of the evidence* that the killing was after premeditation and deliberation and use this finding as an aggravating factor" when a defendant, although tried for first degree murder, was found guilty of second degree murder.

parking lot some distance away and then released her arm when she offered to walk with him; the victim did not resist or attempt to leave because she was afraid of defendant; at one point, defendant told the victim he was going to "fix her face"; when the victim told defendant that their relationship was over, he told her that he had a right to make love to her; and the two walked together to the house of a friend of the defendant where defendant engaged in sexual intercourse with the victim without her consent. G.S. 14-39(a)(2).

2. **Rape and Allied Offenses § 5— second degree rape—sufficiency of evidence of force**

There was sufficient evidence of force or threatened force and lack of consent by the victim to support conviction of defendant for second degree rape where the evidence tended to show that defendant and the victim had lived together at various times; defendant had struck the victim several times; defendant had again struck the victim while they were arguing about money he wanted from her, and the victim had moved in with her mother; a few weeks thereafter, defendant blocked the victim's path as she approached a school; he held her arm tightly and told her she was going with him; when she protested, he pulled her to the parking lot some distance away and then released her arm when she offered to walk with him; the victim did not resist or attempt to leave because she was afraid of defendant; at one point, defendant told the victim that he was going to "fix her face"; when the victim told defendant that their relationship was over, defendant told her that he had the right to make love to her; the two walked together to the house of a friend of defendant; defendant asked the victim if she was ready to go to bed, and she told him that she was not going to bed with him, but he lifted her up from a chair and began kissing and undressing her; the victim did not help or encourage defendant, but neither did she forcibly resist; and once the victim was undressed, defendant told her to lie on the bed and then had sexual intercourse with her.

Judge BECTON dissenting in part and concurring in part.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 12 January 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 November 1982.

Defendant was tried on charges of kidnapping and second degree rape. The State's evidence tended to show the following: Defendant and the prosecuting witness, Cottie Brown, were at one time boyfriend and girl friend. Their relationship began around November 1980. During the months that followed, the two lived together part of the time. However, their relationship began to deteriorate. Defendant began demanding money from Ms. Brown and struck her several times when she refused to do what he wanted her to do. When defendant became angry with Ms. Brown, she would on occasion stay at her mother's house until he asked her to return to her apartment.

In May 1981 the defendant struck Ms. Brown while they were arguing about money he wanted from her. Ms. Brown moved in with her mother. She intended to stay with her mother until defendant stopped going to her apartment. After Ms. Brown moved out, defendant visited her at the technical school she was attending and talked with her about their relationship. He asked her to begin seeing him again, but she refused.

Although they had previously had occasional sexual relations while living together, she refused to do so after moving in with her mother. On 14 June 1981, Ms. Brown moved her furniture and belongings from the apartment. Defendant called her that evening at her mother's house and asked for her new address, but she did not give it to him.

The next day, defendant went to the technical school and waited for Ms. Brown. When Ms. Brown arrived, defendant approached her, blocked her path, and asked where she had moved. When she refused to tell him, he took her arm and held it tightly, telling her that she was going with him. He pulled her to the school parking lot and then released her arm when she offered to walk with him. They continued to walk together through the parking lot. Ms. Brown did not resist or attempt to leave because she was afraid of the defendant. While they walked, defendant talked to Ms. Brown about their problems. At one point, he told her he was going to "fix your face . . . so your family can see." They continued to walk further, with defendant repeatedly asking Ms. Brown for her new address. She would not tell him at first, but finally she said, "If I tell you where I moved to, would you let me go." Defendant responded, "[I]s it over between us," to which Ms. Brown said "yes." Then the defendant said, "Well, since everybody else can see you and I can't see you, then I have the right to make love to you." The two continued walking down Bacon Street towards the house of a friend of the defendant.

Although Ms. Brown saw a group of men on the street, she did not attempt to ask them for help because she recognized most of them as being defendant's friends. They went to defendant's friend's house. When they arrived at the defendant's friend's house, the defendant told Ms. Brown to sit in a chair by the door, which she did. He and his friend went into the back of the house. Defendant returned to the room and began trying to fix a fan. Ms.

Brown did not try to leave the house, and when questioned about this at trial, she testified, "Well, it was nowhere to go. I don't know—I just didn't."

Defendant's friend left the room and the defendant and Ms. Brown argued briefly. The defendant then asked her if she was ready to go to bed. She told him that she was not going to bed with him, but he lifted her up from the chair and began kissing and undressing her. Ms. Brown did not help or encourage the defendant, but neither did she forcibly resist. Once Ms. Brown was undressed, defendant told her to lie down on the bed, which she did. He then had sexual intercourse with her. Afterwards, Ms. Brown asked the defendant if he would let her up. He said he would if she told him her new address, so she told him. The two of them then walked to defendant's mother's house and spent a short time talking to his mother. They then walked to the bus stop where Ms. Brown boarded a bus and went home. She reported the incident to the police that day.

Defendant continued to call Ms. Brown after this incident, but she refused to see him. Sometime later, defendant called her one evening and asked to see her. When she refused, he told her he had a gun and threatened to kick down the door. He left the telephone off the hook so that she could not call out on her telephone and came to her apartment. When he reached her apartment, she let him in because she was afraid he might break down the door. He forced her to have sex with him, but she did not report this incident to the authorities. Defendant continued to call Ms. Brown and try to see her. Finally, on one occasion when he came to her apartment, she obtained a warrant against him for trespassing.

Defendant moved to dismiss the charges against him at the end of the State's evidence. The motion was denied.

Defendant presented no evidence.

The jury found defendant guilty of kidnapping and second degree rape. Defendant appealed from the imposition of active sentences for both offenses.

Attorney General Edmisten, by Assistant Attorney General Lucien Capone, III, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

WEBB, Judge.

[1] Defendant assigns error to the denial of his motion to dismiss the charge of kidnapping. G.S. 14-39 provides in part:

> "(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony . . . ."

The defendant argues there was insufficient evidence to support a conviction of kidnapping. The unlawful restraint or asportation of a person against that person's will for the purpose of committing a felony is kidnapping if the restraint or asportation is not an inherent feature of such other felony. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). The defendant argues that in this case, there was not sufficient evidence of a restraint or asportation and if there were, there was not sufficient evidence that it was done to facilitate the commission of a felony.

We believe that the evidence that the defendant blocked Ms. Brown's path as she approached the school; that he held her arm tightly and told her she was going with him; that when she protested, he pulled her to the parking lot some distance away; and that he threatened to "fix her face" was evidence from which the jury could find that he restrained and carried her away against her will. We believe that in light of what happened after the defendant and Ms. Brown arrived at the home of defendant's friend, there was sufficient evidence for the jury to find the restraint and asportation were for the purpose of raping Ms. Brown. Even if he did not form the intent to rape her until she told him their relationship was finished, we believe the evidence was sufficient for the jury to find that there was a restraint and

asportation for the purpose of committing a felony. There was evidence that she continued to accompany him through fear and not of her own free will. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends there was not sufficient evidence that the sexual intercourse was by force and against the will of Ms. Brown for the jury to find him guilty of rape. "Rape is the carnal knowledge of a female person by force and against her will . . . . The force necessary to constitute rape need not be actual physical force. Fear, fright or coercion may take the place of force . . . . While consent by the female is a complete defense, consent which is induced by fear of violence is void and is no legal consent." *State v. Primes*, 275 N.C. 61, 67, 165 S.E. 2d 225, 229 (1968) (Citations omitted). We believe that the evidence as to the past relationship between Ms. Brown and the defendant in which he had been brutal to her at times, coupled with his action on 15 June 1981 when he twisted her arm, told her he would "fix her face," and did not release his grip on her arm until she agreed to walk with him is evidence from which the jury could find the defendant used force or a threat of force to have intercourse with Ms. Brown and any consent on her part was induced by fear of violence. We hold there was sufficient evidence of force or threatened force and lack of consent by Ms. Brown for the jury to find the defendant guilty of rape.

The defendant relies on *State v. Ricks*, 34 N.C. App. 734, 239 S.E. 2d 602 (1978). In that case the defendant was convicted of raping the 12-year-old daughter of the woman with whom he lived. The 12-year-old girl testified that the defendant had spanked the children in the house when they did not obey him. On the date in question, he offered her $2.00 if she would have intercourse with him. She refused but followed him to a pond near her house. He asked her to take off her panties and lie down, which she did. The defendant had intercourse with the child but stopped when she asked him to do so. In holding the evidence was not sufficient to support a conviction of rape, this Court emphasized that the child followed the defendant away from her house without any compulsion to do so. She did as the defendant told her but there was no force or threatened force to require her to do so. She was in shouting distance of her house and if she had called out, her mother could have come to her aid. Those factors are not

present in this case. There was evidence that Ms. Brown did not voluntarily accompany the defendant. She was in a position where she would receive no aid had she protested in the defendant's friend's house. The jury could have found that resistance on her part would be futile. We believe *Ricks* is distinguishable from this case. The defendant's second assignment of error is overruled.

No error.

Judge HEDRICK concurs.

Judge BECTON dissents in part and concurs in part.

Judge BECTON dissenting in part and concurring in part.

The facts surrounding the sexual intercourse on 15 June 1981 that caused Ms. Brown to charge defendant with rape were (a) not unlike the facts surrounding prior acts of sexual intercourse between the parties[1] and (b) not as egregious as facts surrounding a subsequent act of sexual intercourse between the parties.[2] From defendant's perspective, then, Ms. Brown was engaging in sex on 15 June 1981 to accommodate him just as she had done in the past. On the rape charge, however, defendant's perception is not controlling. We must look at Ms. Brown's state of mind to see if the sex act was without her consent and against her will. Ms.

1. Prior to 15 June 1981, but both before and after Ms. Brown and defendant started living together, they had sexual intercourse with each other. On those occasions when the defendant wanted to have sex but Ms. Brown did not, Ms. Brown would stand still and defendant would undress her and have sex with her. Sometimes they would have sex during her menstrual cycle. Sometimes defendant would get forceful and strike her while engaging in sexual intercourse. Sometimes Ms. Brown had sex with defendant just to accommodate him; sometimes she enjoyed their sexual relationship.

2. After 15 June 1981—indeed, after defendant had been arrested on the rape and kidnap charges in the case *sub judice*—defendant called Ms. Brown from a telephone booth and told her that he had a gun and wanted to come to her house and that he would break the door down and not be responsible for his actions if she did not let him in. When Ms. Brown told defendant she didn't want him to come to her house, defendant "dropped the phone" preventing Ms. Brown from getting a dial tone and ran to Ms. Brown's house. Ms. Brown "was so scared that he was going to kick the door down that [she] opened the door," and defendant engaged in sex with her against her will.

Brown testified that she was afraid and that she had told the defendant that she did not want to have sex with him. Thus, there is evidence from which the jury could find that her submission was without her consent and against her will. I, therefore, concur in the majority's resolution of the rape charge.

I cannot concur with the majority's resolution of the kidnapping charge, however. On the kidnapping charge, it is defendant's perception—his intent, his state of mind—that is controlling. Although there may have been some evidence suggesting that the defendant restrained or confined Ms. Brown, I find no evidence from which the jury could conclude that defendant restrained or confined her "for the purpose of raping Ms. Brown." Ante p. 5. There is no evidence that the defendant, at the time he approached, restrained or confined Ms. Brown, intended at that time to rape her. I, therefore, disagree with the majority's statement "that in the light of what happened after the defendant and Ms. Brown arrived at the home of the defendant's friend, there was evidence sufficient for the jury to find the restraint and asportation were for the purpose of raping Ms. Brown." Ante p. 5.

The evidence shows that defendant wanted to get Ms. Brown alone so he could talk to her about their relationship. Sex was not mentioned as they talked while walking several blocks. Only when Ms. Brown told defendant it was over between them did defendant say that he "thought she owed him one more time of making love." The record shows that at that point Ms. Brown and the defendant turned around, walked back to the street they had earlier travelled, and went to defendant's friend's house. Ms. Brown walked unassisted and defendant made no threats to her. Simply put, the evidence, in my view, was not sufficient for the jury to find that there was a restraint and asportation for the purpose of committing a felony. I vote, therefore, to reverse the kidnapping charge.

STATE OF NORTH CAROLINA v. MICHAEL SHIELDS A/K/A STEVEN MICHAEL MURRAY

No. 8217SC886

(Filed 5 April 1983)

1. **Criminal Law § 34.5; Narcotics § 3.1— possession and sale of marijuana—evidence of earlier sale—competency to show identity**

In a prosecution for felonious possession and sale of marijuana, the trial court properly permitted the undercover agent who purchased marijuana from defendant on the date in question to testify that he had also purchased marijuana from defendant on an earlier date where the trial court instructed the jury that they could consider evidence of the prior sale solely for the purpose of showing the identity of the person who allegedly committed the crime.

2. **Criminal Law § 73.2— statement not within hearsay rule**

In a prosecution for felonious possession and sale of marijuana, an officer's testimony that when he saw defendant on a certain date an informant identified defendant as "Mike Shields" was not inadmissible as hearsay where the trial court specifically instructed the jury not to consider this testimony as evidence of defendant's identity but that the testimony was offered solely to show the officer's state of mind in believing that he was dealing with "Mike Shields" on the date in question.

3. **Constitutional Law § 67— refusal to require identification of informant**

In a prosecution for felonious possession and sale of marijuana, the trial court did not err in refusing to require the State to reveal the identity of a confidential informant where defendant has shown no reason why he needed to know the informant's identity; defendant failed to ask an undercover officer who purchased marijuana from defendant whether the informant was present on the date in question; and even though defendant knew at trial the name of the person he believed was the informant, defendant did not seek to subpoena him for the trial.

4. **Criminal Law § 42.6; Narcotics § 3.1— marijuana purchased from defendant—chain of custody**

The chain of custody of a bag of marijuana purchased fron defendant by an undercover officer was not insufficient to permit its submission into evidence because the officer placed the bag in a safe in his apartment overnight before turning it over to the sheriff's department and because the officer's parents had access to the safe where the officer testified that he labeled and tagged the bag and then placed it in a sealed plastic bag which he locked in his safe; the next day the bag was turned over to the sheriff's department; at trial the officer identified the bag of marijuana as the one he purchased from defendant on the date in question; there was no evidence that the bag had been tampered with and the bag was the same as when submitted to the sheriff's department; and the officer's parents had been advised to notify their son if they needed to get into the safe.

5. Criminal Law § 89.6; Narcotics § 3.1— question about contributing to delinquency of defendant—relevancy

In a prosecution for felonious possession and sale of marijuana, defendant was not prejudiced when the State was permitted to ask defendant whether he had been the subject of a judicial proceeding in which it was alleged that a named person contributed to the delinquency of a minor in that she provided defendant with a place to live and assisted him in not going to school regularly since the question was relevant to prove the State's contention that defendant was living in a shack behind the named person's house and that this shack was the location of the alleged sale; the question was also relevant to impeach defendant's prior testimony that he had been living with his mother; and the trial court instructed the jury not to consider the implication of the question.

APPEAL by defendant from *Long, Judge.* Judgments entered 13 May 1982 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 16 February 1983.

Defendant was indicted on charges of felonious possession of marijuana with intent to sell and deliver and felonious sale and delivery of marijuana. He was found guilty of both offenses.

Evidence for the State tended to show that on 1 July 1981 defendant sold a bag of marijuana to Samuel Page, an undercover narcotics officer with the Rockingham County Sheriff's Department. Defendant testified that he did not know Officer Page and never sold him any marijuana. From judgments imposing consecutive sentences of two and a half years each, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Griffin, Deaton & Horsley, by Daniel K. Bailey, for defendant-appellant.

WELLS, Judge.

[1] Before trial, defense counsel moved to disallow any testimony concerning an alleged sale of marijuana by defendant to Officer Page on 25 June 1981. The trial court delayed ruling on the motion until such evidence was brought out at trial. On rebuttal, the trial court allowed Officer Page to testify that he bought marijuana from defendant on this earlier date. Defendant now contends that the introduction of this testimony prejudiced him, since he was tried only on the possession and sale of marijuana on 1 July 1981.

In drug cases, evidence of other drug violations is relevant and admissible if it tends to show modus operandi, guilty knowledge of identity. *State v. Jones*, 47 N.C. App. 554, 268 S.E. 2d 6 (1980); 1 Brandis on North Carolina Evidence § 92 (1982). The trial court in the case before us instructed the jury that they could consider evidence of the prior sale to Officer Page "solely for the purpose of showing the identity of the person who allegedly committed the crime . . . ." The evidence of this prior sale was relevant for the purpose indicated. When evidence is competent for one purpose but incompetent for another, it is admissible and the party it is offered against is entitled, upon request, to a limiting instruction. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied sub nom. White v. North Carolina*, 410 U.S. 958, 93 S.Ct. 1432, 35 L.Ed. 2d 691 (1973). The law presumes that the jury heeds limiting instructions that the trial judge gives regarding the evidence. *Id.* This assignment of error is overruled.

[2] At trial, the court also allowed Officer Page, over defendant's objection, to testify that when he saw defendant on 25 June 1981 an informant identified defendant as Mike Shields. When the same evidence was elicited on rebuttal, the trial court instructed the jury: "[Y]ou may not consider any identity of some person outside of the court as evidence as to who the person was but only as it may assist you in determining the witness's state of mind at the time that he may have allegedly discussed any matter with the defendant."

Defendant argues that the trial court erred in allowing this evidence, because it deprived him of his Sixth Amendment right to cross-examine the witnesses against him. Defendant further argues that the evidence was inadmissible hearsay. We find no merit to these arguments.

The record on appeal shows that Officer Page personally saw and observed defendant on both 25 June and 1 July 1981. Page testified that on 1 July 1981 he was in defendant's presence and conversed with him for approximately 30 minutes. During this meeting he stood within three feet of defendant. His in-court identification of defendant as the person who sold him marijuana on 1 July 1981 was therefore based on these personal observations and not upon information received from any informant. Furthermore,

the court properly instructed the jury to consider Officer Page's testimony only in determining his state of mind when the alleged sale of marijuana occurred on 25 June 1981. The court specifically instructed the jury not to consider this testimony as evidence of defendant's identity. Evidence of the assertion of any person, other than the witness himself, is not hearsay unless such evidence is offered to prove the truth of the matter asserted. 1 *Brandis* § 138 (1982). Here the testimony was offered solely to show Officer Page's belief that he was dealing with "Mike Shields" on 25 June 1981.

[3] In defendant's fourth assignment of error, he contends that the trial court erroneously refused to reveal the identity of the confidential informant. Under this assignment of error, defendant excepted to the court's refusal to allow the following cross-examination of Officer Page:

> Q. Robert Garner, that is your informer isn't it?
>
> MR. HAMPTON: Objection.
>
> COURT: Sustained.
>
> . . .
>
> Q. And he (Garner) is the one that set up the buy for you wasn't he?
>
> MR. HAMPTON: Objection.
>
> COURT: Sustained.
>
> . . .
>
> Q. How long have you known Robert Garner?
>
> MR. HAMPTON: Objection to this line of questions, Your Honor.
>
> COURT: Sustained.
>
> Q. Do you know where Robert Garner is too—
>
> MR. HAMPTON: Objection.
>
> COURT: Sustained.

Defendant argues in his brief that the court's refusal to disclose the name of the informant denied him due process of law.

The United States Supreme Court has set out the following guidelines to determine whether the identity of an informant should be disclosed:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Roviaro v. United States, 353 U.S. 53, 62, 1 L.Ed. 2d 639, 646, 77 S.Ct. 623, 628-29 (1957). The North Carolina Supreme Court has emphasized that before this determination is made, "a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandates such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E. 2d 580, 582 (1981) (citing cases). In *Watson*, the trial court sustained the district attorney's objections to defense counsel's questions concerning the identity of the confidential informant. The Supreme Court upheld this ruling and noted that "defendant made no showing before the court at the time of the questions concerning the informant as to his particular need for knowing the identity of the source." *Id.* at 537, 279 S.E. 2d at 583. In the case *sub judice*, the record on appeal shows that at no time before or during the trial did the defendant apprise the court of any reason why the informant should have been identified. In his brief defendant has shown no reason why he needed to know the informant's identity. During the trial defense counsel asked Officer Page if Garner was present during both of the alleged sales. Page answered that he was. Page further indicated that an "unknown subject" was also present at the second sale. Defendant, however, never asked Officer Page if the informant was present on 1 July 1981. Furthermore, even though defendant knew Garner's name at trial and obviously believed he was the informant, there is no evidence that defendant ever subpoenaed him or sought to discover his name prior to trial. Under these circumstances, defendant was not entitled to the informant's name.

[4] Defendant next argues that the trial court erroneously allowed into evidence the bag of marijuana which was allegedly sold to Officer Page on 1 July 1981. He specifically argues that the chain of custody was not established because Officer Page placed the bag in a safe in his apartment overnight before turning it over to the Rockingham Sheriff's Department and because Page's parents had access to this safe. We find no merit to this assignment of error.

Officer Page testified that after purchasing the bag of marijuana from defendant, he returned to his apartment. There he labeled and tagged the bag and then placed it in a sealed plastic bag. This sealed bag was locked in his safe. The next day the bag was turned over to the Sheriff's Department. At trial Officer Page identified the bag of marijuana as the one he purchased from defendant on 1 July 1981. He emphasized that the bag was the same as when submitted to the Sheriff's Department. The possibility that the bag of marijuana could have been tampered with by Officer Page's parents is too tenuous to render the bag of marijuana inadmissible. *See State v. Fulton*, 299 N.C. 491, 263 S.E. 2d 608 (1980). This Court has emphasized that "[w]here a package of evidence is properly sealed by the officer who gathered it and is still sealed with no evidence of tampering when it arrives at the laboratory for analysis, the fact that unknown persons may have had access to it does not destroy the chain of custody." *State v. Newcomb*, 36 N.C. App. 137, 139, 243 S.E. 2d 175, 176 (1978). The same reasoning applies here where Officer Page's parents had access to the safe but were advised to notify their son if they needed to get in the safe, and where there was no evidence of tampering.

We also find no merit in defendant's exceptions to questions posed by the trial judge to the S.B.I. chemist who examined the marijuana. Defendant argues that by this conduct, the trial court abandoned its position as a neutral party and expressed an opinion in violation of G.S. 15A-1222. By asking these questions the trial court was merely attempting to clarify the chain of custody issue and no prejudice resulted. *State v. Alston*, 38 N.C. App. 219, 247 S.E. 2d 726 (1978), *cert. denied*, 296 N.C. 586, 254 S.E. 2d 30 (1979).

[5] In defendant's final assignment of error, he argues that he was prejudiced when the court allowed the State to ask the

following question: "Isn't it a fact that you were the subject of a judicial proceeding in which it was alleged that Mrs. Cole Robertson . . . contributed to the delinquency of a minor in that she provided you with or gave you that place to live and assisted you in not going to school regularly?" Defendant responded negatively. This question was relevant to prove the State's contentions that defendant had run away from home and was living in the shack behind the Robertson's house on 1 July 1981. This shack was the location of the alleged sale. Prior to this question, defendant testified that he had been living with his mother. The question therefore tended to impeach defendant's prior testimony. We further point out that the judicial proceeding mentioned in this question was against Mrs. Robertson and not defendant. Finally, the trial court instructed the jury not to consider the implication of this question. No prejudicial error has been shown.

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

No error.

Judges HILL and JOHNSON concur.

PAULA T. PITTMAN, WIDOW; PAULA T. PITTMAN, GUARDIAN AD LITEM OF MEREDITH LAUREN AND BRYAN SCOTT, MINOR CHILDREN OF TIMOTHY SCOTT PITTMAN, DECEASED EMPLOYEE, PLAINTIFFS v. TWIN CITY LAUNDRY & CLEANERS, EMPLOYER; PENNSYLVANIA NATIONAL CASUALTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC429

(Filed 5 April 1983)

Master and Servant §§ 58, 59— workers' compensation—shooting by fellow employee—intoxication of deceased—injury arising out of employment

The evidence supported a determination by the Industrial Commission that a laundry employee's death resulted by accident arising out of and in the course of his employment and that G.S. 97-12 did not bar the employee's dependents from recovering compensation because of the employee's intoxication where it showed that deceased was the assistant manager of the employer's entire laundry operation; deceased was working at one of the employer's plants on the last work day before Christmas; deceased and the other employees were drinking at work that day; deceased had been asked to

help close up the plant and was helping oversee that plant's operations; the plant manager and a fellow employee engaged in an argument over whether the fellow employee had been fired; the fellow employee cut the plant manager's neck and then killed deceased with a gun; deceased had a blood alcohol content of .15%; and the shooting was caused by the argument over whether the fellow employee had been fired by the plant manager.

APPEAL by defendants from the Industrial Commission. Opinion and award entered 25 November 1981. Heard in the Court of Appeals 9 March 1983.

This workers' compensation action involves the rights of the surviving dependents of Timothy Scott Pittman to receive benefits because of the death of Pittman who was shot to death by a fellow employee on the premises of the Trade Street plant of Twin City Laundry & Dry Cleaners, Inc., the employer.

The shooting occurred on Friday 22 December 1978, the employer's last work day before Christmas. It was not an ordinary work day. Employees were drinking at work during the day. Most of the employees got off work in the mid-afternoon. Pittman was the assistant manager of the employer's entire operation. While he maintained his office at another of Twin City's plants, it was not unusual for him to work at the Trade Street plant, which he did on 22 December. Pittman had been drinking while working.

After most of the employees had left for the holidays, Pittman and Wayne Tetterton (the Trade Street plant manager), who were among the employees working on 22 December, left the Trade Street plant at about 4:30 p.m. to attend an impromptu Christmas party at a neighboring business. Lester Whitted, a Trade Street washroom technician and part-time delivery truck driver, accompanied them to the party. At the party, each consumed alcohol. At about 5:30 p.m., Pittman, Tetterton and Whitted returned to the Trade Street plant in response to a telephone call informing Tetterton that a customer wanted to pick up some laundry after normal working hours. Tetterton asked Pittman to accompany him to help close the plant. The employees at the plant and the customer who came in were drinking. Work was continuing after the normal 5:30 p.m. closing time so that business would be caught up for the holidays.

Tetterton asked Whitted to take an intoxicated employee home so that the employee would not have to drive a company-owned vehicle home. Whitted did so and he returned at 6:30 p.m. Work continued up to the time of the shooting in that towels were being dried and folded and customers were coming and going.

Jerry Satterfield, an employee who worked late, testified that when he left work at 6:35 p.m., the remaining employees were Pittman and Tetterton, both white, and Whitted and Joyce Fortune, both black. Before leaving, Satterfield overheard Tetterton, Whitted and Fortune discussing the meaning of the word "nigger." The discussion concluded before Satterfield left. When Satterfield left, Pittman, Tetterton and Whitted were watching a dryer, waiting for it to complete its cycle. Such observation was a necessary fire prevention precaution. Joyce Fortune was folding towels.

Pittman, Tetterton, Whitted and Fortune remained at the plant after 6:35 p.m. Within five minutes after Satterfield's departure, Pittman, Tetterton and Whitted got into a dispute about whether Tetterton had fired (and subsequently rehired) Whitted two weeks earlier. A quarrel ensued and Whitted hit Tetterton in the mouth, knocking him to the floor. Whitted then instructed Fortune to tell Tetterton that he had, in fact, fired Whitted, which she did. Whitted then kicked Tetterton in the mouth and pulled out a gun and shot Pittman (who was on his knees begging not to be shot) in the head, killing him. Whitted also cut Tetterton's neck, seriously injuring him.

The medical's examiner's autopsy report showed that Pittman had a blood alcohol content of .15 percent.

The deputy commissioner hearing the case found that work continued up to the time of the fight and that Pittman was performing employment duties until the argument began. The deputy found that Pittman's death was caused not by his consumption of alcohol but by violence erupting out of a quarrel over Tetterton's firing of Whitted. The deputy commissioner concluded that Pittman's death resulted from an injury by accident arising out of and in the course of his employment and that G.S. 97-12 did not bar Pittman's dependents from receiving compensation because his drinking of alcohol was not a cause of the shooting or

his death. An award was entered in favor of Pittman's dependents.

From the award of the deputy commissioner, defendants appealed to the Full Commission. The Full Commission affirmed adopting in full the opinion and award of the deputy commissioner. Defendants appealed to this court.

Harrington, Shaw & Gilleland, by J. Allen Harrington and Robert B. Gilleland, for plaintiff.

Young, Moore, Henderson & Alvis, P.A., by B. T. Henderson, II, and Joseph W. Williford, for defendants.

WELLS, Judge.

On appeal from the Industrial Commission, the findings of the Commission are conclusive if supported by competent evidence and when the findings are so supported, appellate review is limited to review of the Commission's legal conclusions. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Findings of fact may be set aside by the appellate court only when there is no competent evidence to support them. *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980).

By their first two assignments of error, defendants contend that the evidence was insufficient to support the Commission's findings and conclusions that Pittman's death arose out of and in the course of his employment.

To be compensable, injuries must be "by accident arising out of and in the course of the employment." G.S. 97-2(6). The term "arising out of" refers to the origin or causal connection of the accident to the employment and the phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982); *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *see also Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972). Where the evidence shows that the injury occurred during the hours of employment, at the place of employment, and while the claimant was actually in the performance of the duties of the employment, the injury is in the course of the employment. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47

(1968). With respect to time, the course of employment begins a reasonable time before work begins and continues for a reasonable time after work ends. *Id.* The place of employment includes the premises of the employer. *Id.* Where the employee is engaged in activities that he is authorized to undertake and that are calculated to further, directly or indirectly, the employer's business, the circumstances are such as to be within the course of the employment. *Id.*

There must be some causal relationship between the injury and the employment before the resulting disability or disablement can be said to "arise out of the employment." *Hoyle v. Isenhour Brick and Tile Co., supra; Morrison v. Burlington Industries,* 304 N.C. 1, 282 S.E. 2d 458 (1981). Some risk inherent to the employment must be a contributing proximate cause of the injury and the risk must be enhanced by the employment and one to which the worker would not have been equally exposed apart from the employment. *Gallimore v. Marilyn's Shoes,* 292 N.C. 399, 233 S.E. 2d 529 (1977). For an accident to "arise out of" the employment, it is necessary that the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs. *Felton v. Hospital Guild of Thomasville,* 57 N.C. App. 33, 291 S.E. 2d 158 (1982) (*citing* 1A Larson, The Law of Workmen's Compensation § 6.50 (1978)). To be compensable, the accident " 'need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.' " *Robbins v. Nicholson, supra* (*quoting Harden v. Furniture Co.,* 199 N.C. 733, 155 S.E. 728 (1930)).

In *Conrad v. Foundry Company,* 198 N.C. 723, 153 S.E. 266 (1930), the white claimant and a black co-worker were working on the employer's premises. They engaged in a conversation pertaining to their work and the co-worker addressed the claimant in "language deemed by the latter to be insulting." The claimant struck his co-worker with a shovel. The co-worker at that point left work. Half an hour later, he returned and shot the claimant with a shotgun. The Court concluded that the injury arose out of and in the course of the employment, but remanded the cause because the Commission had failed to find whether the claimant's

injury was occasioned by his wilful intention to injure his co-worker.

In *Hegler v. Mills Co.*, 224 N.C. 669, 31 S.E. 2d 918 (1944), our Supreme Court had before it a fact situation where one employee was killed in an assault by a co-worker. Hegler, the deceased, had complained to his employer criticizing the work of his fellow worker. At work two days later, angry and seeking revenge, the co-worker assaulted Hegler, inflicting injuries which resulted in Hegler's death. The Court affirmed the Commission's findings and conclusion that Hegler's death resulted from an accident arising out of and in the course of Hegler's employment.

In *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668 (1949), the Court held that the claimant had suffered a compensable injury where he was injured during work by a fellow worker's assault precipitated by the claimant's criticism of the quality of the fellow worker's work.

The evidence in the present case was sufficient to support the Commission's findings and conclusion that Pittman received an injury by accident arising out of and in the course of his employment.

Pittman's death was an "accident" in the most tragic sense. The evidence that Pittman had been asked to help close up the Trade Street plant and that he was helping oversee that plant's operations up until the time violence erupted was sufficient to permit the findings that Pittman was working at the time of the shooting; that the shooting occurred on the premises of the employer; and that Pittman was engaged in activities that he was authorized to undertake and that were calculated to further the employer's business. The Commission's findings on these points support its conclusion that the accident occurred in the course of Pittman's employment.

The Commission found that the shooting was caused by the argument between Tetterton and Whitted about whether Whitted had been fired by Tetterton. This finding is amply supported by the evidence. This fact shows that Pittman's employment was a cause of the accident in that it demonstrates that but for his employment Pittman would not have been exposed to an equal risk of injury. The conditions and obligations of Pittman's employ-

ment put him in the position he was in when the shooting occurred. Looking back on the incident, it is clear that Pittman's death had its origin in a risk connected with his employment and that his death was in direct consequence of that risk. That the shooting was unlikely and unexpected does not matter. This case is fundamentally different from cases where the accident has been held to not have arisen out of the employment because the claimant's assailant was a non-employee who had come to the employer's premises and committed an act of violence inspired by factors not related to the employer's business. *See, e.g., Robbins, supra; Gallimore, supra;* and *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 283 S.E. 2d 436 (1981), *disc. rev. denied*, 304 N.C. 726, 288 S.E. 2d 806 (1982). In the present case, the shooting was causally connected to the employment and the Commission did not err in concluding that it arose out of the employment.

Defendant's first two assignments are overruled.

By their third and last assignment of error, defendants contend that G.S. 97-12 bars plaintiff's claim. In pertinent part, that statute provides that "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by: (1) His intoxication. . . ." The Commission found that Pittman had consumed alcohol but that the shooting and death were not proximately caused by Pittman's drinking. The record is devoid of any evidence that Pittman's drinking contributed to his death. The Commission correctly concluded that plaintiff's claim is not barred by G.S. 97-12. This assignment is overruled.

The facts found are supported by competent evidence and they, in turn, support the conclusions of the Commission. The opinion and award of the Commission must be and is

Affirmed.

Judges JOHNSON and PHILLIPS concur.

ROBIE A. SWINK, EMPLOYEE, PLAINTIFF v. CONE MILLS, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC408

(Filed 5 April 1983)

Master and Servant § 68— workers' compensation—chronic obstructive pulmonary disease—failure to show exposure to cotton dust as cause

Plaintiff failed to meet his burden of proof that his chronic pulmonary disease and disability are the result of his exposure to cotton dust in his employment with defendant employer and that he thus has an occupational disease where plaintiff's expert medical witnesses were virtually unanimous in their testimony that plaintiff's cigarette smoking was a major causative factor in his chronic obstructive pulmonary disease and expressed the opinion only that plaintiff's disease "could have" or "may have" been aggravated by exposure to cotton dust, since the mere possibility of causation is not sufficient to establish an employee's disease as an occupational disease.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award filed 25 November 1981. Heard in the Court of Appeals 18 February 1983.

Plaintiff filed a claim for disability benefits under the Workers' Compensation Act alleging he was suffering from an occupational disease caused by exposure to cotton dust. Commissioner Coy M. Vance denied compensation in a decision filed 6 February 1981 and his decision was adopted and affirmed by the Full Commission on 25 November 1981. Plaintiff appeals.

Hassell, Hudson and Lore, by Charles R. Hassell, Jr., for plaintiff-appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick, for defendants-appellees.

HILL, Judge.

Plaintiff argues that the Industrial Commission erred as a matter of law in denying his claim for compensation.

Commissioner Vance found, in pertinent part, the following facts:

1. Plaintiff is a male employee, 76 years of age and went to work for defendant employer in 1926. . . .

2. Plaintiff worked in the finishing room which was next to the Weaving Department. . . .

. . . .

4. At the end of each day, he used a flop, like a mop, to clean lint off the machines. There was usually between a peck and a half bushel of lint to sweep up. In the latter years, plaintiff used an air hose to blow off the machines. There was no air conditioning system.

5. There was dust in the air continuously and you could write your name most any place where dust and lint had settled.

6. In 1947, plaintiff discovered he had tuberculosis and left his employment for treatment and returned to work for the same employer in 1950. He . . . was given a clean bill of health from the disease.

7. Plaintiff had smoked some since he was about ten years old. He now smokes six cigarettes a day and never more than one-half pack a day.

8. In 1955, plaintiff started having a hurting in the breast, spitting up cotton lint and dust and began to choke up. He did not go to the doctor . . . . He does not remember any Monday Morning Syndrome.

9. Plaintiff's last day of work was April 7, 1967 and he has been unable to work since that day. He does some house work. When he walks to the mailbox, which is two hundred feet away from the house, he must sit and rest before he can return.

10. Plaintiff went to see Dr. Cecil M. Farrington for the first time on July 19, 1978. Dr. Farrington diagnosed his condition as "chronic obstructive pulmonary disease". He tried, but was unable, to blow enough air to move the graph high enough to make a readable graph in the pulmonary function studies. He has no asthma.

11. Defendants were ordered to pay for plaintiff's examination by a panel physician, Douglas G. Kelling, Jr., and plaintiff was examined on May 24, 1979. . . . He felt that plaintiff had some chronic obstructive lung disease which could not be confirmed by pulmonary function testing. On the basis of his history, Dr. Kelling felt that the chronic obstructive lung

disease was due to cigarette smoking, tuberculosis, and felt that allergies may play a part in his illness. The x-rays revealed that there is evidence of healed calcified granulomotous disease with minimal parenchymal scarring and slight overexpansion of the lungs consistent with chronic obstructive pulmonary disease. There is no evidence of active chest disease. Because of the inability to do pulmonary function tests, it would be very difficult to determine if this man were disabled because of lung disease. According to information plaintiff gave the doctor, he retired because of shortness of breath. One could at least suggest that the lung disease may be causing some element of disability. Dr. Kelling felt that plaintiff's chronic bronchitis may have been aggravated by cotton dust and may have produced more coughing and sputum, but did not think the chronic lung disease was caused by cotton dust. Having previously had tuberculosis would not have made plaintiff more susceptible to hazards of cotton dust. Cotton dust and smoking could have aggravated his chronic bronchitis.

12. Plaintiff made an appointment on his own and was examined by Dr. Fred Owens, a panel physician, on October 29, 1979. Dr. Owens diagnosed plaintiff as having chronic obstructive pulmonary disease, but was of the opinion that in this particular case, the cotton dust exposure was a minor factor, but it could have aggravated it; that plaintiff is not completely disabled to all jobs, but is disabled to a point that he could not do any work in the mill because of his previous lung disease and the dusty atmosphere. He could have a sedentary-type job, not looking at his age, because of his age is another factor, and we're talking about disability. I could say probably unemployable.

13. Plaintiff's claim is one for byssinosis and/or chronic obstructive lung disease both of which are characterized by cough, chest tightness, shortness of breath, fatigue, and sometimes wheezing. Classically, it is worse on Monday when an employee returns to work after having been out on a weekend and his or her condition improves either on days off or on vacation. As the disease progresses, however, the employee continues to worsen throughout the workweek and

eventually sees no improvement when he leaves his work environment.

14. Byssinosis and/or chronic obstructive lung disease is due to chronic exposure to respirable cotton dust. It is, therefore, characteristic of and peculiar to the employment in the textile trade. The general public is not equally exposed outside the employment.

15. Plaintiff has chronic pulmonary disease. X-rays indicate that there is a flattening of the diaphragm. This is consistent with chronic obstructive lung disease.

16. Plaintiff's chronic pulmonary disease, coupled with his age, makes him unemployable and, therefore, he is totally disabled and has been since April 7, 1967.

17. Plaintiff has failed in his burden of proof to prove with medical evidence that his disability is a result of an occupational disease caused by cotton dust exposure in his employment with defendant employer.

18. Plaintiff's chronic pulmonary disease was aggravated by his exposure to cotton dust in his employment with defendant employer.

19. Plaintiff does not have an occupational disease due to causes and conditions characteristic of and peculiar to his employment with defendant employer.

From these facts the Commissioner concluded that plaintiff had failed to prove that his chronic pulmonary disease and disablement were a result of his exposure to cotton dust in his employment with defendant employer and therefore he did not have an occupational disease. His denial of plaintiff's claim for compensation was affirmed by the Full Commission.

The standard for appellate review of the findings of the Industrial Commission was succinctly set out if *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981):

> Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding

> of fact. The appellate court does not retry the facts. It merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact. [Citations omitted.]

Id. at p. 6, 282 S.E. 2d at p. 463.

Relying upon several recent decisions of the North Carolina Supreme Court, plaintiff contends that he is entitled to a remand for additional findings on the extent of his disability as defined by G.S. 97-2(9). He bases his argument on the findings of the Commission that (1) he has chronic pulmonary disease, (2) that he is totally disabled, and (3) that his chronic pulmonary disease was aggravated by his exposure to cotton dust in his employment with defendant employer. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982); *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822, *as amended in* 305 N.C. 296 (1982); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). We do not agree.

One of the circumstances under which compensation for disability caused by and resulting from a disease may be awarded is when the disease is aggravated or accelerated by causes and conditions characteristic or peculiar to claimant's employment. *Walston v. Burlington Industries, supra, as amended in* 305 N.C. 296, 297. However, as emphasized in *Walston*, in order to be entitled to compensation for disablement from an occupational disease, the claimant must carry his burden of proof in establishing the causal connection among the disability, the disease, and the employment. Plaintiff must establish:

> (1) that [the] disablement *results from an occupational* disease encompassed by G.S. 97-53(13), *i.e.*, an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement *resulting from* said occupational disease, *i.e.*, whether [he] is totally or partially disabled *as a result of the disease*. . . . [T]hat means, in occupational disease cases, that disablement of an employee resulting from an occupational disease which arises out of and in the course of the employment, G.S. 97-52 and G.S.

97-2(6), is compensable and claimant has the burden of proof "to show not only . . . disability, but also its degree." *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E. 2d 857, 861 (1965).

Morrison v. Burlington Industries, supra at 12, 13, 282 S.E. 2d at 466, 467 (1981).

We agree with the Commission that plaintiff failed to meet his burden of proof that his chronic pulmonary disease and disability are a result of his exposure to cotton dust in his employment with defendant employer. Plaintiff's witness, Dr. C. M. Farrington, testified that from his examination of plaintiff, chronic obstructive pulmonary disease could have been caused by cotton dust and cigarette smoking or that the disease could have been solely caused by plaintiff's cigarette smoking or emphysema.

Another medical witness, Dr. Kelling, testified by deposition that from his examination he felt plaintiff had some chronic obstructive lung disease which could not be confirmed by pulmonary function tests and he found no evidence of byssinosis. Dr. Kelling stated that, because of the inability to do pulmonary function tests, it would be very difficult to determine if plaintiff were disabled due to lung disease, but the fact that he retired due to shortness of breath would suggest that lung disease may be causing some element of disability. He further testified that, although plaintiff's chronic bronchitis may have been aggravated by cotton dust, he did not feel that his chronic obstructive lung disease was a result of his exposure. He felt the latter disease was more likely the result of plaintiff's cigarette smoking.

Dr. Fred T. Owens testified that he diagnosed chronic obstructive pulmonary disease in the plaintiff which could have been aggravated by exposure to cotton dust as a minor factor. Dr. Owens stated that cigarette smoking was the main factor in the development of plaintiff's lung disease.

The medical evidence above does not establish that plaintiff was disabled due to an occupational disease. Although the experts were virtually unanimous in their testimony that plaintiff's cigarette smoking was a major causative factor in his chronic obstructive pulmonary disease, the opinion was only that plaintiff's disease "could have" or "may have been" aggravated by exposure to cotton dust. The "mere possibility of causation" is not

sufficient to establish an employee's disease as an occupational disease under our Workers' Compensation statutes. *See Walston v. Burlington Industries, supra* at 679, 285 S.E. 2d at 828. The record is barren of any testimony which established the extent of plaintiff's disability resulting from an occupational disease or the extent to which his disability was aggravated or accelerated by causes and conditions characteristic of and peculiar to his employment with defendant. Plaintiff failed to authenticate the amount or degree of his disablement which resulted from any occupational disease arising out of and in the course of his employment with defendant employer. *See Morrison v. Burlington Industries, supra.* Since the evidence before us supports the Commission's findings, they are conclusive on appeal.

We find no merit in plaintiff's argument that Commissioner Vance committed prejudicial error by applying the language of G.S. 97-53(13) as it currently exists to plaintiff's claim which should have been analyzed under the statute as it existed in 1967. Since plaintiff has failed in his burden of proof that he is disabled as the result of an occupational disease, a requirement under either statute, we agree with the Full Commission that the erroneous application of the later statute is immaterial.

The opinion and award of the Commission is

Affirmed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. DARRELL WAYNE PACKER

No. 8212SC874

(Filed 5 April 1983)

1. Automobiles and Other Vehicles §§ 113.1, 127.2— driving under the influence—involuntary manslaughter—defendant as driver of vehicle—sufficiency of evidence

The evidence was sufficent to permit the jury to find that defendant was the driver of a vehicle at the time it struck a pedestrian so as to support his conviction of driving under the influence and involuntary manslaughter where the owner of the vehicle testified that he was a passenger therein at the time

of the accident and that defendant was driving the vehicle at that time, although there was evidence that the vehicle doors were so badly jammed shut after the accident that they had to be pried open, and the owner was the only person in the vehicle when witnesses and a highway patrolman arrived at the scene, and although defendant testified that he had left the car and was not driving at the time of the accident.

2. **Criminal Law § 86.3— impeachment of defendant—prior convictions—details of crimes**

When a defendant is cross-examined about prior convictions for impeachment purposes, and defendant has admitted a prior conviction, the time and place of the conviction and punishment imposed may be inquired into, but defendant ordinarily may not be examined about the details of the crime by which he is being impeached.

3. **Criminal Law § 85.3— character evidence—cross-examination of defendant**

A defendant whose character is in question may be cross-examined about specific wrongful acts to show his character.

4. **Criminal Law § 85.1— character evidence—failure to hear anything bad about defendant**

Defendant's character witnesses should have been permitted to testify that they had never heard anything bad about the defendant for the purpose of showing his good character.

APPEAL by defendant from *Bowen, Judge.* Judgment entered 21 April 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 February 1983.

The following facts were undisputed at trial. Defendant and Ray Johnson were out together in Johnson's car during the evening of 19 December 1981. They visited several bars, drinking at each establishment. Defendant was driving during this period. Around midnight or during the early morning hours of 20 December 1981, Johnson's car struck and killed a pedestrian, Randy Yara. The accounts differ as to what happened after defendant and Johnson left the Lamplighter, a drinking establishment, around 11:00 p.m. on the 19th of December.

State's Evidence

Johnson testified that he and defendant left the Lamplighter in Johnson's car (defendant was driving) in search of another place to get a drink. He testified further that as he bent over to adjust the tape player, he felt the car leave the road, looked up, and saw a pedestrian in their path on the shoulder of the road. He yelled; they hit the pedestrian from behind. After the car struck

Yara, it rolled, skidded and came to rest on its top. Johnson "blacked out." When he regained consciousness he found the car doors so badly jammed shut that they had to be pried open. Although Johnson was the only person in the car when witnesses and the Highway Patrolman arrived at the scene, he nevertheless maintained that defendant was driving at the time of the accident. Defendant's hat and jacket were found in Johnson's car. Johnson was arrested for driving under the influence upon his release from the hospital. On the strength of Johnson's statements concerning who was driving the vehicle, and the officer's subsequent investigation, defendant was later arrested.

Defendant's Evidence

Defendant testified that after he and Johnson left the Lamplighter they stopped at a Party Store and bought more beer. When they left, defendant was still driving. They then went to his sister's trailer, where he got out. Johnson drove away. Defendant fell asleep on his sister's couch around midnight. He was awakened around 4:00 a.m. by his sister who told him that a Highway Patrolman had come to see him. The patrolman questioned him about his activities that evening and told him about the accident. He was later charged with driving under the influence and involuntary manslaughter.

Defendant was found guilty of both charges. From a judgment imposing consecutive active sentences of six (6) months and three (3) years respectively, defendant appeals to this Court.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

BECTON, Judge.

I

Defendant raises four assignments of error and proffers three arguments on appeal: (i) that the evidence was insufficient to persuade a rational fact finder, beyond a reasonable doubt, that defendant was the driver of the vehicle at the time of the collision; (ii) that defendant is entitled to a new trial because of the

prosecution's improper inquiry into his prior convictions during cross examination; and (iii) that the trial court erred when it excluded competent evidence of defendant's good character.

Although our analysis of defendant's assignments of error and exceptions concerning his third argument reveals the existence of reversible error, entitling defendant to a new trial, we nevertheless discuss all of his arguments.

II

[1] By his assignment of error number one, defendant argues that he is entitled to judgment of nonsuit because the evidence adduced against him at trial was insufficient to permit a rational trier of fact, beyond a reasonable doubt, to find each element of the crimes charged. While defendant has correctly stated the nonsuit standard, *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980), we note also that the evidence must be interpreted in the light most favorable to the State, and all reasonable inferences favorable to the State must be drawn therefrom. *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967). We have examined the evidence in this record and find it sufficient to submit the issue of defendant's guilt to the jury. This assignment of error is overruled.

III

[2, 3] Defendant's assignment of error number two is directed toward the admission of evidence of his prior convictions. He objects to the following testimony, brought out on cross examination when he was on the stand:

> Q. Mr. Packer, that red light or blue light—you didn't run a red light in South Carolina, did you? You weren't convicted of running a red light. You were convicted of failing to stop for a blue light.
>
> A. Yes, sir.
>
> Q. Weren't you also convicted, at that time, of driving under the influence?
>
> A. No, sir.
>
> Q. Were you found in the car at that time, sir?
>
> A. Sir?

Q. Were you found in the car at that time?

MR. SMITH: Objection.

COURT: Overruled.

Q. Were you found in the car, sir?

A. Found in what car?

Q. When you were—

A. My vehicle when I was in South Carolina?

Q. Yes, sir.

A. No, sir. I was out of the car.

Q. Where were you?

MR. SMITH: Objection.

COURT: Overruled.

A. I was about a hundred feet from my car.

Q. And where exactly a hundred feet from your car were you?

MR. SMITH: Objection.

COURT: Overruled.

A. I was behind it.

Q. You were hiding, weren't you?

MR. SMITH: Objection.

COURT: Overruled.

A. I wasn't really hiding—the patrolman that stopped me—when he got out and I got out he grabbed his gun and I got scared.

Q. And you ran?

A. And I came back.

Q. After the dogs found you?

MR. SMITH: Objection.

COURT: Overruled.

A. No, sir. No dogs.

Q. No dogs?

A. There were no dogs there.

Because the issue raised in this argument may confront the trial court on retrial, we state the rules concerning the use of (a) a defendant's prior convictions, and (b) his specific wrongful acts. First, when evidence of a defendant's prior conviction is to be introduced for impeachment purposes, and the witness has admitted that prior conviction, "the time and place of the conviction and punishment imposed may be inquired into upon cross examination." *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). As the *Finch* court aptly stated:

> Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. *Such details unduly distract the jury from the issue properly before it, harass the witness and inject confusion into the trial of the case.* [Emphasis added.]

Finch, at 141, 235 S.E. 2d at 824.

Second,

> [w]here a person's *character is only collaterally in issue*, to allow it to be proved by specific acts of good or bad conduct would consume an unreasonable amount of time, distract the jury's attention from the real issues in the case, lead to acrimonious disputes, and unfairly surprise the opponent, who may be presumed to be ready to defend his own general reputation or that of his witnesses, but not to meet specific charges against either without notice. [Citations omitted.] [Emphasis added.]

1 *Brandis on North Carolina Evidence* § 111 at 406 (2d Rev. Ed. 1982). However, a defendant whose *character is in question* may be cross-examined about specific wrongful acts to show his character. Even "disparaging facts may be elicited provided the questions are based on information and are asked in good faith, and subject of course to the witness's privilege against self-

incrimination and to the control of the judge over questions that tend only to annoy or harass the witness." *Id.* at 407-410.

IV

[4] Defendant sought to introduce evidence of his good character and reputation through the testimony of two witnesses, Captain Robert Mumblow and Betty Strickland. Both testified on direct examination that defendant's character and reputation were good. They admitted, during cross examination, that their opinions were based on their personal knowledge and observations, rather than general community perceptions. However, both witnesses testified on redirect that they had never heard anything bad about the defendant. Apparently, the trial judge erroneously believed that the witnesses' redirect testimony was incompetent to prove defendant's good character in the community. For example, the transcript of the proceedings reflects the following:

> REDIRECT EXAMINATION BY MR. SMITH:
>
> Q. Did you ever hear anything bad about him?
>
> A. No, sir. I haven't.
>
> MR. RICHARDSON: Your Honor, I would like an instruction to the jury to disregard what she has said.
>
> COURT: The jury is instructed to disregard the testimony of the defendant's character and reputation in the community in which he lives.

This was error and requires a new trial.

A criminal defendant is always permitted to offer character evidence as substantive evidence of his guilt or innocence. *State v. Williams*, 299 N.C. 652, 263 S.E. 2d 774 (1980). Although the most common method of proving character is by general reputation in the community, that is not the exclusive way to pull the laboring oar. As we said in *State v. Floyd*, 56 N.C. App. 459, 289 S.E. 2d 139 (1982), a case determined by this same issue:

> We conclude that where a witness testified that he has lived for some time in the same community with the person whose character is at issue, has known that person personally, and has heard nothing negative about him, the witness's

testimony is admissible as evidence of reputation. [Citations omitted.] The trial court erred in concluding otherwise.

In the case at bar, there were no witnesses to the disputed events other than the defendant and the prosecuting witness. The outcome of the trial, therefore, necessarily turned on which version of the facts the jury believed, *i.e.*, which witness the jury found more credible. Accordingly, we find the court's error in excluding evidence of defendant's reputation was prejudicial and entitles him to a

New trial.

Floyd, at 461, 289 S.E. 2d at 140.

Likewise, for the reasons set forth in part IV of this opinion, defendant is entitled to a

New trial.

Judges ARNOLD and PHILLIPS concur.

KENNETH E. ATKINS AND WIFE, RUTH S. ATKINS v. ROSS W. NASH

No. 8217SC346

(Filed 5 April 1983)

1. **Appeal and Error § 6.6— prior action pending—denial of motion to dismiss—immediate appeal**

The denial of a motion to dismiss on the ground of a prior action pending is immediately appealable.

2. **Abatement and Revival § 6; Rules of Civil Procedure § 3— commencement of action—prior action pending**

The trial court erred in refusing to dismiss plaintiffs' Rockingham County action against defendant on the ground of a prior pending action by defendant against plaintiffs in Mecklenburg County because summons was first served in plaintiffs' Rockingham County action where the complaint was first filed in defendant's Mecklenburg County action, since under G.S. 1A-1, Rule 3 a civil action is commenced by filing a complaint, and the earlier service in the Rockingham County action was thus not determinative of the issue.

3. Abatement and Revival § 3; Rules of Civil Procedure § 13— prior pending action—compulsory counterclaim—motion to dismiss treated as motion under Rule 13(a)

Where plaintiffs' claims clearly arose out of the same transaction or occurrence which formed the basis of defendant's prior pending action in another county, G.S. 1A-1, Rule 13(a) required that they be alleged as counterclaims in that action, and the trial court should have treated defendant's motion to dismiss plaintiffs' claims on the ground of a prior pending action as a motion under Rule 13(a) and should have allowed the motion with leave to file such claims as counterclaims in defendant's prior action.

APPEAL by defendant from *Morgan, Judge.* Order entered 8 January 1982 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 8 March 1983.

Hamel, Hamel & Pearce, P.A., by Edward D. Seltzer, for defendant appellant.

Thomas S. Harrington for plaintiff appellees.

WHICHARD, Judge.

I.

The issues presented are whether the court erred in (1) denying defendant's motion to dismiss on grounds of a prior pending action, and (2) denying defendant's motion for a change of venue "for the convenience of parties and witnesses." Our holding, for reasons hereafter set forth, that the court should have granted the first motion, renders consideration of the second issue unnecessary.

II.

[1] A threshold question of appealability is presented. Our Supreme Court has treated refusal to abate on grounds of a prior pending action as immediately appealable. *E.g., Pittman v. Pittman,* 248 N.C. 738, 104 S.E. 2d 880 (1958); *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860 (1952). Subsequent to the adoption of G.S. 1A-1, Rule 13(a), relating to compulsory counterclaims, that Court has treated denial of a motion to dismiss on the ground of a prior action pending as a motion pursuant to that rule, and has allowed immediate review. *Gardner v. Gardner,* 294 N.C. 172, 240 S.E. 2d 399 (1978). We therefore consider the appeal.

III.

Plaintiffs and defendant agreed to "a Section 1031 like kind tax-free exchange" of two tracts of real property in Rockingham County. Plaintiffs were to construct a building on one tract for use by defendant. Upon completion thereof, they were to convey that tract to defendant in exchange for one owned by defendant.

Plaintiffs alleged full performance on their part, including tender of all required documents, but wilful breach by defendant in refusing to accept the tender. They sought specific performance of the contract or, in the alternative, damages for breach, punitive damages, and treble damages with attorney's fees on the ground that defendant's conduct amounted to an unfair or deceptive act or practice affecting commerce.

IV.

Defendant filed a "Motion to dismiss and motion to change venue" alleging the following:

He is a resident of Mecklenburg County. Plaintiffs are residents of Rockingham County. The subject property is in Rockingham County.

He had filed "a prior pending action in Mecklenburg County involving the same breach of contract" on 31 July 1981. The action here was not commenced until 21 August 1981. Under G.S. 1A-1, Rule 3, a civil action is commenced by filing a complaint. By law this action is abated by the prior action in Mecklenburg County, and thus should be dismissed.

Because the action involves a contract which he executed, and because he presently resides in Mecklenburg County, that county is the proper venue. Plaintiffs' complaint raises the single issue of whether defendant's acts constituted a breach of contract, and "an identical law suit previously has been filed in Mecklenburg County." It will involve great expense and inconvenience for his witnesses to require them to attend court in Rockingham County, and "for the convenience of the parties and witnesses and in the interests of justice and fairness, this matter should be removed from Rockingham County, under the provisions of . . . [G.S.] 1-83."

On the basis of these allegations, defendant moved for (1) an order dismissing this action on the basis of a prior pending action, and (2) an order removing the action for trial from Rockingham County to Mecklenburg County. Shortly after filing his motions, he filed an affidavit setting forth essentially the allegations contained in the motions, together with the complaint and summonses in the Mecklenburg County action.

Plaintiffs, in response, denied that the Mecklenburg County action was a prior pending action, that this action was abated or should be dismissed, and that this action should be removed to Mecklenburg County "for the convenience of parties and witnesses."

V.

[2] The trial court denied defendant's motions. Its order recited the following:

> The court being of the opinion that the Motion to dismiss on the grounds of a prior pending action should be denied for the fact that the Complaint in the Rockingham County action was served upon Nash as Defendant in Mecklenburg County, North Carolina prior to service of the Mecklenburg County action on the Atkins as Defendants (they being Plaintiffs in the Rockingham County action), the court being of the opinion that Rockingham County has jurisdiction due to the prior service.
>
> The Defendant's Motion for change of venue is denied on the grounds that the subject case involves the specific performance of a contract involving the exchange of real estate located in Rockingham County and Rockingham County, therefore, is the proper venue for the action.

Defendant appeals.

VI.

Prior to adoption of the Rules of Civil Procedure, a civil action was commenced by the issuance of summons. *See* former G.S. 1-14, 1-88 (repealed by 1967 N.C. Sess. Laws, ch. 954, s. 4 (amended by 1969 N.C. Sess. Laws, ch. 803, to extend effective date from 1 July 1969 to 1 January 1970)). "Under prior practice, former §§ 1-14 and 1-88 combined to say that in most cases an ac-

tion was commenced with the issuance of summons." G.S. 1A-1, Rule 3, Comment. Thus, "[a]n action [was] pending for the purpose of abating a subsequent action between the same parties for the same cause from the time of the issuance of the summons until its final determination by judgment." *McDowell, supra*, 236 N.C. at 398-99, 72 S.E. 2d at 862.

Now, however, a civil action is commenced by filing a complaint. G.S. 1A-1, Rule 3. In *Mazzocone v. Drummond*, 42 N.C. App. 493, 495, 256 S.E. 2d 843, 845, *cert. denied*, 298 N.C. 298, 259 S.E. 2d 300 (1979), this Court stated: "[Plaintiff's decedent] filed her complaint on 24 August 1977. By doing so, she commenced this civil action *as of that date.* G.S. 1A-1, Rule 3. *At all times thereafter, this action was a viable pending action.*" (Emphasis supplied.) It held that the action there, having been properly commenced by filing a complaint, was not abated by the plaintiff's death prior to service of summons on the defendant. The service date thus was not material to the viability of the action, which had been established by the filing of the complaint.

Service of summons was equally immaterial here. The earlier filing of the Mecklenburg complaint established the prior pendency of that action, and earlier service in this Rockingham action was not properly determinative of the issue. The expressed rationale for denial of defendant's motion to dismiss was thus incorrect.

VII.

[3] Denial of the motion itself was also improper.

G.S. 1A-1, Rule 13(a), provides:

> *Compulsory counterclaims.*—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if
>
> (1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

In *Gardner v. Gardner, supra,* our Supreme Court treated a motion to dismiss on grounds of a prior pending action as a motion pursuant to Rule 13(a); and held that the motion should have been allowed because the action there arose out of the same transaction or occurrence which formed the basis of the movant's prior action, and there was no reason not to apply the Rule.

Here, as in *Gardner,* the subject matter of this action "may be denominated a compulsory counterclaim" in the prior action filed in Mecklenburg County. 294 N.C. at 176, 240 S.E. 2d at 403. It clearly arose out of the same transaction or occurrence, *viz.,* the contract for an exchange of real property. It was extant when a responsive pleading would have been due in the Mecklenburg action. It does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Plaintiffs' claims were not the subject of another pending action when defendant's Mecklenburg action was filed, and defendant did not bring suit upon his claim "by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim . . . ." The exceptions to the compulsory counterclaim provisions of Rule 13(a) are thus inapplicable.

As noted in *Gardner,* "[o]nce a claim has been denominated a compulsory counterclaim under Rule 13(a), the question what must be done with it if it is filed as a subsequent, independent claim is not answered by the rule itself." *Id.* at 176, 240 S.E. 2d at 403. The Supreme Court there held that any claim which is filed as an independent action during pendency of a prior claim, and which may be denominated a compulsory counterclaim in the prior action under Rule 13(a), must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action. *Id.* at 181, 240 S.E. 2d at 406. It stated:

> . . . [I]n order to give effect to the purpose of Rule 13(a) [,] once its applicability to a second independent action has been determined, this second action must on motion be either

(1) dismissed with leave to file it in the former case or (2) stayed until the former case has been finally determined.

Id. at 177, 240 S.E. 2d at 403. While that decision related to claims in marital disputes, we perceive no valid reason why the procedure there prescribed should not be of general applicability where the subject matter of the subsequent action was properly the subject of a compulsory counterclaim in the prior action.

Because plaintiffs' claims here clearly arose out of the same transaction or occurrence which formed the basis of defendant's prior action, Rule 13(a) required that they be alleged as counterclaims in that action. The trial court, pursuant to *Gardner, supra,* should have treated defendant's motion to dismiss on grounds of a prior pending action as a motion under Rule 13(a), and should have allowed the motion with leave to file the claims asserted here as counterclaims in that action.

The order denying the motion is therefore reversed. The cause is remanded with instructions to grant the motion, with leave to plaintiffs to assert the claims alleged here as counterclaims in the Mecklenburg action.

VIII.

G.S. 1-76, in pertinent part, provides:

> Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:
>
> (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest . . . .

Plaintiffs contend this statute is "finally determinative" in that their claim for specific performance is one for "recovery of real property, or of an estate or interest therein," it thus "must be tried in the county in which the subject of the action . . . is situated," and it is undisputed that the land which is the subject of both actions lies in Rockingham County.

That question was not before the trial court, however, and it thus is not before us. Pursuant to leave herein instructed to be

granted, plaintiffs may choose to file their claim for specific performance as a counterclaim in defendant's Mecklenburg action. If so, they may then file a motion for change of venue pursuant to G.S. 1-76(1). *See Manufacturing Co. v. Brower*, 105 N.C. 440, 11 S.E. 313 (1890).

Reversed and remanded.

Judges HEDRICK and BRASWELL concur.

STATE OF NORTH CAROLINA v. GUS FRANKLIN ESTEP

No. 8222SC796

(Filed 5 April 1983)

1. **Searches and Seizures § 24— probable cause to issue search warrants—information from confidential informant**

An officer's affidavit based on information received from a confidential informant was sufficient to show that the informant was reliable and that contraband was present in the place to be searched so as to justify a finding of probable cause for issuance of a search warrant where the affidavit stated that the informant had given the affiant information for the past six months which had proven to be reliable in that it had been verified but had not yet led to arrest, and the affidavit further stated that the informant had seen approximately 10 pounds of marijuana at defendant's home two days earlier.

2. **Searches and Seizures § 24— affidavit for search warrant—information from unnamed informant through another officer**

An affidavit for a search warrant was not inadequate because it failed to disclose clearly on its face that knowledge of the informant's statements was obtained by the affiant, a police officer, through an SBI agent.

3. **Searches and Seizures § 40— search under warrant—seizure of items not listed in warrant—"plain view" doctrine**

Two stolen vehicles were lawfully seized by officers under the "plain view" doctrine during a search of defendant's premises pursuant to a warrant to search for narcotics where the evidence showed that officers intended to search for and seize the narcotics specifically referred to in the search warrant in the places where they were likely to be found; the vehicles were discovered when the garage, which was attached to defendant's house, and a vehicle in a detached building were searched for narcotics; the application for the search warrant stated that the unnamed informant had seen drugs stashed in the garage area and automobiles at defendant's residence; and upon searching the two vehicles, officers became suspicious and determined that the two vehicles had been stolen within the last two months.

State v. Estep

APPEAL by defendant from *Freeman, Judge.* Judgment entered 5 April 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 8 February 1983.

Defendant pleaded guilty to felonious possession of marijuana, two counts of possession of a stolen vehicle and drug trafficking in methaqualone, after the trial court denied defendant's pre-trial motion to suppress evidence obtained during a search of his residence. From judgments entered pursuant to his plea of guilty, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General John F. Maddrey, for the State.

Bruce C. Fraser, for defendant-appellant.

EAGLES, Judge.

[1] Defendant's first assignment of error questions the sufficiency of the affidavit upon which probable cause to issue the warrant to search defendant's home was based. We hold that the affidavit was sufficient.

An affidavit sufficient to form a basis for a finding of probable cause to search must contain facts indicating that there are reasonable grounds to believe that illegal activity is being carried on or that contraband is present in the place to be searched. *State v. Hayes,* 291 N.C. 293, 230 S.E. 2d 146 (1976); *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964). Where an unidentified informant is relied upon, the affidavit must contain some of the underlying facts and circumstances which show that the unidentified informant is credible or that the information he furnished is reliable. *Id.* Here, the affidavit stated that:

> On Sept. 21, 1981 Affiant met with Confidential Source of Information, who is known by affiant, SBI Agent John Burns and Chief Deputy Jim Johnson [sic] Confidential Source of Information has given this affiant and SBI Agent Burns information for the past six months that has proven to be reliable. This information has been verified but has not led to arrests as of this date. Confidential Source of Information stated on Sept. 21, 1981 they have been in the presence of Gus Estep during the last year, that on several occasions

Source has purchased quantities of cocaine and marijuana, the latter being turned over to SBI Agent Burns for submittal to Raleigh Lab. The Source has seen on one occasion in Jan. 1981 one kilo of cocaine and in Feb. 1981 approx. fifty pounds of marij... at the Estep home. On the week-end of Sept. 12, 1981 Source saw approx six pounds of marij... at the Estep home and on the week-end of Sept. 19, 1981 Source saw approx ten pounds of Mar... at the Estep home. Confidential Source stated that the Drugs are kept in the living room and bedroom area of the home and has seen on occasions drugs stashed in the kitchen cabinet, Garage area and automobiles at the residence of Estep.

Confidential Source states Estep is a major dealer in Cocaine and Marijuana in North Carolina and was arrested in Guilford Co. N.C. for the sale of 100 pounds to an SBI Agent this year.

This affiant checked with SBI Agent Burns and Agent Burns stated Gus Franklin Estep was arrested in Jamestown, N. C. on Feb. 9, 1981 and charged by the SBI and Guilford Co. Sheriff Dept. with Felonious Possession with intent to sell and deliver Schedule VI Felonious Delievery [sic] of Schedule VI and Trafficing [sic] of Schedule VI, also that after the arrest and seizure of approx 100 pounds of marijuana Gus Estep was searched and charged with Felonious Possession of Cocaine and Carrying a Concealed Weapon. These charges are waiting trial in Guilford Co. N. C.

Defendant's contention that the information contained in the affidavit failed to provide a sufficient basis for a finding of probable cause to search is without merit. This Court has held that the requirement that the informant be reliable and credible is met where the affidavit contains a statement that the informant had given "this agent good and reliable information in the past . . . that had been checked by the affiant and found to be true." *State v. McKoy*, 16 N.C. App. 349, 352, 191 S.E. 2d 897, 899 (1972). The affidavit here stated that "Confidential Source of Information has given this affiant and SBI Agent Burns information for the past six months that has proven to be reliable. This information has been verified but has not led to arrests as of this date." The affidavit also stated "that they (informant) have been in the

presence of Gus Estep (defendant) during the last year, that on several occasions Source has purchased quantities of cocaine and marijuana, the latter being turned over to SBI Agent Burns for submittal to Raleigh Lab." The affidavit sufficiently outlined underlying circumstances showing that the informant was both reliable and credible.

The affidavit, dated 21 September 1981, further stated that "on the week-end of Sept. 19, 1981 Source saw approx ten pounds of mar... at the Estep home." *State v. Singleton*, 33 N.C. App. 390, 235 S.E. 2d 77 (1977), held an affidavit sufficient to establish probable cause where it stated that the informant had seen drugs in defendant's possession at his residence within the past 48 hours and that the informant had provided reliable information in the past. We hold that, as in *Singleton*, the requirements outlined in *Aguilar* and reiterated in *Hayes* have been met in the present case. "This affidavit specifically identifies the defendant, his residence, and the contraband in his possession at his residence. It explains the way in which the informant learned these facts, and it states that on a recent previous occasion the informant gave the affiant information which proved true. This is sufficient to meet the so-called *Aguilar* standard." *State v. Gibson*, 32 N.C. App. 584, 587, 233 S.E. 2d 84, 87 (1977).

[2] Defendant also contends that the affidavit was inadequate because it failed to disclose on its face that knowledge of the informant's statements was obtained by the affiant, Detective Bass, through a third party, SBI Agent Burns. We find no merit in this argument since this court has previously upheld a finding of probable cause based on an affidavit where the affiant received his information from a named informant who in turn received his information from an unnamed informant. *State v. Caldwell*, 53 N.C. App. 1, 279 S.E. 2d 852, *cert. den.* and *app. dismd.*, 304 N.C. 197, 285 S.E. 2d 102 (1981). Such an affidavit will satisfy the *Aguilar* test set out above as long as "it sets out facts upon which the magistrate could determine the reliability of both the unnamed informant and the named informant. . . ." *Id.* at 6, 279 S.E. 2d at 856. In the case *sub judice* we have already established that the affidavit set out facts upon which the magistrate could make his or her determination as to the reliability of the unnamed informant. Furthermore, this court has held that "where the named informant is a police officer, his reliability will be presumed." *Id.*

The fact that the named informant, Agent Burns, had found the undisclosed informant to be reliable in the past was sufficient basis for the affiant to rely on the same undisclosed informant. *State v. Williams*, 49 N.C. App. 184, 270 S.E. 2d 604 (1980). For these reasons we find that the defendant suffered no prejudice as a result of the affidavit's failure to clearly state that the affiant's information was obtained through a third party and not directly from the unnamed informant.

[3] Defendant's final assignment of error deals with the two vehicles which were seized by law enforcement officers during the search of his residence. Defendant argues that the court erred by denying defendant's pre-trial motion to suppress evidence concerning these two vehicles because they were not listed on the search warrant as items to be seized, and were therefore illegally seized. We find no merit in defendant's assignment of error since the evidence in question was properly seized under the "plain view" doctrine recognized by our courts. We have previously applied the "plain view" doctrine to allow the introduction into evidence of objects not specifically listed in the search warrant where "(1) there exists a nexus between the item to be seized and criminal behavior, and (2) the item is in plain view, and (3) the discovery of that item is inadvertent, that is, the police did not know its location beforehand and intend to seize it. . . ." *State v. Zimmerman*, 23 N.C. App. 396, 402, 209 S.E. 2d 350, 355 (1974), *cert. den.* 286 N.C. 420, 211 S.E. 2d 800 (1975).

The trial court found that the requirements of nexus, plain view and inadvertence were all met under the facts of the present case. Its findings can be disturbed only where they are not supported by competent evidence. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977). We find competent evidence in the record to support such a finding. The officers intended to search for and seize the drugs specifically referred to in the search warrant in the places where they were likely to be, when they arrived at defendant's residence on 21 September 1981. The testimony of Detective Bass at the pre-trial hearing indicated that the cars were discovered when the garage, which was attached to the house, and an automobile in a detached building were searched for drugs. Since the search warrant application stated that the unnamed informant "has seen on occasions drugs stashed in the . . . Garage area and automobiles at the residence of Estep," the

officers were within the scope of the search warrant while searching defendant's garage and any automobiles on defendant's property. Upon searching the two automobiles, law enforcement officers became suspicious and a subsequent check revealed that the two vehicles had been stolen within the last two months. This was sufficient basis for a finding that the vehicles had been properly seized and were therefore admissible evidence at trial.

For the above reasons, in the denial of defendant's motion to suppress and the acceptance of defendant's guilty plea, we find

No error.

Judges HEDRICK and JOHNSON concur.

STATE OF NORTH CAROLINA v. CYRIL RODNEY SETZER

No. 8227SC700

(Filed 5 April 1983)

1. **Robbery § 2— indictment—property taken from named person—sufficiency of allegation**

An indictment alleging that, by the use of a pistol whereby the life of a named person was endangered and threatened, the defendant took money from The Pantry, Inc. sufficiently alleged that the money was taken from the named person.

2. **Criminal Law § 163.3— failure to charge—absence of objection at trial**

Defendant could not properly assign as error the failure of the trial court to recapitulate certain evidence in the charge where defendant made no objection to the charge before the jury retired. App. R. 10(b)(2).

3. **Criminal Law § 138— armed robbery—aggravating factors—inducement of others and position of dominance—insufficiency of evidence**

In imposing a sentence for armed robbery, the trial court erred in finding as an aggravating factor that defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants where the evidence showed only that defendant's wife looked with him for a place to rob, placed gauze on defendant's face prior to the robbery, and waited for him in an automobile while he committed the robbery.

4. Criminal Law § 138— armed robbery—pecuniary gain—use of deadly weapon—improper aggravating factors

In imposing a sentence for armed robbery, the trial court erred in finding as aggravating factors that the crime was committed for pecuniary gain and that defendant used a deadly weapon in the crime since those factors are necessary elements of the crime of armed robbery. G.S. 15A-1340.4(a)(1).

5. Criminal Law § 138— aggravating factor—untruthful testimony by defendant

A trial court cannot find as an aggravating factor that the defendant did not testify truthfully when the only evidence of his untruthfulness is his contradicted testimony at a voir dire hearing or during the trial. Therefore, the trial court in an armed robbery case erred in finding as an aggravating factor that defendant deliberately lied to the court concerning the circumstances of the taking of a statement concerning his participation in the offense.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 3 March 1982 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 14 January 1983.

The defendant was tried for armed robbery. Sheila Chapman testified that on 17 October 1981 she was working at "The Pantry," a convenience store in Cleveland County. She testified further that a man whose face was covered with gauze pointed a blue steel revolver at her and forced her to give him money which was owned by "The Pantry, Inc." James Woodard, a Special Agent with the State Bureau of Investigation, testified that the defendant stated to him that on 17 October 1981, he, his wife, and his daughter were in his automobile; that he left the automobile and went into "The Pantry" with gauze on his face and a plastic gun; that he pointed the plastic gun at the clerk in "The Pantry" and demanded the money, which she gave to him. Mr. Woodard testified further that the defendant told him that he, his wife, and his daughter left the area in his automobile and spent the money on groceries.

The defendant testified in his own behalf and denied he committed the robbery. He said he was at home at the time and said he did not tell Mr. Woodard he had committed the robbery. The defendant's wife corroborated his testimony.

The defendant was convicted of armed robbery and was sentenced to 20 years in prison. He appealed.

Attorney General Edmisten, by Assistant Attorney General Jane P. Gray, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

WEBB, Judge.

[1] The defendant argues under one assignment of error that the indictment on which he was tried is fatally defective. The indictment reads as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 17th day of October, 1981, in Cleveland County Cyril Rodney Setzer unlawfully, wilfully, and feloniously having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a pistol whereby the life of Sheila Chapman was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away Two Hundred and Twelve ($212.00) Dollars in United States Currency of the value of Two Hundred and Twelve ($212.00) dollars, from the presence, person, place of business, and residence of The Pantry, Inc., Store #257, a corporation, located on Fallston Road at the intersection of Highway 18 and Highway 180 North of Shelby, North Carolina."

The defendant contends the allegation in the indictment that the property was taken from "the person, presence, place of business and residence" of a corporation named The Pantry, Inc. does not sufficiently allege the property was taken from the person or presence of any person. He says the failure to allege this element of armed robbery renders the indictment defective.

We believe the indictment is sufficient. It charges that by use of a pistol whereby the life of Sheila Chapman was endangered and threatened, the defendant took personal property from The Pantry, Inc. We believe this sufficiently alleges the property was taken from Sheila Chapman. Corporations act through agents, and we believe it is clear from this allegation that Sheila Chapman was the person in control of the corporation's property and from whose possession the property

was taken. *See State v. Rankin*, 55 N.C. App. 478, 286 S.E. 2d 119, *cert. denied*, 305 N.C. 590, 292 S.E. 2d 11 (1982).

[2] The defendant also assigns error to the charge. In recapitulating the evidence, the court did not say that there was evidence that the gun used in the robbery was a plastic gun. The defendant contends this inhibited the jury from finding the defendant guilty of common law robbery. There is nothing in the record to show the defendant objected to the charge before the jury retired, although the defendant was given an opportunity to do so. Rule 10(b)(2) of the Rules of Appellate Procedure (effective 10 October 1981) provides in part:

> "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."

Since no objection to the charge was made before the jury retired, the defendant cannot assign error to the charge.

[3] The defendant assigns error, in which the State concurs, to the sentence imposed. Armed robbery is a Class D felony with a requirement that the defendant receive a sentence of at least 14 years. *See* G.S. 14-87 and *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309 (1982), *cert. denied*, 307 N.C. 471, 299 S.E. 2d 227 (1983). The court found four aggravating factors and three mitigating factors and imposed a sentence of 20 years. The aggravating factors which the court found were as follows: (1) the defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants, to wit: his wife; (2) the offense was committed for hire or pecuniary gain; (3) the defendant was armed or used a deadly weapon at the time of the crime; and (4) the defendant deliberately lied to the court concerning the circumstances of the taking of a statement concerning his participation in the offense.

The evidence supporting the first aggravating factor consisted of his wife's testimony on cross-examination. She testified she had signed a statement in which she said she had placed

gauze on the defendant's face, looked with him for a place to rob, and waited for him in the automobile while he went into The Pantry. This is some evidence that she acted in concert with her husband. We do not believe it is evidence that the defendant induced his wife to participate in the crime or occupied a position of leadership or dominance over her unless we presume a man controls the actions of his wife. Such a presumption against Mr. Bumble brought from him possibly the most colorful denunciation of the law in our literature. I do not believe we should make such a presumption here. We hold the evidence was not sufficient to support a finding of this aggravating factor.

[4] As to the second aggravating factor, there is no evidence the defendant committed the crime for hire. The evidence that he received money was necessary to prove an element of armed robbery; that he took property from The Pantry. It cannot be used to prove he committed the crime for pecuniary gain. *See State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983). Without this, there is not sufficient evidence that the defendant committed the robbery for pecuniary gain to support this finding of an aggravating factor.

It was also error to find as an aggravating factor that the defendant was armed or used a deadly weapon at the time of the crime. The evidence that the defendant was armed and used a deadly weapon was used to prove an element of the crime. *See* G.S. 15A-1340.4(a)(1).

[5] The fourth aggravating factor found by the court is "the defendant deliberately lied to the Court concerning the circumstances of the taking of a statement concerning his participation in the offense." The court conducted a *voir dire* hearing during the trial to determine the admissibility of the defendant's statement to Mr. Woodard. The defendant testified at this hearing that the statement was coerced. Mr. Woodard testified the statement was not coerced. The court accepted Mr. Woodard's testimony and allowed the statement into evidence. There is no other evidence in the record as to the truthfulness of the defendant's testimony.

The fourth aggravating factor found by the court is not one of those listed under G.S. 15A-1340.4. This section does not require that only aggravating or mitigating factors listed in the

section be considered. The court may use any factors which are supported by the preponderance of the evidence and are reasonably related to the purposes of sentencing. We do not believe, based on the evidence in this case, we should hold that the fourth factor could have been considered in imposing a sentence. If, in any case in which the defendant testifies and is found guilty, the court may then find as an aggravating factor that the defendant did not testify truthfully, it would virtually repeal presumptive sentencing in a large percentage of cases. This the courts cannot do. In order to carry out presumptive sentencing as mandated by the General Assembly, we hold that a judge cannot find as an aggravating factor that the defendant did not testify truthfully when the only evidence of his untruthfulness is his contradicted testimony at a *voir dire* hearing or during the trial.

We find no error in the trial. We reverse the sentence imposed and remand for a new hearing as to the sentence to be imposed.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, AETNA CASUALTY AND SURETY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, HOME INSURANCE COMPANY, HOME INDEMNITY INSURANCE COMPANY, STANDARD FIRE INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY, AMERICAN MOTORISTS INSURANCE COMPANY, FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, MARYLAND CASUALTY COMPANY, TRAVELERS INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND AND PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 8210INS428

(Filed 5 April 1983)

Master and Servant § 80— workers' compensation insurance—rate filing—no authority by hearing officer to enter final order

The Commissioner of Insurance had no authority to designate a hearing officer who was a Deputy Commissioner of Insurance as the official to make the final agency decision on a filing by the N.C. Rate Bureau for workers' compensation rates, and an order signed by the hearing officer disapproving the proposed rates for the industrial classification and approving only a portion of the rate increase for the "F" classifications was null and void *ab initio*. Therefore, where the 90-day deadline of G.S. 58-124.21 for the Commissioner of Insurance to make an order of disapproval of a proposal for decision made by a hearing officer has expired, the filing is deemed approved.

Judge WELLS concurring.

APPEAL by defendants from Order of North Carolina Deputy Commissioner of Insurance entered 1 December 1981. Heard in the Court of Appeals 9 March 1983.

This appeal arises out of the filing made on 26 August 1981 by the defendant, North Carolina Rate Bureau (Rate Bureau) on its own behalf and on behalf of its member companies writing workers' compensation insurance in North Carolina seeking approval of revised workers' compensation insurance rates and rating values.

The Commissioner of Insurance on 25 September 1981 issued his notice of public hearing on the filing of the Rate Bureau, pursuant to G.S. 58-124.21. The notice alleges that the filing fails to

comply with the provisions of Article 12B of Chapter 58 of the North Carolina General Statutes in various respects.

Following an evidentiary hearing an order was issued by Hearing Officer Thomas B. Sawyer on 1 December 1981. The order disapproved the entire rate increase set forth in the filing for the industrial classifications and approved a portion of the rate increase for the "F" classification. All defendants appeal.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for plaintiff appellee.

Young, Moore, Henderson & Alvis, by Charles H. Young and George M. Teague, for defendant appellants.

JOHNSON, Judge.

Appellate review of this case is governed by the standards set forth in G.S. 58-9.6 of the Insurance Law, Chapter 58 of the North Carolina General Statutes and by the provisions of the Administrative Procedure Act, in particular G.S. 150A-51.[1] *See Com'r of Insurance v. Rate Bureau,* 300 N.C. 381, 269 S.E. 2d 547, *reh. denied,* 301 N.C. 107, 273 S.E. 2d 300 (1980); *Comr. of Insurance v. Rate Bureau,* 54 N.C. App. 601, 284 S.E. 2d 339 (1981), *disc. rev. denied,* 305 N.C. 298, 290 S.E. 2d 708 (1982).

Appellants have assigned as error the entry of the order, most of the findings and conclusions therein, many of the hearing

1. G.S. 58-9.6(b) provides in pertinent part: The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are: (1) In violation of constitutional provisions or (2) In excess of statutory authority or jurisdiction of the Commissioner, or (3) Made upon unlawful proceedings, or (4) Affected by other errors of law, or (5) Unsupported by material and substantial evidence in view of the entire record as submitted, or (6) Arbitrary or capricious.

G.S. 150A-51. The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedure; or (4) Affected by other error of law; or (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or (6) Arbitrary or capricious . . .

officer's evidentiary rulings and the failure of the hearing officer and Commissioner to take certain actions. Twenty questions are presented for review. We need address only appellants' Assignment of Error No. 29 as our ruling upon it is dispositive of the entire appeal.

Appellants assign as error the action of the hearing officer in entering the order of 1 December 1981, and argue that the order is fatally defective because the hearing officer lacks authority to enter a final order under the provisions of Chapters 58 and 150A of the North Carolina General Statutes. The order of 1 December 1981 was signed by Thomas B. Sawyer. Following his signature are these words: "Deputy Commissioner of Insurance and Designated Hearing Officer Presiding and Designated to make the Final Agency Decision." Apart from this reference, no recital of the hearing officer's authority to make the final order appears either in the order itself or elsewhere in the record.

The appellants do not dispute the Commissioner's authority to designate Deputy Commissioner Sawyer as the hearing officer in this case. Both G.S. 58-9.2 and G.S. 150A-32 recognize the right of the Commissioner of Insurance to designate other persons to serve as hearing officers. However, appellants do dispute the Commissioner's attempt to delegate to Deputy Commissioner Sawyer the authority to make the final agency decision in this matter.

In *State of North Carolina Ex Rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 61 N.C. App. 262, 300 S.E. 2d 586 (1983) this Court recently examined the respective powers and duties of the Commissioner of Insurance and his designated hearing officer in the review of filed rates and entry of a final agency decision in a contested insurance rate case. We found the proper statutory allocation of authority and procedure to be as follows: (1) the powers and duties of both the Commissioner of Insurance and the designated hearing officer are limited by legislative prescription;[2] (2) once there has been a filing, notice

2. In *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 202, 214 S.E. 2d 98, 104 (1975) the court stated that although the Commissioner's office is created by the North Carolina Constitution, his power and authority emanate from the General Assembly and are limited by legislative prescription. The only power he has to fix rates is such power as the General Assembly has delegated to and vested

and a hearing conducted, G.S. 58-124.21(a) provides that the Commissioner may issue his order disapproving the filing and fixing a date after which such filing shall no longer be effective, with a statutory deadline of 90 days from the date of filing in which the Commissioner is to make his order of disapproval;[3] (3) when an agency of state government determines to use the services of a hearing officer G.S. 150A-33 limits his powers to six prescribed categories which do not include the power to issue a final agency decision;[4] and (4) under the Administrative Procedure Act, when the hearing is conducted by a person other than the official who is to make a final decision, G.S. 150A-34(b) requires the person who conducted the hearing to make a "proposal for decision" containing findings of fact and conclusions of law. Section (a) of the same statute provides for service on the parties of the proposed decision and the opportunity to file exceptions, propose findings and present arguments "to the officials who are to make the decision."

Based upon these various statutes we concluded that (1) it was the duty of the hearing officer to go no further than to make a proposal for decision to the Commissioner of Insurance himself (or his chief deputy appointed under G.S. 58-7.1); (2) it then became the duty of the Commissioner to review the submitted proposal for decision and thereafter decide for himself "wherein and to what extent such filing is deemed to be improper;" and (3) when the Commissioner of Insurance delegated to his appointed hearing officer the power to make the final agency decision, the Commissioner made an unlawful delegation of power in excess of his statutory authority. Accordingly we held (1) that the order

in him. A hearing officer designated to conduct hearings in contested cases is a creature of the statutes, G.S. 150A-32, and he too may act only as the legislature has prescribed.

3. G.S. 58-124.21(a) states in pertinent part: If the Commissioner after hearing finds that the filing does not comply with the provisions of this Article, he may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, after which such filing shall no longer be effective. Any order of disapproval under this section must be entered within 90 days of the date such filing is received by the Commissioner.

4. The six categories listed in G.S. 150A-33 are: Administering oaths, signing and issuing subpoenas, taking depositions, regulating the course of hearings, providing for pre-trial conferences of parties to simplify issues, and making application to the court for contempt orders.

entered by the hearing officer pursuant to this unlawful delegation was void *ab initio;* (2) that the filing of the Rate Bureau, never having been disapproved as provided by G.S. 58-124.21, remained in effect; and (3) that the rates filed were deemed to be approved because the 90-day deadline for the Commissioner to issue an order of disapproval had expired.

For the reasons set forth in that opinion, we hold that the order entered 1 December 1981 by Thomas B. Sawyer, a Deputy Commissioner of Insurance and Hearing Officer in this contested case, is void *ab initio* as the delegation of power to him to make the final agency decision was in excess of the Commissioner's statutory authority. Therefore, the order of the Commissioner disapproving the workers' compensation insurance rate increase for the industrial classification and approving only a portion of the rate increase for the "F" classifications proposed in the Rate Bureau's filing is reversed and vacated and the rates proposed therein are deemed approved. *See Comr. of Insurance v. Rate Bureau, supra,* 54 N.C. App. at 606, 284 S.E. 2d at 343; *Commissioner of Insurance v. Rate Bureau,* 40 N.C. App. 85, 108, 252 S.E. 2d 811, 826, *cert. denied,* 297 N.C. 452, 256 S.E. 2d 810 (1979). The portion of the premium escrowed by the member insurance companies in the escrow account pursuant to G.S. 58-124.22(b) shall be distributed to the insurance companies for whose account it was escrowed by the escrow agents.

Reversed and vacated.

Judges WELLS and PHILLIPS concur.

Judge WELLS concurring.

We have overruled the Commissioner of Insurance once again, this time on narrow procedural, but clearly correct, grounds. Our insurance laws are cumbersome and confusing; their administration is often ineffective. North Carolina consumers of insurance protection—who pay both the costs of insurance itself and their share of the cost of insurance regulation—are not being served. The need for reform of our insurance laws is obvious and corrective action is overdue.

STATE OF NORTH CAROLINA v. WHITLEY JEROME BAGGETT

No. 828SC978

(Filed 5 April 1983)

1. **Criminal Law § 73.1— hearsay statement—admission as harmless error**

While a robbery victim's testimony that a police officer told her that she had picked out the same photograph twice was incompetent to prove that she had, in fact, picked the same photograph both times, the admission of such testimony was not prejudicial error where other testimony by the victim clearly established that she had twice picked out the same photograph.

2. **Criminal Law § 35— confession by another—inadmissibility as declaration against penal interest**

An officer's proffered testimony that a third person came to the police department and said that he had committed the robbery for which defendant was on trial and that he did not want to see defendant go to jail did not come within the hearsay exception for declarations against penal interest and was inadmissible where the declarant was available to testify; the evidence that the third person confessed was not necessarily inconsistent with defendant's guilt because defendant's accomplice in the crime remained unidentified; and the third person's statement was not voluntary and reliable since he testified on voir dire that he had not been involved in the robbery but confessed only because of threats.

3. **Criminal Law § 35— repudiated confession by third person—inadmissibility**

The trial court properly excluded testimony by a witness that he had confessed the day before to the robbery for which defendant was on trial where the witness on voir dire unequivocably repudiated his confession and testified that he had confessed because of threats and knew nothing about the robbery, since such testimony could not have been probative of defendant's involvement in the robbery and would have served only to introduce speculative and conjectural evidence before the jury.

APPEAL by defendant from *Stevens, Judge.* Judgment entered 6 May 1982 in WAYNE County Superior Court. Heard in the Court of Appeals 11 March 1983.

Defendant was tried on a properly drawn indictment for robbing Maybelle Norris with a firearm. From judgment entered on a jury verdict of guilty of robbery with a firearm, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

W. Carroll Turner for defendant.

WELLS, Judge.

Mrs. Norris, the victim, testified for the State. She testified that she had been robbed by two men, one of whom had been wearing a blue coat and wielding a pistol. She identified defendant as the man who had worn the blue coat. She had visited the police department on two occasions after she was robbed. On each visit, she looked through photographs that the police had, trying to identify the two men who had robbed her. On her first visit, the day she was robbed, she did not take her glasses with her. Mrs. Norris picked out two photographs on her first visit. She was nearly positive that she had correctly identified one photo as a photo of defendant, but she wanted to see the picture again with her glasses. She returned with her glasses the next day and picked out a photograph which she believed showed the robber who had worn the blue coat. That was a photograph of defendant. Over defendant's objection, Mrs. Norris was allowed to testify that when she picked out defendant's photograph on the second day she asked a police officer if she had picked the same photograph the day before and that the officer responded that she had. On both redirect and recross examination, Mrs. Norris testified without objection from defendant that she picked out the same photograph both times.

[1] By his first assignment of error, defendant contends that the trial court erred in allowing Mrs. Norris to testify that the police officer told her that she had picked out the same picture twice. Defendant correctly asserts that Mrs. Norris's testimony as to what the police officer said was incompetent to prove that she had, in fact, picked out the same photo both times. *See generally* 1 Brandis on North Carolina Evidence §§ 138-141 (1982). Nevertheless, on the facts of this case, defendant could not have been prejudiced by the admission of Mrs. Norris's answer because her other testimony clearly established that she had, in fact, picked out the same photo both times. This assignment is overruled.

In his second assignment of error, defendant contends that the trial court erred in not allowing him to offer testimony of a police officer and of Murray DeMorris McClain to the effect that McClain had confessed to the crime for which defendant was being tried.

On the first day of defendant's trial, McClain, an acquaintance of defendant, came to the courthouse and confessed to robbing Mrs. Norris, telling Sergeant R. D. Hart that he hated to see defendant go to jail. McClain was then advised of his *Miranda* rights, and an attorney was appointed to represent him. From the record, it appears that McClain made no further statements that day. On the second day of defendant's trial, defendant sought to call McClain as a witness. McClain was granted immunity by the prosecution and the court ordered that the jury be excused and a *voir dire* conducted. On *voir dire*, McClain admitted that he had confessed to Officer Hart the day before but further testified that his confession had been a lie, and that he was not involved in the robbery of Mrs. Norris. McClain testified that he was a friend of defendant. On the night before defendant's trial, McClain testified he received an anonymous phone call. The caller told McClain to confess to the robbery lest he be killed. McClain had been drinking whiskey when he received the call and he drank more after receiving the call. When he awoke the next morning, he drank some more and, intoxicated, went to the courthouse where defendant was being tried. McClain testified that the first person he told about the threats was his attorney who was appointed after McClain confessed. On *voir dire*, McClain testified that he was then sober, that he had not been involved in the robbery of Mrs. Norris, and that he had confessed the day before only because he was scared. The trial judge found that McClain's confession was not voluntary and that McClain knew nothing about the robbery of Mrs. Norris and refused to allow defendant to call McClain as a witness, ruling that McClain's confession was not admissible as a declaration against penal interest. Defendant also sought to call Officer Hart to testify that McClain had confessed to the robbery. The trial judge, concluding that he had already ruled on the question, denied defendant's request.

It is clear from the record what the witnesses would have said had defendant been allowed to call them. Officer Hart would have testified that McClain came to the police station of his own initiative and said that he had robbed Mrs. Norris and that he did not want to see defendant go to jail. McClain would have testified that he had been granted immunity, that he and defendant had been friends, he had not been involved in the robbery, and that he had confessed the day before because of threats.

Evidence tending to show that another person committed the crime a defendant is being tried for is generally admissible when it tends to prove that the defendant did not commit the crime. *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981); 1 *Brandis* § 93. Evidence of commission of the crime by another is properly excluded when such evidence is so remote as to create only an inference or conjecture as to the other's guilt. *State v. Hamlette, supra;* cases cited in 1 *Brandis* § 93, note 32. When such exculpatory evidence is in the form of an earlier statement by a person other than the witness testifying, the evidence of the earlier statement may only be admitted if it falls within the hearsay exception for declarations against penal interest. *State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978). In *Haywood*, writing for the Court, Chief Justice Sharp set out the following requirements for admission of declarations against penal interest:

> (1) The declarant must be dead; beyond the jurisdiction of the court and the reach of its process; suffering from infirmities of body or mind which preclude his appearance as a witness either by personal presence or by deposition; or exempt by ruling of the court from testifying on the ground of self-incrimination. As a further condition of admissibility, in an appropriate case, the party offering the declaration must show that he has made a good-faith effort to secure the attendance of the declarant.
>
> (2) The declaration must be an admission that the declarant committed the crime for which defendant is on trial, and the admission must be inconsistent with the guilt of the defendant.
>
> (3) The declaration must have had the potential of actually jeopardizing the personal liberty of the declarant at the time it was made and he must have understood the damaging potential of his statement.
>
> (4) The declarant must have been in a position to have committed the crime to which he purportedly confessed.
>
> (5) The declaration must have been voluntary.
>
> (6) There must have been no probable motive for the declarant to falsify at the time he made the incriminating statement.

(7) The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness.

[2] With regard to Officer Hart's testimony as to McClain's confession, the trial judge properly excluded such evidence because Hart's testimony could not have met the *Haywood* requirements for admissibility. The declarant, McClain, was available to testify. The evidence that McClain confessed to being involved with the robbery was not necessarily inconsistent with defendant's guilt; defendant's accomplice remained unidentified and all McClain had said was that he had robbed Mrs. Norris. McClain's statement was not voluntary. Moreover, McClain's declaration was made under circumstances that rendered it unreliable because he had motives to falsify at the time he confessed.

[3] With regard to McClain's testimony, we hold that the trial judge properly disallowed it, albeit for the wrong reason. Had McClain been allowed to testify that he had confessed the day before, his testimony would not have been hearsay because it was the declarant who was on the stand. *See generally,* 1 *Brandis* § 138. Thus, to be admissible, McClain's testimony did not have to meet the *Haywood* requirements for admissibility of hearsay declarations against penal interests. McClain's testimony, however, to be probative of defendant's innocence must be more than speculative or conjectural in nature. McClain's *voir dire* testimony showed that he was a friend of defendant and he did not want defendant to go to jail and that he had been granted immunity and could have taken the blame for the crime with which defendant had been charged without compromising his own interests. McClain, represented by counsel, unequivocably repudiated his prior confession and admitted that he knew nothing about the crime defendant was charged with. These circumstances clearly show that McClain's testimony could not have been probative of defendant's involvement in the robbery and would only serve to introduce speculative and conjectural evidence before the jury. This assignment is overruled.

Defendant received a fair trial free of prejudicial error.

No error.

Judges HILL and JOHNSON concur.

MATTHEW F. POWERS AND RACHEL P. REESE, INDIVIDUALLY, AND AS CO-EXECUTORS OF THE ESTATE OF FANNIE B. POWERS, PETITIONERS v. LOUIS P. FALES; KATHLEEN P. COX; FRANCES P. MUNSE; JUDITH P. PERRY; A. M. POWERS, JR.; MABLE P. PREVATTE; OLLIN POWERS; THOMAS POWERS AND JAMES POWERS, RESPONDENTS

No. 8216SC304

(Filed 5 April 1983)

1. **Evidence § 45— nonexpert testimony as to value**

Nonexpert witnesses were properly permitted to give their opinion as to the equality in value of several parcels of land involved in a partitioning proceeding where each of the witnesses had been upon the land in question and had demonstrated a business background which would permit the formation of an intelligent opinion.

2. **Partition § 7— fairness of division—supporting evidence**

The evidence in a partitioning proceeding supported the trial court's determination that the division of the land was fair and equal although appellants' expert appraisers ascribed different values to the parcels than did the commissioners.

APPEAL by respondents from *Britt, Judge.* Judgment entered 15 December 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 9 February 1983.

This action concerns the distribution of real property inherited by the eleven children of Avery M. Powers, who died intestate on 9 November 1953. Following the death of Avery M. Powers, the eleven children executed a deed to their mother, Fannie B. Powers, conveying to her a life estate in all of the real property owned by Avery M. Powers at the time of his death. Fannie B. Powers died testate on 4 February 1977, and the co-Executors of her will brought this action seeking, among other things, to have three commissioners appointed "to allot and to award owelty in the division of the real property of Avery M. Powers, deceased, in accordance with the said [L]ast [W]ill and [T]estament of Fannie B. Powers, deceased."

John Wishart Campbell for respondent appellants.

I. Murchison Biggs, P.A., by I. Murchison Biggs, for petitioner appellees.

BECTON, Judge.

I

Procedurally, this case is complicated by the fact that Fannie B. Powers, who had been granted only a life estate in the real property of Avery M. Powers, sought in her Last Will and Testament, to influence the disposition of the real property following her death. Relevant portions of Item V of Fannie Powers' will read:

> Although the land which I now possess is mine only for the term of my natural life and I am unable to to say which part of the land will [go] to any of my children at my death, I have certain wishes regarding the home which I now occupy and the home which I previously occupied that I hope my children will respect. I realize that this is not compulsory on them but if my children will respect me when living and my memory when I am dead they will comply with this request.
>
> It is my request that in the division of the lands between my eleven children that my son M. F. Powers will get the new home which I now occupy and that the other children will let him have it on the basis of $20,000.00. It is my further desire that my son Thomas A. Powers shall get the old home and outbuildings formerly occupied by me and my late husband and that the other children will let him have it on a basis of $1200.00.
>
> My reason for making these requests is not that I love either one of my children more than another because I love each the same, but my two sons lived on the farm and continue to live on the farm and I desire that these homes be theirs.

In a written document executed in July 1977 some of the children agreed "that, as to their respective interest [sic] in said property, the wishes of Mrs. Fannie B. Powers, as expressed in Item V of her Last Will and Testament . . . shall be observed, and

to that end agree[d] to request that the Court shall direct the commissioners appointed to make partition of said land, to allot said lands and to award owelty in said division in accordance with the Last Will and Testament of Fannie B. Powers, deceased."

In this context, the co-Executors instituted this proceeding seeking (a) to have the parties who signed the July 1977 agreement named as petitioners; (b) to have the clerk appoint three commissioners to divide the land in accordance with Fannie B. Powers' express will; or (c) alternatively, to have the matter transferred to superior court for a declaratory judgment with regard to the distribution of the property. Some of the children filed Replies to the Petition, contending that Item V of the Will was "void and of no legal effect, for the reason that the said Fannie B. Powers owned no greater than a life estate in the real property . . . ."

The case was heard in superior court, and the superior court, after establishing the relative rights of the parties and after concluding that the children who had signed the July 1977 agreement were bound by that agreement, remanded the matter to the Clerk with the following directions:

> that said Clerk shall immediately proceed to appoint Commissioners for the partitioning of the lands of Avery M. Powers, deceased, among the Petitioners and Respondents herein; and that said Clerk shall order and direct the Commissioners so appointed that, if it can be done without injury to any party, they should so divide the lands that the portion allotted to Matthew F. Powers be allotted so as to include the new home built by Mrs. Fannie B. Powers on said lands, and occupied by her during the latter years of her life; and that the portion allotted to Thomas A. Powers be allotted so as to contain the old home of Mrs. Fannie B. Powers, with any outbuildings associated therewith. The Clerk will further direct the Commissioners that the portions allotted to Matthew F. Powers and Thomas A. Powers will be allotted without taking into consideration the value of the buildings located thereon; and that said Commissioners be further directed to determine the fair market value of these buildings separately from the lands and to assess an owelty payable to Mable P. Prevatte, Kathleen P. Cox and A. M.

Powers, Jr., based upon such fair market value. The Commissioners shall further be directed to assess an owelty payable to Louise P. Fales, Rachel P. Reese, Judith P. Perry, Thomas Powers, James Powers, Frances P. Munse and Ollin Powers by Matthew F. Powers based upon a valuation of said buildings at $20,000.00 as provided in the Will of Fannie B. Powers, deceased. The Commissioners will further be directed to establish an owelty payable by Thomas A. Powers to Rachel P. Reese, Louise P. Fales, Judith P. Perry, James Powers, Frances P. Munse, Ollin Powers and Matthew F. Powers based upon a valuation for said buildings of $1200.00 as provided in said Will.

Commissioners were appointed by the Clerk as provided by N.C. Gen. Stat. § 46-7 (1976), and, after being sworn, met on the premises and partitioned the land. Although four of the children filed exceptions to the Report of the Commissioners, the Clerk, after hearing evidence offered by the parties, concluded that the Commissioners' partitioning resulted in a division of the land into "equal shares in point of value as nearly as may possibly be done," and confirmed the Report. The four children then appealed to superior court, and the superior court, after a hearing *de novo*, also concluded that the Report of the Commissioners resulted in a division of land "into equal shares in point of value as nearly as may possibly be done," and confirmed the Report. From that order the four children appeal to this Court.

II

Although the procedural history is confusing, resolution of this appeal is simple. Appellants make only two arguments on appeal, and we conclude that the evidence supports the conclusion that the division of the land was fair and equal and that the judgment appealed from should be affirmed.

At the superior court hearing, Johnny Nobles, a registered surveyor, and R. W. Wilkins, a banker (two of the three commissioners), testified about their survey of the land and about their trips to view the land in order to make a fair division. In describing how he and the commissioners sought to divide the land equally, R. W. Wilkins testified:

We went around the property on two or three occasions, rode around it; went in some of the buildings, and then went back

> around, and we met four times, I believe, or five, and we got our figures together, and I got mine, Jimmy Neal got his, Johnny got his, and we come [sic] to the conclusion and opinion that the way we divided it was fair and equal. We tried to take the wooded land, the cleared land, the road frontage and balance it up so that each parcel, as we saw it, was an equal, as equal in value as you could come to make it. It is my opinion today that it's equal and fair.

Johnny Nobles, the surveyor, testified that the commissioners divided the property into eleven parts, ascribing a value of $45,260 to each share. He further testified:

> The figures that were used for this, basically, were on the paved highways, a road front value of one acre deep of $1,500 per acre. The remainder, woodland, including the timber, at $500 an acre, and the branch and swamp land at $250 per acre. Then we have our best grade of crop land at $800, middle at $700, and poorest class at $600 per acre. And on the soil, secondary roads, $1,000 per value per acre was placed on the road fronts, one acre deep along that road. These were the basic figures that were used and compiled under the commission. . . .
>
> . . . .
>
> . . . We were trying to arrive at those equal values exclusive of the two houses that we had been directed by the court to value separately. The value of the two houses that Thomas and Mack Powers were living in were [sic] not included in the division of the estate.

The testimony of these two Commissioners was not the only testimony concerning value before the court. The Commissioners' testimony was buttressed by the testimony of four other witnesses who accompanied one or more of the Commissioners to the land. These witnesses—a tobacco warehouseman and businessman, a bank trust department farm manager, a timber and land merchant, and a former A.S.C.S. employee and farmer—opined that the parcels in the division were equal in value.

[1] Considering this evidence before the trial court, we set forth the applicable law. First, non-experts can give opinion as to value

of property. When "(1) the witness is familiar with the thing on which [he] professes to put a value and (2) . . . has such knowledge and experience as to enable him intelligently to place a value on it," he may testify as to his opinion of value. *Britt v. Smith*, 6 N.C. App. 117, 122, 169 S.E. 2d 482, 486 (1969). Each of the witnesses listed above, before giving his opinion as to the equality in value of the several parcels of land involved in this partition, had been upon the land in question and had demonstrated a business background which would permit the formation of an intelligent opinion.

[2] Second, the fact that the appellants' expert appraisers ascribed different values to the parcels than did the Commissioners is not determinative even though appellants' expert witnesses ascribed values ranging from $66,909 to $150,607. Initially, and by way of example, the $150,607 value ascribed to tract number 8 includes improvements to the tract in the form of the brick home found on the property and two brick storage buildings. The Commissioners valued the house separately. More important, the trial judge, as fact-finder, rejected the discrepancy in values and found that the parcels were equal in value. Because we have concluded that that finding is supported by competent evidence, it is conclusive on appeal, even though the evidence might sustain findings and conclusions to the contrary. *Beasley-Kelso Associates, Inc. v. Tenney*, 30 N.C. App. 708, 228 S.E. 2d 620, *cert. denied*, 291 N.C. 323, 230 S.E. 2d 675 (1976). The trial judge as fact-finder must determine the credibility and probative force of the witnesses' testimony. As stated in *West v. West*, 257 N.C. 760, 762, 127 S.E. 2d 531, 532 (1962), "where an actual partition of lands has been ordered, whether the division made by the commissioners was fair and equitable or unequal in value is a question of fact to be determined by the Judge of the Superior Court upon an appeal from a judgment of the clerk affirming the report of commissioners." [Citations omitted.]

The trial court's conclusion that the Commissioners divided the land into equal shares in point of value as nearly as possible is supported by the evidence and the judgment below is

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILBERT LOUIS DAVIS

No. 829SC712

(Filed 5 April 1983)

1. **Criminal Law § 126— right to unanimous verdict—no coercion into assenting to verdict**

A juror was not coerced into assenting to the verdict where the record disclosed that when the juror said "not guilty" in response to the polling of the jury, she was asking if the clerk's question was whether she voted guilty or not guilty, and her subsequent assent to the verdict was unequivocal. N.C. Constitution Art. I, § 24.

2. **Criminal Law § 91.7— denial of motion for continuance—absence of witnesses—no error**

Where defendant had an opportunity to present his defense through his own testimony and that of another, where he failed to show how he was prejudiced by the absence of other witnesses, and where the testimony of the absent witnesses would not have added anything more than corroboration to his defense, the denial of his motion for a continuance did not deprive him of his constitutional right to confront his accusers.

3. **Criminal Law § 169.7— exclusion of testimony—absence of prejudice**

The failure of the trial court to allow a defense witness on redirect examination to answer whether another man looked anything like defendant was not prejudicial error since defendant failed to include in the record what the witness would have said had he been permitted to answer, since the question was beyond the scope of the matters raised on cross-examination, and since defendant had previously said that the man "ain't identical to me, but he favors me."

APPEAL by defendant from *Brewer, Judge.* Judgment entered 22 April 1982 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 17 January 1983.

Defendant was charged with driving while his license was revoked and suspended, in violation of G.S. 20-28(a). He was convicted in District Court and received a sentence of not less than seven months and not more than eight months. Defendant appealed to Superior Court for a trial de novo. Prior to jury selection, defendant moved for a continuance because four of his subpoenaed witnesses were not present. The motion was denied.

The State's evidence tended to show the following. Donald Valentine, a United States Postal Service mail carrier and auxiliary policeman with the Louisburg Police Department, was the

only witness for the State. He had known defendant for about eleven years. He saw defendant at a party on Kenmore Avenue on 7 September 1981 at midnight or twelve-thirty a.m. About five hours later, Valentine was patrolling, looking for break-ins, and saw defendant's car. He signalled it to stop. With his blue light and siren on, he pursued defendant's car for several blocks. According to Valentine, defendant stopped, got out of his car, turned around and looked at Valentine, and ran off into the bushes. Valentine called out his name and told him not to run. He did not try to follow defendant. Although it was still dark, the headlights of both cars and nearby street lights were on. Valentine said he was positive the man he saw was defendant, and he did not know anybody else who looked like defendant. There were two other officers present who had arrived to assist Valentine. They talked to the woman who was sitting in defendant's car. Valentine asked her what she and Wilbert Davis had been doing, and she told him they had been driving around drinking. He did not ask for her name.

Defendant's evidence tended to show the following. Rufus Davis, defendant's nephew, said he was with defendant all day before they went to the party on Kenmore Avenue. He drove defendant to the party in defendant's car. At the party, Charlie Smith, defendant's cousin, and Wanda Allen, borrowed defendant's car. Rufus Davis said he and defendant left together with Ricky Walker, his brother, at four or five a.m. On re-direct, defendant's counsel asked Rufus Davis if Smith looked like defendant. The State's general objection to the question was sustained.

Deputy Sheriff Johnson testified that he answered a call about a disturbance at a party on Kenmore Avenue. He told defendant and his brother Johnny Davis to leave. When defendant and Johnny Davis got in defendant's car, Johnny Davis got in the driver's side and defendant got in the passenger side.

Defendant's testimony essentially corroborated Rufus Davis' testimony. He said Ricky Walker took him home from the party because Smith had not yet returned his car. He also said that when he got to his mother's house his mother told him someone had brought his car back. The keys were not in the car. He described Smith and said "he ain't identical to me, but he favors me." He denied driving his car on 7 September 1981.

Defendant was found guilty of driving with suspended or revoked license. He was sentenced to a minimum of twenty-two months and maximum of twenty-four months.

Attorney General Edmisten, by Associate Attorney John R. Corne, for the State.

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

VAUGHN, Chief Judge.

[1] Defendant's first argument is that he was deprived of his right to a unanimous verdict as required by Art. 1, § 24 of the North Carolina Constitution. Defendant contends that one juror, Bertha Brodie, was coerced into assenting to the verdict. We do not agree. After the jury finished deliberating, they returned to the courtroom and the assistant clerk read the following: "We, the jury, by unanimous verdict, find the defendant, Wilbert Louis Davis, to be guilty of driving while his license was suspended." Then he asked: "Is this your verdict, so say you all? If it is, please raise your hand." All the jurors raised their hands. The clerk then polled the jury. When he reached the eleventh juror, the following exchange took place:

> Clerk: Bertha Brodie. Your foreman has returned a verdict of guilty of driving while his license was suspended. Is this your verdict and do you now assent thereto?
>
> Juror Brodie: Not guilty.
>
> The Court: Excuse me, ma'am?
>
> Juror Brodie: What do you say? I vote guilty or not guilty?
>
> The Court: Guilty?
>
> Juror Brodie: Oh, yes, ma'am.
>
> Clerk: Guilty of driving while—
>
> The Court: Is that your verdict?
>
> Juror Brodie: Yes, ma'am.
>
> The Court: And do you still assent thereto?
>
> Juror Brodie: Yes, sir.

The purpose of polling the jury is to give each juror an opportunity, before the verdict is recorded, to declare his or her assent in open court, and enable the court to determine that a unanimous verdict has been reached. *Davis v. State*, 273 N.C. 533, 160 S.E. 2d 697 (1968). A verdict is not defective if the juror understood that he or she has a right to dissent and eventually freely assented to the verdict. *State v. Asbury*, 291 N.C. 164, 229 S.E. 2d 175 (1976). In this case it is likely that when Brodie said "Not guilty" she was asking if the clerk's question was whether she voted guilty or not guilty. Her subsequent assent to the verdict was unequivocal. Defendant was convicted by an unambiguous, unanimous verdict.

[2] Defendant's second argument is that the trial court erred in denying his motion for a continuance to enable him to secure attendance of his witnesses. A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling is not reviewable absent abuse of discretion. *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975). The question is one of law, not discretion, and is reviewable on appeal if the motion is based on a right guaranteed by the federal and state constitutions. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). The question here is one of law because the right to face one's accusers and witnesses with other testimony is guaranteed by the sixth amendment to the federal constitution, applicable to the states through the fourteenth amendment, and by Article I, sections 19 and 23 of the North Carolina Constitution. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972). Defendant contends he was prejudiced because the testimony of the absent witnesses would have established testimony critical to his defense and refuted Valentine's testimony. Defendant, however, failed to include in the record the proposed testimony of the absent witnesses. Defendant's counsel merely said,

> I would like for the record to show that the defendant, prior to entering his plea, moved for a continuance for reason that three or four of his defense witnesses are not present or available for trial; that all four of them are under subpoena, namely, Charles Smith, Ricky Walker, Johnny Lee Davis and Wanda Allen. That the majority, or all but one of these witnesses were present in court yesterday when the case

was calendared; however, for reasons unknown to me and just only speculating, they are not here today. And the defendant is of the opinion that they are vital to his defense in this cause.

Since defendant had an opportunity to present his defense through his own testimony and the testimony of his nephew, Rufus Davis, and has failed to show how he was prejudiced by the absence of his other witnesses, the testimony of the absent witnesses would not have added anything more than corroboration to his defense. The denial of defendant's motion for a continuance did not deprive him of his constitutional right to confront his accusers.

[3] Defendant's third argument is that the trial court erred when it did not allow witness Rufus Davis to say whether Smith resembled defendant. Defendant contends that his defense was that Valentine mistook Smith for him, and he was deprived of his defense when the trial judge sustained the State's objection to his question on redirect examination. "[Does Charles Smith] look anything like Wilbur?" Defendant, however, failed to include in the record what Rufus Davis would have said had he been permitted to answer, so the assignment of error cannot be sustained. *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). As well as being too speculative, the question was beyond the scope of the matters raised on cross-examination. 1 Brandis on North Carolina Evidence § 36 (1982). Moreover, defendant previously said Smith "ain't identical to me, but he favors me," so if Rufus Davis had said Smith resembled defendant it would be merely corroborative and not essential to his defense.

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

No error.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. STEPHEN D. HARRIS

No. 8212SC1021

(Filed 5 April 1983)

1. **Criminal Law § 63— evidence concerning sanity of defendant—not pertinent to capacity of defendant at time of crime**

The trial court did not err in failing to allow the defendant to testify concerning his mental condition where his testimony did not concern his mental condition on the evening of the crime in question.

2. **Constitutional Law § 49— waiver of right to counsel—informed of consequences**

Where defendant signed a sworn waiver of his right to assigned counsel and where pursuant to this waiver, defendant represented to the court "That he had been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully [understood]," and where the defendant never indicated that he desired to withdraw the waiver, there was no merit to defendant's argument that he did not knowingly, intelligently and voluntarily waive his right to counsel.

APPEAL by defendant from *Bowen, Judge.* Judgment entered 6 April 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 March 1983.

Defendant was found guilty of armed robbery and sentenced to a minimum term of 80 years and maximum term of life imprisonment. On appeal he assigns error to the court's exclusion of his testimony regarding his mental condition during the months preceding the robbery and the court's acceptance of his waiver of assigned counsel.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

BECTON, Judge.

The record and transcripts before this Court reveal that defendant was indicted for a number of armed robberies that occurred during December 1980 and January 1981. The matter on appeal involves the armed robbery of $250 from a Taco Bell in

Fayetteville on 8 January 1981. Prior to trials on this offense and on three of the other robberies, defendant filed a paperwriting entitled "Motion for Dismissal of Charges by Reason of Insanity." He alleged therein that during 1980 he began to display "an apparent psychological change." Defendant alleged that in August 1980 he suffered a nervous breakdown apparently because of his relationship with one Song Sun Barnett. Soon after his breakdown, he attempted to kill himself, Ms. Barnett and a third person by detonating an explosive device. The attempt was unsuccessful when a wire connecting the device to the detonator was severed. Defendant alleged that he then began writing worthless checks and spending his off-duty time on Hay Street in Fayetteville. He had learned that his former girlfriend was a topless dancer, and he began contemplating killing her and himself.

The trial court accepted this motion as a plea of not guilty by reason of insanity. Thereafter, during the week of 29 March 1982, defendant was found guilty on three counts of armed robbery. The next week, the trial for armed robbery of the Taco Bell began. The State presented evidence that on the evening of 8 January 1981 defendant entered a Taco Bell on Raeford Road in Fayetteville. The cashier observed a gun in defendant's pants. Defendant told the cashier to turn around, to tell the other employees to lie on the floor and to place the money in a bag. After the cashier carried out these instructions, defendant fled from the restaurant with approximately $250.

[1] The sole evidence for the defense consisted of defendant's testimony. He admitted that on 29 December 1980 he and a friend robbed Baldino's Sub Shop in Fayetteville; and that over the next 20 days they robbed 13 other Fayetteville establishments. Defendant then informed the jury that he had pleaded the defense of insanity at his earlier trial. A statement, that was allegedly given to his public defender in March 1981, was marked as an exhibit. The following exchange took place:

> MR. HARRIS: There are four pages to this statement. There were, I believe, ten when I originally wrote this statement. The first part of the statement spoke of an alleged attempted bombing and nervous breakdown and series of—

MR. DESILVA (Assistant District Attorney): Your Honor, I—it doesn't go to the issue of the robbery of the Taco Bell on January the 8th, 1981.

COURT: Sustained. Exception No. 3

The defendant now contends that the court erroneously sustained the State's objection to this testimony and thereby denied him his constitutional right to present evidence relevant to his insanity defense. We find no error here.

In North Carolina, when a defendant pleads insanity as a defense, the test is his capacity to distinguish between right and wrong at the time of and with respect to the matter under investigation. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death penalty vacated*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). "Evidence tending to show the mental condition of the accused, both before and after the commission of the act, is competent provided it bears such relation to the defendant's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto." *Id.* at 314, 167 S.E. 2d at 256.

In the case *sub judice*, the trial court properly sustained the State's objection to defendant's testimony regarding a statement he gave to his public defender, because at that time defendant had not shown any relation between that evidence and his mental condition on 8 January 1981. The court's ruling did not bar defendant from presenting evidence which would establish such a relationship, and the record reveals that defendant never made this showing. Defendant argues that since the court was already familiar with the relevancy of his excluded testimony no showing was necessary. He stresses that the relevancy of the attempted bombing and breakdown was reflected in the allegations of his motion to dismiss by reason of insanity. This argument fails on two grounds. First, the motion shows on its face that it was filed in cases against defendant, other than the one at issue. The case number for the Taco Bell robbery occurring on 8 January 1981 is not among those typed on the motion. Secondly, assuming *arguendo* that the motion applies to the present case, the allegations therein do not show that defendant's mental condition on the evening of 8 January 1981 was such that he could not distinguish between right or wrong. "One who would shelter himself under a plea of insanity must satisfy the jury of his inability to distin-

guish between right and wrong at the time of and in relation to the alleged criminal act." *State v. Harris*, 223 N.C. 697, 704, 28 S.E. 2d 232, 238 (1943). Defendant has not met this burden.

[2] Defendant also assigns error to the court allowing him to represent himself, on the basis that he did not knowingly, intelligently and voluntarily waive his right to counsel. At the arraignment hearing, defendant informed the court that he wished to dismiss his court-appointed counsel and represent himself. The court granted his request, and defendant then signed a sworn waiver of his right to have assigned counsel. Pursuant to this waiver, defendant represented to the court the following: "That he has been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully understands." The trial judge then executed a certificate indicating that defendant had been fully informed of these matters. Defendant now argues, notwithstanding the signed waiver, that the transcript of the arraignment hearing shows that he was never made aware of the permissible sentences for armed robbery or the consequences of waiving counsel.

In *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E. 2d 537, 540, *cert. denied*, 285 N.C. 595, 206 S.E. 2d 866 (1974), this Court held that "[t]he waiver in writing once given was good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." Defendant never indicated that he desired to withdraw this waiver. Furthermore, in light of the facts (i) that the week before this trial defendant represented himself, was found guilty of three counts of armed robbery, and received three sentences of eighty years to life; and (ii) that his court-appointed attorney was dismissed but retained as standby counsel during both the earlier trial and the trial on which this appeal is based, we find no merit in defendant's argument.

No error.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CHARLES WESLEY WILLIAMSON

No. 8227SC1005

(Filed 5 April 1983)

1. **Judgments § 1; Criminal Law § 143— probation revocation—conflict between order and judgment**

When there is a conflict between the language or interpretation of an order and a judgment on the same subject matter, the judgment shall control. Therefore, where there were discrepancies between a probation revocation order and judgment, the judgment controlled.

2. **Criminal Law § 143.5— probation revocation—burden of proof**

The burden of proof in a probation revocation hearing is that the trial judge must be reasonably satisfied from the evidence and in his sound discretion that defendant had violated, without lawful excuse, a valid condition upon which the sentence was suspended, and the findings of fact by the trial judge must show that he exercised his discretion to that effect.

3. **Criminal Law § 143.7— probation revocation—failure to make restitution payments—ability to pay**

Where the trial judge in a probation revocation hearing heard lengthy testimony concerning defendant's inability to find employment and his medical and mental problems and, upon the basis of the evidence presented, found as a fact that defendant had violated the conditions of his probation without lawful excuse by failing to make restitution payments required as a condition of his probation, the trial judge did not abuse his discretion in failing to state in his findings that he had considered and evaluated defendant's evidence of inability to make the required payments and found it insufficient to justify breach of the probation condition.

APPEAL by defendant from *Helms, Judge*. Judgment entered 17 May 1982 in Superior Court, LINCOLN County. Heard in the Court of Appeals 15 March 1983.

On 1 April 1981 defendant pleaded guilty to assault with a deadly weapon with intent to kill, three counts of assault on an officer, two counts of injury to personal property and two counts of assault. He was sentenced to a term of imprisonment of not less than nor more than six years. Sentence was suspended, and defendant was placed on probation for five years. He was allowed to return to his residence in New York on supervised probation.

On 17 May 1982 a hearing was held before Judge William H. Helms after defendant's probation officer had filed a report alleging that defendant was in willful violation of his probationary

judgment. The report stated that defendant was $300 in arrears in his restitution payments, which he had been ordered to pay as a condition of probationary judgment. Defendant presented evidence at the hearing tending to show that he had been unable to find employment in New York other than some part-time work. He was hampered in his job search by the severe eye injury which occurred during the assault for which he was convicted. He estimated that in the last year and a half he had earned about $1,000. Defense counsel submitted a psychiatric report prepared at Dorothea Dix Hospital which indicated that defendant suffered from a thought disorder demonstrated by paranoid and grandiose thoughts. Defendant appeals from the judgment revoking the suspended sentence and ordering him imprisoned.

Attorney General Rufus L. Edmisten by Assistant Attorney General Frank P. Graham for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Nora B. Henry for defendant appellant.

BRASWELL, Judge.

Defendant's sole question presented for review is whether the court erred in its findings of fact by failing to show that defendant's evidence of lawful excuse was considered and evaluated.

[1] Some confusion arises from the fact that there are two separate documents—an order and a judgment—which revoke defendant's probation. Discrepancies, although mostly minor ones, exist in these documents. The major difference is that while the judgment contains the phrase, "From evidence presented, the Court finds . . .", this language is missing from the order. In his brief, defendant attacks the legal sufficiency of the order and not the judgment, although an exception is taken to entry of both documents. "An order is distinguishable from a judgment. [A]n order has been defined . . . as being every direction of a court or judge made in writing and not included in a judgment." 46 Am. Jur. 2d *Judgments* § 3 at p. 315 (1969). A judgment is "a final determination of the rights of the parties in an action." *Id.* at § 1, p. 314. We hold, therefore, that when there is a conflict between the language or interpretation of an order and a judgment on the same subject matter, the judgment shall control. It appears to be

the usual practice in probation revocation proceedings to issue both an order and a judgment revoking probation. Since this practice seems to serve no legal or administrative purpose[1] but can create some confusion when discrepancies exist, we believe that it would be appropriate for the Division of Adult Probation and Parole and the Administrative Office of the Courts to eliminate the use of a separate order in the probation revocation process.

The findings of fact in the judgment read as follows:

> "*From evidence presented,* the Court finds as fact that within the specified period of suspension, the defendant wilfully and without lawful excuse violated the terms and condition of his probation in that: the defendant was ordered to pay the cost, fine and attorney fees into the Office of the Clerk of Superior Court at a rate of $30.00 monthly. As of this date, the defendant has failed to make a payment leaving the court debt in arrears the sum of $300.00. His failure to pay the court debt is a violation of special conditions." (Emphasis added.)

Defendant submits that the findings do not clearly show that defendant's evidence of lawful excuse was considered and evaluated, as required by *State v. Smith*, 43 N.C. App. 727, 259 S.E. 2d 805 (1979), and *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974).

The minimum requirements of due process in a final probation revocation hearing in the Trial Division of the General Court of Justice shall include these procedures:

(1) a written notice of the conditions allegedly violated;

(2) a court hearing on the violation(s) including:

(a) a disclosure of the evidence against him, or,

(b) a waiver of the presentation of the State's evidence by an in-court admission of the willful or without lawful excuse violation as contained in the written notice (or report) of violation,

1. The only statutory reference to an "order" occurs in G.S. 15A-1344(c). In application, such an "order" is limited to the occasion when the probation case is heard "outside the county where the judgment was entered." Then "the clerk must send a copy of the order . . . to the court where probation was originally imposed."

(c) an opportunity to be heard in person and to present witnesses and evidence,

(d) the right to cross-examine adverse witnesses;

(3) a written judgment by the judge which shall contain

(a) findings of fact as to the evidence relied on,

(b) reasons for revoking probation.

See Gagnon v. Scarpelli, 411 U.S. 778, 786, 36 L.Ed. 2d 656, 664, 93 S.Ct. 1756, 1761-62 (1973); *State v. Hewett*, 270 N.C. 348, 353, 154 S.E. 2d 476, 479-80 (1967).

The first step in the decision process is for the trial judge to resolve the factual question of whether the probationer has in fact violated one or more conditions of his probation. If so, a second question for the trial judge is whether probation should be revoked and the suspended sentence activated, or whether other steps should be taken to protect society and improve chances of rehabilitation, such as, continuation of probation or modification of conditions of probation. *See Morrissey v. Brewer*, 408 U.S. 471, 479-80, 33 L.Ed. 2d 484, 493, 92 S.Ct. 2593, 2599 (1972), cited in *Gagnon v. Scarpelli, supra*, at 784, 36 L.Ed. 2d at 663, 93 S.Ct. at 1760-61.

[2] Revocation hearings are often regarded as informal proceedings, and the Court is not bound by strict rules of evidence. The alleged violation of probation need not be proved beyond a reasonable doubt. *State v. Hewett, supra.* The burden of proof in a probation revocation hearing is that the trial judge must be reasonably satisfied from the evidence and in his sound discretion that the defendant has violated, without lawful excuse a valid condition upon which the sentence was suspended. The findings of fact by the judge must show he exercised his discretion to that effect. *State v. Robinson*, 248 N.C. 282, 287, 103 S.E. 2d 376, 380 (1958).

In the violation hearing the defendant should offer evidence of his inability to pay money according to the terms of the judgment. If he offers no such evidence, then the evidence which establishes that defendant has failed to make payments as required by the terms of the judgment is sufficient within itself to justify a finding by the judge that defendant's failure to comply was without lawful excuse. *State v. Young, supra.*

The trial judge has a duty, when the defendant does offer evidence of his ability or inability to make the money payments required, to make findings of fact which clearly show that he did consider and did evaluate the defendant's evidence. *State v. Smith, supra.* "The trial judge, as the finder of the facts, is not required to accept defendant's evidence as true." *State v. Young, supra* at 321, 204 S.E. 2d at 188.

[3] Judge Helms heard lengthy testimony and received evidence concerning defendant's inability to find employment and his medical and mental problems. Based upon the evidence presented, he found as a fact that defendant had violated the conditions of his probation without lawful excuse. Although the Judge could have been more explicit in the findings by stating that he had considered and evaluated defendant's evidence of inability to make the required payments and found it insufficient to justify breach of the probation condition, we hold that his failure to do so does not constitute an abuse of discretion. It would not be reasonable to require that a judge make specific findings of fact on each of defendant's allegations tending to justify his breach of conditions. The breach of any one condition is sufficient grounds to revoke probation. *State v. Seay*, 59 N.C. App. 667, 298 S.E. 2d 53 (1982). The evidence here showed that defendant violated the condition requiring the restitution payments.

The judgment revoking probation and activating the suspended sentence is affirmed.

Judges HEDRICK and WHICHARD concur.

DWIGHT LEE SPENCER v. PAULETTE MARTIN SPENCER

No. 8218DC167

(Filed 5 April 1983)

Divorce and Alimony § 14.2— admissions of adultery—incompetency of husband and wife—privileged communications with minister

Testimony by the wife and by the husband on cross-examination about his admitted adulterous affairs in counseling sessions with the parties' minister and later in answer to the wife's request for further information about these affairs was inadmissible to prove indignities since both the husband and his

wife were incompetent to testify about the husband's adultery under G.S. 8-56 and G.S. 50-10, and since information revealed during counseling with the minister was privileged under G.S. 8-56 and G.S. 8-53.2. Furthermore, the testimony of a third party that the husband admitted to him that he had had affairs with other women was also inadmissible because the witness received his information from the husband himself and G.S. 50-10 clearly provides that no admissions from either party are competent to prove adultery.

APPEAL by plaintiff from *Daisy, Judge.* Order entered 28 September 1981 in District Court, GUILFORD County. Heard in the Court of Appeals 8 December 1982.

By his Complaint, plaintiff husband sought an absolute divorce based on a twelve month separation. Defendant wife sought by counterclaim temporary and permanent alimony, custody of a minor child, child support, attorney's fees, possession of the marital home, and a division of property, based on allegations of indignities, adultery, excessive use of alcohol, failure to provide necessary subsistence, and abandonment. By the date of trial, the parties had obtained an absolute divorce.

During trial, Judge Daisy entered a directed verdict on the adultery issue. Following a jury trial, a verdict was returned finding that (1) the husband, without provocation, offered such indignities to the person of the wife as to render her condition intolerable and life burdensome, and (2) the husband did not willfully abandon the wife without just cause or provocation.

In an order entered 28 September 1981, Judge Daisy ruled that the wife recover permanent alimony from the husband in an amount to be determined in accordance with N.C. Gen. Stat. § 50-16.5 (1976).

On the same date, Judge Lowe entered an order finding and concluding that the wife was entitled to temporary alimony and support for herself and the minor child, awarding $400.00 per month in child support, $600.00 per month in alimony, both "pending trial," and $1,000.00 in attorney's fees *pendente lite.*

From both orders, the husband appeals.

McNairy, Clifford & Clendenin, by Locke T. Clifford and Michael R. Nash, for the plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr., and Gerard M. Chapman, for defendant appellee.

BECTON, Judge.

I

The husband excepts and assigns error to numerous evidentiary rulings of the trial court; however, we will address only the dispositive issues. For the reasons that follow, the husband is entitled to a new trial.

The husband's first, second, and seventh arguments relate to the trial court's admission of testimony concerning the husband's adulterous activities during the parties' marriage. After the wife presented evidence relating to her counterclaim, the trial court entered a directed verdict on the issue of adultery because of the wife's condonation; however, the trial court ruled that evidence of adultery would be admissible "for such impact as it may have toward the question of indignities." The wife then testified about the husband's various adulterous relationships, saying that her husband had told her about these affairs. The husband also was cross-examined about his affairs with other women. The testimony disclosed that the parties were living in Charlotte when the wife learned that the husband had had an affair while they were living in Atlanta. The parties then sought marriage counseling from their minister in Charlotte, and during these sessions the husband admitted to having had other affairs in Atlanta. Subsequently, at the wife's behest during marital discussions at home, the husband informed the wife of the details of his extra-marital excursions, in answer to specific questions asked of him.

The husband contends the trial court erred in admitting all evidence probative of his adultery because both he and his wife were incompetent witnesses under N.C. Gen. Stat. § 50-10 (1981) and N.C. Gen. Stat. § 8-56 (1981) and because the information revealed during counseling with their minister was privileged under G.S. § 8-56 and N.C. Gen. Stat. § 8-53.2 (1981). We agree with these arguments.

N.C. Gen. Stat. § 8-56 provides in pertinent part: "Nothing . . . 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 in any action or proceeding for divorce on account of adultery. . . ." The relevant portion of G.S. § 50-10 provides: "On such trial neither the husband nor wife

shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact." These two statutes have been construed together by our Supreme Court to mean "that neither the husband nor the wife *is a competent witness* in any action *inter se* to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, *and may not be compelled* to give such evidence." *Wright v. Wright*, 281 N.C. 159, 167, 188 S.E. 2d 317, 322 (1972).

Testimony by a spouse concerning his or her relationship with another party has been held admissible by this Court in cases in which there is no clear implication of intercourse. *See, Traywick v. Traywick*, 28 N.C. App. 291, 221 S.E. 2d 85 (1976). In an action for alimony without divorce, we have ruled a wife's testimony that her husband spent a great deal of time with another woman was admissible for proving indignities rendering the wife's condition intolerable and life burdensome. *Id.* Testimony by the offended party of his or her spouse's adulterous activities may be admissible to prove indignities in some cases, as when an adulterous wife boasts of her extramarital affairs to taunt the cuckold with his trusting ignorance of her deceit. In such a situation, the very manner of the revelation itself could rise to the level of an indignity, rendering the wronged party's condition intolerable and his life burdensome. However, on the facts of the present case, the husband's revelation to his wife of his past indiscretions did not amount to an indignity. The record discloses that the husband admitted the adulterous affairs in counseling sessions with the parties' minister in an effort to make an honest confession and make a new start in the marriage, and later in answer to his wife's request for further information about these affairs. The evidence does not indicate he was mocking his wife with her past ignorance of his infidelity. Thus, because the evidence about adultery in the present case cannot be admitted to prove indignities, it is not protected and is barred by G.S. § 8-56 and G.S. § 50-10, since neither the husband nor the wife were competent to testify about the husband's adultery.

This reasoning also renders inadmissible, under the husband's seventh argument, the testimony of Ed Roy, that the husband admitted to Roy that he had had affairs with other

women. The husband contends that the trial court erred in admitting Roy's hearsay testimony under the hearsay rule exception allowing the admission of a party opponent. We agree with the husband because Ed Roy received his information from the husband himself and because G.S. § 50-10 clearly provides that no admissions from either party are competent to prove adultery.

Finally, the husband contends the trial court erred in admitting testimony from both parties about the husband's disclosure of his extramarital affairs in front of his wife during marriage counseling sessions with a minister. G.S. § 8-56 provides: "No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." Under G.S. § 8-53.2, the statute rendering confidential communications between the clergy and communicants, the minister himself was not competent to testify about the affairs because the husband had communicated the information to him in the minister's professional capacity. The minister, as a third party, did not destroy the confidential nature of the admissions the husband made during marriage counseling that he had been unfaithful to his wife. On the contrary, the very purpose of marriage counseling—to attempt reconciliation of the parties in a troubled marriage—reinforces the confidential nature of communications made during these sessions.

Because of these errors in admitting the testimony from both parties and from Ed Roy about the husband's adultery, a new trial must be ordered.

II

Although the husband took exception to Judge Lowe's order granting temporary alimony, support and attorney's fees *pendente lite*, he failed to bring forth any assignments of error thereon or argue those matters in his brief. Thus, pursuant to Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure, this argument is deemed abandoned.

The husband brought forward other assignments of error which we do not reach because they may not recur at the subsequent trial.

New trial.

Judges HEDRICK and WEBB concur.

WILLIAM CLEMONS AND PATRICIA CLEMONS, CO-ADMINISTRATORS OF THE ESTATE OF WAYNE MCCOY CLEMONS v. DONALD RAY WILLIAMS

No. 823SC310

(Filed 5 April 1983)

Automobiles and Other Vehicles § 89.1— last clear chance—sufficiency of evidence to require submission of issue

Plaintiffs' evidence was sufficient to require the submission of an issue of last clear chance to the jury where it tended to show that defendant was travelling 40 miles per hour in a 55 miles per hour speed zone on a level, straight, asphalt road at approximately 1:00 a.m. on a foggy night; plaintiffs' intestate was lying in defendant's lane of travel; when defendant was about 400 feet away, another driver pulled his vehicle in front of the body in an attempt to shield it and blinked the vehicle's headlights from bright to dim for at least five to ten seconds to warn defendant; without slowing down, defendant partially entered the opposite lane of traffic to avoid hitting the vehicle in his lane; immediately upon passing that vehicle, the defendant reentered the proper lane of travel and hit the intestate who was lying approximately 15 feet behind the vehicle blinking its lights; and no oncoming traffic was present to force defendant to return immediately to the proper lane of travel.

APPEAL by plaintiffs from *Brown, Judge*. Judgment entered 27 October 1981 in Superior Court, PITT County. Heard in the Court of Appeals 10 February 1983.

Plaintiffs' original complaint and amended complaint alleged that defendant's negligent operation of his automobile was the proximate cause of the death of plaintiffs' intestate, and further alleged that any contributory negligence on the part of plaintiffs' intestate would not bar recovery in this wrongful death action, since the doctrine of last clear chance was applicable in this case.

Plaintiffs presented evidence at trial tending to show that on the morning of 23 May 1979, at approximately 1:00 a.m., plaintiffs' intestate was lying in the westbound lane of N.C. Highway #264, less than one mile east of Marlboro. At that time Mark Suggs and wife, Lura Suggs, were travelling on N.C. Highway #264 on their

way from Wilson to Greenville. Though the posted speed limit was 55 m.p.h., they were travelling at a speed of approximately 30 m.p.h. because of a heavy fog in the area. At a distance of 80 feet they noticed something in the opposite lane. They passed by the object and upon turning their vehicle around and coming back towards the object, they observed that it was a man. Being cautious, the Suggs did not get out of their vehicle, but they honked their horn several times and called to the man. When the man's only movement continued to be the rise and fall of his chest, they notified the Farmville Police Department using their CB radio.

The Suggs were waiting for the arrival of the police when they observed the faint glow of defendant's headlights coming from the direction of Marlboro and heading towards Wilson. When the defendant was about 400 feet away, the Suggs pulled their vehicle in front of the body in an attempt to shield it and blinked their headlights from bright to dim for at least 5-10 seconds to warn the defendant of the obstruction. When the defendant was 120 feet from the Suggs, he showed no sign of slowing his vehicle or moving out of the lane in which he was travelling (the same lane in which the Suggs were parked), and the Suggs tried to pull off the road. The defendant's vehicle passed them moving at approximately 40 m.p.h. and straddling the center line. The defendant barely missed hitting the Suggs' vehicle and hit plaintiffs' intestate who was still lying in the westbound lane about 15 feet behind the Suggs' vehicle. The defendant did not attempt to brake at any time before hitting the body.

At the conclusion of plaintiffs' presentation of evidence, defendant's motion for a directed verdict was granted and plaintiffs' complaint was dismissed. From judgment entered pursuant to defendant's directed verdict motion, plaintiffs appeal.

Willis A. Talton for the plaintiff-appellants.

Speight, Watson and Brewer by W. Walton Kitchin, Jr., for the defendant-appellee.

EAGLES, Judge.

Plaintiffs assign as error the dismissal of the case at the close of their evidence. The appeal raises the question of whether

plaintiffs presented sufficient evidence of defendant's negligence, plaintiffs' intestate's contributory negligence, and defendant's last clear chance to avoid injury to plaintiffs' intestate, to allow the submission of these three issues to the jury for final determination. At each of the three levels of our inquiry, we must consider the evidence in the light most favorable to the plaintiff. *Sink v. Sumrell*, 41 N.C. App. 242, 254 S.E. 2d 665 (1979). In so doing we find plaintiffs' position persuasive and are compelled to hold that the granting of defendant's directed verdict motion was improper.

Plaintiffs' complaint alleged that defendant was negligent in the operation of his automobile with respect to lookout, control and failing to stop or to exercise proper care. The evidence indicates defendant was travelling 40 m.p.h. in a 55 m.p.h. speed zone on a level, straight, asphalt road. When the accident occurred, at approximately 1:00 a.m., the weather conditions were foggy. Through the fog defendant observed another motor vehicle in his lane of traffic, with its blinking headlights facing him. Without slowing down, defendant partially entered the opposite lane of traffic to avoid hitting the vehicle in his lane. Immediately upon passing that vehicle, the defendant reentered the proper lane of travel and hit the intestate who was lying in the right-hand lane of the two lane road approximately 15 feet behind the automobile blinking its lights. No oncoming traffic was present to force defendant to immediately return to the proper lane. While defendant could not see intestate until he had passed the automobile positioned in his lane, defendant should have been able to see the flashing headlights of the other vehicle from his lane for a distance of approximately 400 feet.

"Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Osborne v. Coal Co.*, 207 N.C. 545, 546, 177 S.E. 796, 797 (1935). A jury could find, on the basis of the facts in this case, that injury was foreseeable when defendant failed to respond to the flashing headlights of the other car by slowing down or stopping. Plaintiffs' evidence is sufficient to submit the issue of defendant's negligence to the jury.

Contributory negligence on the part of intestate must be presumed, since the only reasonable inference which we may

draw, in the absence of evidence to the contrary, is that intestate voluntarily placed himself on the highway and failed to exercise for his own safety the care of an ordinarily prudent person. *Williamson v. McNeill*, 8 N.C. App. 625, 175 S.E. 2d 294 (1970).

The last clear chance doctrine may be invoked against the driver of a motor vehicle upon a showing

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to see the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Wade v. Sausage, 239 N.C. 524, 525, 80 S.E. 2d 150, 151 (1954).

Because the intestate is presumed to have been contributorily negligent, it is necessary for plaintiffs to establish the applicability of the doctrine of last clear chance in order for them to recover for defendant's negligence. As the court found in *Wade*, plaintiffs' evidence in the case *sub judice* raised the issue of last clear chance and required the submission of that issue to the jury.

Our courts have considered the applicability of the last clear chance doctrine to other fact situations where the injured or deceased person was struck by a motor vehicle while he was lying in the road. *Wade, supra; Barnes v. Horney*, 247 N.C. 495, 101 S.E. 2d 315 (1958); *Williamson, supra; Sink, supra; Battle v. Chavis*, 266 N.C. 778, 147 S.E. 2d 387 (1966). In all but *Wade* the applicability of the doctrine of last clear chance was rejected because "the law does not require a motorist to anticipate that a person may be lying or sleeping on the travelled portion of the highway." 41 N.C. App. at 246, 254 S.E. 2d at 668. In each of those cases, the only warning, if any, that the defendant received

was the fact that he observed a box-like object in the road, with only seconds to change course after discovering that the object was in fact a human body. The present case is distinguishable because here the defendant was warned by the highly visible blinking headlights and the presence of another car stopped, facing him, in his lane of traffic. He was required to proceed with the caution that a reasonable person would exercise when there appears to be an obstruction in the road ahead.

Plaintiffs presented sufficient evidence of defendant's last clear chance to avoid injury to plaintiffs' intestate to overcome defendant's motion for a directed verdict.

Reversed.

Judges HEDRICK and JOHNSON concur.

BELLEFONTE UNDERWRITERS INSURANCE COMPANY v. ALFA AVIATION, INC., WILLIAM AXSON SMITH, JR., MARY JO BECK, DONNA STOCKS, WILLIAM T. TAYLOR, AND J. D. DAWSON COMPANY

No. 823SC441

(Filed 5 April 1983)

Insurance § 147— aircraft insurance policy—rented aircraft—pilot not having current medical certificate

An accident involving an airplane rented from the insured was excluded from coverage under an aircraft insurance policy by a requirement that the pilot of an aircraft leased from the insured have a current medical certificate meeting Federal Aviation Administration regulations where the pilot of the leased aircraft did not have the appropriate current medical certificate in effect at the time of the accident, notwithstanding there was no causal connection between the breach of the exclusion limiting coverage and the accident. Furthermore, the accident was also excluded from coverage under an airport liability policy issued to the insured by a provision excluding coverage for "any aircraft owned by, hired by, loaned to or operated for the account of the Insured."

APPEAL by plaintiff from *Reid, Judge.* Order entered 15 February 1982 in Superior Court, PITT County. Heard in the Court of Appeals 10 March 1983.

This is a declaratory judgment action in which plaintiff sought determination of whether it was obligated to provide coverage to defendants under the terms of an aircraft insurance policy and an airport liability policy. The court denied plaintiff's summary judgment motion and granted summary judgment for all defendants.

Plaintiff appealed.

Maupin, Taylor & Ellis by Thomas W. H. Alexander and M. Keith Kapp for plaintiff appellant.

Taft, Taft & Haigler by Kenneth E. Haigler and Thomas F. Taft for defendant appellee Alfa Aviation, Inc.

James, Hite, Cavendish & Blount by M. E. Cavendish and Charles R. Hardee for defendant appellee William Axson Smith, Jr.

Williamson, Herrin, Stokes & Heffelfinger by Ann J. Heffelfinger for defendant appellee Mary Jo Beck.

Dixon, Horne & Duffus by John D. Duffus, Jr., for defendant appellee Donna Stocks.

Speight, Watson and Brewer by William C. Brewer, Jr., for defendant appellee J. D. Dawson Company.

BRASWELL, Judge.

The controlling question before us is whether the trial court erred in ruling as a matter of law that defendants were entitled to recovery under the terms of the insurance policies in question. For the reasons stated below, we reverse that ruling. Summary judgment should have been granted for plaintiff and defendants' motion should have been denied.

This action results from an airplane accident, occurring on 20 June 1978, in which the insured single-engine aircraft was destroyed, and the pilot, defendant William Axson Smith, Jr., and the passengers, Mary Jo Beck, William T. Taylor and Donna Stocks, were injured. Smith had rented the plane as the agent of his employer, defendant J. D. Dawson Company, from defendant Alfa Aviation, Inc., at Pitt-Greenville Airport in Greenville. Smith was attempting to land the plane at Riverside Campground in Belhaven when the crash occurred.

The two insurance policies in effect at the time of the accident had been issued to defendant Alfa Aviation by plaintiff Bellefonte Underwriters Insurance Company, Inc. One was an airport liability policy, required of Alfa Aviation under the terms of its lease from Pitt County-City of Greenville Airport Authority; the other was an aircraft policy covering the plane rented by Smith.

Plaintiff denied liability for all claims arising under both policies. Coverage under the *airport* liability policy was denied because of a specific exclusion stating: "This policy does not apply to any aircraft owned by, hired by, loaned to, or operated for the account of the Insured." Plaintiff maintained that coverage under the *aircraft* policy was specifically excluded by a requirement that a lessee of an aircraft from Alfa Aviation have a current medical certificate meeting Federal Aviation Administration Regulations. The aircraft policy specifically denied coverage "to any occurrence or to any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under Item 7 of the Declaration." Item 7 provides that only pilots holding valid certificates will fly the aircraft and refers to Endorsement 15. Endorsement 15, the Pilot Clause Endorsement, also provides: "Only the following pilot(s) holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight."

During discovery, defendant Smith admitted that the last medical certificate issued to him prior to the accident, pursuant to the FAA Regulations, was a third-class medical certificate issued on 16 October 1975, two years and eight months before the crash. According to the Code of Federal Regulations in effect on 20 June 1978, a third-class medical certificate expired 24 months after the date of examination shown on the certificate. 14 C.F.R. § 61.23(3) (1978). Smith also admitted that, under the terms of his arrangement with Alfa Aviation, he was to pay rental to Alfa Aviation for his use of the aircraft involved in the accident.

When the injured defendants filed negligence suits against defendants Smith and Alfa Aviation, and they in turn sought coverage under the two policies underwritten by plaintiff, plaintiff sought declaratory judgment, contending that plaintiff had no

duty under the policies to indemnify or defend Smith and Alfa Aviation. Defendants also joined in seeking relief by declaratory judgment.

The Declaratory Judgment Act, G.S. 1-253 *et seq.*, affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments and for clarifying litigation. *Insurance Co. v. Curry*, 28 N.C. App. 286, 221 S.E. 2d 75, *disc. rev. denied*, 289 N.C. 615, 223 S.E. 2d 396 (1976). The Act is applicable to construction of insurance contracts and in determining the extent of coverage under a policy. *Insurance Co. v. Simmons, Inc.*, 258 N.C. 69, 128 S.E. 2d 19 (1962). Thus, the trial court properly undertook to interpret the insurance policies in question.

Summary judgment may be entered upon the motion of either the plaintiff or the defendant under Rule 56 of the North Carolina Rules of Civil Procedure, and the Rule applies in an action for declaratory judgment. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). When a summary judgment is sought, either party is entitled to a judgment as a matter of law when there is no genuine issue as to any material fact. G.S. 1A-1, Rule 56(c).

In the present case, the existence of and provisions of the insurance policies are admitted, and there is no controversy about the facts. The question at bar is the legal import of those facts, a controversy which presents only a question of law for determination by the court. *Armstrong v. McInnis*, 264 N.C. 616, 142 S.E. 2d 670 (1965). This case is thus a typical one for summary judgment.

Plaintiff contends the trial court erred in denying its motion for summary judgment and in granting summary judgment to the defendants, because express exclusions in both policies bar all coverage for defendants. Plaintiff compares the present case with the facts of *Baker v. Insurance Co.*, 10 N.C. App. 605, 179 S.E. 2d 892 (1971), in which a pilot and owner of an aircraft damaged in an accident sought insurance coverage under a policy which contained a "pilot endorsement" identical to that in the aircraft policy in this case. The pilot in *Baker* did not have an appropriate current medical certificate in effect at the time of the accident and was denied coverage, although this Court found no causal connection between the exclusion limiting coverage and the accident. This Court held:

> "Even though plaintiff held a valid *pilot* certificate as referred to in subparagraph (a) of § 61.3 of the Federal Aviation Regulations . . ., by the clear and express prohibition contained in subparagraph (c) of that section, *he could not lawfully act as pilot in command under that certificate,* since at the time of the crash he did not have the appropriate current medical certificate. Under these circumstances it is our opinion, and we so hold, that plaintiff cannot be considered to have been 'properly certificated' at the time of the crash within the meaning of those words as contained in the policy exclusionary endorsement."

Id. at 607-08, 179 S.E. 2d at 894.

In support of its *Baker* ruling, this Court cited *Bruce v. Lumbermens Mutual Casualty Company,* 222 F. 2d 642 (4th Cir. 1955), for the proposition that no causal connection is required between the breach of an exclusion limiting coverage and the accident in order for coverage to be denied under the medical certificate requirement. Under the *Baker* rule, which continues to be the law in this State, we must find that plaintiff was not liable under the aircraft policy because the medical certificate requirement clearly was not met by pilot Smith. His medical certificate was not current, having expired eight months before the accident.

Plaintiff also argues that the airport liability policy issued to Alfa Aviation does not provide coverage for this accident because the policy excludes "any aircraft owned by, hired by, loaned to or operated for the account of the Insured." We agree with plaintiff that since the aircraft in question was rented by Alfa Aviation to defendant Smith, it was excluded from coverage by the specific terms of the insurance contract.

We hold that the ruling of the trial court granting summary judgment for defendants is reversed and the ruling denying summary judgment for plaintiff is reversed. The cause is remanded for entry of summary judgment for plaintiff.

Reversed and remanded.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. DAVID WARREN, EDWARD WILLIAMS AND EARL LEON WILLIAMS

No. 8219SC1046

(Filed 5 April 1983)

1. **Searches and Seizures § 24— confidential informant—sufficiency of application for search warrant**

An affidavit for a warrant to search for lottery tickets based upon information received from a confidential informant was sufficient to establish reasonable grounds to believe that contraband was present in the place to be searched and to establish the reliability of the informant where it showed that the informant twice went to the described premises and bought tickets from one defendant; the informant specified the number of tickets bought and, on one occasion, the price paid; all three defendants were present on both occasions; the second purchase occurred the day before the search warrant was issued and executed; and the informant had furnished information in the past which led to the seizure of drugs or the recovery of stolen property and which led to arrests.

2. **Searches and Seizures § 45— motion to suppress—necessity for hearing**

Defendant was not prejudiced when the trial court denied a motion to suppress prior to hearing evidence where the record shows that the court thereafter retracted its ruling, heard evidence, made findings of fact, and ruled on the motion. G.S. 15A-977(d).

3. **Criminal Law § 84; Searches and Seizures § 43— nexus between defendants and seized evidence**

A sufficient nexus was established between defendants and seized lottery tickets to survive a motion to suppress the tickets where the evidence tended to show that defendants were standing behind a counter in a trailer when officers conducting the search entered the trailer and began standing in a line of people; while standing in line, an officer observed one defendant give a package of lottery tickets to a person in exchange for money; and many of the items seized were on, beneath, or behind the counter behind which defendants were standing.

4. **Gambling § 3— possession of illegal punchboards—sufficiency of criminal summons**

A criminal summons alleging that defendant "did unlawfully, willfully, have in his control, possession of illegal punchboards at which games of chance shall be played" sufficiently charged defendant with the offense of possession of illegal punchboards in violation of G.S. 14-295 without an allegation that defendant operated these devices.

APPEAL by defendants from *McConnell, Judge.* Judgments entered 18 May 1982 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 17 March 1983.

Defendants were convicted in district court of dealing in lotteries. Defendant Edward Williams was also convicted of keeping illegal punchboards.

On appeal to superior court defendants pled guilty to the charges after the court denied their motions to suppress evidence seized pursuant to a search warrant, and denied defendant Edward Williams' motion to quash the warrant for possession of illegal punchboards. The court sentenced each defendant to six months imprisonment.

Defendants appeal from denial of their motions to suppress. Defendant Edward Williams also appeals from denial of his motion to quash the warrant charging possession of illegal punchboards.

Attorney General Edmisten, by Associate Attorney K. Michele Allison, for the State.

Bell & Browne, P.A., by Charles T. Browne, and The Legal Center, by C. Richard Tate, Jr., for defendant appellants.

WHICHARD, Judge.

[1] Defendants contend the affidavit underlying the warrant was insufficient because it failed to provide sufficient underlying facts and circumstances from which the magistrate could determine the informant's basis of knowledge and credibility. We disagree.

> An "affidavit is sufficient if it supplies *reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought* and that they will aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 575-76, 180 S.E. 2d 755, 765 (1971). (Emphasis supplied.) To supply reasonable cause to believe the objects sought are on the described premises, the affidavit supporting a search warrant must provide the magistrate with underlying circumstances from which to judge the validity of the informant's conclusion that the articles sought are at the place to be searched. [Citations omitted.]

State v. Whitley, 58 N.C. App. 539, 542, 293 S.E. 2d 838, 840, *disc. review denied*, 306 N.C. 750, 295 S.E. 2d 763 (1982).

The affidavit here stated the following:

> The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: Acting on instructions from the applicant a confidential and reliable source has visited the location described above and purchased baseball lottery tickets on Sat. August 22, 1981, for $2.00, "ticket number 2969G", from Ed or Earl Williams, Ed and Earl was selling baseball lottery tickets, David Warren was sitting in a chair. This confidential and reliable source purchased baseball lottery tickets on Monday, Sept. 1, 1981, ticket number "71443", from one of the Williams brothers. This confidential source does not know Ed and Earl Williams apart by first names, David Warren was talking on the phone. The confidential and reliable source has purchased baseball lottery tickets within the last 48 hours. This applicant has received information from several different sources that . . . Edward Lee Williams and Earl Leon Williams and David Edgar Warren, were selling baseball lottery tickets and gambling at the above described location.
>
> Applicant knows that Edward Lee Williams, and Earl Leon Williams, and David Edgar Warren, has a prior criminal record for selling and possession of lottery tickets.
>
> This confidential and reliable source is reliable because this source has furnished this applicant with reliable information in the past that led to the recovery of stolen property and the searches of several Randolph County residences that resulted in the seizure of known drugs, and led to felony and misdemeanor arrest.

The affidavit thus showed that the informant twice went to the described premises and bought tickets from one of the Williams brothers. The informant specified the number of tickets bought and, on one occasion, the price paid. On both occasions all three defendants were present.

The second purchase occurred the day before the search warrant was issued and executed. The informant thus had reasonably current knowledge that defendants had possessed and sold lottery tickets. Since the informant had purchased tickets almost two weeks before, and within forty-eight hours of, issuance of the war-

rant, there was sufficient basis for finding a reasonable probability that lottery tickets were then on the described premises.

The affidavit also stated that the informant was reliable because the informant had furnished information in the past which led to the search and seizure of drugs or the recovery of stolen property, and which led to arrests. This was sufficient to establish the informant's reliability and credibility. *See State v. Altman*, 15 N.C. App. 257, 259, 189 S.E. 2d 793, 795, *cert. denied*, 281 N.C. 759, 191 S.E. 2d 362 (1972). Since the affidavit need only contain facts from which the magistrate could establish reasonable grounds to believe that contraband was present in the place to be searched, it did not have to establish which of the individuals in that place were engaged in the criminal activity. *State v. McLeod*, 36 N.C. App. 469, 474, 244 S.E. 2d 716, 720, *disc. review denied*, 295 N.C. 555, 248 S.E. 2d 733 (1978).

The affidavit thus supplied "reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense [would] reveal the presence upon the described premises of the objects sought . . . ." *State v. Whitley, supra.* Defendants' contention that the affidavit was insufficient is without merit.

Defendants contend the search of defendant David Warren's automobile was outside the scope of the search warrant and thus illegal. There was uncontradicted evidence, however, that defendants voluntarily consented to the search. The evidence obtained from the search thus was competent, and defendants cannot complain that their constitutional rights were violated. *State v. Jolly*, 297 N.C. 121, 124-25, 254 S.E. 2d 1, 4 (1979).

[2] Defendants contend the court erred by denying the motion to suppress prior to hearing evidence. The record indicates that the court did do this initially, but then retracted its ruling, heard evidence, made findings of fact, and ruled on the motion. It thus fully complied with the requirements of G.S. 15A-977(d). Defendants presented no evidence, and the State's evidence fully supported the findings made. Defendants thus have failed to show prejudicial error.

[3] Defendants contend that no adequate or lawful connection was made between them and the items seized. The evidence tends

to show that defendants were standing behind a counter when the officers conducting the search entered the trailer and began standing in a line of people. While standing in line, an officer observed one of the defendants give a package of lottery tickets to a person in exchange for money. This sufficed to establish operation of a business. Many of the items seized were on, beneath, or behind the counter behind which defendants were standing. Generally, persons behind the counter of a business are in control of items on or about that counter. It was thus reasonable to conclude that defendants were in control of the lottery items seized from the counter area. Lottery tickets were also found in defendant David Warren's car. This evidence clearly sufficed to establish a nexus between defendants and the evidence seized.

[4] Finally, defendant Edward Williams contends the court erred in denying his motion to quash the criminal summons charging him with possession of illegal punchboards, in violation of G.S. 14-295. The basis of his contention is that the summons does not charge that he operated these devices.

G.S. 14-295 provides in pertinent part:

> If any person shall establish, use or keep . . . an illegal punchboard . . . at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars ($200.00) and shall be imprisoned not less than 30 days . . . .

The summons charged that Williams "did unlawfully, willfully, have in his control, possession of illegal punchboards at which games of chance shall be played . . . in violation of the following law: G.S. 14-295." It closely followed the language of G.S. 14-295 and was clearly sufficient to charge a violation thereof. The statute prohibits establishing, using or keeping an illegal punchboard. Actual operation of the device is not an element of the offense.

Affirmed.

Judges HEDRICK and BRASWELL concur.

STATE OF NORTH CAROLINA v. JIMMIE LEE MYERS AND STATE OF NORTH CAROLINA v. DAVID LEE GARRIS

No. 8222SC909

(Filed 5 April 1983)

1. **Narcotics § 4.7— trafficking in more than 10,000 units of methaqualone—no necessity for instructing on lesser degree of crime**

In a prosecution for felonious trafficking by selling or delivering to an undercover agent 10,000 or more dosage units of methaqualone, the trial court was not required to submit to the jury the lesser included offense of trafficking in less than 10,000 dosage units of methaqualone because only 20 of the more than 30,000 tablets seized by undercover agents were actually determined by chemical analysis to be methaqualone where an SBI agent testified that he examined the tablets and determined that they all had the same physical characteristics.

2. **Criminal Law § 138— mitigating circumstance—substantial assistance to authorities—insufficient evidence**

The trial court did not err in concluding that defendant had not provided such substantial assistance to the State so as to entitle him to a reduction of the minimum sentence for drug trafficking pursuant to G.S. 90-95(h)(5) where defendant contended that he had provided SBI agents with information and names relating to a homicide and to drug trafficking, but an SBI agent's testimony tended to show that defendant's information about the homicide had not revealed any new name but concerned an individual already known to the State, that the information had not led to a conviction, and that defendant had not assisted in the prosecution of his accomplices.

APPEAL by defendants from *Collier, Judge.* Judgments entered 28 April 1982 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 8 March 1983.

Defendants were indicted for felonious trafficking by selling or delivering to an undercover agent on 24 July 1981, 10,000 or more dosage units of the controlled substance methaqualone and were found guilty as charged. Each defendant appeals from imposition of a sentence of imprisonment for 35 years and a fine of $200,000.

Attorney General Rufus L. Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

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

Charles H. Harp II for defendant appellant Garris.

BRASWELL, Judge.

DEFENDANT MYERS' APPEAL

[1] Defendant's sole issue presented for our review is whether the court erred by failing to submit to the jury the requested charge on the lesser-included offenses of trafficking in 1,000 and 5,000 dosage units of methaqualone.

Defendant argues that since only 20 of the 30,241 tablets were actually determined by chemical analysis to be methaqualone, the court erred in denying defendant's request for jury instructions on the lesser-included offense of trafficking in less than 10,000 dosage units of methaqualone. The trial court instructed the jury that in order to find defendants guilty of trafficking in methaqualone, the State had to prove two elements beyond a reasonable doubt: that each defendant knowingly sold or delivered methaqualone to the undercover agent and that the amount sold or delivered was 10,000 or more dosage units.

> "The trial judge must submit and instruct the jury on a lesser-included offense when, and only when, there is evidence from which the jury can find that a defendant committed the lesser-included offense. Conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense."

State v. Summitt, 301 N.C. 591, 596, 273 S.E. 2d 425, 427, *cert. denied*, 451 U.S. 970, 68 L.Ed. 2d 349, 101 S.Ct. 2048 (1981).

State's evidence clearly tended to show that the amount of tablets sold or delivered by defendant to the agents exceeded 10,000. According to the evidence, undercover S.B.I. agents seized two bags containing a total of 30,241 tablets of methaqualone. The total was computed based upon weight and not by an actual counting of the tablets. Defendants had agreed to sell 30,000 tablets to the agents. Of the total, 20 tablets were randomly selected and, after chemical analysis, were found to contain the Schedule II substance methaqualone. Defendant contends that the evidence presented a question concerning the actual number of tablets containing methaqualone, other than the 20 analyzed by S.B.I. chemists, and that this issue should have been submitted to

the jury by an instruction on a lesser-included offense. We disagree.

S.B.I. Special Agent Rainey testified that he examined the tablets to make sure that they all had the same physical characteristics. He stated that these were "bootleg" tablets in that they were not commercially prepared. He described them as follows:

> "These showed all the same general characteristics of the bevelled edge, impression of the disc in the logo was the same; the tablet thickness the same. It was not a mixture of two different batches of tablets there."

Rainey selected twenty tablets at random and determined by chemical analysis that they were methaqualone. Our courts have held that "[w]hen 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." *State v. Wilhelm*, 59 N.C. App. 298, 303, 296 S.E. 2d 664, 667 (1982); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Absher*, 34 N.C. App. 197, 237 S.E. 2d 749, *disc. rev. denied*, 293 N.C. 741, 241 S.E. 2d 514 (1977).

To support his contention that a charge on a lesser-included offense should have been given here, defendant cites *State v. Gooch*, 307 N.C. 253, 297 S.E. 2d 599 (1982), and *State v. Reese*, 33 N.C. App. 89, 234 S.E. 2d 41 (1977). We find the holdings in these cases inapplicable to the question presented by this appeal since in those cases the court had erred by failing to give any instruction concerning the amount of controlled substance which had to be proved in order to find defendant guilty of felonious possession of drugs. Here, the trial judge properly instructed the jury on the requisite elements the State had to prove in order to establish defendant's guilt on the offense for which he was charged.

All the evidence tended to show that defendant committed the offense of trafficking in 10,000 or more dosage units of methaqualone and there was no evidence of a lesser-included offense. We therefore hold that the court properly refused to charge on the lesser-included offenses requested by defendant.

As to defendant Myers' appeal, we find no error.

DEFENDANT GARRIS' APPEAL

Defendant Garris' first two questions for review are the same as the one question presented by codefendant Myers' appeal. Therefore, we find no error for the reasons given in our discussion of the Myers' appeal.

[2] We also find no merit to defendant's argument that the court erred in failing to find mitigating circumstances that would have affected the sentencing proceeding. Defendant contends that although he did not testify against anyone, he provided S.B.I. agents with information and names relating to a homicide in Randolph County and to drug trafficking. He submits that this information "provided substantial assistance" such as to allow reduction of the minimum prison term pursuant to G.S. 90-95(h)(5). The S.B.I. agent's testimony, however, tended to show that defendant's information had not revealed any new name but concerned an individual already known to the State, that the information had not led to a conviction, and that defendant had not assisted in the prosecution of his accomplices.

On the basis of the evidence presented, the court concluded that defendant had not provided such substantial assistance to the State so as to entitle him to reduction of the minimum sentence. Defendant was sentenced to the minimum sentence allowed by G.S. 90-95(h)(2)(c). We therefore hold that the imposition of the minimum sentence with no reduction for assistance by defendant did not constitute an abuse of discretion by the trial judge.

> " 'There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.' "

State v. Davis, 58 N.C. App. 330, 335, 293 S.E. 2d 658, 662, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982), *quoting State v. Pope*, 257 N.C. 326, 334-35, 126 S.E. 2d 126, 132-33 (1962).

We find that the record discloses no prejudicial error in defendant's sentencing hearing.

No error in the appeals of defendants Myers and Garris.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. GINA SELLARS

No. 823SC764

(Filed 5 April 1983)

Criminal Law § 143.10— probation revocation hearing—inability to comply with probation order—necessity for findings by trial court

An order revoking defendant's probation for failure to pay a fine, court costs and restitution at a rate of $100 per month and for failure to advise the probation officer of changes in residence is vacated, and the cause is remanded for a new hearing, where defendant offered evidence tending to show that she was unable to comply with the conditions of her probation because of repeated hospitalizations for mental and physical health problems throughout the period in question, and the trial court's findings of fact merely restated the allegations of the violation report without clearly showing that the court had considered and evaluated defendant's evidence of a legal excuse for her failure to comply with the conditions of probation.

APPEAL by defendant from *Winberry, Judge.* Order entered 24 February 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 20 January 1983.

On 29 July 1981 the defendant, Gina Sellars, was given a sentence of not less than two years and not more than three years in the Superior Court of Craven County for the offense of forgery. That sentence was suspended and the defendant was placed on supervised probation for a period of three years. When the defendant was placed on probation she was ordered to pay into the court sums of money totalling $1300 for fines, costs and restitution. A plan was established for the defendant which required payment of $100 per month until the full balance was paid. On 3 December 1981 and 17 February 1982 violation reports were issued by S. Kim Latham, defendant's probation officer, alleging that defendant was in arrears and that defendant had changed

her place of residence without the prior permission of the probation officer. Upon the warrant for arrest issued in February, the defendant was brought into court for a violation hearing on 24 February 1982.

At the violation hearing, the State presented evidence showing that as conditions of defendant's probation she was to (1) report to her probation officer as directed; (2) advise the officer of any changes in residence; and (3) pay a total amount of $1300 into the office of the Clerk of Superior Court of Craven County. On direct examination, her probation officer, Ms. Latham, testified that defendant had made only one payment of $100; had changed her residence to a place unknown, without notice; and had failed to report to a scheduled meeting with her on 26 October 1981.

On cross-examination Ms. Latham stated that sometime shortly after being placed on probation defendant informed her that her trailer had burned and that she had received a letter from defendant on 20 November 1981. In the letter defendant said that she had tried to call several times but that Ms. Latham was not in. Defendant also informed her that she couldn't pay $100 because she was in the hospital, but that she would catch up with her payments at the end of the month. The balance of Ms. Latham's testimony on cross-examination concerned defendant's medical history including the names of the hospitals and dates of her hospitalizations at each one. The testimony indicated that during the period of time she was on probation, defendant spent more than one-half of the time in various hospitals receiving treatment and therapy for both physical and mental problems.

Ms. Sellars testified in detail as to her whereabouts during the period of her probation. Her testimony indicates that she suffered from a number of physical and mental problems which have been treated extensively in many area hospitals. In addition, she experienced a number of personal problems including the loss of her older son in October, 1981. She received permission from Ms. Latham to travel to Missouri for the funeral and was to return by 23 October. After this trip she was in and out of hospitals in Greenville, New Bern, and Chapel Hill, North Carolina and Halifax, North Carolina.

At the conclusion of the hearing, the court entered an order revoking defendant's probation. The order contains findings with

respect to defendant's conviction and sentencing and made the following entry with respect to her violations.

> . . . The defendant was instructed to report to the probation officer on October 26, 1981, which she failed to do and has failed and refused to report in since that date. Upon information believed to be true, the defendant has changed her place of residence to whereabouts unknown to this officer. This being in violation of the above-stated conditions of probation.
>
> . . . A pay plan was established by the probation officer at the rate of $100.00 per month beginning September 31, 1981. The defendant has made one payment in the amount of $100.00 on September 29, 1981, leaving a balance owing of $1235.00, with an arrearage of $400.00 as of February 17, 1982. This failure to pay monies as ordered is in violation of the above-stated conditions of probation.

From the order of the trial court revoking her probation, defendant has appealed.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Office of the Public Defender, by William F. Ward, III, for defendant appellant.

JOHNSON, Judge.

The issue presented for review in this case is whether the trial judge made proper findings with respect to whether the defendant has violated, without lawful excuse, a valid condition upon which her sentence was suspended.

In a probation revocation hearing, our Courts have continuously held that 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. *State v. Robinson*, 248 N.C. 282, 103 S.E. 2d 376 (1958); *State v. Huntley*, 14 N.C. App. 236, 188 S.E. 2d 30 (1972); *State v. Foust*, 13 N.C. App. 382, 185 S.E. 2d 718 (1971). The mere finding of fact by the trial judge that the defendant had failed to comply, and that the fact of noncompliance required revocation of probation is insufficient to support the judgment putting the suspended sentence into effect. *State v. Robinson, supra* at 287, 103 S.E. 2d at 380.

Following *Robinson*, this Court has required the presiding judge to make findings of fact which are definite and not mere conclusions. *State v. Huntley, supra; State v. Foust, supra.* In *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974) the burden was placed on the defendant to go forward with evidence as to whether his failure to meet the conditions of sentence suspension was without lawful excuse. This Court stated that once the defendant goes forward with evidence demonstrating his inability to meet the condition of probation, he is entitled to have his evidence considered and evaluated. Further, that upon review, mere conclusions will not support a revocation of probation for the reason that it will not be "clear whether the trial judge proceeded under an erroneous assumption that the fact of failure to comply required revocation of probation, or whether he considered defendant's evidence and found that defendant had offered no evidence worthy of belief to justify a finding of a legal excuse for failure to comply with the judgment." 21 N.C. App. at 321, 204 S.E. 2d at 188. *Accord State v. Smith*, 43 N.C. App. 727, 259 S.E. 2d 805 (1979). In *Smith* this Court made a final refinement upon the findings of fact requirement by stating, "the defendant is entitled to have the trial judge make findings of fact which will clearly show that he has considered and evaluated [the defendant's] evidence." 43 N.C. App. at 732, 259 S.E. 2d at 808.

In the case under review, the defendant offered evidence which tended to show that she was financially unable to comply with the judgment due to her repeated hospitalizations for mental and physical health problems throughout the period in question. This evidence also tended to establish defendant's excuse for noncompliance with the other conditions of her probation. The trial judge's purported "findings of fact" merely restate the allegations of the violation report without demonstrating the judge's evaluation of the uncontradicted evidence of the defendant as to her health problems and her extensive stays in various hospitals.

Following *Young* and *Smith* the defendant is entitled to have the trial judge make findings of fact which will *clearly* show that he *has considered and evaluated* the evidence. The order under review fails to do this.

The order revoking the probation is vacated and the cause is remanded for a new hearing on the violation report.

New hearing.

Judges HEDRICK and EAGLES concur.

ETHA LANIER COOK, EMPLOYEE, PLAINTIFF v. BLADENBORO COTTON MILLS, INCORPORATED, EMPLOYER AND FIREMAN'S FUND INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC413

(Filed 5 April 1983)

1. **Master and Servant § 68— workers' compensation—occupational disease—necessity for findings as to disability**

The Industrial Commission was required to make findings as to whether plaintiff suffered a loss to her earning capacity as a result of her occupational disease and is entitled to disability benefits under G.S. 97-29 where the Commission found that plaintiff sustained a permanent injury as a result of an occupational disease, obstructive lung disease, and awarded her $3,000 for injury to an important internal organ, and where there was evidence tending to show that plaintiff's work experience was in defendant's cotton mill, that she is a nonsmoker and began to have respiratory problems in 1978, that she should not work in an area where she would be exposed to cotton dust, that she has unsuccessfully looked for a job with the company which bought defendant employer and at the local employment office and a retail store, and that plaintiff was not hired by defendant's successor company because she did not score well enough on the pulmonary function test.

2. **Master and Servant § 68— workers' compensation—occupational disease—compensation for injury to important internal organ**

The Industrial Commission did not err in awarding plaintiff $3,000 pursuant to G.S. 97-31(24) for permanent injury to an important internal organ, the lungs, from obstructive lung disease caused by her exposure to cotton dust in her employment since (1) a finding that plaintiff's injury was permanent was supported by the testimony of a medical expert that "bronchodialator medication would be a suitable short-term—meaning months to perhaps several years or more—way in which her symptoms could be minimized and her lung function brought closer to normal," and (2) G.S. 97-31(24) applies to occupational diseases.

APPEAL by plaintiff and cross-appeal by defendants from the opinion and award of the Industrial Commission entered 23 November 1981. Heard in the Court of Appeals 7 March 1983.

Plaintiff was born on 30 January 1918. She worked most of her adult life for Bladenboro Cotton Mills in various winding

departments where the air was full of cotton dust. She was laid off in April 1980. Bladenboro Cotton Mills was bought by Highland Mills in May 1980. Plaintiff applied for a job at Highland Mills, she was given a pulmonary function test, and was not hired. She also unsuccessfully looked for a job at the local employment agency and a retail store.

Plaintiff filed a claim for byssinosis with the Industrial Commission. After a hearing, the Deputy Commissioner made the following pertinent findings of fact and conclusions of law:

> 4. Plaintiff began to have breathing difficulties in 1978 when she began working at the Number 1 Mill. She coughed and wheezed and felt that she could not get her breath. Her condition appeared to get worse, and she continues to have problems with coughing and wheezing. She has to take her time in climbing stairs and can become overexerted while sweeping. Despite these problems, however, plaintiff applied for work with Highland Mills and wanted to work there. She has not worked since April 1, 1980.
>
> 5. Plaintiff has never smoked tobacco products.
>
> 6. Plaintiff saw Dr. D. Allen Hayes on October 3, 1980. Dr. Hayes was of the opinion that plaintiff had mild obstructive airways disease and that plaintiff's occupational exposure to cotton dust placed her at a greater risk of contracting this disease than the general public.
>
> 7. Dr. Hayes was further of the opinion that although plaintiff's lung function could be returned to normal after bronchodialator treatment, she had some degree of permanent lung impairment, however slight. He testified that plaintiff would benefit from a bronchodialator treatment program. She should not work in an area where she would be exposed to respirable cotton dust.
>
> 8. Plaintiff suffers from obstructive lung disease, an occupational disease which is due to causes and conditions which are characteristic of and peculiar to her particular employment in the textile industry, and said disease is not an ordinary disease of life to which the public is equally exposed outside of the employment.

9. As a result of the aforesaid occupational disease, plaintiff has sustained permanent injury to important internal organs, her lungs. The fair and equitable amount of compensation for said permanent injury under the Workers' Compensation Act is $3,000.00.

10. Plaintiff would benefit from a bronchodialator treatment program in that it would tend to lessen plaintiff's disability.

Based upon the foregoing stipulations and findings of fact, the undersigned makes the following

CONCLUSIONS OF LAW

1. Plaintiff suffers from obstructive lung disease, an occupational disease which is due to causes and conditions which are characteristic of and peculiar to her particular trade, occupation, or employment and which is not an ordinary disease of life to which the general public is equally exposed outside of the employment. G.S. 97-53.

2. As a result of her occupational disease, plaintiff has sustained permanent injury to important internal organs for which she is entitled to compensation in the amount of $3,000.00. G.S. 97-31(24).

Plaintiff appealed to the Full Commission alleging that the Deputy Commissioner erred in failing to award benefits for disability under G.S. 97-29. The Commission adopted and affirmed the Deputy Commissioner's opinion and award.

Hassell, Hudson and Lore, by R. James Lore, for plaintiff appellant.

Teague, Campbell, Conely and Dennis, by C. Woodrow Teague and George W. Dennis III, for defendant cross-appellant.

VAUGHN, Chief Judge.

[1] Plaintiff argues that the Industrial Commission erred in not finding that she was disabled by an occupational disease and entitled to disability benefits under G.S. 97-29.

In general, an opinion and award of the Industrial Commission is conclusive on appeal if the findings of fact are supported

by competent evidence, and the conclusions of law supported by the findings. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 105 (1980).

In this case, the Commission found that plaintiff sustained a permanent injury as a result of her occupational disease, and awarded her $3,000.00 under G.S. 97-31(24). The Commission, however, did not make any findings as to plaintiff's disability. Disability, as defined by G.S. 97-2(9), means "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." To support a conclusion of disability our Supreme Court has said the Commission must find the following three facts:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982).

The Commission found that, except for an eight to ten month period, plaintiff's sole work experience, since she was twenty-five, was in defendant's cotton mill. A nonsmoker, she began to have respiratory problems in 1978. Dr. Hayes testified that plaintiff should not work in an area where she would be exposed to cotton dust. Since plaintiff was laid off, she unsuccessfully looked for a job at Highland Mills, the local employment office, and a retail store. There was some evidence that indicated plaintiff was not hired at Highland Mills because she did not score well enough on the pulmonary function test, which could have been due to her byssinosis. This evidence supported plaintiff's claim of disability. Although the Commission may accept or reject any of plaintiff's evidence, it must make specific findings as to the facts upon which a compensation claim is based, including the extent of claimant's disability. *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E. 2d 743 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982). We hold that plaintiff presented evidence of impairment of her wage earning capacity due to her occupational disease. The Commission, therefore, was required to

either accept or reject any or all of plaintiff's evidence and make findings of fact as to whether plaintiff was disabled.

[2] Defendant cross appeals, arguing that the Commission erred in awarding plaintiff $3,000.00 pursuant to G.S. 97-31(24) and in ordering defendant to provide plaintiff with bronchodialator treatment. G.S. 97-31(24) provides:

> In case of the loss of or *permanent* injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000). (Emphasis added.)

Defendant contends the evidence does not support the finding that plaintiff's injury was permanent. We disagree. Dr. Hayes suggested plaintiff was permanently impaired when he testified that "bronchodialator medication would be a suitable short-term—meaning months to perhaps several years or more—way in which her symptoms could be minimized and her lung function brought closer to normal." As mentioned above, the Commission may accept or reject any or all of plaintiff's evidence. Clearly, the Commission chose to accept this evidence and found plaintiff was permanently impaired.

Defendant also contends that G.S. 97-31(24) does not apply to occupational diseases. We disagree. In both *Priddy v. Cone Mills, supra*, and *Hundley v. Fieldcrest, supra*, the plaintiffs suffered from byssinosis and were awarded benefits pursuant to G.S. 97-31(24) for their permanent injuries.

Defendant also argues that plaintiff has failed to show she is disabled. As we have mentioned above, there was some evidence which indicated plaintiff was disabled since she could not find another job after she was laid off. Because of this evidence the Commission must make findings of fact as to whether plaintiff suffered a loss to her earning capacity as a result of her occupational disease.

Remanded to the Industrial Commission for proceedings consistent with this opinion.

Judges WEBB and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 APRIL 1983

BARBER v. BARBER No. 8220DC491	Anson (81CVD168) (81CVD330)	Dismissed
BARCLAYS AMERICAN v. KNIGHT No. 8225SC381	Caldwell (81CVS475)	Affirmed in Part; Reversed in Part
BLACKWELL v. CONE MILLS No. 8210IC57	Industrial Commission (H-7002)	Affirmed
CHAMBERLAIN v. BEAM No. 8227SC208	Cleveland (81CVS489)	Reversed and Remanded
CLUNE EQUIPMENT v. LAZAROWICZ No. 8226SC388	Mecklenburg (79CVS8624)	Appeal Dismissed
CURTIS v. WILLIAMS No. 822SC498	Martin (76SP66)	No Error
FIRST UNION NATIONAL BANK v. MILLER No. 8222SC472	Davidson (81CVS913)	Affirmed
GLENN v. GLENN Nos. 8221DC437 8221DC721	Forsyth (74CVD324)	Affirmed
HARMON FOOD STORE v. McKEAN No. 8222SC455	Iredell (81CVS00903)	Affirmed
IN RE BRYANT No. 8212DC438	Cumberland (76-J-792) (76-J-793) (76-J-795)	Affirmed
JAMISON v. FORBIS No. 8227SC457	Gaston (80CVS2581)	Vacated and Remanded
JONES v. JONES (CHEEK) No. 8221DC383	Forsyth (79CVD2451)	Affirmed
JONES v. KENDALL CORP. No. 8216SC490	Robeson (82CVS215)	Reversed and Remanded
NEW HANOVER BROADCASTING v. PORT CITY ELECTRIC No. 825SC447	New Hanover (80CVS3021)	Affirmed

STATE v. AVERITT No. 8213SC979	Brunswick (81CRS5713) (82CRS1125)	No Error
STATE v. BOONE No. 824SC1006	Onslow (82CRS1023)	No Error
STATE v. BOYKIN No. 827SC833	Nash (81CRS14622) (81CRS14649)	Remanded for Resentencing
STATE v. CRAWFORD No. 8226SC917	Mecklenburg (81CRS66282)	No Error
STATE v. LOCKLEAR No. 8216SC956	Scotland (81CRS3000)	No Error
STATE v. NOWELL No. 8210SC927	Wake (81CRS67492) (81CRS67493)	No Error
STATE v. SMALL No. 8219SC849	Rowan (82CRS537)	No Error
STATE v. THORNE No. 8210SC736	Wake (78CRS48915) (78CRS48916)	New Hearing
TILLETT v. HUMANE SOCIETY No. 822SC415	Beaufort (80CVS504)	Affirmed
WEST v. WEST No. 8218DC427	Guilford (81CVD4859)	Reversed and Remanded

TERRY'S FLOOR FASHIONS, INC., PLAINTIFF v. RENNIE MURRAY, THIRD-PARTY PLAINTIFF v. CHATEAU BUILDERS, INC., AND E. HAROLD KEITH, DEFENDANTS

No. 8210DC495

(Filed 5 April 1983)

Appeal and Error §§ 6.4, 6.8— interlocutory orders—refusal to add party—summary judgment—premature appeal

Orders denying third-party plaintiff's motions to compel discovery and to add the third-party corporate defendant as a necessary party and granting summary judgment for third-party defendants were interlocutory and not immediately appealable since they adjudicated fewer than all the rights and liabilities of all the parties, the trial judge did not determine that there was no just reason for delay of the appeal, and the orders did not affect a substantial right in that the orders denying the motions to compel discovery and add a necessary party may be challenged after a a final judgment on all the claims of all the parties without prejudicing third-party plaintiff's rights, and the original complaint and third-party complaint relate to different contracts and there is thus no danger of different juries rendering inconsistent verdicts on the same factual issue. G.S. 1A-1, Rule 54(b); G.S. 1-277; G.S. 7A-27.

APPEAL by third-party plaintiff from *Redwine, Judge.* Order entered 9 February 1982 in District Court, WAKE County. Heard in the Court of Appeals 17 March 1983.

This is a civil action wherein plaintiff sued the defendant, Rennie Murray, for payment of $1,185.00 plus interest for carpet supplied and installed by the plaintiff in defendant's house. The defendant denied liability and claimed that the billing account was in the name of Chateau Builders, Inc., and if any money was owed to the plaintiff, it should be paid by Chateau Builders. Defendant then filed a third-party complaint against Chateau Builders, Inc., and its president, E. Harold Keith. In its complaint, the third-party plaintiff, Rennie Murray, alleged that she had contracted with Chateau Builders, Inc., for the construction of a house and that under the terms of the contract Chateau Builders was to supply certain materials including carpet.

In the present action the third-party defendants, Chateau Builders, Inc., and E. Harold Keith, moved for summary judgment, which was granted on 9 February 1982. The third-party plaintiff then moved to have Chateau Builders, Inc., added as a necessary defendant to this lawsuit. This motion was denied.

The third-party plaintiff appealed.

E. Gregory Stott for the third-party plaintiff, appellant.

Kirk, Tantum, Hamrick & Gay, by George N. Hamrick for the third-party defendants, appellees.

HEDRICK, Judge.

Upon careful review of the record on appeal we hold this appeal should be dismissed under Rule 54(b) of the North Carolina Rules of Civil Procedure. Rule 54(b) states:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The granting of the third-party defendants' motion for summary judgment, and the denying of third-party plaintiff's motions to compel discovery and add a necessary party, were decisions of the trial judge which adjudicated fewer than all the rights and liabilities of fewer than all the parties. Plaintiff's claim has yet to be heard, so the third-party plaintiff's appeal is interlocutory. Under Rule 54(b), the judgment and orders may be appealed from only if either (1) the trial judge expressly determines there is no just reason for delaying appeal of his final judgment as to fewer

than all the parties, or (2) they affect a "substantial right" pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27.

The summary judgment and orders in the instant case were not certified for appeal since the trial judge did not declare there was no just reason for delay of appeal. Thus the central question becomes whether the trial judge's orders affected a "substantial right" of third-party plaintiff.

The orders denying third-party plaintiff's motions to compel discovery and to add Chateau Builders, Inc., as a necessary party do not affect substantial rights because those orders may be challenged after a final judgment on all the claims of all the parties without prejudicing third-party plaintiff's rights. As our Supreme Court explained in another attempt to appeal an interlocutory order:

> Defendant's rights here are fully and adequately protected by an exception to the order which may then be assigned as error on appeal should final judgment in the case ultimately go against it. All defendant suffers by its inability to appeal Judge Long's order is the necessity of rehearing its motion. The avoidance of such a rehearing is not a 'substantial right' entitling defendant to an immediate appeal.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E. 2d 338, 344 (1978). The policy behind declining to review the questions presented by third-party plaintiff at this time is "to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Id.* at 207, 240 S.E. 2d at 343.

Nor does summary judgment for third-party defendants affect a substantial right of the third-party plaintiff in the case *sub judice*. The complaint alleges defendant, third-party plaintiff, owes a sum to plaintiff under one contract. The third-party complaint alleges a *separate* contract placing liability, if any, on the third-party defendants. Consequently, the third-party complaint need not be considered unless and until defendant's liability to plaintiff is determined, and appellate review of the summary judgment for the third-party defendants would only be an advisory opinion at this time. The procedural context here is similar

to that of *Green v. Duke Power Co.*, 305 N.C. 603, 607, 290 S.E. 2d 593, 596 (1982), wherein the Court stated,

> We hold that no substantial right would be lost by Duke's [third-party plaintiff's] inability to take an immediate appeal from the summary judgment against it. If Duke [third-party plaintiff] were to win in the principal action, Duke would have no right to appeal. G.S. 1-271 (only an aggrieved party may appeal). If Duke [third-party plaintiff] were to lose, its exception to the entry of summary judgment would fully and adequately preserve its right to thereafter seek contribution.

Furthermore, since the original complaint and the third-party complaint relate to different contracts, there is no danger of different juries rendering inconsistent verdicts on the same factual issue. *See Id.* at 608, 290 S.E. 2d at 596.

The appeal is dismissed.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. CARROLL DEAN BROOKS

No. 8227SC784

(Filed 5 April 1983)

1. **Criminal Law § 34— officer's prior knowledge of defendant—admissibility**

An officer's testimony that he had known defendant "prior to this" did not imply that defendant had been involved in prior criminal activity but was relevant to show that the officer had properly identified defendant.

2. **Criminal Law § 138— aggravating factor—use of deadly weapon—element of crime**

In imposing a sentence for discharging a firearm into occupied property, the trial court erred in finding as an aggravating factor that defendant was armed with or used a deadly weapon since such factor was an element of the offense for which defendant was being sentenced. G.S. 15A-1340.4(a)(1).

3. **Criminal Law § 138— sentencing hearing—effect of failure to object to evidence**

Defendant's failure to object to the introduction of his criminal record at a sentencing hearing constituted a waiver of the right to object, and the admission of the record is not a proper basis for appeal. App. R. 10(b)(1).

4. Criminal Law § 138— improper aggravating factor—remand for resentencing

Where the trial court, in imposing a sentence in excess of the presumptive term, improperly considered one of the two aggravating factors which it found to exist, the case must be remanded for resentencing.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 23 March 1982 in Superior Court, LINCOLN County. Heard in the Court of Appeals 7 February 1983.

Defendant was charged with discharging a firearm into occupied property, in violation of G.S. 14-34.1. The State's evidence tended to show that on 18 December 1981, at midnight, defendant followed his ex-wife, Mary Ellen Stidham, home to her trailer. She went inside and defendant, who remained outside, yelled at her husband, Chuck Stidham. According to Chuck Stidham, defendant pointed a rifle at him and fired. Stidham ducked, and the bullet went through the pantry wall and into the living room. Stidham said defendant was driving a dark blue Datsun with a primered front fender. The car did not look as if it had been in an accident. At twelve-thirty a.m., Deputy Sheriff Craig arrived at David Brooks' house in response to a call about the shooting. David Brooks is defendant's brother. Craig saw defendant's Datsun which appeared to have been in an accident. Defendant's mother was not there. Craig stayed for fifteen minutes.

Defendant introduced evidence which tended to show that at eleven thirty-three p.m., on 18 December 1981, he went to David Brooks' house after wrecking his mother's car. Sometime later, Craig arrived at David Brooks' house. Forty-five minutes after defendant arrived, his mother and two of his brothers came to take him to the hospital. They left for the hospital at twelve-fifty a.m.

Defendant was found guilty of discharging a firearm into occupied property. At the sentencing hearing, the trial judge found the following aggravating factors:

> 9. The defendant was armed with or used a deadly weapon at the time of the crime.
>
> 15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement.

The trial judge found no mitigating factors. He imposed a sentence of five years imprisonment, a sentence exceeding the three-year presumptive term.

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.

VAUGHN, Chief Judge.

[1] Defendant's five assignments of error are presented in three arguments. He first assigns as error the trial judge's overruling his objection to a question the State asked Deputy Sheriff Craig on direct examination. The question was "did you know Mr. Brooks prior to this?" Craig answered, "Yes, sir." Defendant argues that the question was improper because Craig's prior knowledge of defendant implied that defendant had either committed or had been suspected of having committed other, unrelated offenses. This argument is without merit. Craig's knowledge of defendant was relevant to show that he had properly identified defendant. Craig and the defendant lived in a small town. That they knew each other in no way implied defendant had been involved in prior criminal activity. We find no error in the guilt determination part of defendant's trial.

[2] Defendant's remaining assignments of error concern the trial judge's finding aggravating factors and his imposition of a sentence in excess of the presumptive term in the sentencing hearing. Defendant contends, and we agree, that the trial judge erred in finding as a factor in aggravation that defendant was armed with or used a deadly weapon. "Evidence 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). Clearly, the rifle was evidence necessary to prove an element of the offense of discharging a firearm into occupied property, and was improperly used to prove an aggravating factor.

[3] Defendant's next argument is that the trial judge's finding as a factor in aggravation that he had prior convictions was improper. He contends 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 any other method.

Defendant failed to object when his record, which he contends was not shown to be an original or certified copy, was handed to the trial judge at the sentencing hearing. The failure to object to the introduction of evidence constitutes a waiver of the right to object, and the admission of the evidence is not a proper basis for appeal. Rule 10(b)(1), Rules of Appellate Procedure; *State v. Wilkins*, 297 N.C. 237, 254 S.E. 2d 598 (1979). Moreover, the language of G.S. 15A-1340.4(e) is permissive rather than mandatory and does not preclude other methods of proof. *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982).

[4] Defendant assigns as error the trial judge's imposition of a sentence in excess of the presumptive term. Upon a finding that aggravating factors outweigh mitigating factors by the preponderance of the evidence, it is within the trial judge's discretion to decide whether to increase the sentence above the presumptive term, and to what extent. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *review denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). In this situation, however, where one of the two aggravating factors was improperly considered, the judge exercised his discretion in the light of that misapprehension. *State v. Ahearn*, --- N.C. ---, --- S.E. 2d --- (596A82) (filed 8 March 1983). The judgment imposing sentence must be vacated and the case remanded for resentencing.

Vacated and remanded.

Judges WELLS and BRASWELL concur.

J. GARFIELD WALL v. CHARLES W. STOUT AND BETSY W. SANDERS, GUARDIAN AD LITEM FOR MARIE L. WALL v. C. W. STOUT

No. 829SC444

(Filed 5 April 1983)

Physicians, Surgeons, and Allied Professions § 20.2— medical malpractice—instruction that doctor does not guarantee results

In a medical malpractice action, the trial court's instruction that a doctor ordinarily does not guarantee correct diagnosis or successful treatment, the court's instruction that a doctor is not held to the "utmost degree of skill" in his profession, and the court's use of the term "honest error" in explaining the medical standard of care were legally correct and therefore proper. Furthermore, the court's repetition on three occasions of the legally correct instruction that a doctor does not guarantee success was not "exculpatory" or otherwise improper.

APPEAL by plaintiffs from *Hobgood (Hamilton), Judge.* Judgments entered 27 October 1981 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 10 March 1983.

These are civil actions wherein the plaintiff, guardian ad litem for Marie Wall, and the plaintiff, husband of Marie Wall, seek damages for personal injury and loss of consortium allegedly resulting from the medical malpractice of the defendant. The following issues were submitted to and answered by the jury:

1. Was the plaintiff, Marie L. Wall injured by the negligence of the defendant, Dr. C. W. Stout?

ANSWER: No.

2. What amount, if any, is the plaintiff, Marie L. Wall, entitled to recover from the defendant, Dr. C. W. Stout?

ANSWER: _____

1. Did the defendant's negligence proximately cause the plaintiff, J. Garfield Wall, to lose the consortium of his wife, Marie L. Wall?

ANSWER: No.

2. What amount, if any, is the plaintiff, J. Garfield Wall, entitled to recover for loss of consortium?

ANSWER: _____

From a judgment entered on the verdict, plaintiffs appealed.

Grover C. McCain, Jr., Jeff Erick Essen, and Watkins, Finch & Hopper, by William T. Watkins and William L. Hopper for the plaintiffs, appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., Nigle B. Barrow, Jr. and Susan M. Parker for the defendant, appellee.

HEDRICK, Judge.

Plaintiffs purport to raise two questions on appeal. The first question is set out in their brief as follows: "Did the trial court commit reversible error by favoring the contentions of the defendant, mischaracterizing adverse evidence as 'plaintiff's evidence' and presenting a confusing and misleading statement of plaintiff's burden in his charge to the jury?" Plaintiffs indicate this question was preserved for review by Exception Nos. 2-5 and 8-15. All these exceptions relate to the jury charge; however, Exception Nos. 3-5 and 8-11 do not comply with Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and Exception No. 2 does not comply with Rule 21 of the General Rules of Practice for the Superior and District Courts. Thus, Exception Nos. 2-5 and 8-11 present no question for review.

By Exception Nos. 12-15 the plaintiffs have preserved for review and contend that the trial court erred in its instructions to the jury regarding medical doctors' standards of skill. Specifically, Exception Nos. 13, 14, and 15 refer to the instruction that a doctor ordinarily does not guarantee correct diagnosis or successful treatment. Plaintiffs argue that since guarantee of diagnosis was not an issue, and since the charge thrice repeated that a doctor does not ensure results, the instructions tended to "exculpate" the defendant in the minds of the jury. They also maintain in Exception No. 15 that use of the term "honest error" in explaining the medical standard of care was confusing and "exculpatory." Finally, plaintiffs' Exception No. 12 contends it was error to instruct that a doctor is not held to the "utmost degree of skill" in his profession.

The trial judge had a duty to explain the law to the jury. N.C. Gen. Stat. § 1A-1, Rule 51. His use of the term "honest error," his charge on the degree of skill required, and the statements that a doctor does not guarantee results were legally correct, and therefore proper instructions. *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973); *Belk v. Schweizer*, 268 N.C. 50, 149 S.E. 2d 565 (1966). Moreover, the instructions objected to in Exception Nos. 12-15 were directly relevant to the medical standard of practice in issue at trial. *See* N.C. Gen. Stat. § 90-21.12.

The medical standard of practice was repeated several times in a lengthy charge to the jury. Viewing the charge as a whole, repetition of the legally correct instruction that a doctor does not guarantee success is not "exculpatory" or otherwise improper. The plaintiffs failed to show error since there is no reason to believe the jury was misled within the context of the entire charge. *Hanks v. Insurance Co.*, 47 N.C. App. 393, 267 S.E. 2d 409 (1980).

The plaintiffs next claim that the trial court erred in allowing Dr. Watson to testify after Dr. Tarry. They contend the defendants orally stipulated that either Dr. Tarry or Dr. Watson would be a witness, but not both. Defendants deny making such a stipulation. The pre-trial order lists both Dr. Watson and Dr. Tarry as possible defense witnesses, with no "either-or" provision. The pre-trial order contained the only valid stipulations. N.C. Gen. Stat. § 1A-1, Rule 16. Consequently, Dr. Watson was a proper witness.

No error.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. JAMES EARL PRATT

No. 8214SC873

(Filed 5 April 1983)

1. **Criminal Law § 34.1— evidence of defendant's guilt of another offense—prejudicial error**

The trial court in an armed robbery case erred in permitting a witness to testify that defendant told her that he had robbed a certain convenience store by himself two or three weeks before the armed robbery in question since such testimony lacked any relevance to the present case except to show defendant's disposition to commit robbery. Moreover, such testimony constituted prejudicial error in light of the conflicting evidence as to defendant's participation in the robbery in question and questions concerning the credibility of certain State's witnesses.

2. **Criminal Law § 42.4— admissibility of weapon not used in crime**

A shotgun with defendant's initials spray painted on it was relevant and admissible in an armed robbery case in which the evidence tended to show that defendant drove the getaway car, although it was not used by the perpetrator of the robbery, since the gun was found near the scene of the robbery the next day, defendant was seen leaving his apartment with the gun, and the gun could have been used as a back-up.

3. **Criminal Law § 34.8— evidence of another crime—admissibility to show common plan and scheme**

In this armed robbery prosecution, evidence of defendant's participation in a break-in of a mobile home and theft of a movie camera and projector which were later traded for a shotgun used in the robbery was relevant and admissible to show a common plan and scheme.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 22 April 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 15 February 1983.

Defendant was indicted, convicted and sentenced to the maximum sentence of forty years for armed robbery.

Attorney General Edmisten, by Assistant Attorney General Richard H. Carlton, for the State.

Lipton & Mills, by William S. Mills, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that he is entitled to a new trial due to the admission of testimony, over defendant's objection, by the

State's witness Linda Currie that defendant told her that he had robbed a Fast Fare convenience store in Hillsborough by himself two or three weeks before the armed robbery which is the subject of the present case. We agree for the following reasons.

In North Carolina, evidence of other crimes is not admissible when its only relevance to the crime charged is in its tendency to show the defendant's disposition to commit a crime of the nature of the one for which he is on trial. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, if such evidence tends to prove any other relevant fact it will not be excluded merely because it shows guilt of another crime. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). Here, however, the challenged evidence lacks any relevance to the present case except to show defendant's disposition to commit robberies.

Further, the State's evidence is insufficient to overcome the prejudicial effect of the erroneous admission of this testimony. The State presented circumstantial evidence that on 12 November 1981, defendant and Walter Cates, the actual perpetrator of the robbery charged, traded a movie camera and projector for a shotgun owned by Robert Bradshaw; that defendant and Cates sawed down the shotgun at Bradshaw's apartment; that defendant and Cates left Bradshaw's apartment in defendant's car between 8:30 and 9:00 p.m.; that Cates alone went into Medlin's Convenience Store in Durham at approximately 9:00 p.m., pointed the sawed-off shotgun at the clerk, Linda Long, and robbed the store of its cash and an orange bank bag containing cash, checks and food stamps; that defendant and Cates returned to the apartment of Sherri Hamilton Rosso and Vickie Hamilton Clark where they emptied and divided the cash in an orange bank bag between the two of them and burned the checks and food stamps some time after 9:00 p.m.; that defendant and Cates requested Sherri Rosso to drive them some place and defendant specifically told her to avoid Medlin's Store; and that a shotgun identified by Linda Currie as belonging to defendant with the initials "JP" spray painted on its butt and a sawed-off shotgun were found the next day in a churchyard located 50 to 60 yards away from Medlin's Store. Defendant also told Linda Currie that he had driven the getaway car.

On the other hand, there is no evidence that anyone saw defendant or his car at or near the scene of the robbery. Moreover,

Cates, who pleaded guilty, testified for defendant that defendant was not with him and that Jeff Hamilton, the brother of Sherri Rosso and Vickie Clark, drove the getaway car. There were also problems with the credibility of the State's witnesses. Sherri Rosso and Vickie Clark, if Cates' testimony was true, had a motive to lie to protect their brother. There was also evidence that Linda Currie had been jilted by defendant and that upon learning that defendant was going to go back to the mother of his children, she threatened to take defendant "to his grave."

Although the State's evidence is strong, the defendant's evidence is equally strong, thereby increasing the likelihood that the jury was influenced by the testimony. We cannot say that the testimony had no influence upon the jury. We are therefore compelled to order a new trial.

[2, 3] Since we are ordering a new trial, we need not consider defendant's remaining assignments of error except for two evidentiary matters which are likely to recur at the new trial. First, we hold that the shotgun with the initials spray painted on it is relevant and admissible as evidence since the gun could have been used as a back-up, the gun was found near the scene of the robbery the next day, and defendant was seen leaving his apartment with the gun. *See State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971). Second, we hold that evidence of a break-in of a mobile home earlier in the day of 12 November 1981, in which defendant was a participant with Jeff Hamilton and Walter Cates and in which the movie camera and projector were taken and later traded for Bradshaw's shotgun is relevant and admissible to show a common plan and scheme. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

For the foregoing reasons, defendant is entitled to a

New trial.

Judges BECTON and PHILLIPS concur.

JAMES W. THOMPSON III v. GERALD C. WRENN AND WIFE, SANDRA W. WRENN

No. 823SC256

(Filed 5 April 1983)

Mortgages and Deeds of Trust § 25— foreclosure of deed of trust—sufficiency of evidence

The trial court properly affirmed an order of the clerk permitting plaintiff to foreclose under a deed of trust where the evidence was sufficient to support findings by the clerk of a valid debt of which plaintiff was the holder, default, a right to foreclose under the instrument, and notice.

APPEAL by defendants from *Reid, Judge*. Judgment entered 23 October 1981 in Superior Court, CARTERET County. Heard in the Court of Appeals 19 January 1983.

This action is an appeal from a judgment affirming an order of the Clerk of Superior Court of Carteret County to allow plaintiff to foreclose under a deed of trust. Plaintiff, the trustee, presented the following evidence. The purchase money deed of trust was executed by defendants, naming Joseph O. Jenkins, and his wife, as beneficiaries. In November 1980, Jenkins told plaintiff that defendants were in default and he should institute foreclosure proceedings. Plaintiff did so after sending defendants a letter demanding payment. The note was for the principal amount of $80,000.00, calling for annual payments of $8,156.56 due on 9 June of each year. Jenkins' executor testified that both Jenkins and his wife had died, and he found a receipt in Jenkins' records which said that Jenkins had received $3,000.00 from Wrenn on 6 July 1980, and the balance due on the 9 June 1980 payment was $5,156.56. Defendant had not made any payments to the executor. The hearing was held on 26 February 1981, and the Clerk of Superior Court entered an order allowing foreclosure on 6 March 1981.

Defendants did not present any evidence. Their motion for dismissal pursuant to G.S. 1A-1, Rule 41(b) was denied.

The trial judge made the following findings of fact.

1. On June 9, 1978, the defendants executed a promissory note secured by a deed of trust to the plaintiff as trustee of JOSEPH O. JENKINS and wife, ELIZABETH C.

JENKINS, evidencing the balance of the purchase price of property described in the deed of trust. This deed of trust is recorded in Book 419, page 135, Carteret County Registry. The original amount of the debt was for $80,000.00 and was to be repaid with interest at 8% per annum in equal annual installments of $8,156.56 to be applied towards interest and principal until fully paid. Payments were to be made on June 9 of each calendar year beginning June 9, 1979. The note and deed of trust still subsist and are valid evidence of an existing debt of which the party seeking to foreclose is the holder.

2. The deed of trust contains a valid power of sale.

3. JOSEPH O. JENKINS is now dead. He survived his wife, ELIZABETH C. JENKINS. RUFUS H. GOWER, JR. is the duly appointed qualified and acting Executor of the Estate of JOSEPH O. JENKINS. The Executor has continued the proceeding since the death of MR. JENKINS.

4. Notice of this proceeding was properly and timely served upon the defendants.

5. During 1980, defendants paid on the debt the amount of $3,000.00 on July 6, 1980, leaving a balance due on the annual payment of $5,156.56. Defendants have paid no sum or amount in 1981.

6. Prior to his demise, JOSEPH O. JENKINS instructed the trustee under the deed of trust, the plaintiff herein, to begin foreclosure of the deed of trust because of the default of defendants.

7. Due demand for payment was made of the defendants.

8. On December 9, 1980, due notice of this proceeding was served upon the defendants giving notice of a hearing to be held before the Clerk. The hearing was continued and another notice of a rescheduled hearing to be held before the Clerk on January 29, 1981, at 2:00 p.m. was mailed to the defendants on January 6, 1981. Thereafter, the matter was continued to February 26, 1981, and notice of this rescheduled hearing was given on January 28, 1981. Hearing was had before the Clerk on February 26, 1981, and the Clerk entered

an Order of Foreclosure on March 6, 1981. From this Order, the defendants appealed.

Upon these findings, the Court makes the following:

CONCLUSIONS OF LAW

1. There is a valid debt owed by defendants to the Estate of J. O. JENKINS, deceased, which the Executor of the Estate is seeking to foreclose.

2. There has been a default in the payment of the debt.

3. There is a right to foreclose under the deed of trust securing the debt.

4. The defendants are the proper parties to receive notice of these proceedings, and they have received timely and proper notice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff be and he is hereby authorized to proceed with sale under the powers of sale contained in the deed of trust and in accordance with the provisions from notice and sale contained in Article 45 of the General Statutes.

Nelson W. Taylor III, for plaintiff appellee.

Barker, Kafer and Mills, by Bill Barker and James C. Mills, for defendant appellants.

VAUGHN, Chief Judge.

Defendants' sole argument is that the trial judge erred in denying their motion to dismiss pursuant to G.S. 1A-1, Rule 41(b).

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

G.S. 1A-1, Rule 41(b). The judge may, as trier of facts, weigh the evidence, find the facts against plaintiff, and sustain defendant's motion even though plaintiff has made a prima facie case. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

In this case, however, plaintiff's evidence established all the following requisite facts under G.S. 45-21.16(d). There was evidence for the Clerk to find the existence of a valid debt of which plaintiff was the holder; default; a right to foreclose under the instrument; and notice. Defendants presented no evidence. The trial judge found the above facts, and defendant failed to take exception to any of the findings. Since these facts are sufficient to support the trial judge's conclusion of law, defendants' motion to dismiss was properly denied, and their assignment of error is overruled.

For the reason stated, the trial court's judgment is

Affirmed.

Judges WELLS and BRASWELL concur.

STATE OF NORTH CAROLINA v. LARRY PARKER

No. 828SC924

(Filed 5 April 1983)

1. **Constitutional Law § 67— confidential informant—failure to reveal identity—harmless error**

Failure of the trial court to require the State to reveal the identity of a confidential informant who participated in a purchase of narcotics from defendant was harmless error where defendant already knew the informant's identity and testified that he had known the informant all his life.

2. **Criminal Law § 121— instructions on entrapment**

The trial court's instructions placing on defendant the burden of showing entrapment to the satisfaction of the jury were correct, and the court's instructions on agency were sufficient.

3. **Narcotics § 4.6— possession of cocaine with intent to sell—sale of cocaine—failure to instruct on possession of less than one gram**

Where defendant was convicted of possession of cocaine with intent to sell and deliver and sale and delivery of cocaine in violation of G.S. 90-95(a)(1), the

trial court did not err in failing to submit an issue to the jury as to defendant's guilt of possession of less than one gram of cocaine since the provision of G.S. 90-95(d)(2) making it a misdemeanor to have less than a gram of cocaine applies only when a defendant is convicted under G.S. 90-95(a)(3) of mere possession of cocaine.

4. **Criminal Law § 122.1 — jury's request for additional instructions — opportunity to object**

There is no merit in defendant's contention that he should have been given the opportunity to object to the jury's request for additional instructions out of the jury's presence where the record shows that defendant made no comment or no effort to be heard when the additional instruction was given.

APPEAL by defendant from *Bowen, Judge.* Judgment entered 3 June 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 March 1983.

The defendant was indicted on two counts of violating the Controlled Substances Act. He was charged with 1) possession of a controlled substance with intent to sell and deliver and 2) sale and delivery of a controlled substance.

Arnett A. Dove, an undercover agent with the State Bureau of Investigation, was the chief witness for the State at trial. Dove stated that he and a confidential informant met the defendant at the defendant's apartment complex on several occasions.

The defendant, at the request of Dove and the confidential informant, made a number of trips through Goldsboro trying to locate cocaine and finally did find it at a home on Carolina Street. Dove testified that the name of the confidential informant was Kates.

During Dove's testimony, the defendant's motion to disclose the identity of the confidential informant was denied.

The parties stipulated to the testimony of State Bureau of Investigation chemist C. R. Kemp. He testified that the substance in an envelope that Dove forwarded to him was cocaine. The weight of the substance was eight-tenths of a gram.

The defendant testified on his own behalf. He stated that a man he knew as Kates came to him for help in finding drugs. The defendant also told what happened on the day that he purchased the drugs.

The jury found the defendant guilty on both charges. He was given two consecutive three-year sentences and fined a total of $20,000. From the verdicts and sentences, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Duke and Brown, by John E. Duke, for defendant appellant.

ARNOLD, Judge.

[1] The defendant first contends that the State should have disclosed the identity of the confidential informant in order that he could have been called as a witness. This question was decided by the Supreme Court in *Roviaro v. U.S.*, 353 U.S. 53 (1957).

The confidentiality of an informant's identity gives way when "the disclosure of an informer's identity, or the contents of his communications, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . ." 353 U.S. at 60-61.

Although the defendant is correct that disclosure appears proper here, any error committed was harmless because the defendant already knew the informant's identity. The defendant testified that he had known Kates all his life and that his real name was Anthony Best. No effort to have Best testify for the defendant is shown in the record. As a result, this argument fails.

[2] The defendant's next argument attacks the instruction to the jury. He contends that the trial judge should have charged on agency and that it was error to put the burden of proof to show entrapment on the defendant. We find no error on this point.

First, the instruction given was in substantial compliance with N.C.P.I. 309.10 on entrapment. This persuades us that it was correct. *See State v. Gantt*, 26 N.C. App. 554, 217 S.E. 2d 3, *cert. denied*, 288 N.C. 246, 217 S.E. 2d 670 (1975).

Second, entrapment is an affirmative defense and it was correct to charge that the defendant has the burden of showing it to the satisfaction of the jury. The State does not have the burden of showing that the defendant was not entrapped. *State v. Braun*, 31 N.C. App. 101, 228 S.E. 2d 466 (1976).

Finally, the charge was sufficient on any question of agency. The trial judge stated on a number of occasions that if "Kates or Agent Dove, acting separately or together" entrapped the defendant, he should be found not guilty.

[3] It is next argued that "guilty of possession of eight-tenths of a gram of cocaine" should have been submitted as a possible verdict. The defendant contends that if the jury selected this verdict, he would only be guilty of a misdemeanor under G.S. 90-95(d)(2).

The defendant was convicted of two offenses that are punishable under G.S. 90-95(a)(1). The provision making it a misdemeanor to have less than one gram of cocaine by its own words applies *only* when a defendant is convicted under G.S. 90-95(a)(3), *i.e.*, possession of a controlled substance. Because the defendant was not convicted under G.S. 90-95(a)(3), this argument is without merit.

[4] Finally, the defendant contends that he should have been given the opportunity to object to the jury's request for additional instructions out of the jury's presence. We find no merit in this contention because the record shows that the defendant made no comment or no effort to be heard when the additional instruction was given. The additional instructions complied with G.S. 15A-1234 and were free from error.

We have considered the defendant's other arguments and find no error in his trial.

No error.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. CLIFTON RUDOLPH TAYLOR

No. 8210SC1022

(Filed 5 April 1983)

1. **Criminal Law § 76.6— in-custody statements—sufficiency of court's findings**

The trial court's findings of fact in its order denying defendant's motion to suppress in-custody statements were sufficient to resolve conflicts in the voir dire evidence where the court made the essential findings that defendant was fully and properly advised of his rights and that defendant waived his *Miranda* rights both orally and in writing.

2. **Indictment and Warrant § 10— arrest under warrant using defendant's nickname**

Defendant's arrest in Virginia pursuant to a warrant issued in North Carolina for the arrest of a man named "Blood" was lawful where the real name of defendant was not known; "Blood" was a nickname of defendant given to police officers by one of his associates; defendant's correct Virginia address was noted on the warrant; and the associate accompanied North Carolina officers to Virginia and identified defendant as "Blood." Therefore, the trial court properly denied defendant's motion to suppress evidence on the ground that it was the fruit of an unlawful arrest.

3. **Criminal Law § 163— alleged expression of opinion in charge—absence of entire charge from record**

The appellate court will not consider defendant's contention that the trial judge expressed an opinion in his summation of the evidence where defendant failed to set out the entire charge in the record on appeal. App. R. 9(b)(3)(vi).

APPEAL by defendant from *Preston, Judge.* Judgment entered 4 March 1982 by *Battle, Judge,* in Superior Court, WAKE County. Heard in the Court of Appeals 16 March 1983.

Defendant was charged in a proper bill of indictment with armed robbery. The jury returned a verdict of guilty. Defendant appeals from the judgment entered against him.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant-appellant.

HILL, Judge.

[1] Defendant initially contends that Judge Preston made insufficient findings of fact in his order denying defendant's motion to

suppress statements made by him to police officers. Defendant contends that, since his evidence on *voir dire* conflicted with evidence given by the police officers regarding whether he requested an attorney before making the statements and whether he stated that he did not wish to make a statement, the trial judge was required to make more specific findings of fact resolving the conflicts in testimony. The order entered by the trial judge states as follows:

> 1. Defendant was arrested in Alexandria, Virginia on November 8, 1980;
>
> 2. On or about November 10, 1980 an attorney in Alexandria was appointed to represent defendant;
>
> 3. On November 18, 1980 defendant was interviewed by Detective Williams; before the interview defendant was fully advised of his *Miranda* rights and waived all such rights, including right to have counsel present, both orally and in writing;
>
> 4. On January 28, 1981, defendant was interviewed by Detective Mack; before the interview defendant was fully advised of his *Miranda* rights and waived all such rights, including right to have counsel present, both orally and in writing;
>
> 5. On both November 10, 1980 and January 28, 1981, defendant was in full possession of his mental faculties and fully understood his rights.
>
> Based upon the foregoing, the Court concludes as a matter of law that prior to both interviews defendant was fully and properly advised of his rights, that defendant fully understood his rights, that his oral and written waiver of rights were free, voluntary and understanding; and the Motion to Suppress is, therefore, denied.

We find no error. The trial judge made the essential finding that defendant waived his *Miranda* rights both orally and in writing. *State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2164, 64 L.Ed. 2d 795 (1980). The order sufficiently resolves the basic question of whether defendant was fully and properly advised of his rights and made a waiver of those rights freely, voluntarily and with understanding.

[2] Defendant next argues that the trial judge erred in denying his motion to suppress evidence that was the fruit of an unlawful arrest made pursuant to a warrant which failed to properly identify him. The evidence at the hearing on defendant's motion to suppress showed that when the arrest warrant was sworn out in North Carolina on 7 November 1980, the real name of the defendant was not known and the warrant was issued for the arrest of a man named "Blood." This was a nickname of the defendant given to police officers by one of his associates, Cornelius Douglas. Defendant's correct Virginia address was noted on the warrant. Douglas accompanied the North Carolina police officers to Virginia and identified defendant as "Blood." The defendant was properly identified as "Clifton R. Taylor" in the Virginia arrest warrant issued 8 November 1980 upon information received from the North Carolina officers. The defendant's address on the North Carolina and the Virginia warrants was identical.

We agree with the defendant that a warrant must be as accurate and complete as possible in identifying a person charged with a crime. However, in certain instances, such as in the case at hand where defendant's true name was unknown, exactitude cannot be accomplished; and the description of an accused in a warrant by his alias, if done in good faith, will be considered proper. *See State v. Young*, 54 N.C. App. 366, 283 S.E. 2d 812 (1981), *aff'd*, 305 N.C. 391, 289 S.E. 2d 374 (1982). Where reference is made to a defendant in a warrant by the name by which he is commonly known, generally a variance with his true name will be deemed immaterial. *Cf., State v. Spooner*, 28 N.C. App. 203, 220 S.E. 2d 213 (1975) (variance in an indictment). Under the circumstances of this case, we find no error in the denial of defendant's motion to suppress upon this ground.

[3] By his final assignment of error, defendant contends that the trial judge expressed an opinion in his summation of evidence to the jury. Inasmuch as defendant has failed to set out the entire charge to the jury in the record on appeal, we do not reach his argument. Rule 9(b)(3)(vi), N.C. Rules of Appellate Procedure. "A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it." *State v. Harrell*, 50 N.C. App. 531, 535, 274 S.E. 2d 353, 355-56 (1981). This assignment of error is overruled.

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

No error.

Judges WELLS and JOHNSON concur.

AMERICAN DENTAL SERVICES, INC. v. JAMES F. FULP, JR., D.D.S., P.A.

No. 8210DC110

(Filed 5 April 1983)

Ejectment § 1.5— sufficiency of evidence in ejectment action

The plaintiff in an action for summary ejectment was entitled to be put in possession of premises subleased to defendant dentist where the evidence showed that plaintiff is holding under a lease from a department store without any indication that either party to the lease contests it, and that defendant's attorney wrote a letter to plaintiff stating that the lease was terminated and would not be honored by the defendant.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 14 October 1981 in District Court, WAKE County. Heard in the Court of Appeals 17 November 1982.

This action was commenced before a magistrate on 13 August 1981 as an action for summary ejectment. The defendant filed an answer in which he denied the plaintiff's title. The case was transferred to the District Court of Wake County. The defendant then filed an amended answer in which he alleged as an affirmative defense that a purported lease between the parties was void as being against public policy. He counterclaimed, alleging actions for fraud and deceptive trade practices.

The plaintiff filed a motion for summary judgment and the defendant made an oral motion for summary judgment at the time of the hearing on the plaintiff's motion. The papers filed in support of the motions for summary judgment reveal that the following facts are not in dispute. The plaintiff is a Florida corporation which leased 1,500 square feet of space from King's Department Stores, Inc., a Delaware corporation. The plaintiff subleased this space to the defendant. The lease from King's Department Stores, Inc. to the plaintiff was denominated a "Dental Office Lease." It provided that the leased premises would be used for a dental office, and the lessor would receive a minimum

rent with a provision for additional rent based on gross receipts. The terms of the sublease required the defendant to pay a minimum rent plus a percentage based on gross receipts. It provided that in the event of a default by the defendant, the plaintiff could terminate the lease. The plaintiff stated by affidavit of its president that the defendant had paid to the plaintiff on 24 August 1981 $3,458.92, which represented rent payments through 20 July 1981, and that the defendant was delinquent in the amount of $7,491.02 for rent on 29 August 1981.

The defendant filed affidavits in which it was stated that on 17 August 1981, $3,458.92 was paid to the plaintiff for any rent that might be due. Attached to one of the affidavits was a letter dated 25 June 1981 from the defendant's attorney to the plaintiff which stated that the lease violated public policy and was terminated effective 30 June 1981.

The court found "that the purported agreements under which the plaintiff claims an estate . . . are in violation of NCGS Sec. 90-29, and are void as against public policy . . . ." The court granted the defendant's motion for summary judgment as to the plaintiff's claim. The plaintiff appealed.

McDaniel, Heidgerd and Schiller, by Marvin Schiller, for plaintiff appellant.

Pinna and Corvette, by T. E. Corvette, Jr. and Karen Estelle Carey, for defendant appellee.

Bailey, Dixon, Wooten, McDonald and Fountain, by Ralph McDonald and Carson Carmichael, III, for North Carolina State Board of Dental Examiners, amicus curiae.

WEBB, Judge.

At the outset we note that the order for summary judgment was partial. It did not dispose of all claims and this appeal is subject to dismissal. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). In our discretion, we treat the appeal as a petition for certiorari and allow it.

The parties in their briefs argue at length as to whether King's Department Stores, Inc. and the plaintiff are engaged in the practice of dentistry by performing under the lease and

sublease, and whether this is in violation of public policy which makes the sublease between the plaintiff and defendant void. We do not consider this argument because we do not believe it is necessary for a determination of the case. The defendant takes the position that the lease is void. It filed a letter, attached to an affidavit, from its attorney to the plaintiff, stating the lease was terminated and would not be honored by the defendant. In light of these undisputed facts, we believe the plaintiff had the right to declare the lease in default, which it did, and evict the defendant.

We believe that by proving that the defendant has entered the premises under a lease with the plaintiff, which lease is now terminated, the plaintiff is entitled to be put in possession of the property. *Ford v. Moulding Co.*, 231 N.C. 105, 56 S.E. 2d 14 (1949). The defendant argues that the plaintiff's lease with King's Department Stores, Inc. is void as being against public policy, and the plaintiff does not have any title to the property. We do not reach the question of the lease between King's and the plaintiff. King's is not a party to this action. The plaintiff is holding under a lease from King's Department Stores, Inc. without any indication in the record that either party to the lease contests it. We hold this is sufficient to prove the plaintiff's title to the premises.

We reverse and remand for the entry of a judgment putting the plaintiff in possession of the premises. The defendant's counterclaim is left for trial.

Reversed and remanded.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. EVA JANE LOCKLEAR

No. 8216SC1007

(Filed 5 April 1983)

Criminal Law § 138— aggravating factor—prior convictions—absence of evidence of representation by counsel—harmless error

In a prosecution in which defendant pled guilty to ten counts of forgery and ten counts of uttering and the trial court imposed a sentence of five years for five counts of forgery and five counts of uttering and a consecutive

sentence of five years for the remaining counts of forgery and uttering, the trial court erred in finding as an aggravating factor that defendant had prior convictions for criminal offenses punishable by more than 60 days' confinement where there was no evidence in the record as to whether defendant was indigent and was represented by or waived counsel at the prior trials. However, such error was not prejudicial to defendant since the trial court could have sentenced defendant to imprisonment for two years on each of the 20 counts for a total of 40 years, and it is clear that the aggravating factor found by the court did not influence, adversely to defendant, the sentences imposed.

APPEAL by defendant from *Winberry, Judge.* Judgments entered 31 March 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 15 March 1983.

Attorney General Edmisten, by Assistant Attorney General Evelyn M. Coman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

WHICHARD, Judge.

Defendant pled guilty to, and was found guilty of, ten counts of forgery and ten counts of uttering. The court consolidated for judgment five counts of forgery and five counts of uttering, and sentenced defendant thereon to a term of five years imprisonment. It also consolidated the remaining five counts of forgery and five counts of uttering, and sentenced defendant thereon to an additional five years imprisonment, to run consecutive to the other five year term. In each judgment the court found as an aggravating factor that "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement," and that the factors in aggravation outweighed the factors in mitigation.

The sole issue is the sufficiency of the evidence to support the finding in aggravation that defendant had "a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement." The only evidence relating to this finding was the following:

At the sentencing hearing the District Attorney stated to the court: "I don't have a record check, but it's my information that [defendant] ha[s] pulled time—served time before for the theft of federal checks—the theft of checks from mailboxes." The court

then asked: "She has served Federal time?" Defense counsel responded: "Yes. Some three to four years [;] she has served some Federal time. At that time she would go to Baltimore and bring the checks back down here and had them in her account down here."

G.S. 15A-1340.4(e) (Cum. Supp. 1981) provides:

> 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. . . . No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction.

For reasons hereafter set forth, we need not consider whether defense counsel's statement to the court constituted a stipulation regarding defendant's prior convictions. In a recent opinion which was not available to the trial court, this Court indicated that the burden should be on the State to prove that, at the time of prior convictions, the defendant either was not indigent, was represented by counsel, or waived counsel; and that the court cannot find these matters by a preponderance of the evidence when the record contains no evidence with regard thereto. *State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29, *disc. rev. all'd.*, --- N.C. ---, 302 S.E. 2d 258 (1983). *See also State v. Farmer*, 60 N.C. App. 779, 299 S.E. 2d 842 (1983). The record here contains no evidence regarding these matters, and the foregoing cases thus might ordinarily require remand for re-hearing or for imposition of the presumptive sentences.[1] *See also State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) (wherein sentences exceeding the presumptive were imposed and our Supreme Court remanded for resentencing upon holding that the trial court had found a factor in aggravation which was not supported by the evidence).

Under the discrete circumstances here, however, we find the sentences imposed without prejudice. Offenders convicted of forgery and uttering are punishable as Class I felons. G.S. 14-119 (forgery), -120 (uttering). The presumptive prison term for Class I

1. *See State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982), which indicates the contrary, however.

felonies is two years. G.S. 15A-1340.4(f)(7) (Cum. Supp. 1981). Defendant pled guilty to, and was found guilty of, ten counts of forgery and ten counts of uttering. With no finding whatever of aggravating factors, then, the court could have sentenced defendant to two years imprisonment on each of the twenty counts, for a total of forty years. In doing so it would not in any way have run afoul of the statutes governing sentencing.

This Court has stated that "[t]he fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge." *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E. 2d 658, 661 (1982) (quoted with approval by our Supreme Court in *State v. Ahearn, supra*, 307 N.C. at 597, 300 S.E. 2d at 697). The matters recited above make it abundantly clear that the aggravating factor found did not influence, adversely to defendant, the sentences imposed; that the sentences represented the judgment of the trial court, in the exercise of its discretion, as to the appropriate punishment, and were within its power to impose; and that to remand for re-sentencing would thus be purposeless. We therefore decline to find error in the sentencing proceeding.

No error.

Judges HEDRICK and BRASWELL concur.

PEGGY DAVIS MURPHY AND HUSBAND, ROBERT MURPHY, PETITIONERS v. HELEN MILLS DAVIS, DEFENDANT AND T. E. DAVENPORT, TRUSTEE AND FIRST UNION NATIONAL BANK, ADDITIONAL DEFENDANTS

No. 827SC282

(Filed 5 April 1983)

1. Husband and Wife § 4.3— wife's conveyance to husband—absence of private examination

A wife's 1974 deed to her husband attempting to partition property held as tenants by the entireties was void where the provisions of former G.S. 52-6 requiring a private examination of the wife were not complied with, and where the deed was not validated by G.S. 52-8 because that statute did not apply to pending litigation.

2. Constitutional Law § 4; Husband and Wife § 4.3— conveyance from wife to husband—constitutionality of G.S. 52-6—no standing to contest

Petitioner had no standing to contest the constitutionality of G.S. 52-6 as it relates to a deed from petitioner's mother to her father.

APPEAL by petitioners from *Reid, Judge.* Judgment entered 30 November 1981 in Superior Court, NASH County. Heard in the Court of Appeals 7 February 1983.

This action commenced with a petition for partition of property. The facts alleged in the pleadings tend to show that in September 1974, Iredell Davis and Helen Mills Davis, who owned a tract of land in Nash County as tenants by the entireties, attempted to partition the property and create a tenancy in common, but failed to comply with G.S. 52-6. Later, Iredell Davis devised all his interest in the property to his daughter, Peggy Davis Murphy, the petitioner in this action.

Peggy Davis Murphy alleged that she owned, as tenants in common with Helen Mills Davis, a half interest in the property. She requested the property be sold in lieu of partition. Helen Mills Davis, the defendant, contended that petitioner had no interest in the property. She counterclaimed for $5,000.00 damages for the mental suffering she endured from petitioner's harassment and interference.

The trial court allowed defendant's motion for summary judgment and petitioners' motion to dismiss defendant's counterclaim.

J. Michael Weeks, for petitioner appellants.

Moore, Diedrick, Whitaker and Carlisle, by Joy Sykes, for defendant appellee.

VAUGHN, Chief Judge.

[1] Petitioners' first argument is that the trial court erred in granting defendant's motion for summary judgment. Summary judgment shall be rendered 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). Petitioners contend that, although no facts are in dispute, defendant was not entitled to

judgment as a matter of law because the conveyance between Iredell and Helen Davis, which failed to comply with G.S. 52-6, was not void.

G.S. 52-6 (repealed by session laws 1977, c. 375, s. 1, effective January 1, 1978), provided, in part:

> (a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife . . . unless such contract . . . is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.

The deed executed between defendant and her deceased husband was executed on 26 September 1974. The petition for partition was filed 1 May 1980. The following statute was enacted, effective 1 October 1981.

> Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930, and January 1, 1978, which does not comply with the requirement of a private examination of the wife or with the requirements that there be findings that such a contract between a husband and wife is not unreasonable or injurious to the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. *This section shall not affect pending litigation.* (Emphasis added.)

G.S. 52-8.

Since this litigation was pending during the effective date of the statute, G.S. 52-8 does not affect this action. A wife's deed purporting to convey property to her husband, without complying with G.S. 52-6, and not validated by G.S. 52-8, is void. *Boone v. Brown*, 11 N.C. App. 355, 181 S.E. 2d 157 (1971). This rule, although questioned, has been recently applied by this Court in reference to a separation agreement in *DeJaager v. DeJaager*, 47 N.C. App. 452, 267 S.E. 2d 399 (1980).

Petitioners contend that the legislative intent is to validate a deed conveyed under these circumstances, and this Court should

find, as a matter of law, that the conveyance was valid and petitioners own the property as tenants in common with defendant. We find, however, that the legislative intent is clear from the unambiguous language of the statute. "This section shall not affect pending litigation" is not subject to more than one reasonable interpretation. In enacting G.S. 52-8, the legislative intent was to validate contracts made void by G.S. 52-6, except for those in pending litigation. Since this action was pending at the time of enactment of G.S. 52-8, failure to meet the requirements of G.S. 52-6 renders the conveyance void.

[2] Petitioners' second argument is that G.S. 52-6 is unconstitutional and cannot void the deed. They contend that the statute violates the Equal Protection Clause of the 14th Amendment of the United States Constitution, and Article 1, Section 19 and Article 10, Section 4 of the North Carolina Constitution because it discriminates on the basis of sex. Petitioner, however, is merely attempting to raise the constitutional rights of her deceased father. She does not have standing to attack the constitutionality of the statute. Petitioner must allege she has sustained an "injury in fact" as a direct result of the statute to have standing to challenge the statute as violating either the federal or the North Carolina constitutions. U.S. Const. art. III, § 1; *Baker v. Carr*, 369 U.S. 186, 7 L.Ed. 2d 663, 82 S.Ct. 691 (1962); *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974). Instead, petitioner's injury is due to her father's failure to comply with the statute, not because the statute was discriminatory as to her.

The entry of summary judgment is

Affirmed.

Judges WELLS and BRASWELL concur.

MOORE AND VAN ALLEN, A PARTNERSHIP v. MARK G. LYNCH, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 8226SC305

(Filed 5 April 1983)

Taxation § 32— intangibles tax—claims of law firm not yet billed

A law firm is liable for the intangibles tax on claims arising from work it has done for clients although the claims have not progressed to the point at which the law firm is ready to submit bills for them, since such claims constitute "accounts receivable" within the meaning of G.S. 105-201.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 26 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 February 1983.

Plaintiff, a partnership engaged in the practice of law, brought this action to recover $1,336.92 in intangible taxes for the years 1974 and 1975 which it had paid under protest.

The pleadings and affidavits establish that on 31 December of 1974 and 1975, the plaintiff's balance sheet showed as an asset partnership accounts receivable in a certain amount. Not all these accounts were billed to clients in the amount shown. The principal purpose of showing these accounts was to determine the division of the profits of the partnership. After factors other than time devoted to the matters were taken into account, some of the amounts to be billed were changed when the invoices were sent. The plaintiff deducted the accounts receivable which were not ready for billing from the total accounts receivable on its balance sheet and showed the remainder on its intangible personal property tax returns. The N.C. Department of Revenue proposed an assessment of intangible tax on the deleted accounts. The plaintiff paid the tax under protest and sued for a refund.

The trial court granted the plaintiff's motion for summary judgment and the defendant appealed.

Moore and Van Allen, by Daniel G. Clodfelter, for plaintiff appellee.

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

WEBB, Judge.

The question posed by this appeal is whether summary judgment for the plaintiff is proper, holding that the plaintiff is not liable for intangible tax on claims arising from work it has done for clients when the claims have not progressed to the point at which the plaintiff is ready to submit bills for them. The answer to this question depends on the interpretation of G.S. 105-201 which provides in part:

> "All accounts receivable on December 31 of each year, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the face value of such accounts receivable . . . ."

The statute does not define "accounts receivable." We believe it is ordinarily understood to be an amount owed from one person to another usually arising from the sale of goods or rendering of services and not supported by negotiable paper. *See* Black's Law Dictionary 17 (rev. 5th ed. 1979); 1 C.J.S. *Account* (1936); 1 Am. Jur. 2d *Accounts and Accounting* § 2 (1962). Affidavits were filed in the case by the defendant who is a certified public accountant and for the plaintiff by L. Howard Godfrey, a certified public accountant and member of the faculty at the University of North Carolina at Charlotte. The affidavits discussed the accounting principles involved in determining accounts receivable and incorporated some literature in the field on this subject. We believe these affidavits show that accounts receivable are the recognition of revenues to be received. In order to show assets correctly, certain claims should be entered on the books as accounts receivable. If there is some doubt as to the validity of a claim, such as collectability, it should not be shown as an account receivable. It requires at times considerable management judgment as to when services have proceeded to the point that they may be recognized as an asset which has value.

We believe that by the ordinary meaning of accounts receivable or by the accounting definition, it was error to allow the plaintiff's motion for summary judgment. The entries on the balance sheets showed the plaintiff had done some work for its clients and was owed something for it. This would make them accounts receivable. It may take some analysis to determine the

value, if any, of some of the accounts. This is the task of the parties or the courts if the parties cannot agree.

We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges BECTON and HILL concur.

MR. AND MRS. CHARLES F. HEWES, PLAINTIFFS v. HUGH W. JOHNSTON, DEFENDANT, AND HUGH W. JOHNSTON, THIRD-PARTY PLAINTIFF v. CHARLES F. HEWES AND BRENDA P. HEWES, HIS WIFE, AND GRIER, PARKER, POE, THOMPSON, BERNSTEIN, GAGE & PRESTON, THIRD-PARTY DEFENDANTS

No. 8227SC417

(Filed 5 April 1983)

Process § 19— abuse of process—insufficiency of complaint

Third-party plaintiff's complaint was insufficient to state a claim for relief for abuse of process where it alleged a motive of harassment in the filing of suit by third-party defendants but there was no allegation of an improper willful act during the course of the proceedings or of any facts or events which could conceivably support a finding of a willful act.

APPEAL by defendant and third-party plaintiff, Hugh W. Johnston, from *Griffin, Judge.* Orders entered 20 and 21 January 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 8 March 1983.

This is an appeal from orders of the Superior Court granting the motions of third-party defendants, the Hewes and Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston (hereinafter "Grier-Parker"), to dismiss defendant Johnston's third-party complaint on the grounds that it did not state a claim upon which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

This case grew out of an earlier suit in which defendant Johnston acted as attorney for Mr. and Mrs. Wolfe in a "partnership action" brought against the plaintiff Hewes. The Hewes successfully defended the partnership action, then filed suit against

defendant Johnston, claiming his acts in the partnership action constituted an abuse of process. Defendant Johnston responded with a third-party complaint against the Hewes and their attorneys, Grier-Parker, claiming that the abuse of process suit against him was itself an abuse of process. Defendant Johnston appealed from dismissal of his third-party complaint for abuse of process.

Harry C. Hewson and Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and William L. Rickard, Jr., for plaintiffs and third-party defendants, appellees.

Basil L. Whitener and Anne M. Lamm for defendant and third-party plaintiff, appellant.

HEDRICK, Judge.

Defendant and third-party plaintiff, Hugh W. Johnston, contends the trial court erred in ordering dismissal of his claims against the third-party defendants, Mr. and Mrs. Hewes, and against the third-party defendants, Grier-Parker. To prevent a Rule 12(b)(6) dismissal, a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) "state enough to satisfy the substantive elements of at least some legally recognized claim. . . ." *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 378-379, 265 S.E. 2d 890, 909 (1980) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970) and *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979)).

The third-party complaint does not satisfy these tests for overcoming a motion to dismiss because, (1) it does not give sufficient notice of an event constituting abuse of process, and (2) it does not allege the substantive elements of abuse of process. Abuse of process requires both an ulterior motive and a wilful act that are improper and collateral to the suit. *Stanback*, 297 N.C. at 200-201, 254 S.E. 2d at 624. The third-party complaint alleges a motive of harassment in the filing of suit by third-party defendants, but there is no allegation of an improper wilful act during the course of the proceedings. Nor does the pleading mention any facts or events that could conceivably support a finding of a wilful act. Consequently, third-party plaintiff did not state a claim for

which relief could be granted, and the orders to dismiss were proper.

Third-party defendants' appeal of the denial of their motion to dismiss third-party plaintiff's appeal has been rendered moot by this decision.

The orders appealed from are affirmed.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. JEFFREY WARD

No. 823SC793

(Filed 5 April 1983)

1. **Rape and Allied Offenses § 4.3— evidence that victim told defendant of birth control use—exclusion as harmless error**

Cross-examination of the prosecutrix in a rape case as to whether she told defendant just prior to sexual intercourse that she was taking birth control pills was not improper under G.S. 8-58.6 as evidence of sexual activity by the prosecutrix, but the trial court's refusal to permit such cross-examination was not prejudicial error where defendant failed at the voir dire hearing to develop the context in which the statement was made by the prosecutrix and failed to show its relevancy to the issue of consent.

2. **Criminal Law § 86.5— cross-examination of defendant about specific acts of misconduct**

The trial court in a rape case did not err in ruling on defendant's motion *in limine* that, if defendant took the stand, the State might be permitted to question defendant about (1) a specific act of sexual assault in Pennsylvania in which the charges had been dismissed, (2) two charges of assault on a female to which defendant had entered pleas of guilty, and (3) whether defendant knew a named female, who would be present in the courtroom, and whether he had raped her, since a defendant who testifies may be impeached by questions about prior convictions and specific acts of misconduct as long as the district attorney acts in good faith and does not ask about or refer in his questions to prior arrests, indictments, charges or accusations.

APPEAL by defendant from *Peel, Judge.* Judgment entered 19 March 1982 in Superior Court, CARTERET County. Heard in the Court of Appeals 8 February 1983.

From a conviction of second degree rape and a judgment imposing a prison sentence of twelve years, defendant appeals.

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

Wheatley, Wheatley & Nobles, by Stevenson L. Weeks, for defendant-appellant.

EAGLES, Judge.

[1] Defendant assigns as error the refusal of the trial court to allow the defendant to cross-examine the prosecuting witness as to whether she told the defendant just prior to sexual intercourse that she was taking birth control pills. This testimony is not excludable under G.S. 8-58.6 as evidence of sexual activity of the complainant, but we must reject defendant's argument for admissibility on the basis of *State v. Bridwell*, 56 N.C. App. 572, 289 S.E. 2d 842 (1982).

> It is quite probable that a statement by a prosecuting witness to a defendant that she was using birth control pills may be relevant on a fact situation similar to this one. That is, if a prosecuting witness were to make such a statement to a defendant and then disrobe and follow him into bed as the defendant maintains was done here, it would seem to us that the evidence would be relevant on the issue of consent. We cannot say as much for this trial, however. The defendant did not tender evidence at the *voir dire* hearing showing the context of the statement. We are unable to determine from the record what the testimony would have been or what the circumstances surrounding the statement were. Such information is critical to our review. The lack of evidence on the circumstances surrounding which the alleged statement was made prevents us from finding any prejudice to the defendant. As was stated in *State v. Milano*, 297 N.C. 485, 497, 256 S.E. 2d 154, 161 (1979), "we cannot tell whether the court's ruling prejudiced the defendant in any way."

Id. at 575-76, 289 S.E. 2d at 844-45.

Here, as in *Bridwell*, defendant failed at the *voir dire* hearing to develop the context in which the prosecuting witness' statement was made and failed to show its relevancy to the issue of

consent. For this reason we find this assignment of error to be without merit.

[2] Defendant also assigns as error the trial court's tentative ruling on defendant's motion *in limine* that if defendant took the stand, the State might be permitted to question defendant about 1) a specific act of sexual assault in Pennsylvania in which the charges had been dismissed, 2) two counts of assault on a female in which defendant had entered a plea of guilty and 3) whether defendant knew a Linda Keel, who would be present in the courtroom, and whether he had raped her. Charges were also pending against defendant for the first degree rape of Ms. Keel. As a result of the court's denial of defendant's motion *in limine*, defendant Ward never took the stand.

When a defendant becomes a witness and testifies in his own behalf, he is subject to cross-examination like any other witness. For purposes of impeachment he may be questioned about prior convictions and any specific acts of misconduct which tend to impeach his character, as long as the district attorney acts in good faith and does not ask about or refer in his questions to prior arrests, indictments, charges or accusations. *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979).

Since the judge's ruling required the State to first show that any questions regarding these specific acts of alleged misconduct would be asked in good faith, we find no reversible error.

For the above reasons in the trial we find

No error.

Judges HEDRICK and JOHNSON concur.

STATE OF NORTH CAROLINA v. PAULINE DORTCH

No. 828SC816

(Filed 5 April 1983)

1. **Narcotics § 3.1— test results—nonexpert testimony—harmless error**

Testimony by an undercover agent that preliminary tests performed on white powder purchased by him from the defendant showed that it was opium was improper since the witness was not shown to have made the tests or to have expert qualifications, but such testimony was harmless since an expert chemist later testified to the same effect without objection.

2. **Criminal Law § 88— cross-examination—argumentative questions**

The trial court did not err in refusing to permit an SBI agent to answer questions on cross-examination as to whether there is a substantial difference between certain heights and weights which were used by an undercover agent on different occasions in describing the defendant since the questions were argumentative rather than evidentiary.

3. **Criminal Law §§ 87.4, 173— invited error—testimony on redirect explaining new matter raised on cross-examination**

In a prosecution for possession and sale of heroin, the trial court did not err in permitting an SBI agent to testify on redirect examination that clothing with tags still attached and some vegetable material were found in a search of defendant's house since any error was invited when the search was first mentioned during cross-examination of the witness, and since it was permissible to explain on redirect examination any new matter raised on cross-examination.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 11 March 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 9 February 1983.

Defendant was convicted of possessing and selling heroin, a controlled substance.

The State's evidence tended to show that an undercover SBI agent, Mr. Dove, visited the defendant's premises several times and that on two occasions he purchased heroin from her. Defendant denied ever handling or selling narcotics, but recalled having seen Agent Dove at her place on one occasion.

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

Louis Jordan for the defendant appellant.

PHILLIPS, Judge.

[1] The defendant first cites as error the testimony of Agent Dove that preliminary tests performed on the white powder purchased by him from the defendant showed that it was opium. Though this testimony was improper, since Dove was not shown to have made the tests or have expert qualifications, it was harmless, since the record discloses that Agent Kempie, an acknowledged expert chemist, later testified to the same effect, without objection. *State v. Ingram*, 23 N.C. App. 186, 208 S.E. 2d 519 (1974).

[2] The defendant's next citation of error is to the Court's refusal to let SBI agent Surratt on cross-examination say whether "there's a substantial difference between 5' 7" and 5' 9"; between 5' 7" and 5' 9" versus 5' 11", and between weighing 140 and 190 pounds." The different heights and weights stated were all used by Agent Dove on different occasions in describing the defendant, who, in fact, weighed about 190 pounds and was 5' 11" tall. The questions were argumentative, rather than evidentiary, and the Court's refusal to permit answers thereto was proper. *State v. Blount*, 4 N.C. App. 561, 167 S.E. 2d 444 (1969). Anyway, this witness had testified just a moment before, "Yes, I would say there is a substantial difference in 5' 7" and 9" versus 5' 11"."

[3] Defendant's final contention is that defendant was unduly prejudiced by Agent Surratt testifying as to a search that was made of defendant's house after the incident alleged in the bill of indictment. Had this testimony been spontaneously presented by the State, the defendant's point would be well taken. But, the record shows that the search was first mentioned during the cross-examination of this witness, when defense counsel, apparently believing that such evidence would be helpful, had this witness reveal that defendant's house was later searched for cocaine, but that none was found. The testimony complained of—(to the effect that during the search, "clothing with tags still attached and some vegetable material" were found)—was elicited during re-direct examination. Thus, it seems to us that if this evidence was error that it was more or less invited by the defendant. But no error is seen, since it is permissible to explain on redirect any new matter raised on cross-examination, even though standing alone the explanation would be irrelevant and even prej-

udicial. *State v. Oxendine*, 224 N.C. 825, 32 S.E. 2d 648 (1945). Too, since Agent Surratt testified that none of the items found in this search were linked in any way to the defendant, the evidence would seem to be harmless, in any event. *State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1980).

Thus, we find

No error.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. JAMES J. JACOBS

No. 825SC910

(Filed 5 April 1983)

1. **Assault and Battery §§ 11.2, 14.3— felonious assault—fists as deadly weapon—sufficiency of indictment**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury, defendant's fists could have been a deadly weapon given the manner in which they were used and the relative size and condition of the parties where the 39-year-old male defendant who weighed 210 pounds hit the 60-year-old female victim in the head and stomach, and brain hemorrhages and other injuries resulted from the beating, causing the victim to be unable to care for herself. Moreover, the indictment was sufficient where it specifically stated that defendant used his fists as a deadly weapon and gave facts demonstrating their deadly character.

2. **Criminal Law § 115— lesser included offense—instructions—consideration only after finding defendant not guilty of greater offense**

The trial court did not err in instructing the jury to consider the lesser included offenses only after acquitting defendant of the greater charge of assault with a deadly weapon inflicting serious injury.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 4 September 1980, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 March 1983.

The defendant was charged in a proper bill of indictment with assaulting Julia K. James with a deadly weapon (his fists) with intent to kill and inflicting serious bodily injury.

The defendant pleaded not guilty, and was found guilty of assault with a deadly weapon inflicting serious bodily injury.

From a judgment imposing a prison sentence of not less than seven nor more than ten years, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Floyd M. Lewis for the State.

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

HEDRICK, Judge.

[1] Defendant first contends that judgment should be arrested because an assault with his fists does not satisfy the "deadly weapon" element of the indictment. A deadly weapon is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E. 2d 719, 725 (1981) (citations omitted). The defendant, a thirty-nine year old male who weighed two hundred ten pounds, hit the victim, a sixty year old woman, in the head and stomach. Brain hemorrhages and other injuries resulted from the beating, causing the victim to be unable to care for herself. The defendant's fists could have been a deadly weapon given the manner in which they were used and the relative size and condition of the parties. *See State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978); *State v. Archbell*, 139 N.C. 537, 51 S.E. 801 (1905).

Since defendant's fists could have been a deadly weapon in the circumstances of this assault, the indictment was sufficient. The indictment specifically stated that defendant used his fists as a deadly weapon and gave facts demonstrating their deadly character. The Supreme Court of North Carolina in *State v. Palmer*, 293 N.C. 633, 639-640, 239 S.E. 2d 406, 411 (1977) has noted that,

> it is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon. (Emphasis in original.)

[2] Next, defendant contends that the trial court erred in instructing the jury to consider lesser included offenses after acquitting defendant of assault with a deadly weapon, inflicting serious injury. The jury instruction was not ideal, but it could not have coerced the jury into returning a verdict of guilty on the greater offense. A judge may direct the jury to decide upon lesser included offenses only after finding defendant not guilty on the charged offense. *State v. Wilkins*, 34 N.C. App. 392, 399-400, 238 S.E. 2d 659, 664-665 (1977).

The defendant had a fair trial free from prejudicial error.

No error.

Judges WHICHARD and BRASWELL concur.

GEORGE T. HEERY, STANLEY MEYERSON, THOMAS B. CRUMPLER, AND MRS. LEAN PIPPIN v. TOWN OF HIGHLANDS ZONING BOARD OF ADJUSTMENT: JOHN BAUMRUCKER, LIGON CRESWELL, EMMA PELL, EUGENE HOUSTON AND CARL TALLY; THE BOARD OF COMMISSIONERS OF THE TOWN OF HIGHLANDS: HARRY T. WRIGHT, MAYOR, NEVILLE BRYSON, JOHN CLEAVELAND, STEVE PIERSON, RON SANDERS AND CHARLES ZACHARY; AND SHELBY PLACE, LTD., AND JACK FAUL, TRUSTEE

No. 8230SC471

(Filed 5 April 1983)

Municipal Corporations § 31.1— special use permit—no standing to seek review

Petitioners were not "aggrieved parties" and had no standing to seek review of a decision of a municipal zoning board of adjustment to grant a special use permit for the construction of multi-family housing where petitioners failed to allege or show that they would be subject to "special damages" distinct from the rest of the community. Furthermore, petitioners were not adversely affected by any invalidity in the ordinance concerning the percentage of votes necessary to issue a special use permit and thus had no standing to challenge the ordinance on that ground where the permit in question was unanimously agreed to by all five members of the board of adjustment.

APPEAL by respondents, Shelby Place, Ltd. and Jack Faul, Trustee, from *Thornburg, Judge*. Judgment entered 14 December

1981 in Superior Court, MACON County. Heard in the Court of Appeals 15 March 1983.

This is an appeal from an order of the Superior Court reversing and remanding the decision of the Board of Adjustment for the Town of Highlands, North Carolina, which granted a special use permit for the construction of multi-family housing by Shelby Place, Ltd. and Jack Faul, Trustee.

Herbert L. Hyde for petitioners, appellees.

Coward, Coward & Dillard, by Orville D. Coward, Jr. for respondents, appellants.

HEDRICK, Judge.

Respondents contend that petitioners lacked standing to seek review of the Zoning Board of Adjustment's decision. N.C. Gen. Stat. § 160A-388(e) authorizes an "aggrieved party" to seek review of board of adjustment decisions made under zoning ordinances. Thus, petitioners had standing only if they were aggrieved persons within the meaning of the statute.

Earlier versions of N.C. Gen. Stat. § 160A-388, which contained review provisions similar to the present statute, were interpreted to mean that "the appealing party must have some interest in the property affected." *Pigford v. Bd. of Adjustment*, 49 N.C. App. 181, 270 S.E. 2d 535 (1980), *disc. rev. denied and appeal dismissed*, 301 N.C. 722, 274 S.E. 2d 230 (1981) (citations omitted). However, the "property affected" is not limited to the property subject to the special use permit. An order of a board of adjustment which exceeds its authority under the zoning ordinance may be appealed by nearby landowners who will sustain *special* damage from the proposed use. *Jackson v. Board of Adjustment*, 275 N.C. 155, 161-162, 166 S.E. 2d 78, 82-83 (1969) (emphasis added). The Court defined "special damage" as "a reduction in the value of his [petitioner's] own property." *Id.* at 161, 166 S.E. 2d at 82.

Petitioners fail to meet the *Pigford* and *Jackson* test for standing. They alleged that they were property owners who would suffer a decline in the value of their land. The Superior Court concluded they had standing because they were property owners and Ms. Pippin's land was adjacent to the proposed

development. Yet there was no finding of fact that petitioners would experience a loss in property value. In depositions before the Superior Court, petitioners' claim that general land values in the town would decrease was rebutted by respondents' expert on real estate appraisal. Even more importantly, the petitioners failed to allege, and the Superior Court failed to find, that petitioners would be subject to "special damages" distinct from the rest of the community. Without a claim of special damages, the petitioners are not "aggrieved" persons under N.C. Gen. Stat. § 160A-388(e), and they have no standing.

The Superior Court also granted standing on the basis that petitioners were seeking to have declared invalid a portion of the ordinance under which the special use permit had been issued. The ordinance in question authorized issuance of special use permits upon a three-fifths concurring vote of the Board of Adjustment. The ordinance also stated that more restrictive statutory provisions would control. N.C. Gen. Stat. § 160A-388(e) requires special use permits to be granted by at least a four-fifths majority. Since the challenged permit was unanimously agreed to by all five members of Highland's Board of Adjustment, petitioners were not adversely affected by any invalidity in the ordinance concerning the necessary majority. Without being adversely affected by the ordinance, petitioners had no standing to challenge it. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976).

The order appealed from is vacated, and the matter is remanded to the Superior Court for the entry of an order (1) dismissing the petition for a writ of certiorari filed 3 September 1981; (2) vacating the writ of certiorari granted 4 September 1981; and (3) reinstating the amended ruling of the Board of Adjustment dated 8 September 1981. The petitioners and respondents on the appeal to this Court will be taxed one-half (1/2) each of the costs of appeal.

Vacated and remanded.

Judges WHICHARD and BRASWELL concur.

STATE OF NORTH CAROLINA v. AVERY RAY HAMMONDS

No. 8226SC962

(Filed 5 April 1983)

1. **Assault and Battery § 13— victim's reputation for violence—exclusion proper**

The trial court in a felonious assault case properly refused to permit a witness to testify on cross-examination about the victim's reputation for violence where no evidence of self-defense existed when the witness was cross-examined.

2. **Criminal Law § 138— felonious assault—aggravating factors—heinous, atrocious and cruel behavior—use of deadly weapon**

In imposing a sentence upon defendant for assault with a deadly weapon inflicting serious injury, the trial court erred in finding heinous, atrocious and cruel behavior as an aggravating factor since there was no evidence of such factor apart from the evidence proving the elements of the crime. Similarly, defendant's use of a deadly weapon could not be considered as an aggravating factor since it was also an element of the offense. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Howell, Judge*. Judgment entered 2 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 March 1983.

The defendant was charged in a proper bill of indictment with assaulting Patrick Kennedy with a deadly weapon (a pistol) with intent to kill and inflicting serious bodily injury.

The defendant pleaded not guilty, and was found guilty of assault with a deadly weapon inflicting serious injury.

From a judgment imposing a prison sentence of ten years, defendant appealed.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial court erred in not allowing witness Jones to testify on cross-examination about the victim's reputation for violence. A victim's reputation for violence is relevant after the self-defense issue has been raised. *State v.*

Barbour, 295 N.C. 66, 243 S.E. 2d 380 (1978); *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967); 1 BRANDIS ON NORTH CAROLINA EVIDENCE § 106 (2d Rev. Ed. 1982). When witness Jones was cross-examined no evidence of self-defense existed. Consequently, the victim's reputation for violence was irrelevant at that time, and the trial judge correctly excluded that reputation evidence.

[2] Defendant next contends that the trial court erred in finding two of the three factors in aggravation. First, defendant argues that there was no evidence that the offense was especially heinous, atrocious and cruel, and that the same evidence used to find this aggravating factor was used to prove the serious injury element of the offense. The evidence showed that defendant approached the victim without provocation and shot him in the face. The use of a deadly weapon and the seriousness of injury involved here may be evidence of an especially heinous, atrocious and cruel crime. However, the same evidence proved the deadly weapon and serious injury elements of the crime. N.C. Gen. Stat. § 15A-1340.4(a)(1) states, "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." The trial court erred in finding heinous, atrocious and cruel behavior as an aggravating factor since there was no evidence of it apart from that evidence proving the elements of the crime.

Similarly, defendant's use of a deadly weapon cannot be an aggravating factor when it is also an element of the offense.

These errors in finding factors in aggravation require a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Remanded for resentencing.

Judges WHICHARD and BRASWELL concur.

P. D. GOFORTH AND NORRIS MAX WILSON, A PARTNERSHIP D/B/A TRI-COUNTY TIRE COMPANY v. THE HARTFORD ACCIDENT & INDEMNITY CO., A MEMBER OF THE HARTFORD INSURANCE GROUP

No. 8224DC436

(Filed 5 April 1983)

Appeal and Error § 6.2— summary judgment determining liability—issue of damages reserved for trial—appeal premature

The trial court's order allowing plaintiff's motion for summary judgment on the issue of defendant's liability under an insurance policy and reserving for trial the issue of damages was not immediately appealable.

APPEAL by defendant from *Lyerly, Judge.* Judgment entered 23 December 1981 in District Court, MITCHELL County. Heard in the Court of Appeals 9 March 1983.

Plaintiffs, operating as a partnership, are in the business of selling and installing tires. They sue on a liability insurance policy issued by defendant.

Plaintiffs damaged one of their customer's trucks while installing tires on the truck. They seek to recover damages they allegedly suffered as a result of the claim against them by the customer. They allege defendant refused to honor the claim after demand. Although the amount of the claim was not alleged, they prayed for judgment in the amount of $5,000.00. They also set out a second cause of action in which they requested a judgment declaring defendant liable under the policy of insurance upon which they sued in the first cause of action.

The court entered summary judgment for plaintiffs on the issue of liability under the policy in the first cause of action and also entered judgment declaring defendant liable under the policy in the second cause of action. The court ordered trial by jury on the issue of damages.

Dennis L. Howell, for plaintiff appellees.

James F. Blue III, by James F. Blue III, and Sheila Fellerath, for defendant appellant.

VAUGHN, Chief Judge.

Summary judgment on the issue of liability, reserving for trial the issue of damages, is not immediately appealable. *Tridyn Industries v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

In *Tridyn*, the Court quoted with approval from *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950):

> "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."

Tridyn Industries v. American Mutual Insurance Co., 296 N.C. at 488, 251 S.E. 2d at 445.

"These rules are designed to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E. 2d 431, 434 (1980). "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey v. City of Durham*, 231 N.C. at 363, 57 S.E. 2d at 382.

Plaintiffs' election to label a second cause of action as one for a declaratory judgment does not alter the result we are compelled to reach. Defendant's liability on the policy was the same issue the court had to resolve in the first cause of action.

For the reasons stated, we are required to dismiss the appeal.

Appeal dismissed.

Judges WEBB and EAGLES concur.

CHERYL MARTIN BURROW v. RANDOLPH COUNTY BOARD OF EDUCATION

No. 8219SC356

(Filed 19 April 1983)

1. **Schools § 13.2— dismissal of career teacher—plea of no contest to involuntary manslaughter in shooting death**

A career teacher who had pleaded no contest to involuntary manslaughter in the shooting death of her husband and who would have been on work release or parole while teaching was properly dismissed from employment by a county board of education pursuant to the provisions of former G.S. 115-42(e)(1)k (now G.S. 115C-325(e)(1)k), which provides for the dismissal of a career teacher for any cause which constitutes grounds for the revocation of the teacher's teaching certificate, and pursuant to the provisions of 16 N.C. Administrative Code, Sec. 2H.0224(a)(3), which provides for dismissal upon the entry of a plea of *nolo contendere*, as an adult, to a crime when there is a reasonable and adverse relationship between the underlying crime and continuing ability of the person to perform any of his or her professional functions in an effective manner.

2. **Estoppel § 5.1; Schools § 13.2— dismissal of career teacher—application of N.C. Administrative Code—no estoppel of board of education**

A county board of education was not estopped from applying provisions of the N.C. Administrative Code in dismissing a career teacher who pleaded no contest to involuntary manslaughter in the shooting death of her husband on grounds that she had no notice that the board would rely on the provisions of the Administrative Code and that she entered her plea of no contest because of a letter from the board's counsel to her counsel concerning the adoption of and applicability of such provisions of the Administrative Code, since an estoppel of the board under such circumstances might impair the board's exercise of its governmental powers, and since the board cannot be held responsible for the civil consequences of the teacher's voluntary plea of no contest entered in the criminal court or for any information or advice which may have been given the teacher by any agent of the board.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 13 November 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 15 February 1983.

Robert R. Schoch for plaintiff appellant.

Moser, Ogburn, Heafner & Miller by Michael C. Miller and William H. Heafner for defendant appellee.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller by James C. Fuller, Jr., for North Carolina Association of Educators, amicus curiae.

George T. Rogister, Jr., Elizabeth F. Kuniholm and Ann L. Majestic for North Carolina School Boards Association, Inc., amicus curiae.

BRASWELL, Judge.

[1] On 5 January 1980 plaintiff killed[1] her husband, and in criminal court she pleaded no contest to involuntary manslaughter, a felony. On 20 August 1980, the plaintiff was sentenced to an active term of imprisonment of five years maximum, with no minimum, in the State Department of Correction. Work release privileges were recommended.

After spending approximately 26 days in active confinement at Women's Prison, she was placed on work release status and housed at the North Piedmont Treatment Facility for Women of the State Department of Correction. She was paroled about 1 August 1981. Her attorney in criminal court is the same as in civil court.

The plaintiff is a schoolteacher. By her skills and endeavors she had become well liked, admired and respected in the community. She had in the past been an outstanding tenured, career teacher. The School Board held hearings to determine if she should be discharged from employment as a teacher because of her criminal felony misconduct involving the death of her husband.

The Board, after a second hearing, on remand from the first appeal of plaintiff to Superior Court, entered its order of 14 August 1981 discharging the plaintiff from her teaching position.

1. Although plaintiff objected in this emotionally-charged case to the terminology "killed," we perceive that "killed" is supported by the evidence in the record. In her brief plaintiff argues that the death was a tragic accident. We note, however, that in the charging language in the bill of indictment the words "kill and slay" are used. They are the standard for any form of manslaughter, as established by G.S. 15-144. Under the provisions of G.S. 15A-1022(c), the trial judge, before accepting a plea of no contest, must determine (as was done in this case) that there is a factual basis for the plea, and, under Sec. (d) the judge treats the defendant as guilty, whether or not guilt was admitted.

Following plaintiff's appeal, a second hearing was held in Superior Court, with final judgment entered 13 November 1981. Plaintiff appealed on the same day to this Court.

Plaintiff has presented us with eight assignments of error, and defendant has filed six cross-assignments of error. The decision by us of two questions will eliminate the need for independent seriatim discussion of other assignments of error. The first question is whether the Board's findings and conclusions that the conduct of the plaintiff, as set out in the order of 14 August 1981, falls within the statutory grounds for dismissal of a career teacher under former G.S. 115-142(e)(1)k, now codified as G.S. 115C-325(e)(1)k, which reads:

> "Any cause which constitutes grounds for the revocation of such career teacher's teaching certificate."

The second question is whether the trial court erred in upholding the dismissal under 16 N.C. Administrative Code, Sec. 2H.0224(a)(3), which provides for dismissal upon:

> "Conviction or entry of a plea of *nolo contendere*, as an adult, of a crime; provided, that a certificate shall not be revoked on this basis unless there is a reasonable and adverse relationship between the underlying crime and the continuing ability of the person to perform any of his/her professional functions in an effective manner."

Pertinent paragraphs from the Board's Order reveals the following:

> 11. That said Teacher was indicted for the crime of voluntary manslaughter arising out of the death of her husband, Reginald Burrow, and that this Board received a certified copy of said indictment for the Randolph County case of *STATE OF NORTH CAROLINA vs. CHERYL MARTIN BURROW*, 80 CVS 110.
>
> 12. That the Teacher, on or about July 17, 1980, as a result of a negotiated plea bargain, entered a plea of no contest to the charge of involuntary manslaughter, which plea was accepted by the Court; and that a certified copy of said Transcript of Plea was received by the Board of Education.

13. That, upon said plea, the Judge entered prayer for judgment continued until the August 18, 1980 term of Superior Court, and thereafter on August 20, 1980, sentenced said Teacher to a five years maximum active prison sentence in the Department of Corrections Facilities for Women, with work release recommended; and that a certified copy of said Judgment and Commitment was received by the Board of Education.

14. That, from the evidence of law enforcement officers and from the statement and testimony of the Teacher, on January 5, 1980, without provocation and without being in fear of any physical harm, the Teacher introduced a cocked, loaded firearm into a situation involving her husband, the deceased, and through her gross criminal negligence, and her wanton, careless, and reckless use of said firearm, caused the death of said Reginald Burrow, and was criminally responsible therefor; that although the Teacher offered evidence that she felt that her husband was an alcoholic and refused to discuss this problem with her, there was contrary evidence from the deceased's associates and employer that the deceased did not have an alcoholic problem; that the autopsy report of the deceased indicated that the degree of fatty change in the liver was indicative of chronic alcohol abuse, but that the deceased had a 0.0 percent blood level of ethanol at the time of his death. Nevertheless, the Teacher indicated that she had sought little advice from public or private sources, had not called the sheriff, had made no attempts to commit her husband for treatment, and further indicated in her testimony that as of December of 1980, she saw no other way to resolve her problem other than introducing a firearm into the situation, and had to take numerous conscious steps to retrieve said firearm from its hidden place in the bedroom closet, and holding said firearm for some time while her husband was in the shower and afterward. This conduct on January 5, 1980, was criminally reckless, exhibiting gross disregard for life and safety of a human being. The attitude toward human life expressed by this conduct is not in keeping with and is contrary to the duties and obligations of a teacher engaged in public education in Randolph County.

15. That, pursuant to the Judgment of the Court, the Teacher was imprisoned in the Department of Corrections Facilities for Women in Raleigh, North Carolina, on or about August 20, 1980; thereafter, the Teacher's resignation by September 15, 1980, was requested in a letter to her attorney dated August 29, 1980. In response thereto, on September 15, 1980, the Teacher appeared for class at Randleman Senior High School on "work release" without any notice to school officials by the Teacher or by the Department of Corrections officials, but that the media had been previously notified to "cover" the event of her return. This case has been highly publicized through the efforts of the teacher and her representatives, and has attracted wide-spread newspaper and television coverage throughout the county such that the facts and circumstances of the events of January 5, 1980, including the Teacher's versions of the events have been widely reported. The conduct of the teacher in coming back to the school on September 15, 1980 without giving notice to school officials that she would return was unprofessional conduct, purposefully calculated to embarrass school officials and to force a sudden determination of the teaching status of the Teacher; further that the reactions created by the media events staged by the Teacher have not been in the best interest of public education at Randleman High School or in the Randolph County Administrative Unit and have caused a disruption at the school and in the local administrative unit.

16. That the Teacher was in the custody of the prison system at the Central Prison Facilities for Women from August 20, 1980 until September 16, 1980, and was housed in the North Piedmont Treatment Facility for Women, located on Old Rural Hall, Winston-Salem, North Carolina in the custody of the Department of Corrections until on or about August 1, 1981, at which time she was released on parole. The Teacher now remains under the supervision of the North Carolina Department of Paroles.

17. That this Teacher and any teacher in Randolph County has various professional functions including, but not limited to, (a) teaching subject matter, (b) class discipline, (c) interaction with the fellow staff members and administrative superiors, (d) interaction with parents and community

members, and (e) interaction with and being a role model for students.

18. That there have been no complaints of the Teacher's teaching ability in the past and that there are no charges of inadequate performance lodged against the Teacher in this matter.

19. That, as a result of the Teacher being charged with a felony involving the loss of life, and the consequent plea and sentence rendered by the Court, that said Teacher has lost the respect of the community and of many of her fellow professional educators, and as a result, the performance of her professional functions will be severely impaired; therefore, there exists a reasonable and adverse relationship between this crime of involuntary manslaughter and the ability of this Teacher to perform many of her professional functions.

20. That the Teacher's performance in the area of discipline will be impaired in that she will have challenges to her authority from students who, due to all the publicity surrounding this case and events created at the school, are well aware of the Teacher's criminal case and her incarceration. Some high school students also have the tendency to exploit weaknesses in teachers, and the Teacher will be handicapped seriously if she attempts to discipline students while under the stigma of serving an active sentence or parole following the shooting death of her husband.

21. That the Teacher's teaching performance will be affected and her performance in the area of staff interaction has been and will be adversely affected due to the publicity generated by the Teacher, the doubt that this matter casts on the ability of the other teachers of Randleman High School to be models for the students; and the fact that other teachers at Randleman High have been forced against their will to take public stands either for or against the Teacher. There will be questions that other teachers will have as to the efficacy of the Tenure Act with respect to the dismissal of teachers for inadequate performance or neglect of duty for deeds like missing bus duty or failure to make lesson plans, in light of the circumstances of the case at hand wherein the teacher through her gross and wanton acts was criminally

responsible for the death of another person. Other teachers and especially administrators will have difficulties with the Teacher due to problems with the discipline as set out above, when called upon to assist the Teacher or perform the job for her.

22. That the Teacher's interaction with parents and the community have been and continue to be adversely affected, in that the loss of respect experienced by the Teacher renders it impossible for her to be a model for the children of these parents. Many feel that this Teacher, serving an active sentence with the Department of Corrections after such a serious crime, is not an appropriate person to be a pattern for their children and will not allow their children in the Teacher's classroom. It is further inappropriate by any community standard to allow a teacher on work release from serving a sentence for the crime involved in this case to be allowed to teach and be in the position of being a role model for students and an interactor and advisor to the students and their parents. In addition, the trend in discipline today is away from corporal punishment and towards suspension for disciplinary action. The Teacher, her principal, and the Superintendent will have great difficulty with parents of students who are suspended for misconduct under the Teacher's supervision due to the inconsistency of the school system having a teacher serving an active sentence for a felony in its employ who was not suspended, and at the same time attempting to suspend a student for some type of misbehavior less serious than a felony which would normally justify that type of disciplinary action. In addition, the duties of a teacher in areas beyond the classroom such as in club sponsorship, which will require her exposure to the public, will be met by community disagreement and personal exposure to negative reactions and comments by the public, the total result of which will be an overall loss of support for the school system as a whole.

23. The Teacher's interaction with students will be adversely affected. The school system would be making a grave mistake by condoning the type of conduct and acts for which this Teacher has been charged and sentenced. High school students are at a very impressionable age and cannot

be led to believe that these acts and the distinct lack of judgment shown by the Teacher are proper. Her teaching effectiveness will be particularly impaired if students cannot consider her to be a credible teacher.

24. This Board of Education would be setting an improper precedent in this case by allowing this Teacher to return as a teacher in the Randolph County System following the entry of a no contest plea to a serious felony. It is not in the best interest of the educational process at Randleman High School, or in the Randolph County Public School System. Public education in general will be damaged and the reputation of the System seriously tarnished if the teacher is allowed to return. This would adversely affect the Teacher's ability to perform many of her important professional functions, as well as adversely affect the performance of the system as a whole.

We hold that the Board's evidentiary findings do support its ultimate conclusion of a dismissal under either or both grounds, G.S. 115C-325(e)(1)k and 16 N.C. Administrative Code, Sec. 2H.0224(a)(3). The totality of the recited facts, within paragraphs 11 through 24 of the order do show just cause to constitute grounds for the revocation of the plaintiff's teaching certificate under G.S. 115C-325(e)(1)k.

With the passage of G.S. 15A-1011(a) in 1973, the plea of no contest is equated in the statute with a plea of *nolo contendere*. The Administrative Code specifically relates to dismissal upon the entry of a plea of *nolo contendere* (now by statute synonymous with no contest) as an adult of a crime. The plaintiff is an adult, aged 37. Involuntary manslaughter is a crime. Further, the Code requires in addition "a reasonable and adverse relationship between the underlying crime [of involuntary manslaughter] and the continuing ability of the [plaintiff] to perform any of . . . her professional functions in an effective manner." In paragraph 17 of the Board's order some of the various professional functions of the plaintiff as a teacher are listed. We hold that the totality of the facts in all of paragraphs 11 through 24 do show the reasonable and adverse relationship between the crime of involuntary manslaughter and the plaintiff's continuing ability to perform as a teacher in an effective manner

while on work release or on parole, which was her status during the proceedings below. The facts meet the requirements of the Administrative Code.

[2] Plaintiff contends that she had no notice of the quoted section of the N.C. Administrative Code and no notice that the Board would rely on it; that a 19 June 1980 letter from defendant's counsel to plaintiff's counsel concerning the adoption of and applicability of the Administrative Code led plaintiff to enter her criminal plea; and, in effect, that her counsel would not have pleaded "no contest" if he had had prior knowledge of the Code provision or of the civil consequences of the Board's consideration of same; and that the Board ought to be estopped from applying the Code in this case. We feel the plaintiff fails to make out a *prima facie* case of equitable estoppel. *See Boddie v. Bond*, 154 N.C. 359, 365-66, 70 S.E. 824, 826-27 (1911). The law of this State is contrary to plaintiff's position argued in her brief. The defendant Board is a governmental agency. To estop the Board on the points raised in the brief on this assignment of error while the Board was exercising a governmental and sovereign right might, as the rationale is expressed in *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E. 2d 402, 406 (1953), render helpless the Board "to assert its powers in government." Although *Washington* recognized that a governmental agency may be estopped, it also ruled that any estoppel must "not impair the exercise of the governmental powers of the county." *Id.*

Here, the teacher's reliance was upon her own private attorney and not upon the Board. The record discloses that in addition to plaintiff's concern for her future status as a teacher after entering a plea, she was also concerned about a possible wrongful death action by her deceased husband's parents. Likewise, she answered the criminal trial judge's question under oath that no one had made any further promises or threatened her in any way to cause her to enter her plea. The Board of Education cannot be held responsible for the civil consequences of the plaintiff's free and voluntary plea of no contest entered in the criminal court or for any information or advice which may have been given plaintiff by any agent of the Board of Education. *See Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E. 2d 754 (1948), a case of alleged misleading and costly state sales tax instructions and advice by a state auditor to plaintiff-taxpayer.

The criteria for judicial review in Superior Court of an order of dismissal by the Board of Education is known as the "whole record" test. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977); G.S. 150A-51. From our inspection of the judgment, the trial judge, in both the wording and substance of his findings, did conscientiously apply the recognized standard for review. Also, in keeping with *Thompson*, the record shows that the trial judge considered the report of the Professional Review Committee. After determination and evaluation of the facts, the judgment shows that the trial court's derivative holding was "that the charges brought by the Superintendent based on then G.S. 115-142(e)(1)k (now recodified as G.S. 115C-325(e)(1)k) and the N.C. Administrative Code and the August 14, 1981 Order of the Board of Education are supported by competent, material, and substantial evidence, and that a reasonable and adverse relationship exists between the crime in this particular case, involuntary manslaughter with a deadly weapon, and the teacher's continuing ability to perform many of her important professional functions." The various findings and conclusions which are adverse to plaintiff are fully supported by the whole record test.

Under the whole record test, which is also the test this Court must apply, we hold that the decision to dismiss the plaintiff as a schoolteacher by the Randolph County Board of Education is fully supported by competent, relevant, and substantial evidence in consideration of the entire record as submitted to us. We affirm.

We believe it would serve no useful purpose to discuss each of the details in the orders and final judgment, since they are sufficiently explicit. Plaintiff's other assignments of error we find to be without merit. Because of the result reached here, we deem it unnecessary to reach any of defendant's cross-assignments of error.

In spite of the brevity of this opinion when compared with the quantity of materials submitted for review, we have made a thorough study of the entire record, including its voluminous attachments, exhibits, amicus curiae briefs, and errata.

Affirmed.

Judges HEDRICK and WHICHARD concur.

DEPARTMENT OF TRANSPORTATION v. JAMES WAVERLY BURNHAM, SR. AND WIFE, EDITH LOUISE WHITE BURNHAM

No. 821SC492

(Filed 19 April 1983)

1. **Eminent Domain § 6.2— appraisal witness—sales price of nearby tract of land**

In a highway condemnation action, the trial court erred in permitting defendant landowners' appraisal witness to state on cross-examination the price for which a nearby tract of land sold in 1973 after the witness had twice testified that he did not know the sales price of the nearby tract since (1) the impeachment purpose of the cross-examination was satisfied when the witness twice responded that he did not know what the nearby tract sold for in 1973, and the record failed to show that the trial judge determined in his discretion that the impeachment value of such cross-examination outweighed the possibility of confusing the jury with collateral issues, and (2) the record did not show that the two tracts were comparable so as to make the witness's answer admissible as substantive evidence.

2. **Eminent Domain § 6.2— sales prices of other land—similarities to condemned land—no necessity for voir dire**

The trial court in a highway condemnation action did not abuse its discretion in determining without a voir dire hearing that three tracts of land were sufficiently similar to the condemned land to render the sales prices of those tracts admissible as evidence of the value of the condemned land.

3. **Eminent Domain § 5.6— highway condemnation—fair market value—instructions on expenses of subdividing**

The evidence in a highway condemnation action supported the trial court's instruction that "[t]he fair market value is not the aggregate of the prices of lots into which the tract could best be divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and sale of the same, and holding it and paying taxes and interest until all lots are disposed of cannot be ignored and it is too uncertain and conjectural to be computed."

APPEAL by defendants from *Brown, Judge.* Judgment entered 11 February 1982 in Superior Court, CAMDEN County. Heard in the Court of Appeals on 17 March 1983.

This is a condemnation proceeding for state highway purposes. On 3 December 1979 plaintiff took 7.381 acres out of a 50.819-acre tract owned by defendants.

The tract is located on U.S. Highway #17 on the outskirts of the village of South Mills, approximately 14 miles from Elizabeth City. The plaintiff took a strip of land fronting 500.91 feet out of

.7 mile of frontage on the east side of the highway. Running parallel to the opposite side of the highway is the Dismal Swamp canal, which accommodates interstate water traffic. The land was devoted to agricultural purposes before the taking. Defendants' well-preserved dwelling house on the highway is of historical interest. The house has been Mr. Burnham's residence for 73 years.

Within the tract taken, the plaintiff has constructed two sixty-five foot high bridges carrying two lanes of traffic in each direction. Two witnesses characterized the impact from the effect of the bridge on the original tract as unprecedented. In flat and level Camden County, the finished bridge project was described as "a mountain."

Defendants' evidence on highest and best use was for a real estate subdivision, a strip development along the highway. Damages testimony of defendants' witnesses ranged from $71,600 to $80,000. Plaintiffs' witnesses, who gave opinions that the highest and best use was agricultural purposes, gave damages testimony from $27,800 to $29,200.

Defendants appeal from the jury verdict of $37,000 on the issue of just compensation.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Claude W. Harris, Assistant Attorneys General Robert G. Webb, Charles M. Hensey and Blackwell M. Brogden, Jr., for plaintiff appellee.

LeRoy, Wells, Shaw, Hornthal & Riley by Dewey W. Wells for defendant appellants.

BRASWELL, Judge.

The assignments of error consist of three questions which are concerned with evidence on cross-examination, "comparable" tracts of land, and jury instructions.

[1] Robert Ripley, an expert land appraiser for the Burnhams, the defendant-landowners, twice testified that he did not know the sales price of another tract, Camden Woods. During cross-examination when the same question was put a third time, defendants' objection was overruled, and counsel's request to "be heard" was denied. Ripley answered, "$115,000." The reception of this answer was error for which we reverse and order a new trial.

The evidence shows that on direct examination Ripley stated he was familiar with the nearby Camden Woods property and that he used it only in considering the highest and best use of the Burnham property. As to the Burnhams' land, Ripley said, "[t]he highest and best use was for the sale of individual homesites facing [Highway] 17 and one acre of other tract, depending upon what the purchaser wanted." Ripley's opinion of fair market value before the taking was $325,192, with an after-value of $248,582, for a difference of $76,610. As to Camden Woods, which contained 123.6 acres as compared to Burnhams' 50.819 acres, Ripley knew that it had been sold in 1973 for a residential subdivision. Prior to the 1973 sale, Camden Woods land was used for agricultural purposes, as was Burnham's land immediately before the 1979 taking. Camden Woods is located approximately one quarter to one half mile north of the Burnham land, on the same highway.

An extensive *voir dire* was held during the direct examination of Ripley concerning his testimony about Camden Woods. Mr. Ripley said that he considered the Camden Woods tract in arriving at his opinion of highest and best use of the Burnham tract, that he knew the Camden Woods tract had been divided into lots on U.S 17 and on a secondary road, that he determined some of the lots had been sold and that houses had been built in the $50,000-$85,000 range, and that he considered all that information in arriving at his appraisal of the Burnham tract. Ripley also stated that he did not use the Camden Woods tract in determining the fair market value of the Burnham land.

On *voir dire* cross-examination by plaintiffs' counsel of Ripley, the following occurred:

> "Q. Mr. Ripley, did you determine *what the tract of land sold for* when it was in its original state prior to the time it was developed as Camden Woods?
>
> A. No, sir." (Emphasis added.)

On subsequent cross-examination of Ripley before the jury several appropriate and proper questions regarding Camden Woods were asked. Then, the following occurred:

> "Q. Now, the Camden Wood property you said was sold in 1973, as an undivided tract for residential subdivision?

A. I don't know *what it was sold for.*

Q. It was sold as an undivided tract, and subsequently it was developed sir?

A. Yes, sir.

Q. Do you know *what it sold for* in 1973?

OBJECTION. OVERRULED.

BY MR. WELLS:

May I be heard, your Honor?

BY THE COURT:

No, sir.

A. $115,000.00." (Emphasis added.)

On direct examination after the *voir dire,* Mr. Ripley was questioned whether in his opinion Camden Woods was comparable to the Burnham tract prior to the subdivision of Camden Woods. His answer was: "The property along 17, that tract of land, similar to the property that Mr. Burnham has along 17, is comparable or near comparable to Mr. Burnham's property in its original state." No sales price for Camden Woods was offered or attempted to be offered by the Burnhams.

Defendants now contend that the sales price of Camden Woods is too remote in time, that there is no showing of firsthand knowledge in Ripley of sales price, and that there was no *voir dire* to determine admissibility or discretion for allowing the evidence on cross-examination, and that it is not comparable as a measure of value.

It is the law in condemnation proceedings that "[a] witness who expresses an opinion on property value may be cross-examined with respect to his *knowledge* of values of nearby properties for the limited purpose of testing the worthiness of his opinion, or challenging his credibility, even if those properties are not similar to that involved in the litigation." *Power Co. v. Winebarger,* 300 N.C. 57, 63, 265 S.E. 2d 227, 231 (1980). This principle was discussed by the court as follows: "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. The impeachment purpose of the cross-examination is satisfied when the witness responds to a question probing the scope of his knowledge." *Id.* at 64-65, 265 S.E. 2d at 231-32. *Winebarger* listed as one of the controlling principles in condemnation proceedings that:

> "[I]f the witness responds that he does not know or remember the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied and the inquiry as to that property is exhausted. [Citation omitted] If, on the other hand, the witness asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, he may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues."

Id. at 66, 265 S.E. 2d at 232-33.

Another principle of law spelled out in *Winebarger*, *id.* at 65, 265 S.E. 2d at 232, is that, "Whether two properties are sufficiently similar to admit the sales price of one as circumstantial evidence of the value of the other is a question to be determined by the trial judge, usually upon *voir dire.*" In the case before us, although an extensive *voir dire* was held earlier, there was nothing within it to eliminate the need for another *voir dire* on the sales price of Camden Woods when Burnham's counsel objected and asked to be heard. The whole record does not show that the two tracts, Camden Woods and Burnhams', are comparable, so as to make the answer of Ripley admissible as substantive evidence. While the brief of the plaintiff points out that the words "comparable or near comparable" were used by Ripley, we hold that the total answer given by Ripley referred only to that portion of Camden Woods fronting U.S. Highway 17 as being similar to Burnham's frontage along the same highway one half mile apart. There is nothing in Ripley's answer to indicate that he was referring to any other part of the 123.6-acre tract as being comparable or nearly comparable to the 50.819 acres of Burnham's. It is true that as of 3 December 1979, the date of the taking of the Burnham land, Ripley had an opinion

that the highest and best use of the Burnham tract was the same as Camden Woods as of 1973. However, this opinion was reached as of 1979 when substantial progress had been made in developing the residential subdivision in Camden Woods. Also, Ripley had testified on *voir dire* that he did not consider the Camden Woods tract in arriving at his fair market value of Burnham's land. Thus, the answer given over objection of a sales price of $115,000 was erroneously received, and as received it became prejudicial substantive evidence.

Plaintiff strongly contends that the question and answer were competent as a part of legitimate cross-examination. Certainly cross-examination of an expert witness's knowledge of the values and sales prices of similar or comparable properties in the area is permitted when the witness has testified directly on the fair market value of the land in issue, and certainly the same witness can be cross-examined as to his knowledge of sales prices of dissimilar property for the limited purpose of impeachment in order to test his credibility and expertise. Although plaintiff's questions did not suggest a specific sales price, which under *Winebarger* would not have been proper, when the witness Ripley twice responded that he did not know what Camden Woods sold for in 1973, the impeachment purpose of cross-examination had been satisfied and sales price inquiry was exhausted as to that witness on that property. On this record there is nothing to show that the trial judge determined in his discretion that there was any impeachment value in overruling the objections and declining to allow counsel a requested opportunity to be heard before a specific sales price was given. A legitimate basis for the sales price as given by Ripley for Camden Woods is left to pure speculation. The conclusion drawn and opinion expressed by Ripley regarding Camden Woods never reached the point of being fully and totally comparable to the Burnham tract. We hold therefore that it was error for the court to permit cross-examination of Ripley as to the price for which the Camden Woods tract was sold.

[2] Although we find no merit to the other assignments of error, since they could possibly be raised as questions at the new trial, we will proceed to discuss them. In their second question defendants argue that it was error to allow the Department of Transportation's witness Shaw to testify as to the sales price of the Mullen

tract, the Carey tract, and the Keaton-Albertson tract, because they were non-comparable with the Burnham tract, and that if there were any doubt about it, the judge should have conducted a *voir dire*. Defendants contend that if they had been offered a *voir dire*, their cross-examination of Shaw would have shown and emphasized non-comparability, and sales price would have thus been excluded.

Each time in the record when Shaw was being questioned about the three named tracts, the record is silent as to any request for a *voir dire*, and there was no motion to strike any of the answers. Also, the transcript shows fifteen pages of vigorous cross-examination of the same witness. Defendant had his opportunity to elicit evidence to support his contention on non-comparability. There is no requirement that the trial judge conduct a *voir dire* hearing or to make a specific ruling on comparable values of other tracts of land. *Highway Comm. v. Hamilton*, 5 N.C. App. 360, 366, 168 S.E. 2d 419, 423 (1969). As stated in *Barnes v. Highway Commission*, 250 N.C. 378, 394, 109 S.E. 2d 219, 232 (1959):

> "It is within the sound discretion of the trial judge to determine whether there is a sufficient similarity to render the evidence of the sale admissible. It is the better practice for the judge to hear evidence in the absence of the jury as a basis for determining admissibility."

The evidence as actually adduced, while it shows some dissimilarities in size (each of the three tracts were smaller) and in location, is not here sufficient to warrant exclusion. *See Duke Power Company v. Smith*, 54 N.C. App. 214, 282 S.E. 2d 564 (1981). It must also be borne in mind that the plaintiff's appraisers were using the "comparables" as "agricultural" highest and best use comparisons, rather than defendants' showing of "residential subdivision." After careful consideration of the evidence, we hold that the court did not abuse its discretion in determining that the three tracts were sufficiently similar to the condemned land to render sales of these tracts admissible as evidence of the value of the condemned land. *Highway Commission v. Conrad*, 263 N.C. 394, 400, 139 S.E. 2d 553, 558 (1965).

[3] In his final assignment of error, defendant alleges that the trial judge erred in his jury instructions by charging on an

abstract principle of law which in context amounted to an expression of opinion. We disagree.

The challenged portion of the charge is as follows:

"You should reject as they would purely imaginative or speculative uses in value. Fair market value of the land in this suit before the taking is not a speculative value, based on imaginary subdivisions and sales and lots to many purchasers. It is the fair market value of the land as a whole in its then state, according to the purposes for which it was then best adapted and in accordance with its best and highest capabilities. The fair market value is not the aggregate of the prices of lots into which the tract could best be divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and sale of the same and holding it and paying taxes and interest until all lots are disposed of cannot be ignored and it is too uncertain and conjectural to be computed."

Upon the completion of the charge, and in apt time, the record reflects that defendants' counsel stated the following:

"Before the jury retired the defendants excepted to the reference in the jury instructions to the expense of constructing streets as bearing upon the speculative expense of subdividing the land as there has been no evidence that the use of the land for residential lots or residential purposes would require the construction of streets."

Thus, counsel's concern at the time of the jury instructions was about expense of constructing streets and speculative expense of dividing land. Earlier in his charge the judge had correctly defined the applicable measure of damages and had explained to the jury the meaning of fair market value. Next, the judge instructed the jury on the evidence of highest and best use. Then, immediately preceding the portion of the charge assigned as error the judge said:

"You should consider these factors in the same way in which they'd be considered by the willing buyer and the willing seller in arriving at a fair price.

You should reject as they would purely imaginative or speculative uses in value."

We hold that the challenged portion of the charge was supported by the evidence, which in excerpt shows the following: The landowner, Mr. Burnham, testified that his opinion of highest and best use was "[t]o sell it off for lots to build houses." Mr. Ripley testified that he "considered that the highest and best use of the property would certainly be—even with the Highway Department across—would be for singly [*sic*] family, individually sold, properties for single family use." At another point Mr. Ripley had testified that "[t]he highest and best use was for the sale of individual homesites facing 17 and one acre of other tract, depending upon what the purchaser wanted." The jury also had knowledge that one-half mile away, a residential subdivision existed at Camden Woods, and reference had been made to lots in that subdivision.

Mr. Frank Veach, an appraiser for the landowner, testified: "I don't consider Mr. Burnham to be the property owner after the [taking]. I consider a typical buyer, one who'd develop the place because he would have to develop it, he would develop now what is left." Henry Brothers testified, "It could have been cut up or laid off in building lots."

Thus, the judge did not charge on an abstract principle. Streets and cleaning off and improving land are a typical part of a buyer's use of land for residential purposes when such is its highest and best use. The jury should not have speculated on imaginary residential subdivisions and sales of lots, even when all the evidence may show that to be the highest and best use. The charge was supported by the evidence.

Reversed and remanded for a new trial.

Judges HEDRICK and WHICHARD concur.

LIZZIE KUYKENDALL v. W. T. TURNER AND R. T. BOOTH

No. 8218SC424

(Filed 19 April 1983)

1. **Rules of Civil Procedure § 50— directed verdict while jury deliberating**

The trial judge acted in accordance with G.S. 1A-1, Rule 50(a) when he granted directed verdicts on assault and battery issues while the jury was deliberating.

2. **Trespass § 7— unauthorized entry—sufficiency of evidence**

Plaintiff's evidence was sufficient to show an unauthorized entry into her home by defendant police officers so as to support submission to the jury of an issue of trespass where it tended to show that defendants had a warrant for the arrest of plaintiff's former boyfriend and entered plaintiff's house to search for him; plaintiff and her daughter denied that the boyfriend was at plaintiff's house; and the first officer to enter the house did so without announcing his purpose. G.S. 15A-401(e)(1).

3. **Assault and Battery § 3.1; Damages § 11.1— assault and battery—punitive damages—sufficiency of evidence**

Plaintiff's evidence was sufficient to support an award of punitive damages in an action for assault and battery where it tended to show that defendant police officers, while searching plaintiff's house for her former boyfriend, slammed plaintiff around in the hall, shook her "like a rag doll," and used threatening and abusive language.

4. **Assault and Battery § 3.1— action for civil assault—sufficiency of evidence**

Plaintiff's evidence was sufficient to be submitted to the jury in an action against two police officers for assault and battery where it tended to show that defendants, while searching plaintiff's house for her former boyfriend, slammed plaintiff around in the hall and shook her "like a rag doll."

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 11 December 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 March 1983.

This case involves a suit for damages by the plaintiff for alleged torts committed on her by the defendants, two Greensboro policemen.

The evidence showed that the plaintiff was at her home at 1805 Allenbrook Drive in Greensboro at about eight a.m. on 8 July 1978. Her daughter and son-in-law, Trudy and Kerry Sinclair, were present. The three were conducting a yard sale.

Defendant R. T. Booth, a Greensboro police officer, approached the residence. He had an arrest warrant in his hat for Junior Jim Wilson on a charge of issuing a worthless check.

Booth asked if Wilson was there. The plaintiff and her daughter answered no. Booth testified that they denied knowing Wilson. He left after concluding that the address on the warrant was incorrect. There is a conflict in the evidence if Booth told the two women that he had an arrest warrant for Wilson.

When Booth stopped a few blocks away from the plaintiff's home, he discovered another arrest warrant for Wilson with the plaintiff's address on it. On the warrant that he found was a notation that stated: "Subject will run; owner of house will lie."

Booth then radioed for instructions. Officer W. T. Turner heard Booth and remembered that he had arrested Wilson at the plaintiff's home on 28 February 1978.

Turner testified that the plaintiff denied that Wilson was present when Turner arrested Wilson there in February. A pair of men's shoes near the couch led to the discovery of Wilson in one of the bedrooms on that occasion.

Both defendants then drove to the plaintiff's home. One car parked directly in front of the house and the other next door. Booth went to the back of the house and Turner went to the front.

The evidence conflicts at this point. The Sinclairs testified that Turner went in the house without permission and threatened both of them with arrest. Booth had entered the home through the back door.

The plaintiff asked the defendants what they were doing in her home. According to the plaintiff's evidence, they said that they had a warrant for Wilson's arrest and would search the house to find him if necessary.

Turner testified that his entry into the house was with Kerry Sinclair's consent. When Turner called Booth's name, Booth entered through the back door.

According to the plaintiff's evidence, the plaintiff refused to let the defendants search her home and tried to block the

hallway. The defendants pushed her and then took her into a bedroom where Turner shook her violently, "like a rag doll," according to Trudy Sinclair.

Turner testified that the plaintiff was slamming herself against the hallway wall to block his path. Although he did state that he grabbed the plaintiff's wrist to calm her down, Turner did not say that he shook her.

Booth testified that he moved the plaintiff from the hallway without her resisting. He saw Turner take the plaintiff by the hands when she attempted to strike him.

The plaintiff testified that she loved Wilson but that he left in March or April, 1978. She denied knowing a Junior Wilson when the police found him at her house on 28 February 1978 because she knew him as Jim Wilson.

The plaintiff presented two medical witnesses. Dr. Paul Harkins, an orthopedic surgeon, testified that he began to treat the plaintiff on 11 July 1978, three days after the incidents that are the subject of this case.

He observed bruises and some cervical strain of the plaintiff's neck, shoulder, and low back and said that she could do light work. Harkins concluded that the plaintiff's condition was compatible with the history that she gave.

Russell A. Cobb, Jr., a doctor of chiropractic, also testified. He first saw the plaintiff on 17 October 1980. Cobb's opinion was that the plaintiff's injuries were consistent with a physical mishandling or forcible physical conduct.

The plaintiff also introduced photographs into evidence that showed her injuries. They were received as illustrative evidence only.

At the close of the plaintiff's evidence, the trial judge granted the defendants' motion for a directed verdict on the trespass and punitive damages issues.

On the second day of the trial, the case was submitted to the jury. They deliberated for about one and one-half hours before the court recessed.

The jury returned on the following day and deliberated for one and one-half hours before asking for additional instructions. The trial judge gave an additional instruction on assault, battery, and unreasonable force, to which the plaintiff made a timely objection.

After the jury deliberated for another hour, the trial judge granted the defendants' motion for a directed verdict on all issues. He had reserved ruling on this motion when it was made at the close of the plaintiff's evidence.

The plaintiff's motion to have the jurors brought in to ask if they were deadlocked was denied. The trial judge also denied the plaintiff's motions for a mistrial, a judgment notwithstanding the verdict, and a new trial.

From the verdict and the rulings of the trial judge, the plaintiff appealed.

McNairy, Clifford & Clendenin, by Michael R. Nash and Locke T. Clifford, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Joseph R. Beatty, for defendant-appellees.

ARNOLD, Judge.

The primary question on this appeal is if it was proper for the trial judge to enter directed verdicts on the trespass and punitive damage issues at the close of the plaintiff's evidence and on the assault and battery issues while the jury was deliberating.

I. *Directed Verdict Standard*

In reviewing the grant of a directed verdict on appeal, we "must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a matter of law,* the evidence is insufficient to justify a verdict for the plaintiff." *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971) (emphasis in the original). "[T]he evidence in favor of the nonmovant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor." *Snow v. Power Co.*, 297 N.C. 591, 596, 256 S.E. 2d 227, 231 (1979); *Summey v. Cauthen*, 283 N.C. 640, 647, 197 S.E. 2d 549, 554 (1973). *See generally* W. Shuford, N.C. Civil Practice and Procedure § 50-5 (2d ed. 1981) (discusses the test to be used in evaluating a directed verdict motion).

[1] Before determining if the entry of directed verdicts was proper here, we note that the trial judge acted in accordance with G.S. 1A-1, Rule 50(a) when he granted directed verdicts on the assault and battery issues while the jury was deliberating.

As the rule states, "The order granting a motion for a directed verdict shall be effective *without any assent of the jury*" (emphasis added). In *Odell v. Lipscomb*, 12 N.C. App. 318, 183 S.E. 2d 299 (1971), a case in which the trial judge granted directed verdicts within ten days after the jury failed to reach a verdict, this Court stated that in deciding the directed verdict question, "the court should give no consideration to the fact that the jury may have failed to reach a verdict, but should consider only the evidence in the case." 12 N.C. App. at 321, 183 S.E. 2d at 301. Thus, Rule 50(a) eliminates the useless act of asking for jury assent. 5A Moore's Federal Practice ¶ 50.02[3] (2d ed. 1982).

We are aware that the better practice may be for the trial judge to refrain from directing a verdict, even when he could, in order to expedite a final determination on appeal. That is, if the grant of a directed verdict is reversed, a new trial is required. But if the case goes to the jury, the trial judge can grant a judgment notwithstanding the verdict if he believes the verdict to be erroneous or the court on appeal can reverse and reinstate the jury verdict without a new trial if it finds that the trial court erred. *See* C. Wright & A. Miller, Federal Practice and Procedure § 2533 (1971). However, the trial judge did not violate Rule 50(a) in this case.

We now consider if the evidence in support of the four issues in this case was sufficient to withstand a directed verdict motion.

II. *Trespass*

[2] A trespass to real property requires three elements: 1. Possession by the plaintiff when the trespass was committed, 2. An unauthorized entry by the defendant, and 3. Damage to the plaintiff from the trespass. *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E. 2d 553, 555 (1952).

The plaintiff was clearly in possession of her home when the officers entered and has arguably presented enough evidence to show damage from their entry. What this issue turns on is if the entry of the defendants was unauthorized.

G.S. 15A-401(e)(1) outlines the situations when a law enforcement officer may enter on private premises to arrest someone. Three requirements must be met. The officer must possess a warrant for the arrest of a person, he must have reasonable cause to believe that the person to be arrested is present, and he has given, or made a reasonable effort to give, notice of his authority and purpose to an occupant of the premises.

When considering the evidence in the light most favorable to the plaintiff, we find that the entry by the defendants here was unauthorized under G.S. 15A-401(e)(1).

The plaintiff's evidence shows that she never saw the warrant and that Booth would not let her see it. The denial by the plaintiff and her daughter that Wilson was at the house is sufficient to negate the reasonableness of the defendants' belief that he was present. Finally, even though the authority of the defendants was clear, the plaintiff's evidence shows that Turner entered the house without announcing his purpose. Thus, it was improper to direct a verdict for the defendants on the trespass issue.

III. *Punitive Damages*

[3] In North Carolina, punitive damages are recoverable in assault and battery cases only when the assault and battery is accompanied by an element of aggravation like malice. North Carolina courts will not imply or impute malice, but instead require a showing of actual or express malice, "that is, a showing of a sense of personal ill will toward the plaintiff which activated or incited a defendant to commit the alleged assault and battery." *Shugar v. Guill*, 304 N.C. 332, 338-39, 283 S.E. 2d 507, 511 (1981).

The purpose of punitive damages is not to compensate a plaintiff for personal injuries. Instead, they are awarded to punish the defendant's conduct. E. Hightower, N.C. Law of Damages § 4-1 (1981).

Punitive damages are awarded only in cases where a plaintiff also recovers nominal or compensatory damages. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968). The jury has discretion on whether to award punitive damages even though the trial judge decides if there is evidence to be submitted to the jury that would justify their award. Ervin, *Punitive Damages in North Carolina*, 59 N.C.L. Rev. 1255, 1257-58 (1981).

We cannot say as a matter of law that the defendants did not show "personal ill will" toward the plaintiff when they searched her house. The plaintiff's evidence showed that they slammed her around in the hall, shook her "like a rag doll," and used threatening and abusive language. When considered in the light most favorable to the plaintiff and resolving all conflicts in the evidence in her favor, the punitive damages issue should have gone to the jury.

IV. *Assault and Battery*

[4] Our Supreme Court recently reiterated that North Carolina follows the common law definitions of assault and battery. According to *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981),

> An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow. The interest protected by the action for battery is freedom from intentional and unpermitted contact with one's person; the interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one's person.

302 N.C. at 444-45, 276 S.E. 2d at 330. *See also* Restatement (Second) of Torts §§ 13 and 21 (1965); W. Prosser, Handbook of the Law of Torts §§ 9 and 10 (4th ed. 1971) (definitions and interests to be protected).

The evidence considered in the light most favorable to the plaintiff shows that this issue should have gone to the jury. Slamming her against the walls and shaking her could constitute a battery and there is some evidence of an apprehension of unpermitted contact. Even the defendants admit that Turner grabbed the plaintiff's wrists.

We find *Todd v. Creech*, 23 N.C. App. 537, 209 S.E. 2d 293, *cert. denied*, 286 N.C. 341, 211 S.E. 2d 216 (1974), to be helpful. In granting a new trial in an assault and battery case against a law enforcement officer, the court stated, "[W]hen there is substantial evidence of unusual force, it is for the jury to decide whether the officer acted as a reasonable and prudent person or whether he acted arbitrarily and maliciously." 23 N.C. App. at 539, 209 S.E. 2d at 295. *Todd* is persuasive even though the plaintiff there sued

an officer who sought to arrest him while the plaintiff here is suing officers who sought to search her house to arrest another person.

We also note that G.S. 15A-401(d), which outlines when force may be used in an arrest, states: "Nothing in this subdivision constitutes a justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force." The plaintiff's evidence presents questions on if the defendants' conduct was willful or malicious, whether she was injured, and if the force used was unreasonable.

Although we hold that the jury should have been allowed to reach a verdict on the issues submitted by the plaintiff here, we express no opinion on the merits of the plaintiff's claims.

V. *Jury Instructions*

The plaintiff argues that the trial judge's jury instructions on assault and battery at the end of all the evidence and when the jury asked for a clarifying instruction were erroneous. This contention is irrelevant because the jury was not allowed to reach a verdict. As a result, any error in the instructions was harmless.

Because we find that directed verdicts were improperly entered on the issues in this case, it is unnecessary to discuss the denial of plaintiff's motion for a mistrial and a new trial.

Reversed and remanded for a new trial.

Judges BECTON and PHILLIPS concur.

In re Estate of Heffner

IN THE MATTER OF THE ESTATE OF HELEN BRYTTE HEFFNER, DECEASED

No. 8218SC468

(Filed 19 April 1983)

1. **Rules of Civil Procedure § 60.2— motion to vacate executor's final account**

The heirs at law of a testatrix could properly file with the clerk of court a motion in the cause under G.S. 1A-1, Rule 60(b)(6) to vacate the executor's final account on the ground that the executor had misconstrued testatrix's will and had made an improper distribution of real property assets.

2. **Wills §§ 34.1, 68— defeasible life estate—remainder interest—sale after death of testatrix—proceeds as realty**

Provisions of the will of testatrix's mother stating that the homeplace should be retained as the regular dwelling place of her five daughters as long as any of them, singly or together, wished to remain there, and that when the daughters no longer wished to retain the homeplace as a regular dwelling place, it should be sold and the proceeds divided among her nine children *are held* to create a defeasible life estate in the five daughters and a vested remainder in each of the nine children so that testatrix, the only daughter who ever lived in the homeplace, had a life estate in the homeplace which terminated at her death and a one-ninth fee simple interest therein. The one-ninth interest in the homeplace devised to testatrix in her mother's will was an interest in real property which was not disposed of by a provision of her will bequeathing her "other personal belongs," and where there was no language in the will to dispose of real property, and where the other children sold the homeplace after the death of the testatrix, the doctrine of equitable conversion did not apply, testatrix died intestate as to her one-ninth ownership in the homeplace, and the proceeds of the sale remained real property which should have been distributed to the heirs at law of the testatrix.

APPEAL by respondent Ben B. Phillips, Jr., executor of the estate of Helen Brytte Heffner from *Collier, Judge.* Order entered 11 December 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 March 1983.

On 17 July 1980 four of the heirs at law of Helen Brytte Heffner, testatrix, filed a motion in the cause, under Rule 60 of the Rules of Civil Procedure, in the estate before the Clerk of the Superior Court of Guilford County to vacate and set aside the final account of Ben B. Phillips, Jr., executor of the estate of Helen Brytte Heffner. The final account had been filed on 11 July 1979, with this notation by the Assistant Clerk at the end of the accounting:

"The above account has been audited by me and the vouchers submitted in support thereof examined. The account is hereby approved."

There was no order of discharge of the executor by the Clerk of Superior Court as is provided for in the procedure of G.S. 28A-23-1 after the filing of a final account.

The executor had made distribution of monies in his final accounting in accordance with his construction of Helen Brytte Heffner's will. The motion in the cause alleged that Helen Brytte Heffner died intestate as to her undivided interest in her mother's real property, that the will contained no dispositive provisions for this property, and that the executor had improperly distributed as "cash" to legatees assets that should have gone to "heirs."

Among the findings in the Order of the Clerk of Superior Court dated 19 March 1981 on his hearing of the heirs' motion in the cause, are these:

"3. That said accounting shows a final distribution in this estate in cash assets to Ben B. Phillips, Jr., Beth Heffner Phillips and Ben Phillips, III each receiving the sum of $4,112.13;

4. That among the receipts in the said estate was cash assets totaling $8,364.62 from the Estate of Mrs. S. L. Heffner, the Mother of the deceased, which sum constituted the deceased's share from the sale of real property inherited by her from her Mother;

5. That the Last Will and Testament of the deceased makes no disposition of the said real property or the proceeds from the sale of said real property and therefore she died intestate as to this item of property, and that it should have been distributed to the heirs at law of the deceased and was therefore improperly distributed and should not have been approved as filed;

6. That Item #10 of the deceased's Last Will and Testament providing for the disposition of the deceased's personal belongings was not intended by the deceased to dispose of her residuary estate in personality; [*sic*]

7. That it is necessary that an Order be entered for said estate to be reopened and directing that a proper distribution be made of this asset among the heirs at law of the deceased;"

Whereupon, the Clerk ordered the estate to "be reopened for the purpose of a proper distribution to the heirs at law . . . ," that the executor recover distributions improperly made in his final accounting, that Ben B. Phillips, Jr., reapply and qualify as executor, and that he make a proper final account.

Phillips appealed to the Superior Court on 25 March 1981. On 20 June 1981 Judge Robert A. Collier, Jr., affirmed the Order of the Clerk and dismissed the appeal.

On 28 July 1981 respondents Ben B. Phillips, Jr., Beth Heffner Phillips, and Ben Phillips III moved for a new trial. On 11 December 1981 the trial judge entered an Amended Judgment on respondent's motion for a new trial and for amendment of the "July 20, 1981 [*sic* June 20, 1981]" Order of the Clerk of Superior Court. The court made additional findings of fact, denied the motion for a new trial and affirmed the 19 March 1981 Order of the Clerk of Superior Court. Respondent Ben B. Phillips, Jr., appealed. The appellees are two brothers and two sisters of Helen Brytte Heffner.

Smith, Moore, Smith, Schell & Hunter by Vance Barron, Jr., Pamela DeAngelis and Mary F. Cannon for respondent appellant.

William L. Durham for petitioner appellees.

BRASWELL, Judge.

[1] It is necessary for us to first examine G.S. 1A-1, Rule 60 of the Rules of Civil Procedure, under which the present motion in the cause in the estate of Helen Brytte Heffner was made. The movants (two brothers and two sisters of Helen Brytte Heffner) contended that the executor made an improper distribution of assets through a final accounting, that the executor made a mistake in his construction of the will, and that they were entitled to relief from the order of the Clerk approving the final accounting.

Rule 60(b) provides that:

"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:

* * * *

(6) Any other reason justifying relief from the operation of the judgment.

. . . The procedure for obtaining any relief from a judgment, order, or proceeding shall be by *motion* as prescribed in these rules or by an independent action." (Emphasis added.)

Original jurisdiction in probate and administration of estate matters lies in the Clerk of the Superior Court. G.S. 28A-2-1. The will of Helen Brytte Heffner was being administered under the supervision of the Clerk of the Superior Court. Although a final account had been filed and had been routinely approved as to accounting, there had been no order of discharge of the executor by the Clerk under the provisions of G.S. 28A-23-1. Rule 60 grants to an aggrieved party a choice of remedies for relief from a judgment—either by motion or by independent action.

Clearly, the heirs at law were aggrieved parties if the executor had made an improper distribution of real property assets, in that the will contained no specific devise or residuary clause as to realty. Since the "reason justifying relief" [Rule 60(b)(6)] was an alleged erroneous construction of the will and distribution of assets under the will, it became essential for the Clerk of the Superior Court to construe the wills in question upon his hearing the evidence in the motion in the cause to vacate and set aside the final account. By virtue of the explicit provisions of Rule 60 no independent action for declaratory type relief was required, although the preferred procedure in the interpretation and construction of a will is a declaratory judgment proceeding.

We also note that no "controversy" arose until the time the motion in the cause was filed. Under Rule 60 the rights of all parties can be as fully protected as if there had been an independent suit. No party was taken by surprise as to why they were in court. The Clerk properly construed the wills in question incidental to his original probate jurisdiction. *See* 1 N. Wiggins, Wills and Administration of Estates in N.C. § 130 (1964). *Compare generally,* the application of Rule 60 to G.S. 46-19 in a partitioning

proceeding where there was a petition in the cause for relief after confirmation of the report of commissioners. *Macon v. Edinger*, 49 N.C. App. 624, 272 S.E. 2d 411 (1980), *reversed on other grounds*, 303 N.C. 274, 278 S.E. 2d 256 (1981).

[2] Holding that the case is properly before us under the provisions of Rule 60, we now examine the merits of the motion to vacate. In doing so it is essential that we examine, as did the Clerk of Superior Court and Judge of Superior Court, the two wills in controversy.

Lillie Crouse Heffner (Mrs. S. L. Heffner, the mother), died testate on 4 March 1946; Helen Brytte Heffner (the daughter and one of nine children of Lillie Crouse Heffner) died testate on 16 February 1974.

The pertinent provisions of the holographic will of Lillie Crouse Heffner are:

"THE HOUSE

I want the house, our present dwelling and homeplace, retained as a house for the girls so long as they (or any one of them) desire (or desires) to live in it regularly. I want the furnishings to remain in the house for their use without charge. As long as any one of the children, (Brytte Heffner, Madeline Heffner, Beth Heffner Phillips, Ruth Heffner Self or Zoe Heffner Turner) or several of them together, if they mutually desire, wish to remain in the house as her or their regular dwelling place, I want them to have free use of the house and furnishings. . . ."

The pertinent provisions of the holographic will of Helen Brytte Heffner are the residuary clauses, she not having made elsewhere any specific devise of any interest she might have in the homeplace and are as follows:

"10. My other personal belongs [*sic*] are to go to Beth H. Phillips and are to be shared with my other sisters as she sees fit.

11. All my expenses including funeral and burial are to be paid from my life insurance, my savings and checking accounts at First Union Bank and my savings in G.P.S. Credit

Union and State Employees Credit Union. Any money left from this shall go to Ben Phillips, III, Beth H. Phillips, and Ben Phillips, Jr. shared equally."

By stipulation of facts before the Clerk of Superior Court and the trial judge, the parties agree that when Lillie Crouse Heffner died she was the owner in fee simple absolute of the "homeplace" mentioned in her will. Helen Brytte Heffner was the only daughter of Lillie who resided in the "homeplace" from the time of the death of her mother until her own death. None of the daughters of Lillie lived in the "homeplace" at any time thereafter or expressed a desire to do so. The "homeplace" was sold and conveyed by deed to purchasers for value on about 15 January 1977. From the proceeds of this sale the administrator c.t.a. d.b.n. of Lillie Crouse Heffner paid $8,364.62, which was a one-ninth share, to the estate of Helen Brytte Heffner. These proceeds were distributed by the executor of the estate of Helen Brytte Heffner to Beth H. Phillips, Ben Phillips, Jr. and Ben Phillips III, as indicated in the final account, and allegedly done under Item 11 of the will of Helen Brytte Heffner.

The argument of the appellant asserts that the will of Lillie Crouse Heffner created a testamentary trust for the benefit of her daughters; that the remainder interest in the trust was an interest in personal property; that the direction to the executors in Lillie Crouse Heffner's will required them to sell the homeplace and that this worked an equitable conversion from real property into personal property of Brytte's interest in the proceeds of the sale; that the bequest of "personal belongs" in the will of Helen Brytte Heffner constituted a residuary bequest of personal property; that the trial court erroneously concluded that the proceeds of the "homeplace" sale which were paid into the estate of Helen Brytte Heffner constituted intestate property; and that there should be an entry of judgment for appellant as a matter of law. We disagree for the following reasons.

We summarize the dispositive words of the will of the mother, Lillie Crouse Heffner, as follows: I want the homeplace retained as my daughters' regular dwelling place as long as any one of them, singly or together, wish to remain there, and I want them to have free use of the house. When my daughters no longer wish to retain the house as a regular dwelling place, I want the

property sold and the proceeds divided among my nine children. We hold that this language demonstrated an intent to create a defeasible life estate in her five daughters and a vested remainder interest in each of her nine children. Thus, Helen Brytte Heffner, the only daughter to ever live in the house, had only a 1/9th fee simple interest in the "homeplace." Her life estate terminated upon her death.

The will of the mother lacks any language to create a testamentary trust. As detailed in *Starling v. Taylor*, 1 N.C. App. 287, 291, 161 S.E. 2d 204, 207 (1968), a testamentary trust must have:

"(1) sufficient words to raise a trust,
(2) a definite subject or trust, *res*, and
(3) an ascertained object."

As in *Starling*, even though we assume that the mother's will established the homeplace as the trust *res*, "there is no language in the instrument evidencing any intent to create a trust, nor is there any language from which a transfer of any title or interest to trustees for the benefit of another could be inferred. *Id.* at 291, 161 S.E. 2d at 207. The transfer of title was not to a trustee, but for life to daughters living in the homeplace with remainder in fee to all her children equally. *See* 2 N. Wiggins, Wills and Administration of Estates in N.C. §§ 292, 293 (1964); *Baxter v. Jones*, 14 N.C. App. 296, 188 S.E. 2d 622, *cert. denied*, 281 N.C. 621, 190 S.E. 2d 465 (1972).

The expression, "I want . . . my . . . Executors . . . to carry out the provisions of this my will" is insufficient to constitute the executor as a trustee. The executors can still "carry out" the will in its actual form as a life estate with remainder in fee. Another facet of the language in the will shows an intention to give direction to the remaindermen, and not to a trustee: "If the house is not paid for upon my death . . . then each of the nine children . . . shall share equally in the cost of these final payments."

The defeasible life estate had the potential of duration for the life of the last daughter who continued to make her dwelling place in the homeplace. This potential was exterminated when all of the mother's children conveyed the homeplace by deed to a purchaser for value on 15 January 1977 as shown in the record.

No daughter other than Brytte had expressed a desire to live in the homeplace.

We now turn our attention to the will of Helen Brytte Heffner, the daughter, and start with the court's holding that the 1/9th interest in the homeplace which was devised to Brytte in her mother's will was an interest in real property and not personal property. There is no language in the daughter's will to dispose of her real property. Brytte Heffner died intestate as to the 1/9th ownership interest in the homeplace. We hold that the sentence, "My other personal belongs [*sic*] are to go to Beth H. Phillips . . . ," as expressed in Brytte's will, means belongings of personal property and not the 1/9th interest in realty.

As stated in *Ferebee v. Procter*, 19 N.C. 439, 446 (2d Dev. & Bat. 1837):

> "Nothing can defeat the heir, but a valid disposition to another. Whatever is not given away to some person must descend. . . . If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will, as if his name had been inserted in it as devisee. But, in the mean time, the land descends, and the estate is in the heir."

The doctrine of equitable conversion, as urged upon us by appellants, does not apply. Brytte's will contains no residuary clause as to real property. Even though there is a presumption in law that a testator meant to dispose of all property, the presumption will not prevail when the words employed by the testator refer only to personal property and are silent as to realty. *In re Wolfe*, 185 N.C. 562, 117 S.E. 804 (1923). In this case, for equitable conversion to have possibly applied, it would have been necessary that all of the daughters of the mother cease to live in the homeplace and express no desire to ever live in the homeplace prior to daughter Brytte's death; that the homeplace be sold prior to Brytte's death; and that the proceeds of sale remain undistributed at Brytte's death. Our facts show that Brytte died in 1974 and that the homeplace was not sold until 1977.

The executor distributed the $8,364.62 under Item 11 of Brytte's will, which provided, "Any money left from this shall go to Ben Phillips, III, Beth H. Phillips, and Ben Phillips, Jr." Having

declared that the proceeds were from the sale of realty, that equitable conversion does not apply, and that there was no testamentary trust or residuary clause covering real property, this distribution by the executor was in error. The proceeds of the sale of the homeplace should have been distributed to the heirs at law of Helen Brytte Heffner.

From our examination of the various orders and judgments we hold that the findings of fact and conclusions of law of the Clerk of the Superior Court were proper and fully supported in the record and that therefore findings and conclusions of the trial judge were proper and fully supported in the record.

Affirmed.

Judges HEDRICK and WHICHARD concur.

AYDEN TRACTORS, INC. v. BEVERLY GASKINS AND ARTIS GASKINS v. MASSEY-FERGUSON, INC.

No. 823SC397

(Filed 19 April 1983)

1. **Sales § 17.1— revocation of acceptance—breach of warranty**

The evidence was sufficient to support the trial court's determination that defendants justifiably revoked their acceptance of a combine purchased from plaintiff within a reasonable time after defects therein were not cured, that the remedy provided by an express warranty failed in its essential purpose, and that defendants were entitled to recover the purchase money previously paid to plaintiff.

2. **Trial § 57— nonjury trial—conclusiveness of findings**

Findings of fact made by the court sitting without a jury are conclusive on appeal if supported by competent evidence, and it is presumed that the trial judge considered only the competent evidence and discarded the rest.

APPEAL by plaintiff and third-party defendant from *Rouse, Judge.* Judgment entered 24 November 1981 in Superior Court, PITT County. Heard in the Court of Appeals 17 February 1983.

This controversy arose out of the purchase, by the Gaskins brothers, of a diesel combine from Ayden Tractors, Inc. (Ayden).

Because of alleged defects in that equipment, and numerous unsuccessful attempts by Ayden to cure the defects, the Gaskins returned the combine to Ayden. Ayden sued on the resulting unpaid balance and on an open account. The Gaskins counterclaimed, alleging, primarily, that the defective nature of the combine constituted a breach of the express warranty, and that because they had properly revoked their acceptance of the machine, they were entitled to a refund of the purchase price, consequential damages, attorney's fees and costs. From a judgment for defendants, the Gaskins brothers, plaintiff and third-party defendant Massey-Ferguson, Inc., appeal to this Court.

Everett & Cheatham, by Edward J. Harper, II, for plaintiff appellants.

Harrell & Titus, by Richard C. Titus, for third-party defendant appellant.

Barker, Kafer & Mills, by James C. Mills, for defendant appellees.

BECTON, Judge.

I

Procedural and Factual History

The lengthy and involved factual and procedural background of this case follows. On 1 October 1975 defendants, the Gaskins brothers, entered into a contract for and purchased a Massey-Ferguson model 750 combine, a Cornhead and a grain table, from the plaintiff, Ayden Tractors, Inc., for $43,500. Defendants tendered, at that time, a Gleaner with trade-in value of $7,500. They made a $7,625 down payment, $3,825 of which was cash, the balance evidenced by a promissory note in the principal amount of $3,800. That note was due on 1 November 1975; plaintiffs charged no interest on the $3,800. The reverse of the purchase contract contained a warranty agreement covering the purchased equipment, which provided:

> All NEW Massey-Ferguson agricultural machines and equipment (hereinafter called products) are sold by the dealer upon the following warranty and agreement given by the dealer, WHICH IS IN LIEU OF AND EXCLUDES ALL OTHER WARRANTIES AND CONDITIONS EXPRESSED OR IMPLIED, INCLUDING

THE WARRANTIES AND CONDITIONS OF MERCHANTABILITY AND FITNESS FOR PURPOSE, and any other obligation on the part of the dealer or Massey-Ferguson. The dealer neither assumes nor authorizes any person to assume for it any other liability in connection with the sale of such products. The obligation of the dealer or Massey-Ferguson, under this warranty, is limited to replacing parts, at no charge to the Buyer, which prove defective with normal and proper use of the product for the purpose intended.

This warranty applies only to a new, unused Massey-Ferguson product, there being no warranty of any nature in respect to used products or new products that have been modified or altered, repaired, neglected, or used in any way which, in the opinion of the dealer or Massey-Ferguson, adversely affects its performance.

All such new, unused Massey-Ferguson products are warranted to be free from defects in material or workmanship, which may cause failure, for a period of twelve months from the date of delivery to Buyer or 1500 hours of use, whichever occurs first.

It is the responsibility of the Buyer, at his expense, to transport the machine or equipment to the dealer's service shop or, alternatively, to reimburse the dealer for any travel or transportation expense involved in fulfilling this warranty. When requested by the dealer, part or parts shall be returned for inspection, transportation prepaid, to a place designated by the dealer. IN NO EVENT SHALL THE BUYER BE ENTITLED TO RECOVER FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF CROPS, INCONVENIENCE, RENTAL OF REPLACEMENT EQUIPMENT, LOSS OF PROFITS, OR OTHER COMMERCIAL LOSS.

Defendants took delivery of the combine and accessories on 1 October 1975. The following day they began to experience problems with the combine. Evidence tended to show that the combine's diesel engine would overheat and then be automatically shut-down by a safety valve mechanism. Defendants testified that it ran about thirty minutes and stopped. Plaintiff was notified, and a serviceman was promptly dispatched. The safety valve was removed. For the remainder of the 1975 harvest season the

machine worked properly about one-third (1/3) of the time it was in use. Defendants admit that plaintiff's representatives responded promptly on each of the numerous occasions service calls were made, and that parts of the combine were taken into the shop, repaired and returned. This work was all "under warranty."

In addition to the heating problem, defendants noticed, during the 1976 harvest season, that the combine's engine had begun to "use oil." Defendant Artis Gaskins testified that plaintiff's serviceman removed the engine, kept it for about a week, and reinstalled it into the combine. Further: "After they [Plaintiff] put the motor in the machine, we tried to use it some more. It would still run hot. Still do the same thing when we used it an hour or sometimes two." Toward the end of the 1976 season, the engine overheated, a hydraulic line burst, and the engine caught fire. Plaintiff was called, and its representative came to defendants' farm and removed the combine to Ayden, North Carolina. Plaintiff kept the combine from late fall of 1976 to sometime in August of 1977.

Apparently, because of the numerous problems defendants experienced with the machine, plaintiff asked the manufacturer and third-party defendant, Massey-Ferguson, Inc., to extend the warranty covering defendants' machine. This modification was made in June of 1977. Defendants contend that a refinancing agreement was also executed in June of 1977, extending the repayment period on the debt owed for the combine. Plaintiff agrees that the warranty was extended in June 1977 but argues that the renewal contract was not executed until 22 December 1977. The parties are in accord on the fact that the renewal contained the following pertinent provisions:

> In further consideration of such renewal, refinancing, restatement and extension of time of payment, *I hereby expressly waive all claims arising out of the purchase of said property and all defenses, statutory or otherwise, to the payment hereof.* I understand and agree that the execution and delivery of this agreement shall not rescind or revoke the refinanced Contract(s) or affect in any way the rights and obligations thereunder except as expressly amended or revised herein. [Emphasis added.]

Defendants began the 1977 harvest season using the combine. Despite extensive repairs made by plaintiff during the spring of 1977, the combine continued to overheat. Also, defendants testified that the batteries were not sufficiently charged by the machine's engine. Beverly Gaskins testified that plaintiff's representative admitted to him and his brother that plaintiff could not correct the problem.

Subsequently, either in November 1977 or January 1978, defendants informed plaintiff that they were returning the combine, and asked plaintiff to refund that portion of the purchase price already paid. Plaintiff took possession of the combine in early 1978. Plaintiff sued, alleging that defendants owed $1,600 on the promissory note evidencing the partial down payment and $3,072.23 on an open account, and asked for judgment in those amounts against defendants with interest on same. Defendants answered, denying the principal allegations of the complaint, and counterclaimed, alleging that the problems with the combine and plaintiff's inability to correct them constituted a breach of warranty, and that the "down time" caused them financial loss. Defendants sought refund of the purchase price, down payment, and interest paid to date, lost profits, consequential damages, attorneys' fees and costs. Defendants filed, at the same time, a Third-Party Complaint against Massey-Ferguson, Inc. and Massey-Ferguson Credit Corporation, as manufacturer and lien holder, respectively. Defendants prayed for the same relief against the third-party defendants as they did against plaintiff, and in addition, asked that the original sales contract and financing agreement dated 1 October 1975 be declared null and void.

Plaintiff moved to dismiss the defendants' counterclaim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, replied to the counterclaim in the alternative, and filed a cross-claim against the third-party defendants for indemnification. Similarly, the third-party defendants moved to dismiss the Third-Party Complaint pursuant to Rule 12(b)(6) and filed, in the alternative, defenses to that Complaint.

Plaintiff moved for summary judgment on its claim for relief and against defendants on their counterclaim. A hearing in Pitt County Superior Court was held on plaintiff's motion together with third-party defendant's summary judgment motion. The trial

court entered an order on 25 September 1979, granting plaintiff's first cause of action ($1,600, interest and costs), denying defendants' counterclaim, and continuing plaintiff's second cause of action ($3,072.23 on the open account). The court treated third-party defendant Massey-Ferguson Credit Corporation's Rule 12(b)(6) motion to dismiss as a motion for summary judgment and dismissed defendants' claim against it. Defendants appealed to this Court.

Upon filing and service of briefs, plaintiff and third-party defendants moved that the matter be remanded to Pitt County Superior Court because the issue of revocation of acceptance was not raised in the trial court but rather was raised for the first time on appeal. The Credit Corporation argued also that defendants failed to argue the impropriety of the dismissal in its favor and thus had abandoned its appeal as to the judgment for the Credit Corporation. This Court reversed the trial court's order with respect to plaintiff and third-party defendant Massey-Ferguson, Inc.; it affirmed the dismissal of the action against the Massey-Ferguson Credit Corporation and remanded the matter to the Superior Court of Pitt County.

A trial was held before the Honorable Robert Rouse, sitting without a jury, in Superior Court, Pitt County. After hearing the evidence, the trial court found, *inter alia*, that due to the continuing pattern of problems with the combine, the defendants justifiably revoked their acceptance of the combine within a reasonable time after the defects were not cured and gave notice of revocation in apt time. The trial court found further that the Gaskins reasonably expected that the defects in the combine had been or would be cured. Upon those and the other findings, the trial court concluded that plaintiff was not entitled to recover the balance of the purchase price but was entitled to recover the arrearage on the pre-existing open account. It further concluded and ordered that while defendants were entitled to recover the purchase money previously tendered to plaintiff, they were not entitled to recover consequential damages, and that the remedy provided by the express warranty given defendants failed in its essential purpose. Finally, the trial court ordered that plaintiff could recover, on its cross-claim against Massey-Ferguson, Inc., the sums awarded defendant.

II

Motion To Dismiss

[1] Plaintiff and third-party defendant raise fifty-eight (58) assignments of error and bring forth twelve (12) arguments on appeal. Appellants, by their first argument, contend that the trial court erred when it denied both plaintiff's and third-party defendant's motions to dismiss defendants' counterclaim and third-party claim, made pursuant to Rule 41(c) of the North Carolina Rules of Civil Procedure. Involuntary dismissal under Rule 41(b) is properly granted in the following circumstances: (1) if the party with the burden of proof has shown no right to relief, or (2) if that party has shown a right to relief but the trial court as trier of fact determines that the movant is entitled to a judgment on the merits. *Jones v. Insurance Co.*, 42 N.C. App. 43, 255 S.E. 2d 617 (1979). "The question raised [by a] motion to dismiss [pursuant to Rule 41(b)] made at the close of all the evidence is whether any findings of fact could be made from the evidence which would support a recovery for [the party with the burden of proof]." [Citation omitted.] *Neasham v. Day*, 34 N.C. App. 53, 55, 237 S.E. 2d 287, 288-89 (1977). The denial of the appellants' motions and entry of judgment for defendants *sub judice* means that the trial court concluded that defendants presented sufficient evidence to show a right to relief. Since our review of the record reveals that that conclusion was supported by findings of fact based on competent evidence, we affirm the trial court's denial of appellants' motions. *Cf. Jones v. Insurance Co.* at 46, 255 S.E. 2d at 619 (denial of motion for involuntary dismissal and entry of judgment for plaintiff *held*, reversible error because conclusion not supported by findings based on competent evidence).

III

Evidentiary Rulings

Appellants' eleven remaining arguments concern evidentiary rulings of the trial court. Because the trial court made numerous factual findings and evidentiary rulings, we set forth appellants' contentions concerning them *seriatim*. Argument # : . . .

2. The trial court erred when it found that the combine was defective, based on testimony given by lay witnesses.

3. The trial court erred when it found as a fact and concluded that defendants' revocation of acceptance was reasonably made in a timely fashion.

4. The trial court erred when it found as a fact and concluded as a matter of law that defendants reasonably expected defects in the combine had been or would be cured and that defendants' acceptance of the equipment was induced by plaintiff's assurances that the nonconformity would be cured.

5. The trial court admitted evidence, extrinsic to the warranty contract, in violation of the parol evidence rule.

6. The trial court erroneously assumed that the gravamen of defendants' counterclaim and third party complaint was breach of express warranty.

7. The trial court erroneously found that defendants relinquished the combine in November 1977, and should have found that defendants returned it in January or February of 1978.

8. The trial court admitted evidence concerning the date of the renewal contract in violation of the parol evidence rule.

9. The trial court admitted evidence relevant only to matters not pleaded.

10. The trial court failed to find that plaintiff was entitled to recover interest on the unpaid open account at an A.P.R. of 18%.

11. The trial court erroneously admitted testimony concerning the legal effect of a letter.

12. The trial court erroneously concluded that the express warranty contained in the original contract failed in its essential purpose.

The applicable rules follow.

[2] When, as here, issues are tried before the court sitting without a jury, the trial court sits as both judge and jury. Findings of fact so made, if supported by competent evidence, are as conclusive on appeal as a jury verdict. *McMichael v. Motors, Inc.*, 14 N.C. App. 441, 188 S.E. 2d 721 (1972). Further, it is presumed that a trial judge, when sitting as fact finder, is able to and does

sift through the evidence presented, considering only that which is competent, and discarding the rest. *Cf., State v. Sneed*, 14 N.C. App. 468, 188 S.E. 2d 537 (1972) (judge presumed to have considered only competent evidence during *voir dire* hearing).

We have conducted an extensive review of the briefs and records in this case and find that there was plenary competent evidence to support the trial court's findings, that those findings support its conclusions, and that the conclusions support the judgment. Although four (4) of the "findings" are more properly denominated conclusions of law, appellants were not prejudiced by that error since they, too, are based on facts which are supported by competent evidence.

Accordingly, we find no error in the appellants' trial and affirm the judgment below.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

ALVIS T. WEAVER v. SWEDISH IMPORTS MAINTENANCE, INC., RELIANCE INSURANCE COMPANY

No. 8210IC183

(Filed 19 April 1983)

Master and Servant § 67— workers' compensation—heart attack—accident

The evidence supported the Industrial Commission's determination that plaintiff mechanic was injured by accident arising out of and in the course of his employment in that his activity in attempting to replace a wheel and tire on an automobile required unusual or extraordinary exertion and, by reason thereof, he sustained a heart attack where it tended to show that the total weight of the tire and wheel was 60 pounds, some 20 pounds heavier than the tires he normally worked with; while plaintiff was in a squatting position, he lifted a wheel and tire off the floor and upward toward the hub; the hub turned and he missed placing the wheel on it; the weight of the wheel pulled him over forward and he experienced a heart attack; he lifted the wheel and tire several inches higher than normal; he normally scooted the wheel up to the hub by using his knees without bodily lifting the wheel the distance to the hub; plaintiff's medical expert testified that in his opinion the exertion of lifting the wheel and tire from the floor and attempting to place it on the hub

could have precipitated the heart attack; and plaintiff had not had any difficulty with chest pains before and was in good health.

APPEAL by defendant from order of the North Carolina Industrial Commission entered 8 September 1981. Heard in the Court of Appeals 11 January 1983.

This action was brought under the Workers' Compensation Act for compensation for the temporary total disability of plaintiff, Alvis T. Weaver, alleged to have resulted from an injury by accident arising out of and in the course of his employment as a mechanical technician by defendant, Swedish Imports Maintenance, Inc. A hearing was conducted before Deputy Commissioner Haigh. Upon the evidence presented, the deputy commissioner found that on 12 April 1979, plaintiff's activity in attempting to replace a wheel on a Volvo automobile, under the circumstances, required unusual or extraordinary exertion and, by reason thereof, he sustained a myocardial infarction or heart attack. The deputy commissioner concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer, and awarded compensation for temporary total disability from 13 April 1979 to 15 July 1979. On review, the Full Commission modified two of Deputy Commissioner Haigh's findings of fact and adopted and affirmed the award of compensation to plaintiff. Defendants appeal.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison, by William P. Daniell, for defendant appellants.

E. C. Harris, for plaintiff appellee.

JOHNSON, Judge.

The issues on appeal in this workers' compensation case are whether the Commission erred in finding and concluding that the plaintiff's activity at the time he sustained a myocardial infarction constituted an unusual or extraordinary exertion and erred in finding and concluding that there was a causal relationship between the plaintiff's employment and the injury suffered by him.

We note at the outset that the jurisdiction of appellate courts on appeal from an award of the Industrial Commission is limited to the questions of (1) whether there was competent evidence

before the Commission to support its findings and (2) whether such findings support its legal conclusions. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *King v. Forsyth County*, 45 N.C. App. 467, 263 S.E. 2d 283, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 676 (1980).

The Full Commission found the following facts to which no exceptions have been taken: Plaintiff worked for the defendant employer as a mechanical technician performing maintenance and repair work on Volvo and Saab automobiles. On 12 April 1979 he began repairing a Volvo. Plaintiff, who was 5 feet, 4 inches tall and weighed 125 to 130 pounds, used a jack to raise the automobile so that the front wheels were approximately two inches above floor level. He removed the front wheels, rolled them out of the way, and jacked the Volvo to a height so that the center of the wheel hub was about 20 inches above floor level. Each wheel weighed approximately 60 pounds. Later, while plaintiff was in a squatting position, he turned to his right and lifted a wheel off the floor and upward toward the hub to replace it. The hub turned and he missed placing the wheel on it. The weight of the wheel pulled him over forward and he experienced a crushing chest pain, dropped the wheel and fell forward to his knees. He remained on the floor for about five minutes in terrible pain and with loss of the use of his arms. The wheel which plaintiff was lifting was larger than the normal size of one on a Volvo. Also, plaintiff had never been in a squatting position before while lifting a wheel this heavy this distance. He normally jacked the wheel so that the clearance between a mounted wheel and the floor was only about two inches and he normally scooted the wheel up to the hub by using his knees, without bodily lifting the wheel the distance to the hub.

Plaintiff was later examined by Dr. Samuel W. Warburton, Jr. at Durham County General Hospital. Dr. Warburton diagnosed that plaintiff had suffered an anterior wall myocardial infarction or heart attack. Plaintiff was hospitalized, placed in intensive care, and given medication. Subsequent to his discharge from the hospital, plaintiff was seen by Dr. Warburton through 7 September 1980. He released plaintiff to return to work 15 July 1979 without any physical limitations. Plaintiff returned to work with defendant employer 10 September 1979 and has continued to work there since.

At the time of the incident, plaintiff was 46 years of age. Prior to 12 April 1979 he had never had "heart problems" nor received medication therefor. Plaintiff did have a history of high blood pressure and routinely had medical checkups two or three times a year.

Defendants except and assign error to the following finding and conclusion:

> Plaintiff sustained an injury by accident arising out of and in the course of his employment on 4-12-79. His activity, under the circumstances, required unusual or extra-ordinary exertion and by reason thereof he sustained a myocardial infarction.

Error is also assigned to this additional conclusion of law:

> Plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer on 4-12-79. G.S. 97-2(6): *GABRIEL v. NEWTON*, 227 N.C. 314 (1947).

Defendants concede that there was sufficient competent evidence to support a finding that the plaintiff lifted a 60 pound tire a greater distance than normal at the time of his injury, and that this finding is, therefore, conclusive upon appeal. However, defendants contend that there was insufficient evidence to support the Commission's finding that the plaintiff's activity constituted an unusual or extraordinary exertion. Defendants argue that "neither the existing case law nor simple logic support a finding that the lifting of the tire in question several inches higher than normal constitutes an unusual or extraordinary exertion."

In determining whether the facts found are supported by the testimony offered, we are to consider the evidence of record in the light most favorable for the claimant. Permissible inferences *contra*, which might be drawn from the testimony, would not warrant the court in setting aside the findings of the Commission. *Gabriel v. Newton*, 227 N.C. 314, 316, 42 S.E. 2d 96, 97 (1947). Examination of the testimony presented, taken in a light favorable to the claimant, leads to the conclusion that the finding of "unusual or extraordinary exertion" is supported by the testimony offered. The testimony offered shows that plaintiff

lifted, rather than "scooted" the tire and wheel as he usually did; that the total weight of the tire and wheel was 60 pounds, some 20 pounds heavier than the tires he normally worked with; and that he lifted this weight to a height higher than normal from a squatting position. This evidence supports the reasonable inference that the exertion required was unusual or extraordinary, particularly for a person as small as the plaintiff. Testimony from plaintiff's doctor that the lifting of a weight comparable to that of a normal tire might just as likely have precipitated plaintiff's heart attack, raising a permissible inference *contra*, does not warrant the setting aside of the Commission's findings. *Gabriel v. Newton, supra.* The Commission's finding of unusual exertion is supported by competent evidence and is therefore conclusive on appeal.

The Workers' Compensation Act, G.S. 97-1, *et seq.* defines a compensable personal injury as "injury by accident arising out of and in the course of the employment." G.S. 97-2(6). The same statute provides that an injury by accident "shall not include disease in any form, except where it results naturally and unavoidably from the accident."

Based upon its finding of excessive exertion, the Commission concluded that on 12 April 1979 plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer. Defendants contend that this conclusion is error because plaintiff has failed to demonstrate a causal link between his injury and his employment by expert medical testimony. In support of this contention, defendants rely upon *Bellamy v. Stevedoring Co.*, 258 N.C. 327, 128 S.E. 2d 395 (1962) and *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410 (1954) and argue that Dr. Warburton's testimony failed to establish that plaintiff's activity caused the heart attack and that the medical evidence demonstrated that plaintiff was going to suffer a heart attack regardless of that activity.

We believe that the Commission correctly concluded from the evidence presented that the extent and nature of plaintiff's exertion in lifting the wheel resulted in injury to the plaintiff's heart by accident within the meaning of G.S. 97-2(6), as that statute has been interpreted and applied in *Gabriel v. Newton, supra* and *King v. Forsyth County, supra.*

In this case Dr. Warburton, recognized as an expert in the general field of medicine, testified on direct examination that he did have an opinion satisfactory to himself as to the cause of the heart attack or myocardial infarction, and further stated that in his opinion the exertion expended in lifting a 60 pound wheel from the floor and placing it 20 inches from the floor could have precipitated the heart attack at that time. On cross-examination the following exchange occurred:

Q. You weren't saying his activity caused it?

A. Since cause with heart attack is extremely hard to determine, in my opinion—

Q. It wasn't your opinion to state his activity caused the heart attack?

A. There is a difference between cause and specific cause. I leave that to you.

Q. But your intention . . . you're talking about precipitation and by that I take it you mean it brought about the onset of the myocardial infarction?

A. Correct.

As to plaintiff's health prior to the heart attack, Dr. Warburton testified that although plaintiff had a history of past high blood pressure, plaintiff had not had difficulty with chest pains before and was in good health. Dr. Warburton admitted on cross-examination that arteriosclerosis of the coronary arteries is the primary cause of myocardial infarction. The doctor responded to a question regarding plaintiff's having some type of arteriosclerosis prior to 12 April 1979 by stating only "I would presume so."

"In *Gabriel v. Newton*, 227 N.C. 314, 42 S.E. 2d 96 (1947) our Supreme Court clearly recognized that damage to heart tissue clearly precipitated or caused by 'overexertion' constitutes an injury by accident." *King v. Forsyth County*, 45 N.C. App. at 468, 263 S.E. 2d at 284. In *Gabriel*, the claimant, a municipal policeman was called to arrest a young man under the influence of liquor. The man resisted and was subdued only by great exertion during a long struggle. Once at the jail, Gabriel and an assistant had to carry the man up three flights of stairs. On arriving at the top, Gabriel collapsed. A physician diagnosed Gabriel's condition as

acute dilation of the heart due to excessive exertion. The Commission awarded compensation. In affirming the award, the Supreme Court stated:

> It would seem from the facts found that reasonable inferences may be drawn which afford support for the conclusion reached that the deceased suffered an injury by accident within the meaning of the statute, and that death proximately resulted . . . There was evidence warranting the conclusion that the injury resulted not from inherent weakness or disease but from an unusual and unexpected happening. The circumstances, embracing the excessive exertion of subduing a recalcitrant prisoner and carrying the weight of his body up the stairs, indicated that the injury sustained was "a result produced by a fortuitous cause."

227 N.C. at 317-18, 42 S.E. 2d at 98. In *King* the claimant, a deputy sheriff, engaged in a vigorous foot chase of a suspect. Immediately after the chase, King suffered difficulty in breathing. A physician diagnosed that King had experienced an acute myocardial infarction. The Commission found that prior to the chase, King was 49 years old, in good health, and had no prior indication of heart problems. Further, that King had suffered his heart attack as a result of physical exertion entailed in the foot chase. However, compensation was denied by the Commission on the ground that the plaintiff had failed to show that the overexertion occurred while he was engaged in some unusual activity. This Court reversed the Commission's conclusion, holding that the evidence and the findings of the Commission supported no other legal conclusion but that the extent and nature of the exertion experienced during the foot chase classified the resulting injury to King's heart as an injury by accident within the meaning of G.S. 97-2(6). 45 N.C. App. at 471, 263 S.E. 2d at 285. Although the testimony of the medical expert which established the necessary causal link is not set out in the opinion, it is clear that this Court found the evidence of King's unusual physical exertion followed by a heart attack, coupled with his lack of prior indication of heart problems sufficient to establish a causal link between the exertion and the heart attack.

The evidence before the Commission in the case under discussion supports its conclusion that plaintiff suffered a compensable injury by accident while attempting to replace the wheel on

an automobile. The Commission found that the wheel plaintiff was lifting was heavier than normal; was lifted a greater height than normal from an unusual position; and that when plaintiff missed placing it on the hub, "the weight of the wheel carried or pulled him over forward whereupon he experienced crushing chest pains." Further, that plaintiff had never had "heart problems" nor medication therefor prior to the date of the injury, when an EKG (electrocardiogram) revealed an anterior wall myocardial infarction. Dr. Warburton's testimony, taken as a whole, establishes a causal link between the exertion and the heart attack. As in *Gabriel* and *King*, there was sufficient evidence warranting the conclusion that the injury resulted not from inherent weakness or disease, but from an unusual and unexpected occurrence.

Bellamy v. Stevedoring Co., supra, where recovery was denied, is distinguishable because the medical evidence in *Bellamy* had shown that the work in which Bellamy was involved did not cause the heart attack. There the claimant was 65 years of age, had a fair amount of arteriosclerosis and diabetes, which accelerates the arteriosclerosis hardening process. On the morning before his heart attack, Bellamy had vomited before leaving for work. Although his expert medical witness testified that the exertion on the occasion might have been a precipitating or hastening factor, he concluded that "activity has nothing to do with production of a myocardial infarction." 258 N.C. at 329, 128 S.E. 2d at 397.

Here, plaintiff's medical expert adequately established the causal link between the activity and the injury. The defendants' reliance upon *Lewter v. Enterprises, Inc., supra*, is similarly misplaced. The record in that case indicated that Mrs. Lewter had been treated by a doctor for high blood pressure for some three years. Mrs. Lewter, who was a cashier in the ticket booth of a theater, had been told that the theater was on fire. She exerted herself while giving the patrons refunds. Later, Mrs. Lewter collapsed unconscious in the ticket booth and died the following morning of a cerebral hemorrhage due to hypertension. The medical evidence was to the effect that the fire and Mrs. Lewter's excitement would only have aggravated her condition. Recovery was denied on the grounds that Mrs. Lewter's employment could not, therefore, be considered a contributing proximate cause to her death. However, the Supreme Court, in reviewing its position

on the compensability of heart attack claims under the Act, again concluded that upon a showing that unusual or extraordinary exertion brought on the heart injury, compensation would be proper. 240 N.C. at 404, 82 S.E. 2d at 415.

Defendants' argument that plaintiff's history of high blood pressure leads to the inescapable conclusion that plaintiff was going to suffer a heart attack irrespective of the activity on the occasion, as was true of the claimants in *Bellamy* and *Lewter*, is not supported by the record in this case. Rather, the record amply sustains the Commission's findings and conclusions that plaintiff's activity under the circumstances required unusual or extraordinary exertion and that the damage to plaintiff's heart was precipitated or caused by that overexertion. For the reasons stated herein, the award of compensation by the Industrial Commission is

Affirmed.

Judges HEDRICK and EAGLES concur.

MYRON SILVERMAN v. GEORGE TATE, JR., D/B/A/ TATE CONSTRUCTION CO.

No. 8215SC480

(Filed 19 April 1983)

1. **Rules of Civil Procedure § 55— entry of default—showing defendant's failure to answer**

An entry of default was not improper because plaintiff failed to file an affidavit attesting to defendant's failure to answer since G.S. 1A-1, Rule 55(a) does not require proof of defendant's failure to answer solely by affidavit but permits the clerk to act upon any proof which he or she deems appropriate, including the record alone.

2. **Rules of Civil Procedure § 55.1— setting aside entry of default—failure to show good cause**

Defendant failed to show good cause for setting aside an entry of default against him where defendant asserted that he had taken the complaint and summons to his insurance agent who assured him that everything would be taken care of, but plaintiff filed an unrebutted affidavit by his attorney that he had discussed the case with defendant's attorney before seeking an entry of default.

3. Rules of Civil Procedure § 55— entry of default—jurisdictional proof not required

Proof of jurisdiction over a nonappearing defendant is required by G.S. 1-75.11 only when a default judgment is to be entered against such defendant but is not required for an entry of default.

4. Contracts § 29.2— defective roof repairs—measure of damages

In an action to recover damages for defective work in repairing a roof, the trial court properly permitted plaintiff to recover 54% of the amount plaintiff paid another contractor to replace the entire roof plus an amount for the repair of structural water damage where the evidence showed that defendant's work covered approximately 54% of the roof area; the initial repair to plaintiff's roof made by defendant failed and defendant made two subsequent attempts to repair the roof; the roof developed large blisters in the area repaired by defendant, indicating the emergence of water under the blisters; the roof should have lasted for several years had defendant properly performed the work; and the work performed by the second contractor was necessary to assure that the roof would not continue to leak.

APPEAL by defendant from *Martin, Judge.* Judgment entered 26 January 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 16 March 1983.

Appeal from judgment by defendant who cites as error the repeated denial of his motions to set aside an entry of default.

Haywood, Denny & Miller, by Michael W. Patrick, for plaintiff-appellee.

Levine, Stewart & Tolton, by Michael D. Levine and John Stewart, for defendant-appellant.

HILL, Judge.

On 23 November 1979, defendant entered into a written contract for $1,300.00 to repair a portion of plaintiff's leaking roof. Defendant scraped gravel off a 400-500 square foot area of the roof, applied tar and replaced the gravel. When defendant later learned that the roof had resumed leaking, he made further repairs. Plaintiff determined subsequently that defendant's repairs were defective, causing deterioration of the roof and requiring him to expend an additional $5,618.00. Plaintiff's attorney, by letters dated 30 April 1981, 15 May 1981, and 23 June 1981, advised defendant of the need for additional repairs and asked defendant to contact him. Defendant did not reply. On 5 August 1981, plaintiff filed a complaint in which he alleged defendant's

defective work and sought $5,618.00 in damages. Defendant failed to file an answer. On 10 September 1981, the Clerk of Orange County Superior Court filed an entry of default against defendant pursuant to G.S. 1A-1, Rule 55(a).

In support of his 14 October 1981 motion to set aside the entry of default, defendant by affidavit asserted that he had taken the complaint and summons to his insurance agent at the Chapel Hill Communities Insurance Company who had assured defendant he would "take care of everything." The "next thing [he] knew," defendant received a court calendar showing the case scheduled for hearing the week of 26 October 1981. Defendant gave the calendar to his insurance agent who had been discussing the case with plaintiff's attorney. On 7 October 1981, defendant, formerly unaware that his insurance company had "not taken any steps to defend this case," referred the matter to his attorney.

In opposition to defendant's motion, plaintiff's attorney submitted an affidavit showing substantially that he had written and mailed the previously mentioned letters to defendant; that in July 1981 defendant's attorney contacted him, but they were unable to reach an acceptable settlement; that suit was filed in August 1981 with entry of default taken on 10 September 1981; that no one contacted him after institution of the suit until 1 October 1981, when an insurance agent for Reliance Insurance Company, defendant's insurer, called him. Defendant had contacted the agent on 1 October 1981 after he received the court calendar. The trial judge denied defendant's motion, concluding that defendant failed to show good cause to set aside the entry of default.

On 3 December 1981, plaintiff notified defendant that he would "bring on this action for hearing to assess damages to permit entry of default judgment" on 19 January 1982. Defendant renewed his motion to set aside the entry of default and contended that a default judgment against him would contravene G.S. 1A-1, Rule 55(a) and G.S. 1-75.11.

Defendant offered at hearing and renews on appeal two arguments for setting aside the entry of default: (1) plaintiff did not file, as required by G.S. 1A-1, Rule 55(a), an affidavit attesting to defendant's failure to answer; and (2) entry of default violated the provisions of G.S. 1-75.11 which requires proof of jurisdiction over a nonappearing defendant before entry of a judgment by de-

fault. We find that the defendant has misconstrued the former statute and misapplied the latter. Therefore, we hold that the court properly denied defendant's motions to set aside the entry of default.

[1] "When a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit, motion of attorney for the plaintiff, *or otherwise*, the clerk *shall* enter his default." G.S. 1A-1, Rule 55(a) (emphasis ours). Rule 55(a) plainly does not require proof solely by affidavit; the clerk may act upon any proof he or she deems appropriate, including the record alone. Shuford, N. C. Civil Practice and Procedure 2d, Default, § 55-3, p. 423.

[2] To set aside an entry of default, good cause must be shown. *Crotts v. Pawn Shop*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972). Thus, the question before this Court is whether the trial judges below abused their discretion in finding defendant failed to show good cause to set aside the entry of default. We find the trial judges ruled properly. Plaintiff asserted that he had discussed the case with defendant's attorney before seeking entry of default, an allegation not rebutted by defendant. We conclude that there was ample evidence from which the court may have found that defendant was negligent in establishing promptly any defenses he may have had.

[3] Unlike entry of judgment by default, entry of default does not require submission of jurisdictional proof. *See* G.S. 1A-1, Rule 55(b), G.S. 1-75.11 and Shuford, *id.* The clerk of court properly entered a default based on the existing proof of defendant's inaction. *See* G.S. 1A-1, Rule 55(a). Defendant was served personally on 6 August 1981. The record before the clerk of court indicated the date of filing of the lawsuit and that the necessary time had passed before plaintiff's motion for entry of default was made. Plaintiff's attorney orally moved for entry of default, a widely-used practice approved by our courts. *See Sawyer v. Cox*, 36 N.C. App. 300, 244 S.E. 2d 173, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 216 (1978). The record revealed that no answer by defendant had been filed as of the date of plaintiff's motion. We conclude the language of G.S. 1-75.11 indicates that proof of jurisdiction is required only when a *judgment* is to be entered against a nonappearing defendant. Such proof is not required for an entry of default.

The courts below appropriately denied defendant's motion to set aside the entry of default. There being no clear abuse of discretion, the denial of defendant's motions must stand. *See Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 264 S.E. 2d 395 (1980).

[4] We turn finally to defendant's contention that the trial court applied an incorrect rule of damages in making its award to plaintiff. This assignment likewise is overruled.

The initial repair to plaintiff's roof made by defendant failed, and defendant made two subsequent attempts to repair the roof. The roof developed large blisters, indicating the emergence of water under the blister. Plaintiff retained Pickard Roofing Company to replace the entire roof at a total cost of $5,018.00. The defendant's original work covered approximately 54 per cent of the area later covered by Pickard. The trial judge awarded plaintiff an amount equal to 54 per cent of the total cost less $600.00, which represents the cost of sloping the roof, a structural change.

Defendant contends plaintiff got what he bargained for—a patch job. Pickard testified plaintiff's roof might have lasted several years had defendant properly performed his contract. Defendant further argues plaintiff failed to show that the damages were the natural and probable result of defendant's action; and that plaintiff failed to establish his loss with reasonable certainty. *Goforth v. Jim Walters, Inc.*, 20 N.C. App. 79, 201 S.E. 2d 51 (1973); *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968).

A basic principle underlying decisions regarding the measure of damages for defective performance of building and construction contracts is that the parties are entitled to the benefit of their bargain, or an equivalent thereof. *Silver v. Board of Transportation*, 47 N.C. App. 261, 267 S.E. 2d 49 (1980).

> "What the equivalent is depends upon the circumstances of the case. In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contrac-

> tor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value."

Robbins v. Trading Post, Inc., 251 N.C. 663, 666, 111 S.E. 2d 884, 887 (1960). A corollary of the foregoing principle is that the parties injured by breaches of contract are entitled to be placed as nearly as possible in the positions they would have occupied had their contracts been properly performed. *Coley v. Eudy*, 51 N.C. App. 310, 276 S.E. 2d 462 (1981). A second basic principle is that special contract damages must have been foreseeable at the time the contract was entered into as natural or contemplated results of a breach. *See Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979).

In the case before us, the evidence showed the presence of water beneath the roof which caused blistering. The defendant had agreed to repair the roof to eliminate water. This he failed to do. It was reasonably foreseeable that areas of the house beneath the roof would be damaged if water were permitted to enter.

The trial judge found:

> Each of the items performed by Pickard Roofing Company, Inc., except the work it did in sloping the roof by installing fibreboard insulation for which it charged Six Hundred Dollars ($600.00), was required to repair the roof because of the defective repair by defendant.

Defendant did not except to this finding. He did except to finding of fact #15, which states:

> Plaintiff has established by the greater weight of the evidence that he has suffered damages in the amount of One Hundred Two Dollars and Forty-four Cents ($102.44) for the repair of structural damages and Two Thousand Seven Hundred Nine Dollars and Seventy-two Cents ($2,709.72) for the additional repairs to his roof, said sum being 54% of the sum of Five Thousand Eighteen Dollars ($5,018.00).

The question before us is whether the evidence in the record is sufficient to establish with reasonable certainty the damages awarded by the trial judge. *See Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975). James Pickard of Pickard Roofing Company

testified that all the repair work he had performed in 1981 was necessary to assure the roof would not continue to leak. He further testified that the cost of repairing the 540 square foot area was proportional to the total cost of the job. We conclude this formula is adequate, since the cost of sloping the roof had been eliminated from the cost of repair. This assignment is overruled.

We find no error in the award of $102.44 for replacement of the wooden structural materials beneath the roof. Plaintiff testified no wooden structural damages existed when defendant first repaired the house. Pickard testified the damage he found later had been caused by water. One may reasonably conclude in the absence of other factors that the repaired roof had leaked. The cost of repair is established in the record.

The judgment of the trial court is

Affirmed.

Judges WELLS and JOHNSON concur.

SOUTHLAND ASSOCIATES, INC. v. WILLIAM BERNARD PEACH, ALICE BARBER PEACH, RAYMOND JOHN STANLEY, CAROLYN S. STANLEY, E. G. DUENWEG, MARY LOUISE DUENWEG, HARRISON D. COLE, CORRINE A. COLE, JAMES E. MARTIN, PEGGY N. MARTIN, MORRIS FRANKLIN BRITT, ANN ROBERTSON BRITT, JAMES R. PETERSON, BETTY W. PETERSON, JACK McM. PRUDEN, NANCY W. PRUDEN, W. Y. MANSON, PATRICIA S. MANSON, ELEANOR R. KINNEY, A. DOUGLAS RICE, CALVIN A. MOORE, RHUMELLE B. MOORE, RUBEN KISER, STEPHANIE WAIN, RALPH KIER, PERLA KIER, DAVID WAIN, SONDRA WAIN, THOMAS C. POLLOCK, LILLIAN S. POLLOCK, DAVID F. HERZIG, BRUCE ALAN ROELLKE, TRISHA PHYLLIS ROELLKE, EDWARD E. FORREST, MARY W. BROWN, GARLAND M. NANCE, JR., YVONNE C. NANCE, JOSEPH E. SOKAL, NANCY V. SOKAL, JEREMY CYRIL ROMANOVSKY, CARL F. SAPP, DOROTHY G. SAPP, WILLIAM STANLEY METCALF, VIRGINIA M. METCALF, EARL G. MUELLER, MARY PATRICIA ETTARI, LORAN S. CLARK, CAROLA M. McEACHREN, JOHN W. McEACHREN, THOMAS D. ROWE, JR., KATHRYN K. DERR, BETTY H. ROBERTS, WARREN E. ATCHISON, RUBY M. ATCHISON, GEORGE W. FERGUSON, REBECCA F. FERGUSON, MARTIN D. CICCHELLI, DADE WILLIAM MOELLER, BETTY R. MOELLER, SAMUEL J. CARAHER, ELAINE D. CARAHER, BRUCE MICHAEL FREEDMAN, BRAD MITCHEL FREEDMAN, GORDON C. HOPKINS, JOYCE S. HOPKINS, LARRY T. FUNK, IDA E. FUNK,

ELEANOR J. EVANS, CLAYBORNE L. EVANS, HARRY S. HAMRICK, EMOGENE G. HAMRICK, GERALD R. KIRBY, CARL H. RICHTER, LOIS M. RICHTER, DAVID F. ADERMAN, JOAN O'CONNER ADERMAN, JOHN A. THAXTON, ELIZABETH D. THAXTON, CARL C. JAMES, MARJORIE P. JAMES, EILEEN A. MORRIS, DALE E. FILES, DORIS R. FILES, NATHANIEL A. GREGORY, MARY STUART L. GREGORY, ROBERT HARRIS SHAW, JR., MAXINE WELLBORN SHAW, FENNER DOUGLASS, JANE F. DOUGLASS, DOROTHY W. McGREGOR, CLARENCE H. McGREGOR, HAYDEN KING CLINE, SUSAN T. CLINE, MARVIN W. FERRELL, RUTH M. FERRELL, VICTOR A. BUBAS, MARCELYN D. BUBAS, JAY S. SKYLER, DENISE L. SKYLER, BEN EISENBERGER, JR., LUANA M. EISENBERGER, GARY S. WILSON, CHARLES S. WARNER, HEIDI H. WARNER, GUARANTY STATE BANK, TRUSTEE, CENTRAL CAROLINA BANK AND TRUST COMPANY, TRUSTEE, JOSEPHINE M. BROWN, TRUSTEE, RICHARD M. HUTSON, II, TRUSTEE, C. THOMAS BIGGS, TRUSTEE, R. ROY MITCHELL, JR., TRUSTEE, F. GORDON BATTLE, TRUSTEE, CHARLES W. WHITE, TRUSTEE, ARTHUR VANN, II, TRUSTEE, CENTRAL CAROLINA BANK AND TRUST COMPANY, ANTHONY PATRICK NUNN, HOME SAVINGS AND LOAN ASSOCIATION, WACHOVIA MORTGAGE COMPANY, DeWITT RALPH ROGERS, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF DURHAM, N. C., SECURITY SAVINGS AND LOAN ASSOCIATION, BARCLAY'S BANK OF NEW YORK, THE NORTHWESTERN BANK

No. 8214SC451

(Filed 19 April 1983)

Deeds § 19.3— acreage as common area of condominium project—right to construct additional condominiums—questions for jury—harmless error in instructions

In an action by plaintiff developer of a condominium project for a judgment quieting title to a 2.646 acre portion of the project and a decree that plaintiff has the right to construct additional condominium units on that tract, the evidence supported the trial court's submission of issues as to (1) whether the intent of language in the Declaration of Unit Ownership was that the 2.646 acres were to be part of the common area of the existing condominiums, and (2) whether the Declaration of Unit Ownership gave plaintiff the right to construct additional units on the 2.646 acres. However, the trial court erred in instructing the jury that if it answered the first issue "yes," the lawsuit would be ended, since the jury could have found that the tract was part of the common area but that plaintiff had reserved the tract for future construction, but such error was harmless where the jury ignored the court's instruction and answered the second issue "no" after having affirmatively answered the first issue.

APPEAL by plaintiff from *Cornelius, Judge.* Judgment entered 20 December 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 March 1983.

Plaintiff instituted this action alleging that pursuant to plans for development of an 11.402 acre tract of land into a condominium complex, plaintiff executed a Declaration of Unit Ownership which was recorded on 22 July 1974. Plaintiff alleges that it mistakenly made the entire 11.402 acre tract subject to the declaration and that it intended for the 2.646 acres in dispute to be reserved for future development. Plaintiff further alleges that the defendants knew that the 2.646 acres were not part of the "common area" of the condominium project. It sought reformation of the Declaration of Unit Ownership, or, alternatively, a judgment quieting title to the 2.646 acre tract in dispute and a decree that it has the right to construct additional units on that tract.

Defendants, purchasers of the condominium units and holders of security interests in the units, answered denying plaintiff's allegations.

From the granting of summary judgment for plaintiff, defendants appealed. This Court vacated summary judgment and remanded the case for trial, finding a genuine issue of material fact. *Southland Associates v. Peach*, 52 N.C. App. 340, 278 S.E. 2d 293, *disc. review denied*, 303 N.C. 546, 281 S.E. 2d 394 (1981).

Before trial, plaintiff took a voluntary dismissal of its claim for a reformation of the Declaration of Unit Ownership.

From judgment declaring the 2.646 acre tract to be a part of the common area of the existing 42 units of the Pebble Creek Condominiums, and that plaintiff does not have the right to construct additional units on that tract, plaintiff appeals.

Bryant, Drew, Crill & Patterson, by Victor S. Bryant, Jr., for plaintiff appellant.

Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for defendant appellees.

ARNOLD, Judge.

The court submitted the following issues to the jury:

1. Did the parties intend that the language in the Declaration of Unit Ownership, to wit: "The land on which the building is erected and all lands surrounding the buildings as is more fully described on the plat recorded in Plat Book 79

at Page 79, Durham County Registry", would mean that the 2.646 acre tract was a part of the common area of the existing 42 units of Pebble Creek Condominiums?

2. Did the parties intend that the Declaration of Unit Ownership, Section 18, Amendments, give the Plaintiff, Southland Associates, Inc., the right to construct up to 25 additional units on the 2.646 acre tract?

Among other instructions, the court charged the jury that the language of the section entitled "Common Areas" in the Declaration of Unit Ownership was ambiguous and proceeded to instruct the jury on the law relating to ambiguities in an instrument.

Shortly after retiring to deliberate, the jury returned to the courtroom and submitted the following question to the court: "Can we, the jury, vote yes on issue number one and yes on issue number two, or issue number two also, or no on both items?"

In response to this question, the court instructed, in pertinent part:

> If you should answer the first issue yes, finding that the 2.646 acre tract was a part of the common area of the existing 42 units of Pebble Creek Condominiums, then that would end the lawsuit, and you would not have to answer the remaining issue. If you should find that the 2.646 acres was not intended to be a part of the common area of the existing 42 units, then you would take up and consider the second issue.

The jury returned shortly thereafter with its verdict, answering the first issue "Yes" and the second issue "No."

Plaintiff argues that the court erred in submitting the first issue and in the subsequent instruction that if they answered the first issue "yes," the lawsuit would be ended, and it would not be necessary to answer the second issue. It also argues that the court erred in instructing the jury that the language of the section entitled "Common Areas" in the Declaration of Unit Ownership was ambiguous.

Common areas and facilities are defined in the Declaration of Unit Ownership as follows:

> The common areas and facilities consist of all parts of the multi-unit buildings and other structures situated on the property described hereinabove, other than the individual dwelling units therein . . ., including, without limitation, the following (except such portions of the following as may be included within an individual unit):
>
> A. The land on which the building is erected and all lands surrounding the buildings as is more fully described in Plat Book 79 at page 79, Durham County Registry.

Although no model of grammatical clarity, this definition is clear and unambiguous. Under this definition, the 2.646 acre tract is clearly part of the common area. The trial judge apparently based his finding of ambiguity on a misreading of our first opinion in this case. This Court did not state in the first appeal that the definition was ambiguous; instead, we stated that the declaration as a whole was ambiguous. 52 N.C. App. 340, 278 S.E. 2d 293.

Nevertheless, the court's instruction that the definition was ambiguous was not prejudicial error, nor did the court err in submitting the first issue to the jury. Ordinarily, the form and number of issues to be submitted is a matter which rests within the sound discretion of the trial judge. *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968). It is sufficient if the issues are framed so as to present the material matters in dispute as raised by the pleadings, to enable each party to have the full benefit of his contentions before the jury and to enable the court, when the issues are answered, to determine the rights of the parties under the law. *Id.*

With the voluntary dismissal of the reformation claim, this action became one to quiet title to the 2.646 acres. Defendants contend that the tract was part of the "common area" and owned by the condominium unit owners. Plaintiff denied in its complaint that the tract was part of the common area and claimed that it reserved title to the tract. This Court, in the first appeal of the case, stated the issue as being "whether the 2.646 acres in dispute is part of the common area of Pebble Creek Condominiums *or* was reserved by plaintiff for future construction . . . ." 52 N.C. App. at 343, 278 S.E. 2d at 294.

Thus, in rendering its judgment, the jury first had to determine whether the 2.646 acres was part of the common area. If so,

the jury had to next determine whether plaintiff reserved the tract, despite its being part of the common area, for future construction. The jury could have found that the tract was part of the common area, yet plaintiff reserved the tract for future development pursuant to the following language contained in the Declaration of Unit Ownership:

> Anything contained in this Declaration to the contrary notwithstanding, it is contemplated that the Declarant, Southland Associates, Inc. will construct additional units, not to exceed, in the aggregate, twenty-five (25) units, which shall be located in one or more additional buildings. Declarant shall have the absolute right in its discretion to construct additional units, and if any of such units are so constructed on the land now owned by the Declarant and contiguous to the land now covered by this Declaration (or contiguous by way of easement) . . . .

Therefore, the court's instruction that if they answered the first issue yes that it would end the lawsuit was erroneous. However, the error was harmless. The jury ignored the court's instruction and answered the second issue "no," *i.e.*, that the parties did not intend for the declaration to give the plaintiff the right to construct additional units on the 2.646 acre tract. The second issue was the crux of this lawsuit: "Could plaintiff build additional units on this tract?" That issue was determinative of the rights of the parties.

The jury's verdict was supported by the language in the declaration that plaintiff could build additional units "on the land now owned by the Declarant *and* contiguous to the land now covered by this Declaration (or contiguous by way of easement)." There was evidence that plaintiff owned land contiguous to the land covered by the declaration at the time of the recording of the Plat Map in Plat Book 79.

Moreover, plaintiff failed to record a copy of the plans showing graphically all the particulars of the building, including the location of the buildings and of the common areas as required by G.S. 47A-15. Thus, plaintiff effectively failed to give notice of the location of proposed additions and effectively failed to reserve title to the 2.646 acre tract. And, the 2.646 tract was not surveyed until 1977, three years after the recording of the Declaration of

Unit Ownership, which tends to show that plaintiff had no intention of building on the tract at the time of the recording of the declaration.

Plaintiff's post-trial motions to set aside the verdict and for a new trial were therefore properly denied. In the judgment of the trial court there is

No error.

Judges HILL and BECTON concur.

PORSH BUILDERS, INC. v. CITY OF WINSTON-SALEM, A NORTH CAROLINA MUNICIPAL CORPORATION, WAYNE A. CORPENING, MAYOR; JOHN B. DEVRIES; EUGENE F. GROCE; ERNESTINE WILSON; VIRGINIA H. NEWELL; JON J. CAVANAGH; ROBERT S. NORTHINGTON, JR.; VIVIAN K. BURKE; LARRY D. LITTLE, MEMBERS OF THE BOARD OF ALDERMEN FOR THE CITY OF WINSTON-SALEM, AND THE REDEVELOPMENT COMMISSION OF WINSTON-SALEM, A POLITICAL SUBDIVISION OF THE CITY OF WINSTON-SALEM

No. 8221SC288

(Filed 19 April 1983)

Municipal Corporations § 4.5— sale of redevelopment commission property—effect of prior appellate decision

A decision by the Supreme Court in this case did not require a municipal board of aldermen to accept plaintiff's highest bid for property being sold by a redevelopment commission but permitted the board either to accept plaintiff's bid or to reject all bids.

APPEAL by plaintiff from *Cornelius, Judge.* Order entered 10 November 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 February 1983.

Plaintiff Porsh Builders, Inc. (Porsh) instituted this action in Superior Court seeking an order directing the defendant Mayor and Board of Aldermen of Winston-Salem to accept a bid made by Porsh to buy a certain parcel of real estate in the City of Winston-Salem, or, in the alternative, an order awarding monetary damages. By its amended complaint, Porsh sought injunctive relief to enjoin defendants from conveying the subject property to John P. Ozmun, another bidder, and, in the event the

court was unable to compel the defendants to transfer the property to the plaintiff, that defendants be ordered to begin the bidding process prescribed in G.S. 160A-514 anew.

The parcel at issue was acquired by the City as a part of a tract of land to be developed in accordance with the Crystal Towers Community Development Plan. The parcel had been offered for sale by the Winston-Salem Redevelopment Commission pursuant to the terms of G.S. 160A-514. Both plaintiff and Mr. Ozmun submitted their development plans and bids. Both proposals were found to meet the requirements of the zoning district and Development Plan. Plaintiff's bid of $6,550.00 was the higher of the two submitted bids. Although G.S. 160A-514 directs the Redevelopment Commission to sell to the "highest responsible bidder," Porsh's higher bid was rejected and the lower bid submitted by Ozmun accepted because the City Planning Staff had determined that the Ozmun plan "more nearly" complied with the City's Development Plan.

The Forsyth County Superior Court granted defendants' motion for summary judgment and denied plaintiff's motion for injunctive relief pending appeal. In its judgment of 28 November 1978 the court made findings of fact and entered the following conclusion of law in support of the judgment:

> G.S. 160A-514(c) and (d) authorize the defendants to give consideration to the redevelopment plan of each bidder, the housing needs of the City, the housing policies of the City, the revenue to be derived from each bid, and factors other than merely the dollar amount bid for the property in question, those being legislative matters for consideration by the Board of Aldermen rather than the Court.

On appeal from entry of the judgment this Court, with one judge dissenting, reversed the summary judgment entered in favor of defendants, and remanded the matter to the Superior Court, holding that if the Board of Aldermen elected to accept either of the two bids, it would have to accept plaintiff's bid as the "highest responsible bid" under the language of G.S. 160A-514(d). *Builders, Inc. v. City of Winston-Salem*, 47 N.C. App. 661, 267 S.E. 2d 697 (1980). In its opinion this Court expressly rejected the contention that factors other than the dollar amount of the bid may be taken into account by the Board.

> We hold that the plain words of the statute require in the case sub judice that if a bid is to be accepted it must be the bid of Porsh, which was the high bid.

47 N.C. App. at 663, 267 S.E. 2d at 698. The term "responsible" in the phrase "highest responsible bidder" was interpreted to mean only that the bidder must have the resources and ability to do what he has agreed to do in his proposal. *Id.* The relevant portion of G.S. 160A-514(d) states:

> After receipt of all bids, the sale shall be made to the highest responsible bidder. All bids may be rejected. All sales shall be subject to the approval of the governing body of the municipality.

Defendants appealed as a matter of right pursuant to G.S. 7A-30 (2). The Supreme Court stated the issue presented by the appeal as follows:

> The sole question presented by this appeal is whether defendants were required under the language of G.S. 160A-514 to accept plaintiff's bid as the "highest responsible bid," if the defendants decided to accept either bid submitted.

Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 552, 276 S.E. 2d 443, 444 (1981). Immediately after this formulation of the question presented, the Court stated its answer and conclusion as follows:

> For the reasons stated below, we find the Court of Appeals' majority opinion correct in its interpretation of the statute as allowing defendants to either reject all bids or accept plaintiff's "highest responsible bid," and hold that summary judgment entered in favor of defendants was properly reversed.

Id. The Court proceeded to analyze the statute and concluded that neither subsection of G.S. 160A-514 could be interpreted to give defendants the discretionary powers recited by the trial court. In conclusion the Court stated:

> For the foregoing reasons, we affirm the Court of Appeals' majority holding that under the language of G.S. 160A-514, defendants are required to accept the "highest responsible bid," if any, where that bid is in compliance with the applicable zoning restrictions and redevelopment plan for the

property to be sold. The Court of Appeals' decision reversing summary judgment in favor of defendants is affirmed.

302 N.C. at 556, 276 S.E. 2d at 447.

On 29 April 1981 defendants filed a motion in Superior Court for entry of a judgment remanding the matter to the Board of Aldermen of the City of Winston-Salem for action in conformity with the decision of the North Carolina Supreme Court. Subsequently, Porsh filed its motion on 8 June 1981 for entry of judgment in accordance with that same decision. By its motion Porsh sought entry of an order directing defendants to accept Porsh's bid and further ordering defendants to convey, transfer and deed the subject parcel to Porsh.

The matter was heard in Forsyth County Superior Court. The court entered an order on 10 November 1981 which states:

> [T]he Court determines and concludes that the Supreme Court in its decision determined that the statute in question permits the defendant to either reject all bids or accept plaintiff's bid, and thus the matter must be remanded to the Board of Aldermen of the City of Winston-Salem for the purpose of rejecting both bids or accepting plaintiff's bid which was previously rejected by the Board of Aldermen;
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this matter is hereby remanded to the Board of Aldermen of the City of Winston-Salem for rejection of all bids or acceptance of the bid of the plaintiff, all in accord with the decision of the North Carolina Supreme Court.

Plaintiff appeals from the entry of this order.

Frye, Booth and Porter, by Leslie G. Frye and John P. Van Zandt, III, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr. and Ronald G. Seeber, for defendant appellees.

JOHNSON, Judge.

The sole question presented by this appeal is whether the trial court's order properly effectuates the opinion and mandate of the Supreme Court in this case. For the reasons stated below,

we find that the trial court correctly interpreted the Supreme Court's opinion and hold that the order entered by Judge Cornelius conforms to the decision rendered therein.

Upon appeal from the Superior Court, the mandate of the Supreme Court is binding and must be strictly followed without variation or departure. "No judgment other than that directed or permitted by the appellate court may be entered." *D & W, Inc. v. Charlotte,* 268 N.C. 720, 722, 152 S.E. 2d 199, 202 (1966). Plaintiff Porsh contends that the decision of the Supreme Court in this case commanded the Board of Aldermen of the City of Winston-Salem to convey the property in question to Porsh Builders. The City of Winston-Salem maintains that the Supreme Court went no further than to hold that the City could not convey the property of Mr. Ozmun, but that the City could either convey the property to Porsh or reject all bids. Thus, the issue revolves around the intent of the Supreme Court in its decision affirming the decision of this Court and remanding the matter to the Superior Court for judgment consistent with its opinion.

In its amended complaint the plaintiff sought injunctive relief, an order directing the defendants to accept plaintiff's bid and convey the property to it or, in the alternative, that the bidding process be started anew. The trial court erroneously interpreted the language of G.S. 160A-514(c) and (d) as permitting defendants to consider factors other than the monetary amount of the bid in passing upon the bids offered, and therefore, entered summary judgment for defendants. This Court reversed the summary judgment and remanded the case to the Superior Court on the grounds that the statute permitted the defendants to either reject all bids or accept plaintiff's highest responsible bid. This opinion was affirmed and elaborated upon by the Supreme Court. Noticeably absent from either appellate opinion is language indicating, as plaintiff now argues, that the Board lost its option to reject all bids once it elected to proceed with one of the two bids submitted.

G.S. 160A-514(d) clearly states, "All bids may be rejected." The Board's approval of the lower Ozmun bid has been determined by the Supreme Court to be erroneous, but there is nothing in the statute, or in the opinion of this Court or in the opinion of the Supreme Court to suggest that the erroneous ac-

ceptance of the Ozmun bid made the rejection of the Porsh bid unlawful. Nor is there any affirmative indication in either opinion that the City *must* now accept the Porsh bid. All of the relevant language is clearly to the contrary.

This Court's interpretation of the statute as *allowing defendants to either reject all bids or accept plaintiff's highest responsible bid,* and reversal of summary judgment entered in favor of defendant was upheld. 302 N.C. at 552, 276 S.E. 2d at 444. The Supreme Court then stated, "[t]he clear meaning of the language of subsection (d) is that *although the municipality may reject all bids,* if any bid is accepted, it must be the "highest responsible bid." *Id.* at 555, 276 S.E. 2d at 446 (emphasis added). And further, that "use of the term 'shall' renders the procedural requirement mandatory, *if the governing body of the municipality decides to accept any bid.*" *Id.* (Emphasis added.)

It is thus evident that the Supreme Court intended the matter ultimately to be placed before the Board of Aldermen to determine whether they now desire to reject all bids or accept the Porsh bid. Given the Supreme Court's interpretation of G.S. 160A-514(c) and (d), the final judicial determination of the rights of the parties could only be that plaintiff is *entitled* to have its bid accepted, *if, and only if,* defendants choose to accept either of the two bids submitted. However, the Board retains the ultimate authority, under the statute and the Supreme Court's ruling, to decide to reject all bids.

The summary judgment in defendants' favor, in practical terms, would have allowed the City's acceptance of the lower Ozmun bid and rejection of Porsh's higher bid to stand. The Supreme Court's decision reversing the summary judgment, in practical terms, held that the City could not accept the lower Ozmun bid on the non-monetary grounds that it "more nearly" complied with the Development Plan. The net effect of the order entered 10 November 1981 was to reverse that erroneously-granted summary judgment, and to enter a judgment that plaintiff was entitled to have its bid accepted *unless the Board chose to reject all bids.* We find this portion of the order to be in full accordance with the decision of the Supreme Court. For the trial court to have ordered the Board to accept the Porsh bid, as Porsh requested in its motion, would have impermissibly enlarged upon

the mandate directed by the Supreme Court in this case. *D & W, Inc. v. Charlotte, supra.*

Plaintiff next takes issue with that portion of the order which purports to "remand" the matter to the Board of Aldermen, and argues that such a "remand" is not included in the Supreme Court's mandate. It is true that the case technically was not taken to the Superior Court "on appeal" from a decision by the Board of Aldermen, and therefore, it is technically incorrect to use the term "remand" in the order. However, as we stated earlier, the Supreme Court clearly intended the matter to be placed again before the Board for consideration. The order directs the Board as to what its options are pursuant to that appellate decision. In this context we consider the term "remand" mere surplusage. The order entered by the trial court is a reasonable means by which the opinion and mandate of the Supreme Court in *Builders, Inc. v. City of Winston-Salem* could be put into practical effect. The order of the trial court is

Affirmed.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. TERRY BRUCE BALDWIN

No. 8229SC667

(Filed 19 April 1983)

1. Kidnapping § 1.2— purpose of terrorizing victims—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant unlawfully confined, restrained and removed three young men from one place to another for the purpose of terrorizing them so as to support defendant's conviction of three charges of kidnapping where it tended to show that the three victims had car trouble at midnight and were waiting for the father of one of them to pick them up; defendant told the victims that he was "a bad dude" and told the oldest victim to come over to his car and have a beer with him; when the oldest victim declined, defendant told him to get out of the car and do as he was told or he would kill all three of them; when the oldest victim went to defendant's car, defendant pulled him into the car and drove him across the street; defendant and the oldest victim then got out of defendant's car and walked back to the victims' vehicle; defendant told the other two victims that if they tried to run and he caught them, he would kill them; defend-

ant then pushed the oldest victim into the victims' car, got in himself, succeeded in starting the car, and drove the car with all three boys in it about a quarter of a mile; defendant then stopped and stated that the victims had been lying about their car trouble and that he was going to put all three of them in the hospital; at that point, the two younger victims jumped out of the car and ran off in different directions looking for help; defendant then drove off with the oldest victim and traveled several miles into the country, during the course of which he slapped such victim's face several times with his open hand; upon approaching a bridge, defendant told the oldest victim that he would "throw him over it," whereupon the victim opened the door and escaped while the car was still moving; and the victims were all smaller and younger than defendant.

2. Criminal Law § 114.2— instructions—no expression of opinion

The trial court's instruction on the jury's duty to find defendant guilty of kidnapping "if you find" that "this was done for the purpose of terrorizing [the victim] by threatening to throw him out of the automobile from a bridge, threatening to kill him, put him in the hospital or by hitting him in the face" did not constitute an expression of opinion that defendant's purpose to terrorize would be established if the jury found that defendant made threatening statements but required the jury to determine not only whether the threats were made but also whether they manifested a purpose to terrorize.

3. Kidnapping § 1— indictment for first degree kidnapping

An indictment was insufficient to charge defendant with first degree kidnapping where it failed to allege that the victim was either not released by defendant in a safe place, was seriously injured, or was sexually assaulted. G.S. 14-39(b).

APPEAL by defendant from *Owens, Judge.* Judgment entered 8 December 1981 in Superior Court, HENDERSON County. Heard in the Court of Appeals 12 January 1983.

A jury found the defendant guilty of one count of first degree kidnapping, two counts of second degree kidnapping, and unauthorized use of a conveyance. Only the kidnapping convictions were appealed. The State's evidence, in gist, was as follows:

On the evening of August 29, 1981, Terry Stamey, Mike Wines, and Jim Kuykendall, who lived at Canton in Haywood County, drove to Hendersonville, about 35 miles away, to watch a football game. Stamey was 19 years old, 5 feet tall and weighed 110 pounds; Wines was 16, stood 5 feet 6 inches and weighed 125 pounds; Kuykendall, only 13, was 5 and ½ feet tall and weighed 150 pounds. After the game, around midnight, while still in Hendersonville, they had car trouble and stopped at a convenience store, where Stamey telephoned his father in Canton to come after them. As they waited for Stamey's father, a car con-

taining the defendant, another male, and two females pulled into the store parking lot. The two males purchased beer while the females talked briefly with the three teens about the football game, then all four drove away.

About thirty minutes later, defendant returned alone in his car, which he parked beside Stamey's car. Defendant, who was 26 years old, nearly 6 feet tall and weighed 168 pounds, apparently assuming that the boys were waiting for the two females to return, belligerently, with some obscenities, told them that the girls would not be coming back and that he was "a bad dude." He then told Stamey to come over to his, the defendant's, car and have a beer with him. When Stamey declined, defendant told him to get out of the car and do as he was told or he would kill all three of them. Upon Stamey's going to defendant's car and asking defendant to let him stand beside the car, instead of getting in it as defendant directed, defendant pulled him into the car and drove him across the street.

The defendant and Stamey then got out of the car and walked back across the street to Stamey's vehicle. As they did so, Wines and Kuykendall, who had been sitting in Stamey's car, started to get out. Defendant told them that if they tried to run and he caught them, he would kill them. Defendant then pushed Stamey into the car, got in himself, succeeded in starting it up, and drove Stamey's car with all three boys in it about a quarter of a mile. Defendant then stopped and stated that the boys had been lying about their car trouble and that he was going to put all three of them "in the hospital." At that point, Wines and Kuykendall jumped out of the car and ran off in different directions looking for help.

Despite Stamey's protestations that he didn't want to be separated from the other two, since he was responsible for getting them home, defendant then drove off with Stamey and traveled several miles into the country, during the course of which he slapped Stamey's face several times with his open hand. Upon approaching a bridge and telling Stamey that he would "throw him over it," Stamey opened the door and jumped out on the ground, even though the car was moving about 20 M.P.H. Stamey ran through the woods until he came to a house, raised the occupants, and they called the police, which had already been

called on behalf of the other two boys. All the boys appeared to be and said they were very scared and upset.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Marc D. Towler, for the defendant appellant.

PHILLIPS, Judge.

Under G.S. § 14-39(a), unlawfully confining, restraining, or removing a person from one place to another without the consent of such person is kidnapping if one of the purposes of such confinement, restraint or removal is for the purpose of "terrorizing the person so confined, restrained, or removed. . . ." It is under that part of the statute that defendant was indicted, tried and convicted.

[1] Defense counsel stoutly contends—and has at every opportunity since the State rested—that the evidence does not suffice to show that defendant's purpose was to terrorize these youngsters and that the case against him should therefore be dismissed. Bearing in mind the oft-cited rules that we are obliged to follow in matters of this kind, a repetition of which here would be superfluous, we disagree.

Gratuitously accosting three smaller and younger boys in a strange, unprotected place at midnight, belligerently telling them what a rough character he was, ordering them to move or not move as he saw fit, taking over the operation of their car, and threatening to kill or send all of them to the hospital if they did not do his bidding, as the State's evidence tended to show happened, was basis enough, we think, for the jury finding that defendant's purpose was to terrorize all of them.

But those were just the circumstances that existed before two of the three youngsters escaped defendant's control. The circumstances that defendant created thereafter, according to the State's evidence, make it even more likely that defendant's purpose was as charged. By then, so the State's evidence tends to show, defendant knew that the two younger boys were frightened sufficiently to jump from the car and dash wildly off into the night and that Stamey was sufficiently cowered to have done his

bidding from the outset. Yet, instead of attempting to allay Stamey's fears, by telling him that he was just joking and joining Stamey in finding the other boys and demonstrating that no harm was intended, as one with an innocent purpose might be expected to do under such circumstances, the State's evidence shows that defendant thereafter dragged Stamey into the front seat of his car, drove away over his protests, slapped him in the face twice, traveled several miles into the country, and told Stamey that he was going to throw him off a bridge.

That defendant apparently had no weapon and may even have been incapable of fully carrying out his threats, particularly while the three boys were still together, did not require an acquittal, as the defendant contends. Since the crime defendant was convicted of did not involve a purpose to kill or maim, but a purpose to terrorize, *State v. McRae*, 58 N.C. App. 225, 292 S.E. 2d 778 (1982); *State v. Jones*, 36 N.C. App. 447, 244 S.E. 2d 709 (1978), that is the capacity that the jury had to consider, along with the way that that capacity was used. And as the record plainly shows, in concluding that the defendant did have the capacity to terrify these youngsters and used it for that purpose, the jury was not without justification.

[2] Defendant also cites the following part of the Court's charge to the jury (and others like it when charging on the other indictments) as being an expression of opinion about a disputed fact, and thus violative of G.S. 15A-1212:

> So I charge you that if you find from the evidence beyond a reasonable doubt that on or about August 29th, 1981, the defendant Terry Bruce Baldwin, unlawfully removed Terry Douglas Stamey from a fast food place in Hendersonville and carried him in an automobile and that Terry Douglas Stamey did not consent to this removal *and that this was done for the purpose of terrorizing Terry Douglas Stamey by threatening to throw him out of the automobile from a bridge, threatening to kill him, put him in the hospital or by hitting him in the face,* and that Terry Douglas Stamey was not released in a safe place, it would be your duty to return a verdict of guilty of first degree kidnapping of Terry Douglas Stamey . . . . [Emphasis added.]

The defendant contends that by these words the Judge in effect told the jury that if they found that the defendant made the threatening statements attributed to him that the defendant's purpose to terrorize would be established thereby. We think otherwise. The instruction is in the usual form approved by many decisions of our Supreme Court and is in keeping with the Pattern Instructions adopted by the North Carolina Conference of Superior Court Judges. The usual "if you find" that the instruction starts out with manifestly applies to each of the phrases that follow it, including the purpose to terrorize phrase; and we are satisfied that the jury understood from it that none of the possible facts stated therein had already been established, but that all of them were for their consideration and determination.

[3] But defendant's contention that the indictment charging him with the first degree kidnapping of Terry Stamey is insufficient to support a conviction of that offense is well taken. Paragraph (b) of N.C. Gen. Stat. 14-39 provides as follows:

> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released . . . in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

Thus one of the essential elements of first degree kidnapping is that the person kidnapped was either not released by the defendant in a safe place, was seriously injured, or was sexually assaulted. Yet this element is not mentioned in the indictment. Since there was no serious injury or sexual assault, and the State's case was that Stamey wasn't released at all, but escaped, it might appear at first blush that alleging that he was not released in a safe place was unnecessary; but our law is otherwise. No indictment is sufficient if it does not accurately and clearly allege *all* the essential elements of the charged offense. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); *State v. King*, 285 N.C. 305, 204 S.E. 2d 667 (1974).

But since the indictment does accurately and clearly charge all the elements of kidnapping in the second degree, we are of the opinion that the case should be remanded for entry of judgment as on a verdict of guilty of that offense. This course has been approved in previous cases and cannot prejudice the defendant, since the evidence is not only sufficient to establish that offense, but the higher one as well. *See*, for example, *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982).

Remanded for judgment.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. JOSEPH M. BARNEYCASTLE

No. 8227SC558

(Filed 19 April 1983)

1. Assault and Battery § 11.1— assault with deadly weapon—sufficiency of warrant

A warrant was sufficient to charge defendant with the offense of assault with a deadly weapon where it alleged that defendant did unlawfully and willfully assault three named police officers with a deadly weapon, a butcher's knife with an 8-inch blade, by holding them at bay in the process of serving a warrant for his arrest in violation of G.S. 14-33(b)(1).

2. Assault and Battery § 14.1— assault with a deadly weapon—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon where it tended to show that, when officers went to defendant's trailer with a warrant for his arrest, defendant was seated on the steps of the trailer with his hands concealed; as the officers approached defendant and were within 20 feet of him, defendant stood and held within his left hand a butcher's knife with an 8-inch blade extended toward the officers; the officers stepped back and drew their revolvers; as defendant held the knife extended toward the officers, he backed into the doorway of the trailer and threatened to kill the officers if they came up to the trailer; and each time the officers attempted to advance toward defendant, defendant caused them to retreat by advancing toward them with the knife.

3. Criminal Law § 163.4— broadside exception to the charge

Defendant's exception at the conclusion of the charge and his assignment of error stating that "the court committed error in its charge to the jury" con-

stituted a broadside attack upon the jury instructions and were ineffective to preserve any particular portion of the instructions for review.

4. Assault and Battery § 16.1— assault with a deadly weapon—failure to submit simple assault

The trial court in a prosecution for assault with a deadly weapon was not required to charge the jury upon the lesser included offense of simple assault where the State's evidence tended to show that defendant drew a knife with an 8-inch blade on three officers, held it extended toward them, threatened to kill them if they came up to his trailer, and advanced toward them with the knife, causing them to retreat, and where defendant contended that he never threatened the officers in any fashion.

APPEAL by defendant from *Owens, Judge.* Judgment entered 22 January 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 6 December 1982.

Defendant was charged in a warrant drawn under G.S. 14-33(b)(1), with assaulting Officers W. C. Durst, C. D. Cloninger, and G. A. Clemmer with a deadly weapon, a butcher's knife with an 8-inch blade, by holding them at bay in the process of serving a warrant for his arrest. Defendant was originally tried in district court upon a plea of not guilty and found guilty of assault with a deadly weapon.

Defendant appealed to superior court where the State offered evidence which tended to show the following: On 4 August 1981 Officers W. C. Durst, Gary Alan Clemmer, and C. D. Cloninger of the Gaston County Police Department went to Carpenter's Trailer Park in Dallas, North Carolina to arrest defendant on a warrant charging him with assault on a female. Defendant's wife, Debra Barneycastle, had earlier called for the police, advising them that she and her husband had been fighting all that day. Upon arriving, the officers observed defendant seated on the steps of the trailer with his hands concealed. As they approached the defendant and were within 20 feet of him the officers identified themselves. Officer Clemmer advised defendant he had in his possession a warrant charging him with assault on a female and that he was under arrest. Officer Clemmer further advised defendant to stand so they could see his hands. As defendant stood, he held a butcher's knife with an 8-inch blade in his left hand which he pointed toward the officers. The officers stepped back and drew their service revolvers. As the defendant held the knife extended toward the officers, he backed into the doorway of

the trailer and stated, "I'll kill you sons-of-bitches if you come up here." The officers advanced toward defendant several times but had to retreat each time they reached the top step as the defendant would advance toward them with the knife. While advancing toward the officers, defendant stated that it would take ten officers to take him in. Defendant's wife was permitted to enter the trailer to talk to him. On entering the trailer, she grabbed the knife and commenced to struggle with defendant in an effort to disarm him. The officers rushed in and subdued the defendant.

Defendant offered evidence which tended to show that when the officers reached the steps to arrest him, he stood up, placed the knife to his own neck and then to his wrist, backed into the trailer and said, "I'm not going to go until I talk with my wife. If I don't I'll kill myself." Defendant further testified that after his wife entered the trailer and talked with him, he gave her the knife and peacefully surrendered to the officers and that he never threatened the officers.

The jury found defendant guilty of assault with a deadly weapon and from a judgment imposing an active sentence of 18 months, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Malcolm B. McSpadden, Assistant Public Defender, for defendant appellant.

JOHNSON, Judge.

[1] By his first assignment of error defendant contends the trial court erred in denial of his pre-trial motion to dismiss the charge on the ground that the pleadings in the warrant are not sufficient to charge defendant with the offense of assault with a deadly weapon in the manner required by G.S. 15A-924(a)(5). We do not agree.

Together, G.S. 15A-924(e) and 15A-954(a)(10) provide that on motion of the defendant the court must dismiss the charges stated in a criminal pleading if the pleading fails to charge the defendant with a crime in the manner required by G.S. 15A-924(a), unless the failure is with regard to a matter as to which an

amendment is allowed. As a general rule a warrant following substantially the words of the statute is sufficient when it charges the essentials of the offense in a plain, intelligible, and explicit manner. If, however, the statutory language fails to set forth the essentials of the offense, then the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged. *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1977); *State v. Loesch*, 237 N.C. 611, 75 S.E. 2d 654 (1953).

The statute under which defendant is charged, G.S. 14-33(b)(1), states:

> Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray he: (1) Inflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon.

The warrant in question charges defendant as follows:

> The undersigned finds that there is probable cause to believe that on or about the 4th day of Aug., 1981, in the county named above, the defendant named above did unlawfully and willfully assault officers W. C. Durst, C. D. Cloninger, and G. A. Clemmer with a deadly weapon, a Butcher's Knife with an 8-inch Blade by holding them at bay in the process of serving a warrant for his arrest in violation of G.S. 14-33(b)(1).

G.S. 15A-924(a)(5) provides that a criminal pleading 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 or defendants of the conduct which is the subject of the accusation.

The essential elements of the offense of assault with a deadly weapon under G.S. 14-33(b)(1) are (1) the assault of an individual,

(2) by the use of a deadly weapon. The warrant in question is couched in the language of the statute and contains a plain and concise factual statement supporting sufficiently the elements of the offense with precision to clearly inform defendant of the accusation as required by G.S. 15A-924(a)(5). The warrant specifically states the names of the victims, describes a weapon, and the circumstances of the weapon's use which show its character as a deadly weapon, as required by the case law. *State v. Palmer, supra; State v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84 (1967). Therefore, defendant's first assignment of error is without merit.

[2] Defendant next assigns as error the denial of his motion for nonsuit made at the close of the evidence.

Upon a defendant's motion for judgment of nonsuit in a criminal action, all admitted evidence, whether competent or incompetent evidence must be considered in the light most favorable to the State, and giving the State every reasonable inference fairly deducible therefrom. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Copeland*, 11 N.C. App. 516, 181 S.E. 2d 722, *cert. den.* 279 N.C. 512, 183 S.E. 2d 688 (1971). The question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense; if so, the motion is properly denied. *State v. Copeland, supra.*

The evidence showed that defendant was seated on the steps with his hands concealed. As the three officers approached defendant and were within 20 feet of him, defendant stood and held within his left hand a butcher's knife with an 8-inch blade extended toward the officers. The officers stepped back and drew their service revolvers. As defendant held the knife extended toward the officers he backed into the doorway of the trailer and stated, "I'll kill you sons-of-bitches if you come up here." The officers attempted to advance toward defendant several times. Each time the officers reached the top step, defendant caused them to retreat by advancing toward them with the knife.

The foregoing evidence was sufficient to take the case to the jury on the charge of assault with a deadly weapon either by an overt act on the part of the defendant evidencing an intentional offer to do injury to the persons of the officers or by the "show of

violence" on the part of the defendant sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the officers which caused them to engage in a course of conduct they would not otherwise have followed. *State v. Douglas*, 268 N.C. 267, 150 S.E. 2d 412 (1966); *State v. O'Briant*, 43 N.C. App. 341, 258 S.E. 2d 839 (1979). Therefore, defendant's motion for nonsuit was properly denied.

[3] Defendant next argues that the court committed reversible error by including in its charge to the jury facts not supported by the evidence. However, defendant has failed to properly identify the portion of the instructions in question by setting it within brackets or by any other clear means of reference as required by Rule 10(b)(2) of the Rules of Appellate Procedure.

Failure to observe the rules only increases the burden of this Court in its review of cases. The difficulty presented by defendant's failure to properly set off the particular portion of the charge to which he takes exception by brackets is compounded by the fact that defendant's "EXCEPTION NO. 4" is located at the very conclusion of the court's entire charge and the assignment of error based upon this exception states merely that "the court committed error in its charge to the jury."

We find defendant's exception and assignment of error, thus presented, to be a broadside attack upon the jury instructions as a whole, and ineffective to preserve any particular portion of the instruction for review. *State v. Snyder*, 31 N.C. App. 745, 230 S.E. 2d 599 (1976), *disc. rev. denied*, 292 N.C. 268, 233 S.E. 2d 395 (1977). Our review of the charge as a whole, taking due regard to that portion to which defendant refers in his brief, discloses no error prejudicial to the defendant.

[4] Defendant next contends the trial court erred in failing to submit to the jury the charge of simple assault as a lesser included offense of assault with a deadly weapon.

It is well established that the trial court is not required to charge the jury upon the question of defendant's guilt of a lesser degree of the crime charged where there is no evidence to sustain a verdict of defendant's guilt of such lesser degree. *State v. Green*, 246 N.C. 717, 100 S.E. 2d 52 (1957); *State v. Cox*, 11 N.C. App. 377, 181 S.E. 2d 205 (1971).

All of the State's evidence tended to show that the defendant drew a knife with an 8-inch blade on the officers, held it extended toward them, threatened to kill them if they came up to the trailer, and advanced toward the officers with the knife, causing them to retreat. The defendant, on the other hand, contended that he never threatened the officers in any fashion.

There is no evidence tending to support a contention that the defendant, if not guilty of the crime charged (assault with a deadly weapon), is guilty of the lesser crime of simple assault. The evidence necessarily restricted the jury to return one of two possible verdicts, guilty of assault with a deadly weapon as charged or not guilty. Therefore, the trial court was correct in failing to submit the charge of simple assault to the jury.

We have reviewed the entire record and find that defendant's trial was free from prejudicial error.

No error.

Judges ARNOLD and BRASWELL concur.

RICHARD L. McDOWELL AND WIFE, MERLE B. McDOWELL v. KATE B. McDOWELL AND EAST FEDERAL SAVINGS & LOAN ASSOCIATION

No. 828SC262

(Filed 19 April 1983)

1. **Partition § 2— tenants in common—waiver of right to partition**

A tenant in common is entitled to partition as a matter of right, but this right may be waived for a reasonable time by either an express or implied contract.

2. **Partition § 2— right to partition—waiver in separation agreement**

Petitioner impliedly waived his right to a partition sale of a house and lot without respondent's consent by entering into a separation agreement permitting respondent to live in the house or to rent it, with petitioner paying a portion of the monthly mortgage indebtedness, until such time as petitioner and respondent "both mutually agree to sell said house and lot."

3. **Partition § 2— waiver of right to partition without former wife's consent—no unreasonable restraint on alienation**

A provision of a separation agreement permitting respondent wife to live in a house or to rent it and requiring the consent of both parties for a partition

sale of the house and lot did not constitute an unreasonable restraint on alienation since the longest possible time during which the property could remain in respondent's possession without agreement to sell was for her life, and such a restraint on alienation is not unreasonable.

4. **Partition § 2— waiver of right to partition in separation agreement—consideration**

A provision of a separation agreement requiring the consent of both parties to a partition sale of a house and lot was supported by consideration where, pursuant to the agreement, respondent wife relinquished her claims for alimony and support and released her rights in petitioner husband's estate and property in exchange for some household furnishings and the possession of the house.

APPEAL by petitioners from *Llewellyn, Judge.* Judgment entered 11 January 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 20 January 1983.

Petitioners commenced this proceeding to partition and sell a house and lot owned by petitioner Richard McDowell and former wife, respondent Kate McDowell, as tenants in common.

Respondent answered the petition, asserting that she did not consent to the partition of the property and that the terms of a final separation agreement entered into by the parties on 10 July 1978 barred any partition sale of the property without her consent. The separation agreement provided, in pertinent part, that:

> 2. Husband and Wife are the owners of a house and lot at 3205 Hillman Road, Kinston, North Carolina, as tenants by the entirety, which said premises is subject to a mortgage indebtedness to East Federal Savings and Loan Association, Kinston, North Carolina. Wife shall be entitled to the exclusive possession and control of said house and lot and Husband agrees to pay the monthly mortgage indebtedness on same until the youngest child born of the marriage, CONNIE CAROLINE MCDOWELL, has completed her college education and obtains suitable employment. After the said child has completed her college education Husband agrees to pay one-half of the monthly mortgage indebtedness on said house and lot until such time as Husband and Wife both mutually agree to sell said house and lot. At such time as Husband and Wife both mutually agree to sell said house and lot the net proceeds from said sale shall be divided equally between Husband and Wife.

> Wife shall have the option to rent said house and lot and receive the rentals therefrom as her sole and separate property free from all claim or demand of Husband and Husband agrees to pay the monthly mortgage indebtedness on said house and lot until the youngest child has completed her college education and obtains suitable employment. After said child has completed said college education and Wife is renting said house and lot and receiving said rentals therefrom, Husband agrees to pay one-half of the mortgage indebtedness on said house and lot until such time as Husband and Wife both mutually agree to sell same and upon the sale of said house and lot the net proceeds from said sale shall be divided equally between Husband and Wife.

The parties stipulated that their youngest child had completed her college education and obtained suitable employment; that respondent is presently in possession of the house and lot and is renting it and receiving rental proceeds; and that respondent has not agreed to sell the house and lot.

The court granted respondent's motion for summary judgment. Petitioners appeal.

White, Allen, Hooten, Hodges and Hines, by John R. Hooten, for petitioner appellants.

Barker, Kafer and Mills, by Charles William Kafer, for respondent appellee McDowell.

JOHNSON, Judge.

The issue raised by this appeal is whether the court erred in granting the respondent's motion for summary judgment, thereby dismissing the petition for partition. On a motion for summary judgment, under N.C.G.S. 1A-1, Rule 56, the movant has the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). For the reasons which follow, we find no genuine issue of material fact and affirm.

[1] Under Chapter 46 of the North Carolina General Statutes, a tenant in common is entitled to partition as a matter of right. *Brown v. Boger*, 263 N.C. 248, 139 S.E. 2d 577 (1965). This right

may be waived, however, for a reasonable time, by either an express or implied contract. *Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E. 2d 553 (1966). In *Hepler v. Burnham*, 24 N.C. App. 362, 210 S.E. 2d 509 (1975), this Court held that a cotenant's right to partition can be contracted away in a deed of separation entered into while the property is still owned by the parties as tenants by the entirety. In *Hepler*, the parties agreed in a deed of separation that prior to the emancipation of the parties' minor child, the husband would make the mortgage payments on the parties' house and the wife could reside there rent free. This Court held that by executing the deed of separation the parties had effectively modified and limited their right to partition the property. The provisions allowing the wife to live rent free on premises owned by the parties for the duration of the agreement at the least impliedly limited the petitioner's right to partition the property. More recently in *Winborne v. Winborne*, 54 N.C. App. 189, 282 S.E. 2d 487 (1981), this Court relied on *Hepler* and held that a petition for partition should have been dismissed where the parties entered into a separation agreement containing the following provision: "The parties own a home as 'tenants by the entirety,' in which husband will continue to live and make payments." The agreement in *Hepler* was considered indistinguishable from that in *Winborne* because in each case "the gravamen of the separation agreement as to the disposition of the entirety property is that the respondent will be allowed to live in the house so long as he or she meets certain conditions." 54 N.C. App. at 190, 282 S.E. 2d at 488.

[2] The separation agreement in the case under discussion is indistinguishable in this respect from the agreements in *Hepler* and *Winborne*. It allows the respondent to either live in the house herself or to rent it, with petitioner paying the monthly mortgage indebtedness, subject to certain conditions, until such time as the parties mutually agree to sell the property. Under the rule of *Hepler* and *Winborne*, petitioner, by entering into this agreement, impliedly limited his right to partition the property *without the consent of the respondent.*

[3] Petitioner further argues that the provisions regarding sale upon mutual consent is void as being an unreasonable restraint on alienation and, therefore, against public policy. In *Properties, Inc. v. Cox, supra*, the Supreme Court addressed a similar attack upon

a separation agreement and upheld the agreement not to partition during the lifetime of the wife. The Court noted that "[w]hile it is the general rule that a tenant in common may have partition as a matter of right, it is equally well established that a cotenant may, either by an express or implied contract, waive his right to partition for a *reasonable time.* 268 N.C. at 19, 149 S.E. 2d at 557 (emphasis added). From a separation agreement providing for the wife's exclusive use of the property during her lifetime, the court implied a waiver of the right to partition during her life. From this holding it is clear that an agreement providing for the wife's continued possession of property for her life is valid and not subject to attack as an unreasonable restraint on alienation. In this case, the longest possible amount of time during which this property could remain in the wife's possession without agreement to sell is for her life. Under the rule of *Properties* this does not constitute an unreasonable restraint on alienation, and the provision at issue is enforceable.

We note that courts in other jurisdictions have denied partition where an agreement not to sell common property without the consent of the other cotenants exists. Annot., 37 A.L.R. 3d 1009 (1981). In *Rosenberg v. Rosenberg,* 413 Ill. 343, 108 N.E. 2d 766 (1952), the court upheld the validity of an agreement not to sell except by joint consent of the parties. Even though the agreement contained no time limit for performance, the court found it valid since the period of restraint could exist only as long as the parties were alive.

[4] Petitioner raises one final argument regarding the enforceability of the agreement not addressed by the cases previously cited. Petitioner contends that Section 2 of the separation agreement is unenforceable due to lack of consideration. We do not agree.

Mutual promises contained within a separation agreement constitute adequate consideration. *Tripp v. Tripp,* 266 N.C. 378, 146 S.E. 2d 507 (1966). Pursuant to the agreement under discussion respondent relinquished her claims for alimony and support and released her rights in her husband's estate and property in exchange for some household furnishings and the possession of the house. We find these mutual promises to be the sort contemplated by *Tripp* and serve as adequate consideration for this

separation agreement. We therefore conclude that the parties' separation agreement constituted a valid waiver of the right to partition.

Having concluded that the implied waiver of the right to partition in the parties' separation agreement is enforceable, we must now address petitioner's remaining argument. Petitioner submits that there is an ambiguity in the first paragraph of Section 2 of the separation agreement, regarding the period of respondent's possession of the property, which presents a genuine and material issue of fact. We have carefully examined both paragraphs of Section 2 and find no ambiguity. When Section 2 is read as a whole, it is clear that the respondent was to have exclusive possession and control over the property, as well as the option to rent it, until the youngest child completed her college education and obtained suitable employment. During that time, petitioner was to pay the entire monthly mortgage indebtedness. After the child finished college, the petitioner was to pay only one-half of the monthly mortgage indebtedness, and the respondent was to retain exclusive possession and control, as well as the option to rent, until both parties mutually agreed to sell the property. We believe the language of the agreement evidences a clear and unambiguous intent by the parties not to sell the property in the absence of a mutual agreement. Where the language of a contract is clear and unambiguous, the meaning and effect of the contract is a question for the court, not the jury, to decide. *Bank v. Corbett*, 271 N.C. 444, 156 S.E. 2d 835 (1967).

In his brief petitioner points out that the respondent could keep Richard L. McDowell from selling the property for the rest of his natural life "without agreement, without cause, without reason, or out of pure vindictiveness." We are not unaware of the plight petitioner finds himself in as a result of the terms of the separation agreement. However, as courts do not make contracts, we are not permitted to inquire into whether the contract was good or bad, wise or foolish. *See Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968). As a man consents to bind himself, so shall he be bound.

The court properly awarded summary judgment for respondent.

Affirmed.

Judges HEDRICK and EAGLES concur.

ARTHUR C. ROBERTS, JR., EMPLOYEE, PLAINTIFF v. SOUTHEASTERN MAGNESIA AND ASBESTOS COMPANY, EMPLOYER; GREAT AMERICAN INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 8210IC333

(Filed 19 April 1983)

1. **Master and Servant § 68.2— workers' compensation—asbestosis—findings supported by evidence**

The Industrial Commission's findings that plaintiff's exposure to asbestos after 20 September 1976 augmented his asbestosis and that plaintiff's last injurious exposure to asbestos was between 20 September 1976 and 17 July 1978 were supported by evidence that the employer's inventory figures for the years 1975 through 1979 showed that asbestos products were being handled by the employer during that period; during such period, plaintiff handled and moved various asbestos products on a daily basis five days a week and was exposed to some asbestos "on any work day"; and any exposure to asbestos was potentially injurious to plaintiff.

2. **Master and Servant § 68.1— workers' compensation—asbestosis—no necessity for diminished earning capacity**

For purposes of determining eligibility to receive workers' compensation benefits, a diagnosis of asbestosis is the equivalent of a finding of actual disability, and the employee may receive disability compensation for asbestosis without showing that he has suffered diminished capacity to earn an income. G.S. 97-61.5(b); G.S. 97-61.7.

3. **Master and Servant § 68.3— workers' compensation—award for asbestosis—compulsory change of occupation**

The Industrial Commission properly awarded plaintiff compensation for 104 weeks for asbestosis and properly ordered plaintiff to refrain from exposing himself to the hazards of asbestosis in his employment.

DEFENDANTS appeal from the North Carolina Industrial Commission. Opinion and award entered 9 June 1981. Heard in the Court of Appeals 14 February 1983.

This proceeding was brought by Arthur C. Roberts, Jr., employee, for compensation under the provisions of the North Carolina Workmen's Compensation Act, for disability due to asbestosis.

The first hearing in this proceeding was before Chief Deputy Commissioner Shuford in Charlotte, North Carolina, on 24 August 1979. At that time the plaintiff requested withdrawal of his claim, since he was still working and had not suffered any incapacity as a result of asbestosis. The case was removed from the hearing docket, with the understanding that plaintiff could refile his claim, within the two year statute of limitation, if his condition changed. On 17 September 1979, Commissioner Shuford reinstated plaintiff's claim, having determined that the language of G.S. 97-61.5 required that the case be heard without further delay.

The second hearing in this proceeding was before Deputy Commissioner Roney in Charlotte, North Carolina, on 20 March 1980. It appears from the evidence presented at that hearing that plaintiff was at that time president and manager of Southeastern Magnesia and Asbestos Company, Inc. (Southeastern). Plaintiff had worked at Southeastern since 1950, and had experienced considerable exposure to the hazards of asbestos in the 1950's and 1960's. During 1976, 1977, and 1978, plaintiff was still exposed to asbestos dust on a daily basis, although asbestos products were slowly being phased out of the inventory. Inventory figures for 1975 through 1979 showed that asbestos products were still being handled by Southeastern's employees during that period. No more asbestos products had been purchased by Southeastern since 1978. At the time of the second hearing, plaintiff was not disabled from doing the work which he had previously performed.

A third hearing was held before Deputy Commissioner Stephens in Charlotte, North Carolina, on 15 November 1980. Medical testimony established that plaintiff had undergone extensive testing and had been diagnosed on 11 July 1980 as having asbestosis, Grade I. Dr. Hillis L. Seay, in a letter to plaintiff's attorney, stated that plaintiff was forty percent disabled as a result of asbestosis.

Having made findings of fact and conclusions of law on the basis of the above evidence, Deputy Commissioner Roney awarded plaintiff $158.00 per week for 104 weeks as compensation for asbestosis. Plaintiff was ordered to refrain from activity in occupations which would involve further exposure to asbestos dust.

The full Commission upheld Deputy Commissioner Roney's award on appeal. Defendants appeal from this award.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick and Mel J. Garofalo, for plaintiff-appellee.

Teague, Campbell, Conely & Dennis by Richard B. Conely, for defendant-appellants.

EAGLES, Judge.

[1] Defendants first challenge the Industrial Commission's findings of fact that plaintiff's exposure to asbestos after 20 September 1976 augmented his disease and that plaintiff's last injurious exposure to asbestos was between 20 September 1976 and 17 July 1978. If the Commission's findings of fact are supported by competent evidence they may not be disturbed on appeal. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968); 8 N.C. Index 3d, Master and Servant § 96. Since these findings of fact were supported by competent evidence presented at the hearing, we find defendants' first assignment of error to be without merit.

G.S. 97-57 requires that the employee must have been exposed to the hazards of asbestosis "for as much as 30 working days, or parts thereof, within seven consecutive calendar months" for such exposure to be deemed injurious. Plaintiff's employer's year-end inventories showed that in 1975 plaintiff's business had, in its warehouse, asbestos products valued at $6,906.24; in 1976, asbestos products valued at $8,658.53; in 1977, asbestos products valued at $10,705.19; in 1978, asbestos products valued at $15,465.65; and in 1979, asbestos products valued at $3,093.01. During this five year period, plaintiff handled and moved asbestos pipe insulation, asbestos paper, asbestos tape, asbestos roll board, asbestos cloth and asbestos mill board on a regular daily basis, five days a week. Plaintiff testified that he was exposed to *some* asbestos "on any work day." Dr. Hillis L. Seay, who was stipulated as an expert in the field of pulmonary medicine, testified that *any* exposure to asbestos was "potentially injurious" to plaintiff. We hold that this evidence was sufficient to support both challenged findings of fact.

Defendant next asserts that the facts in this case did not support the Industrial Commission's conclusion of law that

2. Payment of compensation to employees afflicted with asbestosis for 104 weeks pursuant to N.C.G.S. 97-61.5(b) is predicated upon removal from the hazards thereof as opposed to actual incapacity to earn wages and begins upon removal from the hazards thereof as incentive to forced change in occupation, subject to waiver. Session Laws 1935, Chapter 123, Sec. 1; Session Laws 1945, Chapter 762, Sec. 4; Session Laws 1955, Chapter 525, Sec. 1 and 2. N.C.G.S. 97-61.5 is in conflict with the general provisions of N.C.G.S. 97-54 and N.C.G.S. 97-58(a), thereby establishing an exception. *Davis v. Granite Corp.*, 259 N.C. 672, 676, 131 S.E. 2d 335 (1963). This exception makes the diagnosis of asbestosis or silicosis the same as disablement. The disease must therefore have developed within two years of the last exposure.

Before the 1981 amendments, G.S. 97-61.5(b) stated that

> If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis, and if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G.S. 97-61.7, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death resulting from asbestosis or silicosis; provided, that if the employee is removed from the industry the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages before removal from the industry, but not more than eighty dollars ($80.00) or less than twenty dollars ($20.00) a week, which compensation shall continue for a period of 104 weeks. Payments made under this subsection shall be credited on the amounts payable under any final award in the cause entered under G.S. 97-61.6.

G.S. 97-61.7 provides that

Waiver of right to compensation as alternative to forced change of occupation.—An employee who has been compensated under the terms of G.S. 97-61.5(b) as an alternative to forced change of occupation, may, subject to the approval of the Industrial Commission, waive in writing his right to further compensation for any aggravation of his condition that may result from his continuing in an occupation exposing him to the hazards of asbestosis or silicosis, in which case payment of all compensation awarded previous to the date of the waiver as approved by the Industrial Commission shall bar any further claims by the employee, or anyone claiming through him, provided, that in the event of total disablement or death as a result of asbestosis or silicosis with which the employee was so affected, compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than 100 weeks in addition to the 104 weeks already paid. Such written waiver must be filed with the Industrial Commission, and the Commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person.

[2] It is clear from the language of these two statutes that a diagnosis of asbestosis, for purposes of determining eligibility to receive benefits, is the equivalent of a finding of actual disability. *See Davis v. Granite Corp.*, 259 N.C. 672, 131 S.E. 2d 335 (1963). We reject defendants' argument that plaintiff may receive disability compensation only upon a showing that he has suffered diminished capacity to earn an income. The Commission's award of 104 weekly payments was proper.

[3] The Commission's award was predicated upon the employee avoiding further exposure to asbestosis in his employment. We recognize that the intent of the Legislature in providing for an automatic 104 installment payments was to encourage employees to remove themselves from hazardous exposure to asbestos and to provide for employee rehabilitation, *Honeycutt v. Carolina Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426 (1952). We also recognize that G.S. 97-61.5(b) which authorizes this award, has as an additional purpose the compensation of employees for the incurable nature of the disease of asbestosis. *See Honeycutt v. Carolina Asbestos Co., supra; Pitman v. L. M. Carpenter & Associates*, 247 N.C. 63, 100 S.E. 2d 231 (1957). There is no indica-

tion that the Legislature intended to prohibit any recovery whatsoever to those employees who refused to remove themselves from contact with asbestos after being diagnosed as having asbestosis. The statutory language merely prohibits recovery for actual partial incapacity if the employee, after receiving the initial compensation in the form of the 104 week installment payments, is shown to have remained in a job where he or she is exposed to asbestos.

In addition to awarding plaintiff compensation for asbestosis, the Commission ordered the plaintiff to refrain from exposing himself to the hazards of asbestos in his employment. The above statutes provide that if plaintiff chose to obey the Commission's order to avoid exposure to the hazards of asbestosis in his employment and later established that his earning capacity was diminished due to the asbestosis, he could recover an additional amount as compensation for that loss of earning capacity. Since one of the purposes of G.S. 97-61.5(b) is "to provide compulsory changes of occupations for those workmen affected by asbestosis . . ., whose primary need is removal to employments without dust hazards," the Industrial Commission did not err when it ordered plaintiff to abstain from working with asbestos in the future. *Young v. Whitehall*, 229 N.C. 360, 365, 49 S.E. 2d 797, 801 (1948).

For these reasons, we affirm the Industrial Commission's opinion and award of 9 June 1981.

Affirmed.

Chief Judge VAUGHN and Judge WEBB concur.

DEREK F. SPEIGHT, BY HIS GUARDIAN AD LITEM, JAMES W. SPEIGHT, JR. v. SANDRA HINNANT

No. 828SC188

(Filed 19 April 1983)

Automobiles and Other Vehicles § 63.3— negligence in striking child in driveway

In an action to recover for injuries to the minor plaintiff when he was struck by defendant's automobile in a driveway, plaintiff's evidence was suffi-

cient for the jury to find that defendant was negligent in moving her automobile from a stationary position in the driveway without first determining that such movement could be made in safety where it tended to show that the 22-month-old plaintiff, his five-year-old sister and his mother returned from a shopping trip in defendant's car; defendant drove her car into a driveway and parked facing plaintiff's mother's car; the plaintiff, his sister and their mother walked to their car, whereupon the mother opened the door on the driver's side and pushed the front seat forward to allow her children to get in the back seat; the two children got into the car, but the minor plaintiff did not climb into his special infant's car seat; the car door remained open while the mother returned to defendant's vehicle in order to remove her dry cleaning therefrom; as the mother began walking back to her car, she saw only her daughter in the back seat and began calling for the minor plaintiff; a few seconds later she turned around to face defendant's car and saw defendant's tire roll over the plaintiff's face; and before the impact defendant saw plaintiff's sister inside the mother's car but did not see plaintiff therein.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 2 December 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 January 1983.

Plaintiff, an infant, brought this action by his father and guardian ad litem alleging personal injury caused by defendant's negligent operation of an automobile. The evidence offered at trial tended to show the following.

On 6 April 1979, the plaintiff, his mother, and his sister went shopping with the defendant and the defendant's two children. They were traveling in the defendant's car. The six returned from their shopping trip to Patricia Speight's uncle's house where Mrs. Speight had left her car parked in the driveway. Defendant drove her car into the driveway of the house and parked in front of the Speight car. The two cars faced each other in the driveway two to ten yards apart.

When defendant stopped in the driveway, Patricia Speight, her daughter and her son, the plaintiff, got out of defendant's car and walked to their car. Mrs. Speight opened the door on the driver's side, placed some packages on the seat and pushed the front seat forward to allow her children, Danielle and Derek, then five years and twenty-two months old respectively, to get in the back seat. The two children got into the car, but Derek did not climb into his special infant's car seat. The car door remained open while Patricia Speight turned away from her car and walked to the driver's side of the defendant's vehicle in order to remove

her dry cleaning from defendant's car. As she turned again and began walking back to her car, the plaintiff's mother saw only Danielle in the back seat and began calling for Derek. A few seconds later she turned around to face defendant's car and saw defendant's tire roll over the plaintiff's face. She watched as his body bounced from the impact. Plaintiff suffered head and facial injuries and some loss of hearing from the accident.

Patricia Speight testified at trial that when she saw the defendant's car and her son's body collide, the defendant was looking toward her at the front of defendant's car. The defendant testified she saw Mrs. Speight open the car door and tell the children to get in and that before the impact she saw Danielle in the back seat. She did not see Derek in the Speight automobile, however.

After hearing the defendant's evidence, Judge Barefoot granted defendant's motion for a directed verdict. From a judgment directing a verdict for the defendant, plaintiff appealed.

James, Hite, Cavendish & Blount, by Charles R. Hardee for the plaintiff, appellant.

Barnes, Braswell & Haithcock, by W. Timothy Haithcock for the defendant, appellee.

HEDRICK, Judge.

The only question presented on this appeal is whether the trial judge erred in directing a verdict for the defendant. The plaintiff contends that the evidence was sufficient to require submission of the case to the jury. The plaintiff argues the defendant was negligent because she did not see plaintiff in the Speight car and failed to keep a proper lookout for the infant before she began backing her car. The plaintiff also argues the defendant was put on notice that the plaintiff could have been in the driveway when plaintiff's mother called for him while standing in front of defendant's vehicle.

Anyone who operates a motor vehicle must exercise a reasonable amount of care and caution under the circumstances, and a failure to do so constitutes negligence. 2 N.C. Index 3d, *Automobiles and Other Vehicles* § 8 (1976). If children are present, the motorist's duty of care includes a recognition that

children are less able to avoid danger than adults and the motorist must act as a reasonable man would under such circumstances. *Williams v. Trust Co.*, 292 N.C. 416, 233 S.E. 2d 589 (1977). Such a standard of care applies when a car is operated on private property as well as on public streets and highways. *Id.*

In a recent case, our Supreme Court addressed a situation involving the discharge of a five year old passenger onto a busy residential street. There the Court quoted the following from Justice Parker's opinion in *Pavone v. Merion*, 242 N.C. 594, 594, 89 S.E. 2d 108, 108 (1955):

> A motorist must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, that their excursions into a street may reasonably be anticipated, that very young children are innocent and helpless and that children are entitled to a care in proportion to their incapacity to foresee and avoid peril.

Colson v. Shaw, 301 N.C. 677, 681, 273 S.E. 2d 243, 246 (1981). Thus, when there are children present whom the driver sees or should see, the driver must act reasonably to control the movement of his vehicle and to keep a careful lookout to avoid injury to the children. *Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973).

We are cited by the defendant to *Ham v. Fuel Co.*, 204 N.C. 614, 169 S.E. 180 (1933), where our Supreme Court, Justice Clarkson dissenting, reversed a denial of defendant's motion for nonsuit in a case similar in many ways, but, in our opinion, sufficiently distinguishable to require the trial court in the present case to overrule the defendant's motion for directed verdict, and to submit to the jury the issue of negligence on the part of the defendant. In *Ham* the majority of the Supreme Court stated:

> The evidence leaves no doubt as to the fact that the little child crawled under the truck while the driver was delivering ice and was concealed thereunder when the driver returned to resume the operation thereof. The evidence of careful lookout is uncontradicted, and the failure of the driver to bend down and look under the truck cannot be held for actionable negligence when all other ordinary and reasonable elements of prudent lookout and inspection have been observed.

204 N.C. at 618, 169 S.E. 180 at 182. When the driver of the ice truck in the cited case parked the vehicle on the street in front of the house, where he and his father delivered fifty pounds of ice, he observed a crowd of little children on the other side of the same street playing in a sandpile which extended onto the sidewalk and into the edge of the street. The two men completed their delivery and returned to the truck. Before getting back into the truck, they looked to the front and back of the truck. They got into the truck and again looked to the front and back before backing over the child.

In the present case, the defendant parked her car in the driveway facing the mother's car. The defendant sat facing Mrs. Speight's vehicle while Mrs. Speight took her two small children to the Speight vehicle and opened the door for the children to get into the back seat. The mother left her automobile door open while she returned to the defendant's vehicle to get her laundry. The defendant testified she saw the plaintiff get out of the defendant's car and walk with his mother to the Speight automobile. At no time did she see the plaintiff inside of the Speight car, but she did see the plaintiff's sister, Danielle, inside of the car. The plaintiff's mother testified that when she returned and found that the infant plaintiff, twenty-two months of age, was not in the back seat of her car she began calling and looking for the child a few moments before the defendant began backing. During all this time, the two vehicles were "two to ten yards apart."

Unlike the *Ham* case, where the children were playing on the other side of the street, the plaintiff in this case had been in the defendant's car immediately before the accident and the defendant knew the plaintiff was in close proximity to her car. The infant's mother had also begun calling for her child. The evidence, when considered in the light most favorable to the plaintiff, in our opinion, will permit, but not compel, the jury to find that the defendant was negligent in that she moved her automobile from a stationary position in the driveway without first determining that such movement could be made in safety and that such negligence was a proximate cause of the injury to the infant plaintiff.

We hold the trial court erred in directing a verdict for the defendant.

Reversed and Remanded.

Judges JOHNSON and EAGLES concur.

LILLIE H. ALLEN v. OLLIE LEE ALLEN

No. 828DC250

(Filed 19 April 1983)

1. **Husband and Wife § 11.2— separation agreement—wife's consent for husband to go upon her property—reasonable opportunity to retrieve property**

A separation agreement which forbade defendant husband from going upon plaintiff wife's premises without her written consent did not give the wife the right to withhold her consent for defendant to go upon her premises to obtain personal property allocated to him by the agreement until sued for the recovery of such property but impliedly required plaintiff to accord defendant a reasonable opportunity to retrieve his property, and plaintiff's persistent and prolonged refusal to do so constituted a breach of the agreement which entitled defendant to damages.

2. **Husband and Wife § 11.2— breach of separation agreement—matters not expressly mentioned in agreement**

In a counterclaim by defendant for breach of a separation agreement, the trial court properly admitted defendant's evidence that plaintiff disposed of a boat which was his, failed to pay a light bill incurred by her in defendant's name, and cashed income tax refund checks in which defendant had an interest, although such matters were not expressly mentioned in the separation agreement, since they were fairly encompassed by the agreement. Even if these matters were erroneously treated as breaches of the separation agreement rather than as independent claims, such error was harmless since each claim subjected plaintiff to the same liability set forth in the trial court's instructions to the jury, and all the claims would have been tried together since they all arose out of the marital state and had to be asserted as a counterclaim in plaintiff's divorce action. G.S. 1A-1, Rule 13(a).

3. **Evidence § 45— opinion testimony as to value**

The trial court properly permitted defendant to give opinion testimony as to the fair market value of his television set, boat trailer, lumber, and electrical equipment where the evidence showed that defendant had purchased, collected, or built all of these articles and was familiar with their condition and use.

APPEAL by plaintiff from *Wright, Judge*. Judgment entered 28 October 1981 in District Court, WAYNE County. Heard in the Court of Appeals 19 January 1983.

After being married for twenty-two years, the parties entered into a separation agreement which recited the adjustment of all their claims against each other and a division of their debts and property, both real and personal. Some of the personal property allocated to defendant was situated on real estate allocated to the plaintiff, and the agreement expressly forbade the defendant from going on her real estate thereafter without her written consent.

Upon plaintiff's divorce action being filed a year later, the defendant counterclaimed, alleging that plaintiff had breached the separation agreement by wrongfully detaining or disposing of certain goods of his that were left on her property (a boat, television set, two trailers, "the assortment of lumber situated under the shelter at the farm, and the collection of electrical equipment used in making electrical repairs"), by failing to pay a light bill incurred in his name, and by cashing federal and state income tax refund checks that he had an interest in.

The plaintiff's divorce action was resolved at an earlier trial and the trial that concerns us involved only the defendant's counterclaim. Defendant's evidence supported his several allegations and showed that plaintiff not only refused to let him get his articles, but actually sold or wasted some of them. Though plaintiff testified that defendant was invited and encouraged to pick up his goods and failed to do so, she admitted that all the goods referred to in the counterclaim were owned by the defendant, they were left on her property, she sold some of defendant's electrical equipment, which she described as "junk," for $300, and her written consent for defendant to enter the premises and get his property was never given.

During the trial, over plaintiff's objection, defendant gave opinion testimony as to the fair market value of all the personal property involved, and plaintiff also objected to each of the Court's instructions to the jury with respect thereto. The jury found that plaintiff had breached the separation agreement and that defendant had been damaged thereby in the amount of $5,000. From judgment entered thereon, the plaintiff appealed.

Hulse & Hulse, by Herbert B. Hulse, for plaintiff appellant.

Duke & Brown, by John E. Duke, for defendant appellee.

PHILLIPS, Judge.

Though seven questions are presented, based on twenty-seven assignments of error and more than one hundred exceptions, they all can be resolved by examining and interpreting the separation agreement that is the basis for the counterclaim and the rules of evidence whereunder opinion testimony as to value is permissible. In doing so, it becomes clear that the trial below was conducted without prejudicial error to the plaintiff.

[1] First of all, the plaintiff's contention that the separation agreement—(which forbade the defendant to enter her premises without receiving her written consent and did not expressly require her to give her consent)—gave her the legal right to withhold her consent and retain defendant's goods until sued for its recovery, is rejected. Manifestly, a property settlement, in which one party remains at liberty to retain the other's property until sued for its possession, would be no settlement at all and a pointless absurdity, in the absence of special circumstances or an express recital to the contrary, of which there was none in this instance. Furthermore, a dominant purpose of all separation and property settlement agreements, whether recited or not, is to avoid litigation, rather than require it. In depriving the defendant of the relatively meager fruits of his bargain—(her bargain included the parties' homeplace in Goldsboro, a farm in Indian Springs, and their place at White Lake)—by refusing to let him possess and enjoy property acknowledged to be his, plaintiff was not acting under the sanction of either the agreement or the law. Even though not recited therein, the law wisely and justly deems that every party to a contract impliedly promises to do all those things reasonably necessary to enable the contract purposes to be realized, and to refrain from doing those things that would render the contract ineffective.

> . . . [T]he law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made. Moreover, in every contract there exists an implied covenant of good faith and fair dealing; and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's rights to

receive the fruits of the contract. 17A C.J.S., Contracts § 328, pp. 284-86.

These salutary principles have been approved by our Supreme Court in *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973), *Edwards v. Proctor*, 173 N.C. 41, 91 S.E. 584 (1917), *Brown Chemical Company v. Atkinson, Cobb & Company*, 91 N.C. 389 (1884), and many other decisions. Thus, plaintiff was legally bound to accord defendant a reasonable opportunity to retrieve his property. Her persistent and prolonged refusal to do so, as the jury found, was a breach of contract, entitling the defendant to legal redress in damages.

[2] Three of the matters that defendant complained of and testified to, however, were not expressly mentioned in the separation agreement—a sixteen-foot boat and trailer of the defendants, allegedly conveyed away by her, state and federal income tax refund checks, which she allegedly cashed, and a light bill that she incurred in his name and admittedly didn't pay, causing him to be dunned several times by a credit bureau. Since the declared basis for the defendant's counterclaim was the separation agreement and it was silent as to these matters, plaintiff contends that receiving evidence about them and instructing the jury thereon was prejudicial error. We disagree.

Though not expressly referred to in the separation agreement, all these matters, in our view, were fairly encompassed by it. Each arose out of their marital state and involved a legal right of one kind or another; and it has been well held that a separation and property settlement agreement, nothing else appearing, imports "a full and final settlement of all property rights of every kind and character." *Bost v. Bost*, 234 N.C. 554, 557, 67 S.E. 2d 745, 747 (1951). Certainly that is what the circumstances import here. In addition to terminating their marital association, dividing the ownership of their four tracts of real property, acknowledging that each owned certain specific articles of personal property, and declaring that each was responsible for certain debts, the agreement recited that "all other personal property owned by the parties has been satisfactorily divided between the parties;" that each was obligated not to "interfere with the personal rights, liberties or privileges or affairs of the other;" and that neither would "incur any debts which will in any way obligate the other

party to pay the same." Converting defendant's boat and tax refunds and refusing to pay a bill incurred in his name were clear violations of both the letter and spirit of the contract.

But even if that was not the case, treating these matters as breaches of the separation agreement, rather than as independent claims, would be a mere error of form or nomenclature, rather than substance, and thus harmless. However treated, each claim, specifically alleged, upon proof, subjected plaintiff to the same liability set forth in the trial judge's instructions to the jury—to wit, the fair market value of the boat, trailer, and tax refund, and nominal damages for the unpaid light bill, which defendant had not paid either; and each claim would have been tried when it was, since all of them arose out of their marital state, the subject of plaintiff's divorce action, and had to be asserted in the counterclaim, if at all. Rule 13(a), Rules of Civil Procedure.

[3] Finally, the defendant's opinion testimony as to the fair market value of his television set, boat trailers, lumber, and electrical equipment was properly received and the Court's instructions with respect thereto were without error. The evidence shows that defendant had purchased, collected, or built all of these articles and was familiar with their condition and use, which adequately qualified him to testify as to their values. 1 Brandis, N.C. Evidence § 128 (2d ed., 1982). Expert knowledge or qualifications were not required. Though defendant did not show that he knew the market for similar items, his knowledge of and familiarity with the items involved enabled him to make an intelligent estimate of their values; which is all that the law requires in matters of this kind, the weight thereof being for the jury. *State v. Harper*, 51 N.C. App. 493, 277 S.E. 2d 72 (1981); *Harrelson v. Gooden*, 229 N.C. 654, 50 S.E. 2d 901 (1948).

Thus, in the judgment below, we find

No error.

Judges WEBB and BECTON concur.

JOHN MANGUM AND BEATRICE F. MANGUM v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 8210SC477

(Filed 19 April 1983)

1. **Judgments § 36.5— action on fire policy—failure to file timely proof of loss—res judicata**

Plaintiffs' action to recover under a fire insurance policy for the loss of personal property in a fire in their home was barred by the doctrine of *res judicata* where plaintiffs sought damages in a prior action against defendant insurer for the loss of their home, the record and appellate opinion in the first action show that plaintiffs did not file a timely proof of loss and that the issue as to proof of loss was fully adjudicated, and the matter to be litigated in both actions involved coverage under a single insurance policy for loss of property caused by the same fire.

2. **Insurance § 136— fire insurance—loss of real property and personal property—only one cause of action**

Where only one premium was paid and one fire insurance policy was issued to cover loss of real and personal property, and the same fire damaged both real and personal property owned by plaintiff insureds, only one claim existed to recover under the policy, and plaintiffs were estopped from bringing a second action to recover for damage to personal property after their prior action to recover for damage to their home had been litigated.

APPEAL by plaintiffs from *Herring, Judge.* Judgment entered 16 December 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 15 March 1983.

On 18 September 1980 plaintiffs filed suit on a fire insurance policy issued by defendant Nationwide Mutual Fire Insurance Company. They sought compensatory damages for the loss of personal property resulting from a 19 January 1978 fire in their home. Nationwide alleged several defenses including collateral estoppel and *res judicata.*

On 2 November 1981 Nationwide moved for summary judgment on grounds that the plaintiffs' action was barred by these defenses and that plaintiffs had unlawfully split one cause of action. In support of its motion, Nationwide relied upon a prior action between the parties wherein plaintiffs sought compensatory damages for the loss of their home caused by the same fire. At the conclusion of the trial on this earlier action, Nationwide's motion for directed verdict was granted. This Court, in an unpub-

lished opinion, dismissed plaintiffs' appeal. *Mangum v. Nationwide*, 52 N.C. App. 734, *disc. review denied*, 304 N.C. 196, 285 S.E. 2d 99 (1981).

After considering the pleadings between the parties and this Court's opinion in the first action, Judge Herring granted Nationwide's motion for summary judgment and dismissed plaintiffs' action. Plaintiffs appeal from this judgment.

Ernest E. Ratliff, for plaintiff appellants.

Moore, Ragsdale, Liggett, Ray & Foley, by Peter M. Foley, for defendant appellee.

BECTON, Judge.

Plaintiffs' sole assignment of error relates to the granting of Nationwide's motion for summary judgment. After careful examination of the present record on appeal and the record and opinion in the prior action, we affirm the award of summary judgment in Nationwide's favor.

[1] Plaintiffs first argue that the doctrine of *res judicata* does not bar their recovery for damages to the contents of their dwelling because there was no judgment on the merits in the previous action. The evidence before this Court is to the contrary.

Estoppel by judgment, or *res judicata*, has been defined as follows: "[W]hen a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." *Humphrey, et al. v. Faison*, 247 N.C. 127, 133, 100 S.E. 2d 524, 529 (1957), *quoting Armfield v. Moore*, 44 N.C. 157 (1852).

In the first action against Nationwide, plaintiffs prayed for compensatory damages for the loss of their dwelling as a result of the 19 January 1978 fire and for punitive damages. At the close of plaintiffs' evidence, the trial court directed verdict in favor of the insurance adjuster for Nationwide and in favor of Nationwide as to all claims for punitive damages. At the close of Nationwide's evidence, a directed verdict with respect to the remaining claims in the complaint was entered in Nationwide's favor, and plaintiffs' action was dismissed. In its judgment, the trial court indicated

that it was granting Nationwide's motion for directed verdict on its counterclaim, in part, on the ground that plaintiffs breached the provision of the policy providing for an examination under oath of the insured. This Court dismissed plaintiffs' appeal from this judgment because of Appellate Rule violations. This Court further examined the evidence in the record and concluded that plaintiffs failed to establish their cause against Nationwide. Judge Harry C. Martin, writing for the Court, explained:

> Moreover, N.C.G.S. 58-176(c) requires that within sixty days after a fire loss the insured shall render to the company a sworn proof of loss. Defendant Nationwide relied upon the failure of plaintiffs to comply with this requirement as a stated basis for its motion for directed verdict at the close of all the evidence.
>
> In North Carolina, no action may be maintained on a standard fire insurance policy unless proof of loss has been filed within the prescribed sixty-day period following the fire. [Citation omitted.] N.C.G.S. 58-180.2 allows a claimant faced with the defense of failure to file timely proof of loss to plead that such failure was for good cause and that the insurance company has not been substantially harmed in its ability to defend. Plaintiffs failed to take advantage of this statute, and did not file any pleading or introduce evidence as provided thereby. Nor do plaintiffs contend in their brief that they did so. Plaintiffs followed this course of action although the trial judge had advised their counsel that he would allow an amendment to their pleadings for this purpose. This fire loss occurred on 19 January 1978; plaintiffs were provided with forms for filing proof of loss 24 January 1978. They did not file proof of loss until 27 April 1978, more than sixty days after the loss. By so doing, with nothing else appearing, plaintiffs have failed to establish their cause against defendant Nationwide, and the court for this reason properly allowed Nationwide's motion for directed verdict. [Citation omitted.]

Mangum v. Nationwide, supra, slip op. at 3-4. Pending the appeal of the first action against Nationwide, plaintiffs filed the present action seeking compensation for the fire damage to their personal property.

The record and opinion of this Court in the first action clearly show that the issue as to proof of loss was fully adjudicated. Pursuant to the doctrine of *res judicata* the parties were bound by this decision in all other actions involving the same matter. *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157 (1941). The matter to be litigated in both actions involved coverage under a single insurance policy for loss of property caused by the same fire. The fact that the presiding judge in the first action did not expressly allow directed verdict in Nationwide's favor because of failure to file timely proof of loss is not a matter of concern. *Res judicata* "prevails as to matters essentially connected with the subject matter of the litigation and necessarily implied in the final judgment, although no specific finding may have been made in reference thereto." *Craver v. Spaugh*, 227 N.C. 129, 132, 41 S.E. 2d 82, 84 (1947). The matter of timely proof of loss was clearly pertinent to the issue of plaintiffs' recovery under the insurance policy for loss caused by the 19 January 1978 fire. In the first action, the record on its face showed that plaintiffs did not file a timely proof of loss and chose not to amend their pleadings to allege a good cause for this failure. This choice was made at their peril. "As to them, they have had a day in court and an opportunity to be heard. The facts found by the court at that hearing are conclusive. They preclude any recovery in this cause." *Id.*

[2] Plaintiffs have also argued that since they never raised the issue of compensation for loss of personal property in their first action, a subsequent suit on this matter could be litigated. We agree with Nationwide that plaintiffs are estopped from bringing their second action, because the claims for recovery of damages to personal and real property should have been litigated in one suit. The situation here is almost identical to *Lisenbey v. Farm Bureau Mutual Ins. Co. of Arkansas, Inc.*, 245 Ark. 144, 431 S.W. 2d 484 (1968). The issue before the Arkansas Supreme Court involved the right of homeowners whose houses were destroyed by fire to bring successive suits upon their fire insurance policy, first to recover for the loss of the house and later to recover for the loss of its contents. The trial court held that the first suit barred the second suit. In affirming this judgment, the Arkansas Supreme Court emphasized that only one fire insurance policy had been issued; that one premium was paid to cover loss of personal and

real property and that the same fire caused damage to the property. Based upon these reasons, the Court concluded that only one cause of action existed and that plaintiffs should not be permitted to subdivide this action.

The reasoning in *Lisenbey* is consistent with the general rule cited by our courts that all damages resulting from a single wrong or cause of action must be recovered in one suit. *See Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822 (1940). This reasoning is also consistent with the doctrine of merger, a collateral aspect of *res judicata*, as applied in actions for installments of money under a single contract. *See, e.g., Behr v. Behr*, 46 N.C. App. 694, 266 S.E. 2d 393 (1980) (suit for arrearages in separation agreement). In *Behr*, this Court concluded, "Under the doctrine of merger, a party suing for the breach of an indivisible contract must sue for all of the benefits which have accrued at the time of suit or be precluded from maintaining a subsequent action for installments omitted." *Id.* at 693, 266 S.E. 2d at 396. In the case *sub judice*, there was one action which arose from a breach of a contract to insure. Plaintiffs were correctly barred from splitting this cause of action.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

OSCAR MILLER CONTRACTOR, INC. v. THE NORTH CAROLINA TAX REVIEW BOARD

No. 8210SC89

(Filed 19 April 1983)

Taxation § 31.1— use tax—sale of machinery to asphalt paver

Petitioner had a right to rely on a regulation from the Secretary of Revenue providing that a sale of mill machinery to an asphalt plant is a sale to a manufacturer and subject only to a 1% use tax with a maximum of $80.00 per article, and the purchase of machinery by petitioner to make asphalt to be used principally in the performance of its asphalt paving contracts was subject to a maximum use tax of $80.00. G.S. 105-264; G.S. 105-164(h).

Oscar Miller Contractor v. Tax Review Board

APPEAL by petitioner from *Preston, Judge.* Judgment entered 2 October 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 16 November 1982.

This is an appeal from a judgment of the superior court affirming an order of the Tax Review Board. The petitioner is an asphalt paving contractor. It purchased machinery from an out-of-state vendor which it used in making asphalt, at least 90% of which was to be used in the performance of its asphalt paving contracts. The petitioner sold the balance of the asphalt. The petitioner paid a use tax of $80.00 on the purchase of the machinery. The North Carolina Department of Revenue assessed an additional tax of 4% on the purchase price of this machinery. After a hearing the North Carolina Secretary of Revenue sustained the assessment of this tax. The Tax Review Board affirmed the decision of the Secretary of Revenue and the superior court affirmed the order of the Tax Review Board. The petitioner appealed.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for The North Carolina Tax Review Board and The Secretary of Revenue.

Parker, Sink, Powers, Sink and Potter, by William H. Potter, Jr. and Henry H. Sink, for petitioner appellant.

WEBB, Judge.

This appeal brings to the court the question of the amount of use tax which is owed by the appellant for the purchase of machinery to make asphalt to be used principally in the performance of its contracts. The following are germane to the determination of this case; G.S. 105-164.6:

> "Imposition of tax.—An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price, to wit:
>
> (1) At the rate of three percent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed,

distributed or stored for use or consumption in this State; except that, whenever a rate of less than three percent (3%) is applicable under the sales tax schedule set out in G.S. 105-164.4 to the sale at retail of an item or article of tangible personal property, the same rate, and maximum tax if any, shall be used in computing any use tax due under this subdivision. . . .

. . . .

(4) Where a retail sales tax has already been paid with respect to said tangible personal property in this State by the purchaser thereof, said tax shall be credited upon the tax imposed by this Part. Where a retail sales and use tax is due and has been paid with respect to said tangible personal property in another state by the purchaser thereof for storage, use or consumption in this State, said tax shall be credited upon the tax imposed by this Part. . . .

G.S. 105-164.4 provides:

"Imposition of tax; retailer.—There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail . . . the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

. . . .

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars ($80.00) per article, on the following items:

. . . .

h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants . . . ."

The Secretary of Revenue pursuant to G.S. 105-262 has made a regulation which we quote in part:

"SALES AND USE TAX REGULATION 30

. . . .

Section II—Specific Tangible Personal Property Classified for Use By Industrial Users

A. Sales of mill machinery, mill machinery parts and accessories to manufacturing industries and plants for industrial processing are subject to the 1% sales or use tax, subject to a maximum tax of $80.00 per article where applicable. . . .

. . . .

Section III—Specific Industries

Following are certain specific classifications as to taxable and nontaxable items of tangible personal property when sold to specific types of manufacturing or industrial plants. . . .

E. Other Mills & Processors:

Sales of production machinery, and parts and accessories thereto, . . . are deemed to be sales to manufacturing industries and plants when made to any of the following: . . . asphalt plants . . . and any other producer of processed, fabricated or manufactured articles of tangible personal property."

G.S. 105-264 provides in part:

"Construction of Subchapter; . . .

. . . .

Whenever the Secretary of Revenue shall construe any provisions of the revenue laws administered by him and shall issue or publish to taxpayers in writing any regulation or ruling so construing the effect or operation of any such laws, such ruling or regulation shall be a protection to the officers and taxpayers affected thereby and taxpayers shall be entitled to rely upon such regulation or ruling. . . ."

The appellant contends it is a manufacturer which has purchased machinery to produce asphalt, which means that G.S. 105-164.4 limits the tax imposed by G.S. 105-164.6 to one percent

of the sales price with a maximum of $80.00 per article. The appellant which uses the machinery for making asphalt would ordinarily be considered a manufacturer. *See Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E. 2d 289 (1968). The appellee, relying on *In Re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E. 2d 199 (1974) argues that the appellant is not a manufacturer within the meaning of the Sales and Use Tax Act. *Clayton-Marcus Co.* dealt with the imposition of a use tax on the sale of cloth to a furniture maker which cloth was processed into swatch books. The swatch books were sent out-of-state to retail stores that were customers of the taxpayer to be used by the retail stores as samples. Our Supreme Court held the purchase of cloth which was made into these swatches was not subject to a use tax because the use made of it did not fit the definition of a use which was subject to the tax. Although it was not necessary for a decision of the case, the Supreme Court went into some detail in defining what is a sale to a manufacturer for purposes of the Sales and Use Tax Act.

Our Supreme Court said it is clear that the purpose of the Sales and Use Tax Act is to impose a use tax, credited with any sales tax previously paid, upon the user of any tangible personal property in this state. If the property is used to produce something which will add to the taxpayer's profit but the thing produced will not be sold subject to the sales tax, the sale of the property is not a sale to a manufacturer within the meaning of the Sales and Use Tax Act. Such a sale is subject to the Use Tax at the rate of four percent (3% for the state and 1% for the county). The appellee argues that under the reasoning of *Clayton-Marcus Co.* the sale of the machinery to the appellant was a sale of tangible personal property which would be used by the appellant to make asphalt to be used in fulfilling its paving contracts and the asphalt so used is not subject to a sales tax. The appellee contends that for this reason the sale of machinery to the appellant did not come within G.S. 105-164.4.

We might be persuaded by the appellee's argument if it were not for the regulation from the Secretary of Revenue. This regulation says specifically that a sale of mill machinery to an asphalt plant is a sale to a manufacturer and subject to a one percent use tax with a maximum of $80.00 per article. G.S. 105-264 provides that a taxpayer may rely on the Secretary's regulations

and be protected by them. The appellee contends that these regulations must be read to mean that if a purchaser is a manufacturer under the Sales and Use Tax Act as defined in *Clayton-Marcus Co.* and the machinery is used to produce manufactured articles as defined in that case, such a sale is subject to a one percent tax rate with a maximum of $80.00 per article. The appellee says the sale to the appellant does not fit this definition. We do not so read the regulation. It could have been written to say specifically that a sale of machinery to an asphalt plant would be considered a sale to a manufacturer if the machinery was to be used to produce property for sale subject to the sales tax. It was not so written. We believe the taxpayer had the right, pursuant to G.S. 105-264, to rely on the regulation as written. We do not believe we face the question of whether a taxpayer may rely on a regulation in conflict with the plain words of a statute. The statute in this case is ambiguous and there has not been a square holding by a court which defines it.

For the reasons stated in this opinion, we hold the superior court was in error for affirming the order of the Tax Review Board.

Reversed and remanded.

Judges HEDRICK and BECTON concur.

CLARENCE D. HESTER, JR. v. HANES KNITWEAR AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8217SC474

(Filed 19 April 1983)

Master and Servant § 108.1— unemployment compensation—use of drugs on employer's property—supporting evidence—discharge for misconduct

A finding by the Employment Security Commission that claimant was discharged from his employment for using drugs on company property was supported by the testimony of an undercover agent that he observed claimant smoking marijuana on the job and that his belief that claimant was smoking a marijuana cigarette was based upon his prior experience and training in drug and alcohol enforcement. Furthermore, such finding supported the Commission's conclusion that claimant was discharged for "misconduct connected with

his work" pursuant to G.S. 96-14(2) and was disqualified for unemployment benefits.

APPEAL by defendants from *Lamm, Judge.* Order entered 18 December 1981 in Superior Court, STOKES County. Heard in the Court of Appeals 15 March 1983.

This case involves a claim filed by appellee Hester for unemployment benefits under the Employment Security Law after he was terminated on 13 August 1980 by his employer, appellant Hanes Knitwear (hereafter "Hanes"). A claims adjudicator of the Employment Security Commission initially ruled that Hester was eligible to receive benefits. Upon appeal, a hearing was held on 29 October 1980 before an appeals referee who reversed the initial eligibility determination and ruled that Hester had been discharged for using illegal drugs on company property, which was misconduct in connection with his work within the meaning of G.S. 96-14(2). Hester was therefore disqualified for benefits under the Employment Security Law. This decision was affirmed by the full Commission on 8 April 1981.

Hester appealed the Commission's decision to Superior Court of Stokes County. On 18 December 1981, after a hearing, Judge Lamm reversed the Commission's decision and ordered that Hester be determined eligible for unemployment benefits under the Law. Hanes and the Employment Security Commission appeal from entry of this order.

Legal Aid Society of Northwest North Carolina, Inc., by Gwyneth B. Davis for claimant appellee.

Ogletree, Deakins, Nash, Smoak and Stewart by W. Britton Smith, Jr., for appellant Hanes Corporation.

Chief Counsel T. S. Whitaker and Deputy Chief Counsel V. Henry Gransee, Jr., for appellant Employment Security Commission.

BRASWELL, Judge.

The sole issue presented on appeal is whether the court erred in its order reversing the Commission's decision. In its order the court found as a fact that "The only evidence on the record of claimant's alleged use of drugs on company property

were conclusory allegations by an undercover agent, which lacked any basis for the conclusions drawn by the witness." Judge Lamm concluded as a matter of law:

> "2. Finding of fact number 2 of the Employment Security Commission's decision, Docket No. 81(C)0871 [that 'Claimant was discharged from this job for using illegal drugs on company property in violation of state drug laws and company policy'], as adopted from the Appeals Referee finding of fact, was not based upon competent evidence contained in the record, and is therefore not binding upon this Court.
>
> 3. The Employment Security Commission did not properly apply the law to the facts in its final decision of April 8, 1981, in that the record and the evidence contained therein, do not support the Employment Security Commission's decision that claimant is disqualified for unemployment benefits due to misconduct in connection with his work, pursuant to N.C.G.S. Sections 96-14(2)."

In reviewing decisions of the Employment Security Commission, the Superior Court's jurisdiction is based upon G.S. 96-15(i) (1975), which provides in pertinent part that:

> "The decision of the Commission shall be final, subject to appeal . . . to the superior court of the county of his residence. . . . In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. . . ."

The Superior Court functions as an appellate court and must determine: "(1) . . . whether there was evidence before the Commission to support its findings of fact; and (2) . . . whether the facts found sustain the conclusions of law and the resultant decision of the Commission." *Employment Security Com. v. Jarrell*, 231 N.C. 381, 384, 57 S.E. 2d 403, 405 (1950); *In re Enoch*, 36 N.C. App. 255, 243 S.E. 2d 388 (1978).

In this case, the Superior Court found that the evidence did not support the Commission's finding that claimant was discharged for using illegal drugs on company property. Judge Lamm found as a fact that the only evidence of defendant's al-

leged use of drugs consisted of conclusory allegations by DeVane, the undercover agent. The court believed that the evidence showed no basis for the conclusions drawn by DeVane.

At the hearing before the appeals referee on 29 October 1980, DeVane testified that he was a private investigator for the Pinkerton Agency and had been hired by Hanes to work undercover to discover whether any employees were using drugs or alcohol on the job. DeVane had previous experience working undercover in controlled liquor violations and marijuana violations for the Fayetteville and Clinton ABC Boards. He worked three or four months for Hanes in the investigation. He knew claimant and identified him at the hearing. DeVane testified concerning his observance of claimant using marijuana as follows:

"Q. Alright did you ever observe Mr. Hester using drugs or alcohol on company time on the premises at Hanes Knitwear?

A. Yes sir.

* * * *

Q. Did you observe him [claimant] smoking marijuana?

A. Yes sir I did.

Q. Did you report that to the company?

A. Yes sir, it was in turn mailed into my Charlotte Office.

Q. Are you familiar with marijuana?

A. Yes sir.

Q. Did your prior experience with the ABC make you, give you information upon which you could rely to know that associates with marijuana?

A. Yes sir.

Q. Is there any question in your mind that marijuana was being smoked by Mr. Hester and the other employees?

A. There's no doubt in my mind that they weren't smoking marijuana, sir."[1]

Although claimant presented evidence tending to show that he had worked for Hanes for ten years, that he did not smoke or drink and had never smoked marijuana at his place of employment, DeVane testified that he had observed claimant smoking marijuana on the job. Claimant argues that DeVane's evidence was incompetent in that there were no corroborating witnesses, the testimony was an opinion on the ultimate issue to be decided by the trier of fact and DeVane's conclusion that claimant was smoking marijuana was unsubstantiated by any details as to DeVane's experience which enabled him to recognize marijuana or by any details on the facts surrounding claimant's alleged use of marijuana. We find no merit to claimant's argument and hold that the court erred in its finding and conclusion that the Commission's finding of misconduct was not based upon competent evidence.

We think there can be no doubt that the use of marijuana on company property during working hours in violation of the employer's rules constitutes "misconduct connected with his work" pursuant to G.S. 96-14(2). At the hearing DeVane stated several times that he had seen claimant smoking marijuana on Hanes' property during working hours. An observer is qualified to testify about an incident because he has firsthand knowledge of what occurred. McCormick, *Law of Evidence*, § 13 (2d ed. 1972). Although DeVane was not found by the referee to be an expert witness, his belief that what claimant was smoking was a marijuana cigarette was clearly based upon his prior experience and training in drug and alcohol enforcement. While it may be true, as claimant argues in his brief, that DeVane's testimony concerning the drug use by claimant was primarily in response to leading questions posed by Hanes' attorney and that his description of the occasion when he observed claimant was unclear at times, these weaknesses are not fatal to the employer's case. The Employment Security Law authorizes the Commission to establish its own methods of procedure and conduct of hearings. G.S.

1. In the context of DeVane's testimony, it seems clear that by this ambiguous statement he meant that he had no doubt that the employees were smoking marijuana.

96-4(a) and (p). G.S. 96-4(p) provides in part that "The Commission shall not be bound by common-law or statutory rules of evidence or by technical formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties." *See* Hanft, *Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635, 653-55 (1971).

We hold that there was competent evidence presented by DeVane's firsthand observation of claimant's misconduct sufficient to support the Commission's finding that claimant was discharged for using drugs on company property. Therefore, pursuant to G.S. 96-15(i), the Commission's findings are conclusive, and it was error for the Superior Court to reverse the decision of the Commission. *See In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980). The Superior Court cannot consider the evidence for the purpose of finding the facts for itself. *Employment Security Comm. v. Young Men's Shop*, 32 N.C. App. 23, 231 S.E. 2d 157, *disc. rev. denied*, 292 N.C. 264, 233 S.E. 2d 396 (1977).

We reverse the judgment of the Superior Court and remand the cause to the Superior Court of Stokes County for an order reinstating the order of the Employment Security Commission disqualifying claimant from receiving unemployment insurance benefits.

Reversed and remanded.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. ETHEL BELL DAVIS

No. 827SC1056

(Filed 19 April 1983)

Homicide § 28.4— no duty to retreat within own home—failure to instruct

The trial court in a homicide prosecution erred in failing to give defendant's requested instruction that a person who is attacked in his own home is under no duty to retreat and may use reasonable force in self-defense.

CERTIORARI to review *Bruce, Judge.* Judgment entered 22 February 1980 in EDGECOMBE County Superior Court. Heard in the Court of Appeals 18 March 1983.

Defendant was indicted and tried for the second degree murder of Robert Lee Hill.

The evidence for the State showed, in pertinent part, the following. The victim, Hill, called defendant on the telephone at approximately 1:00 p.m. and told defendant he was coming to visit her in a few minutes. Defendant and Daisy Williams waited a few minutes for Hill, but he did not arrive. At that point, defendant and Williams got in a car and went to look for Hill, with Williams driving. After some searching, they found Hill's car at the house of another woman. They blew the car horn and the woman came to the door. Defendant told her that if Robert Lee Hill was there, to tell him to stay there and that if "he puts a foot in [defendant's] yard she was gonna kill him." The women drove away. Daisy Williams testified that, after leaving, defendant reiterated that she would kill Hill if he came and that she had made similar statements on prior occasions.

Some time after 5:00 p.m., Hill went to defendant's house, waved to a friend in the yard, and entered the front door. Several witnesses were present. Hill was in a room alone. Defendant entered the room and shot Hill twice in the chest with a pistol from point blank range, killing him.

No one was present in the room at the time of the shooting, which occurred approximately one or two minutes after Hill arrived. Immediately prior to the shooting, several witnesses saw defendant with a pistol and argued with her about it, telling her to put it away. Defendant refused. Defendant's granddaughter shut a door. Defendant pulled the granddaughter out of the way by the collar and went through the door to the room where Hill was. Defendant's daughter ran out of the house and exclaimed, "Mamma gonna shoot Mr. Robert Lee." The shots were fired a few seconds after defendant entered the room where Hill was. Shortly thereafter, Daisy Williams arrived and saw Hill's body on the floor. Defendant told Williams, "I told you I was going to kill him."

The State introduced into evidence a statement made by defendant to a deputy sheriff shortly after the shooting. Defendant

told the deputy, in part, the following. Defendant admitted that she shot Hill. Prior to the killing, Hill had called defendant on the telephone and told her that he had a gun, a "monkey," in his pocket and was coming to shoot defendant with it, that defendant had better get her "monkey." Hill arrived and asked defendant if she remembered his warning. He told her to go get her "monkey" because he had his. She went and got her pistol and put it inside her skirt. She returned to the room where Hill was standing. Hill told her, "God knows, I ain't lying this time, I am going to kill you." Hill grabbed and shoved defendant. As he put his hand in his right pocket, defendant pulled her pistol from her skirt and fired at him. He continued coming toward her and she fired again and Hill fell to the floor.

The investigating deputy testified that he found a loaded pistol in Hill's right inside coat pocket, the barrel of the pistol sticking out of the pocket. When the deputy arrived, there was a crowd of people at the house and, because defendant stated that she was afraid that Hill's brother would come and kill her, the crowd was ordered to disperse. Defendant was taken to the sheriff's department. She cooperated and readily waived her rights and made the statement.

Defendant testified in her own behalf and admitted shooting Robert Lee Hill. In her testimony, defendant reiterated the story, essentially the same as she had told the deputy. She further testified that on numerous prior occasions she and her family had been the victims of Hill's abuses, threats and assaults. Defendant knew that Hill carried a pistol in his right pocket. Defendant testified that she was afraid of Hill and believed he would kill her. The jury found defendant guilty of second degree murder and the trial judge entered judgment on the jury's verdict, imposing an active sentence of imprisonment. No appeal was taken. This Court allowed defendant's petition for Writ of Certiorari.

Attorney General Rufus L. Edmisten, by Associate Attorney William N. Farrell, for the State.

Bridgers, Horton & Simmons, by Edward B. Simmons, for defendant.

WELLS, Judge.

In her brief, defendant contends that she is entitled to a new trial because the trial judge denied her request for an instruction to the jury that a person who is attacked in his own home is under no duty to retreat and may use reasonable force in self-defense.

The law of self-defense takes on an additional dimension if the accused is threatened or assaulted by the victim on the accused's own premises. Our Supreme Court, in *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964), stated the rule as follows:

> Ordinarily, when a person who is free from fault in bringing on a difficulty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. (Cites omitted.)

See also State v. McCombs, 297 N.C. 151, 253 S.E. 2d 906 (1979); *State v. Walker*, 236 N.C. 742, 73 S.E. 2d 868 (1953); *State v. Church*, 43 N.C. App. 365, 258 S.E. 2d 812 (1979).

In *State v. Poplin*, 238 N.C. 728, 78 S.E. 2d 777 (1953), the evidence favorable to the defendant showed that the defendant and the deceased got into an altercation in the defendant's kitchen; that the defendant ordered the deceased from the house; that when the deceased did not leave, the defendant went to his bedroom and got a pistol and shot and killed the deceased who continued to approach him with an upraised chair. The Supreme Court held that the defendant was entitled to a new trial because the trial judge had failed to charge upon the defendant's right to defend himself in his own home, to defend his home from attack and to eject trespassers from his home, as substantive features of the case arising upon the evidence.

In *State v. McLaurin*, 46 N.C. App. 746, 266 S.E. 2d 406 (1980), the State's evidence showed that the defendant lured the deceased to his house, announced his intentions to kill her and shot her in cold blood. The defendant testified that he knew the victim to carry a gun; that the victim told him that she was going

to give him "six little bullets" and reached into her coat pocket; and that he shot her twice, believing that she was going to kill him. This Court awarded the defendant a new trial because the trial judge failed to charge that there was no duty on the part of the defendant to retreat within his own home.

For other cases on a defendant's right to have a jury instructed on his rights while in his home to stand his ground and repel assaults, *see* 6 Strong's N.C. Index 3d, Homicide § 28.4.

In the present case, defendant's only defense was her theory of self-defense. The trial judge erred in failing to give defendant's requested instruction on her right to stand her ground. For the trial judge's failure to instruct thoroughly on the law raised by the evidence, defendant must have a new trial. *See* G.S. 15A-1232.

We do not address defendant's other assignments of error as such questions are not likely to present themselves on retrial.

New trial.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. ROSS TURNER BOND

No. 826SC702

(Filed 19 April 1983)

Narcotics § 4— possession of marijuana—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for possession of more than 100 pounds of marijuana where it tended to show that two officers who were keeping a field of growing marijuana under surveillance noticed that some of the marijuana plants had been stripped of their leaves since the preceding day and saw two large plastic bags filled with something standing up in the field; the officers observed defendant walking toward the field wearing a backpack and carrying a shotgun; upon reaching the field, defendant picked up one of the large plastic bags and then put it back on the ground, after which the officers left to get assistance and a warrant; upon returning to the field about 45 minutes later, the officers found no one there and the two filled bags which they had seen earlier were gone; the officers noted that still more marijuana stalks had been stripped of their leaves and found five more large plastic bags, all of which contained marijuana leaves; one of the bags also contained the backpack which defendant had been seen wear-

ing earlier and it, in turn, contained a sales receipt and other items; defendant's left thumbprint was found on one of the plastic bags, his right thumbprint was found on the sales receipt, and nine of defendant's palm prints were found on three other bags; and the marijuana found in the bags weighed more than 100 pounds.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 3 February 1982 in Superior Court, BERTIE County. Heard in the Court of Appeals 14 January 1983.

Defendant was convicted under an indictment charging him with possessing more than 100 pounds of marijuana, in violation of G.S. 90-95(h)(1)(b).

The State's evidence tended to show that: Two law enforcement officers, after locating and photographing a remote, secluded, woods-surrounded field where marijuana was being grown, lay in wait the next day to see who was cultivating it; they saw that some of the marijuana plants had been stripped of their leaves since the preceding day and saw two large plastic bags filled with something standing up in the field; after awhile they saw the defendant walking toward the field wearing a back pack and carrying a shotgun; upon reaching the field, defendant picked up one of the large plastic bags and then put it back on the ground, after which the officers left to get assistance and a warrant. Upon returning to the field about forty-five minutes later, the officers found no one there, and the two filled bags that they saw earlier were gone; they noted, however, that still more marijuana stalks had been stripped of their leaves during the interim and found five more large plastic bags like the one defendant had picked up earlier, all of which contained marijuana leaves; one of the bags also contained the backpack that the defendant had been seen wearing earlier, and it, in turn, contained a sales receipt and other items. The plastic bags and sales receipt were examined for fingerprints and defendant's left thumbprint was on one of the plastic bags, his right thumbprint was on the sales receipt, and nine of the defendant's palm prints were on three other bags. The marijuana involved weighed more than 100 pounds.

No evidence was presented to show who owned the land where the marijuana was growing and the defendant was not observed at any time to be either cultivating or harvesting the

marijuana. From judgment of conviction and an active prison sentence, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Moore & Moore, by Regina A. Moore, for the defendant appellant.

PHILLIPS, Judge.

The only question presented is whether the evidence was sufficient to convict. Viewing the evidence favorable to the State, as we must, *State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968), we are of the opinion that it was.

That defendant was in this isolated patch where marijuana was being cultivated and harvested, handling one of the bags used in harvesting it; that during the short interval that followed more marijuana was harvested and the backpack defendant wore was left in one of the harvesting bags containing marijuana; that his thumbprints were on one bag and a sales slip that was in his backpack; and that his palm prints were on three of the other bags, was proof enough, we think, of his participation in the illicit operation.

That the evidence does not show that defendant owned or otherwise controlled the land where the marijuana was being grown and harvested in unimportant. The evidence does show, we think, that defendant was in possession of the marijuana, as the indictment charged, and that is legally sufficient. Indeed, "possession," within contemplation of our controlled substance laws, does not even require ownership of the substance, much less the land upon which it is situated. *State v. Pevia*, 56 N.C. App. 384, 289 S.E. 2d 135 (1982). "Possession," either actual or constructive, can be proven in many different ways. One approved way is by showing that an accused was knowingly and intentionally in control of a forbidden substance. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). Which is the course the State followed here, the evidence presented being sufficient to show, in our judgment, that defendant knew what was being cultivated and harvested and had control of it. Unlike the situation in *State v. Weems*, 31

N.C. App. 569, 230 S.E. 2d 193 (1976), where the heroin was hidden from view and defendant's knowledge of it was not established, here the contraband, readily recognized by the officers as such, was in plain view, defendant was seen in control of one sack of it, and his finger and palm prints tend to show that other quantities of it were likewise in his possession.

However, the record does contain one circumstance favorable to the defendant. During cross examination one of the officers admitted that many hunters were near the area involved that day. That might explain defendant's presence there with a shotgun; and being there, ordinary curiosity could perhaps also explain defendant picking up the bags of marijuana and his palm and thumbprints being on them. But defendant's backpack being stored with the contraband materials and the harvesting of the illegal crop having been resumed almost immediately after defendant was seen in the marijuana patch are unexplained, if not unexplainable. This evidence, in our view, along with the rest, justified the jury in concluding that defendant was an insider and active participator in the forbidden project, rather than an innocent passerby or onlooker, as the defendant contends.

Consequently, we find

No error.

Judges WEBB and BECTON concur.

GARY L. HARRINGTON, D/B/A/ LANDIS AUTOMOTIVE, PLAINTIFF-APPELLEE v. RANDY A. OVERCASH, DEFENDANT, AND ROBERT BOONE, D/B/A SOUTHERN MOTORS, INTERVENING DEFENDANT-APPELLANT

No. 8219DC138

(Filed 19 April 1983)

Rules of Civil Procedure § 24— intervenor defendant—extent of participation in the action

In an action to perfect a statutory lien on a motor vehicle, an intervenor defendant could properly present evidence that plaintiff surrendered possession of the vehicle so that he lost his lien right so far as the intervenor defendant was concerned. G.S. 1A-1, Rule 24.

Harrington v. Overcash

APPEAL by intervening defendant from *Montgomery, Judge.* Judgment entered 17 December 1981 in District Court, ROWAN County. Heard in the Court of Appeals 7 December 1982.

This action was commenced by plaintiff to perfect a statutory lien on a motor vehicle. The original defendant did not file an answer and the court entered a judgment for the plaintiff on 11 June 1981 which judgment authorized the plaintiff to sell the automobile by public sale pursuant to G.S. 44A-4(e)(3). On 23 September 1981 an order was entered allowing Robert Boone to intervene as a defendant and "have a right to defend in that lawsuit as if he had been originally made a party to the action."

The intervening defendant filed an answer in which he alleged that the plaintiff had lost his right to a lien by surrendering possession of the motor vehicle for a few days to the original defendant. The plaintiff filed a reply to the answer of the intervening defendant in which he denied that he had surrendered possession of the motor vehicle to the original defendant.

On 17 December 1981 a judgment was entered in which the court recited that "the Judgment entered on June 11, 1981 . . . is, proper, valid, and binding, and that the movant-intervenor, while having been allowed to intervene, is in no position, either in law or in fact, to change the directives of such Judgment." The court ordered that the intervening defendant "recover nothing of the plaintiff, and that the relief prayed for by intervenor-defendant is hereby denied." The intervening defendant appealed.

Robert M. Critz for plaintiff appellee.

Davis and Corriher, by Thomas A. King, for intervening defendant appellant.

WEBB, Judge.

The appellant was allowed to intervene pursuant to G.S. 1A-1, Rule 24 which provides in part:

> "(a) Intervention of right.—Upon timely application anyone shall be permitted to intervene in an action:
>
> . . . .

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The appellee has not cross-appealed or made an assignment of error to the order allowing the appellant to intervene. The question posed by this appeal is whether Robert Boone, having intervened, may present evidence that the plaintiff surrendered possession of the vehicle so that he lost his lien right so far as the intervening defendant is concerned. The original defendant may not contest as to himself the lien established by the plaintiff.

The parties have not cited any cases from this jurisdiction and we have not found a case dealing with the issue on this appeal. W. Shuford, N.C. Civil Practice and Procedure § 24-11 (1973), at page 212, says:

> Rule 24 is silent as to the extent an intervenor may participate in the action once the court allows him in as a party. In view of the liberal philosophy of the rules as regards joinder and enlargement, anything less than full right of participation seems unduly restrictive and tends to defeat the important rules policy of avoiding multiplicity of actions. Once the intervenor becomes a party, he should be a party for all purposes.

We hold that the judgment of 11 June 1981 is not binding on the intervening defendant so that he may defend as to himself the plaintiff's claim of a lien on the vehicle.

The appellee argues that the judge met in chambers with the attorneys for the parties and after hearing from the appellant's attorney, determined that the appellant could not make his case. The appellee says this is the basis for the judgment. None of this appears in the record and we do not pass on it.

We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HEDRICK and BECTON concur.

IN THE MATTER OF: THE BANKRUPTCY OF SPECTOR-RED BALL, INC., TRANSPORT INSURANCE COMPANY, SURETY

No. 8210IC878

(Filed 19 April 1983)

Master and Servant § 78— workers' compensation—self-insurer's bond—ordering surety to settle claims

Where a self-insured employer was ordered by a federal bankruptcy court not to pay workers' compensation claims in this state, the surety on the bond filed with the Industrial Commission by the employer was liable only for any default of the employer within the penal sum of the bond ($100,000), and the Industrial Commission erred in ordering the surety to bring to a conclusion all the workers' compensation claims outstanding against the employer.

APPEAL by respondent from order of North Carolina Industrial Commission entered 29 June 1982. Heard in the Court of Appeals 12 January 1983.

Spector-Red Ball is a self-insured employer under the Workers' Compensation Act. On 28 April 1982, it filed a reorganization petition in the Bankruptcy Court in San Antonio, Texas. Under the order of the bankruptcy court, Spector-Red Ball could not pay workers' compensation claims in this state. Spector-Red Ball had filed a bond with the Industrial Commission with Transport Insurance Company as surety. This bond provided in pertinent part:

> "Spector Red Ball, Inc. . . . as Principal, and Transport Insurance Company . . . as Surety, are held and firmly bound unto the State of North Carolina in the full and just sum of $100,000.00 . . . to be paid to the said State of North Carolina, to the payment whereof we hereby bind ourselves and each of us . . . .
>
> . . . .
>
> . . . [I]t being understood that the Surety shall be liable, within the penal sum mentioned herein, for the default

of the Principal in fully discharging any liability on its part accruing during the life of this obligation."

The Industrial Commission on 29 June 1982 ordered Transport Insurance Company to "proceed to bring to a conclusion all of the claims outstanding against Spector-Red Ball, Inc. . . . . Each claimant will then be paid his proportionate share of the funds now held by Transport Insurance Company." Transport Insurance Company appealed.

Pfefferkorn and Cooley, by Robert M. Elliot, for Joseph Moore, workers' compensation claimant against Spector-Red Ball, Inc.

Attorney General Edmisten, by Assistant Attorneys General Sandra M. King and Ralf F. Haskell, for amicus curiae.

Bell, Davis and Pitt, by Walter W. Pitt, Jr. and Joseph T. Carruthers, for respondent appellant Transport Insurance Company.

WEBB, Judge.

This appeal raises the question of the extent of the obligation of Transport Insurance Company as surety on the bond filed by Spector-Red Ball, Inc. with the Industrial Commission. Transport bound itself to be liable for any default of Spector-Red Ball within the penal sum, which is $100,000.00. Transport's liability is thus limited to $100,000.00. It was error for the Industrial Commission to order Transport to bring all claims to a conclusion in addition to paying $100,000.00 on the claims. We believe that Transport by becoming surety on the bond obligated itself only to pay money in the event Spector-Red Ball defaulted. Under the terms of the bond, Spector-Red Ball agreed to perform the acts required by the Workers' Compensation Act and Transport agreed to pay money if Spector-Red Ball did not so perform. All Transport can be required to do is pay up to $100,000.00 for the default of Spector-Red Ball.

We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. HARVEY WARD

No. 8216SC1030

(Filed 19 April 1983)

Criminal Law § 155.1— failure to docket record in apt time

Appeal is dismissed for failure of appellant to file the record on appeal in the appellate court within 150 days after giving notice of appeal, the time for filing the record on appeal not having been extended by the trial court's order extending the time for serving the proposed record on appeal.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 21 April 1982 in SCOTLAND County Superior Court. Heard in the Court of Appeals 16 March 1983.

Defendant was tried for offering a bribe to a public official. From judgment entered on a jury verdict of guilty, defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Jo Anne Sanford, for the State.

Gordon and Horne, P.A., by John H. Horne, Jr., for defendant.

WELLS, Judge.

Rule 12(a) of the Rules of Appellate Procedure provides that "no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." This requirement of Rule 12(a) is jurisdictional and it imposes a limit on the aggrieved party's right to appeal. *See Piguerra v. Piguerra,* 54 N.C. App. 188, 282 S.E. 2d 567 (1981); *In re Farmer,* 52 N.C. App. 97, 277 S.E. 2d 880, *cert. denied,* 304 N.C. 195, 285 S.E. 2d 98 (1981). Only the appropriate *appellate* court can extend this 150 day time limit. App. R. 27(c).

Judgment in defendant Ward's case was entered on 21 April 1982 and he gave notice of appeal in open court either on that date or on the day appeal entries were made, 29 April 1982. Assuming that the latter date applies, defendant was required to file the record on appeal on or before Monday, 27 September 1982, the 151st day after notice. (*See* App. R. 27(a) on computing

time when the last day falls on a Sunday.) The record in this case was filed on 4 October 1982, at least seven days late.

We note that on 28 July 1982, defendant, through counsel moved the trial court for a 30 day extension of time for preparing and serving on the State the proposed record on appeal and Superior Court Judge John C. Martin, properly within his discretion, gave defendant "an additional period of 30 days within which to prepare and *serve* the proposed record on appeal." (Emphasis supplied.) Our search of the record in this case (and, as an added precaution, of the files in this Court's Clerk's office) reveals that defendant has made no motion that the 150 day period for filing the record be extended.

Defendant having filed the record in this case well beyond the 150 day limit set by App. R. 12(a), this appeal is

Dismissed.

Judges HILL and JOHNSON concur.

PATRICIA LYON MYERS v. WOODROW H. MYERS

No. 825DC181

(Filed 19 April 1983)

Appeal and Error § 6.6— prior action pending—denial of dismissal—premature appeal

Defendant had no right of immediate appeal of an interlocutory order denying defendant's motion to dismiss plaintiff's divorce action on the ground of the pendency of a prior action filed by defendant against plaintiff in another county.

APPEAL by defendant from *Lambeth, Judge.* Order entered 19 November 1981 in District Court, PENDER County. Heard in the Court of Appeals 10 January 1983.

Nichols, Caffrey, Hill, Evans and Murrelle, by Charles E. Nichols, William W. Jordan and Reid C. Adams, Jr., for plaintiff appellee.

Ellis, Hooper, Warlick, Waters and Morgan, by Lana S. Warlick, for defendant appellant.

VAUGHN, Chief Judge.

Plaintiff filed this action for absolute divorce on 8 October 1981. Plaintiff also sought distribution of marital property under G.S. 50-20.

Defendant answered and, among other things, sought to have the action dismissed because of the pendency of a prior action filed by him on 15 July 1981 in the District Court of Onslow County. The prior action is said to involve substantially the same parties, subject matter, issues and relief sought so that a judgment in the first action would support a plea of *res judicata* in the present action.

The judge denied defendant's "plea in abatement" and motion to dismiss. He also set out certain conclusions of law going to the merits of the defense alleged.

The appeal is from an interlocutory order and must, therefore, be dismissed. The merits of the conclusions of law set out in the order are, of course, not before us.

Appeal dismissed.

Judges WELLS and BRASWELL concur.

IN THE MATTER OF TONY VENSEN RILEY, JUVENILE

No. 8214DC634

(Filed 19 April 1983)

Infants § 17— juvenile proceeding—custodial statement—necessity for findings

The trial court in a juvenile delinquency proceeding erred in admitting a statement made by the juvenile during custodial interrogation without first making findings as required by G.S. 7A-595(d) that the juvenile knowingly, willingly and understandingly waived his rights.

APPEAL by respondent from *LaBarre, Judge.* Juvenile disposition order entered 6 April 1982 in District Court, DURHAM County. Heard in the Court of Appeals 10 January 1983.

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

Lipton and Mills, by William S. Mills, for defendant appellant.

VAUGHN, Chief Judge.

This juvenile proceeding was heard on a petition alleging that the juvenile was delinquent in that he was guilty of felonious breaking and entering.

Over respondent's objections, the State was allowed to offer evidence of a statement made by respondent during custodial interrogation. The statement was received without any findings as to whether the respondent had waived his rights.

G.S. 7A-595 sets out mandatory procedures which must be followed when a juvenile is interrogated by a law enforcement officer. G.S. 7A-595(d) provides: "Before admitting any statement resulting from custodial interrogation into evidence, the judge *must* find that the juvenile knowingly, willingly, and understandingly waived his rights." (Emphasis added.) The statute clearly provides that before any statement flowing from custodial interrogation is admitted the judge must make the required findings. Since this was not done the order is reversed, and the case is remanded for a new hearing.

Reversed and remanded.

Judges WELLS and BRASWELL concur.

LINNIE ATHALEA SCHMITT v. DONALD MELVIN SCHMITT

No. 8221DC198

(Filed 19 April 1983)

Appeal and Error § 6.2— preliminary injunction ordering support payments—no right of appeal

Defendant had no right to appeal a preliminary injunction ordering defendant to make monthly support payments pursuant to the terms of a

separation agreement until plaintiff's action for breach of the separation agreement is determined on its merits.

APPEAL by defendant from *Keiger, Judge.* Order entered 19 October 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 12 January 1983.

This is an appeal from a preliminary injunction ordering defendant to make monthly support payments, pursuant to the terms of a separation agreement executed by the parties several years earlier, until plaintiff's action for breach of the separation agreement is "heard and determined on its merits."

Gary J. Walker for the plaintiff appellee.

Pettyjohn & Molitoris, by Theodore M. Molitoris, for the defendant appellant

PHILLIPS, Judge.

This preliminary injunction is inherently and expressly interlocutory in nature. Consequently, it is not immediately appealable unless it affects a substantial right. G.S. § 1-277, § 7A-27(d). A showing to that effect has neither been made nor attempted by the appellant, and our study of the record failed to discover any substantial right of the defendant that might be jeopardized or compromised if the preliminary injunction remains in force until the case is tried. Defendant has merely been ordered to continue making the monthly payments that he voluntarily contracted to make several years earlier. This being so, even though the question of appealability was not raised by the parties, under *Bailey v. Gooding,* 301 N.C. 205, 270 S.E. 2d 431 (1980), we are obliged to dismiss the appeal on our own motion.

Appeal dismissed.

Judges WEBB and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 APRIL 1983

BURNS v. COLONY DODGE, INC. No. 8221SC377	Forsyth (79CVS5554)	Affirmed
GLADSTEIN v. SOUTH SQUARE ASSOC. No. 8214SC394	Durham (76CVS2381)	No Error
IN RE EMIL ROBERT GACKI No. 821DC899	Chowan (82J10)	Reversed
PERRY v. PILOT LIFE INS. CO. No. 8223DC461	Wilkes (79CVD918)	Affirmed
STATE v. CHAMBERS No. 8222SC1189	Iredell (82CRS1378)	No Error
STATE v. DUNCAN No. 824SC1066	Onslow (81CRS10847)	Vacated & Remanded
STATE v. GRIFFIN No. 822SC1228	Martin (81CRS4799)	No Error
STATE v. HUNT No. 8216SC1033	Robeson (82CRS4411)	Remanded for Resentencing
STATE v. JEFFERSON No. 8210SC995	Wake (82CRS3445) (82CRS3446)	Affirmed in Part; Reversed in Part
STATE v. LINDSAY No. 8222SC1101	Iredell (79CRS14368) (79CRS14615) (80CRS993) (80CRS994) (80CRS995) (80CRS996)	No Error
STATE v. MARSHBURN No. 827SC961	Nash (82CRS1983)	No Error
STATE v. MOORE No. 8212SC1173	Cumberland (81CRS58352)	No Error
STATE v. PARTOZES No. 8210SC952	Wake (81CRS78531)	No Error
STATE v. REED No. 8226SC1249	Mecklenburg (81CRS51248)	No Error
STATE v. WILSON No. 8219SC1166	Cabarrus (78CRS4636) (78CRS6237)	Dismissed

STODDARD v. NORTH AMERICAN SYSTEMS, INC. No. 8219SC456	Randolph (78CVS970)	Affirmed
TAYLOR v. WILKINS No. 8222SC1107	Davidson (82CVS0316)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Pendency of Prior Action

The trial court should have treated defendant's motion to dismiss plaintiffs' claims on the ground of a prior pending action as a motion under Rule 13(a) and should have allowed the motion with leave to file such claims as counterclaims in defendant's prior action. *Atkins v. Nash*, 488.

§ 6. Priority of Institution of Actions

The trial court erred in refusing to dismiss plaintiffs' action against defendant on the ground of a prior pending action by defendant against plaintiffs in another county because summons was first served in plaintiffs' action where the complaint was first filed in defendant's action. *Atkins v. Nash*, 488.

APPEAL AND ERROR

§ 6. Right of Appeal Generally; Effect of Statutes

When plaintiff took a voluntary dismissal without prejudice of his claims against defendant, he destroyed his right to appeal a prior adverse ruling allowing summary judgment on one count of the complaint. *Lloyd v. Carnation Co.*, 381.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

Plaintiff had no right to appeal an interlocutory order staying arbitration pending a determination as to whether plaintiff procured the contract between the parties by fraud. *Peloquin Associates v. Polcaro*, 345.

The trial court's order allowing plaintiff's motion for summary judgment on the issue of defendant's liability and reserving for trial the issue of damages was not immediately appealable. *Goforth v. Hartford Accident & Indemnity Co.*, 617.

Defendant had no right to appeal a preliminary injunction ordering defendant to make monthly support payments pursuant to the terms of a separation agreement. *Schmitt v. Schmitt*, 750.

§ 6.4. Appeals Related to Party Matters

Orders denying third-party plaintiff's motions to compel discovery and to add the third-party corporate defendant as a necessary party and granting summary judgment for third-party defendants were interlocutory and not immediately appealable. *Terry's Floor Fashions v. Murray*, 569.

§ 6.6. Appeals Based on Motions to Dismiss

The denial of a motion to dismiss on the ground of a prior action pending is immediately appealable. *Atkins v. Nash*, 488.

Defendant had no right of immediate appeal of an interlocutory order denying defendant's motion to dismiss plaintiff's divorce action on the ground of the pendency of a prior action filed by defendant against plaintiff. *Myers v. Myers*, 748.

§ 31.1. Exceptions and Assignments of Error to Charge

Defendants could not properly assign as error the trial court's failure to give certain instructions where defendants made no objection or request for instructions. *City of Winston-Salem v. Hege*, 339.

§ 68. Law of the Case and Subsequent Proceedings

The doctrine of the law of the case did not apply to a statement in a prior appellate decision which was not necessary to the holding in that decision. *Waters v. Phosphate Corp.*, 79.

ARBITRATION AND AWARD

ARCHITECTS

ARREST AND BAIL

ARSON AND OTHER BURNINGS

ASSAULT AND BATTERY

ASSAULT AND BATTERY — Continued

§ 16.1. Submitting Question of Defendant's Guilt of Lesser Degrees of Offense—Not Required

The trial court in a prosecution for assault with a deadly weapon was not required to charge the jury upon the lesser included offense of simple assault. *S. v. Barneycastle*, 694.

AUTOMOBILES AND OTHER VEHICLES

§ 57.1. Failing to Yield Right-of-Way to Vehicle on Dominant Highway; Effect of Stop or Yield Signs

Summary judgment was improperly entered for defendants in an action to recover damages for injuries received in an intersection accident when plaintiff's car was struck by defendants' car after plaintiff crossed defendants' lane of travel on the dominant street and reached the median between the two lanes of travel of that street. *Derrick v. Ray*, 218.

§ 63.3. Striking Children; On Private Property

In an action to recover for injuries to the minor plaintiff when he was struck by defendant's automobile in a driveway, plaintiff's evidence was sufficient for the jury to find that defendant was negligent in moving her automobile from a stationary position in the driveway without first determining that such movement could be made in safety. *Speight v. Hinnant*, 711.

§ 89.1. Sufficient Evidence to Require Jury to Determine Last Clear Chance

Plaintiff's evidence was sufficient to require the submission of an issue of last clear chance to the jury in an action to recover for the death of plaintiff's intestate who was struck while lying in defendant's lane of travel. *Clemons v. Williams*, 540.

§ 113.1. Sufficiency of Evidence of Manslaughter

The evidence was sufficient to permit the jury to find that defendant was the driver of a vehicle at the time it struck a pedestrian so as to support his conviction of driving under the influence and involuntary manslaughter. *S. v. Packer*, 481.

§ 125. Warrant and Arrest for Operating Vehicle While Under Influence of Intoxicating Liquor

A defendant convicted in superior court of a second offense of driving under the influence of an intoxicating liquor was not prejudiced by the fact that he had been convicted in district court on a citation in which the words "intoxicating liquor" had been stricken and replaced with the phrase "alcoholic beverage." *S. v. Daughtry*, 320.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The State was not required to disclose to defendant prior statements of State's witnesses made to the police and criminal records of witnesses. *S. v. Miller*, 1.

The trial court did not err in permitting the State to question defendant about a prior nonsupport conviction which had not been revealed to defense counsel pursuant to a request for voluntary discovery or in denying defendant's motion for appropriate relief based upon such cross-examination. *S. v. Parker*, 94.

The trial court did not err in failing to suppress defendant's oral statement to a detective because the State did not inform him of the contents of the detective's notes concerning the statement until the day of trial. *S. v. Keaton*, 279.

BURGLARY AND UNLAWFUL BREAKINGS

CONSPIRACY

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW — Continued

§ 67. Identity of Informants

The trial court did not err in refusing to require the State to reveal the identity of a confidential informant. *S. v. Shields*, 462.

The trial court's failure to require the State to reveal the identity of a confidential informant who participated in a purchase of narcotics from defendant was harmless error. *S. v. Parker*, 585.

CONTRACTS

§ 26.2. Competency and Relevancy of Other Contracts or Dealings

In an action to recover the balance due on an alleged oral contract to build a back-up scoreboard console, testimony by plaintiff concerning maintenance work he had previously done for defendant on another scoreboard on a "time basis" and concerning cost overruns and losses sustained by plaintiff on the contract for construction of the original console was relevant to show the existence and terms of an express oral contract, the reasonable value of services rendered, and plaintiff's motive in insisting on certain terms in the contract. *Brower v. Sorenson-Christian Industries*, 337.

§ 27.2. Sufficiency of Evidence of Breach of Contract

Plaintiffs' evidence was sufficient to be submitted to the jury on the issue of breach of contract by defendants to pave a roadway easement adjoining lots sold by defendants to plaintiffs. *Metcalf v. Palmer*, 136.

§ 29.2. Calculation of Compensatory Damages

In an action to recover damages for defective work in repairing a roof, the trial court properly permitted plaintiff to recover 54% of the amount plaintiff paid another contractor to replace the entire roof. *Silverman v. Tate*, 670.

§ 32. Actions for Interference

Summary judgment was properly entered for defendants in plaintiff's action to recover damages for wrongful interference with plaintiff's contract rights to act as an exclusive territorial distributor for a third party. *Lloyd v. Carnation Co.*, 381.

CRIMINAL LAW

§ 16.1. Jurisdiction of Superior and District Courts

The superior court had no jurisdiction to try defendant for a new offense of failure to support an illegitimate child for which defendant had not been convicted in the district court. *S. v. Killian*, 155.

§ 34. Evidence of Defendant's Guilt of Other Offenses; Inadmissibility

An officer's testimony that he had known defendant "prior to this" did not imply prior criminal activity but was relevant to show that the officer had properly identified defendant. *S. v. Brooks*, 572.

§ 34.1. Evidence of Defendant's Guilt of Other Offenses to Show Defendant's Character and Disposition to Commit Offense

The trial court in an armed robbery case erred in permitting a witness to testify that defendant told her he had robbed a certain convenience store by himself two or three weeks before the armed robbery in question. *S. v. Pratt*, 579.

CRIMINAL LAW — Continued

§ 34.4. Admissibility of Evidence of Other Offenses

The trial court properly admitted evidence of unrelated crimes by defendant which was relevant to explain or rebut facts solicited by a codefendant. *S. v. Miller*, 1.

Where the trial court granted defendant's motion in limine to prohibit the district attorney from referring to defendant's involvement in two cases charging him with conspiracy to commit armed robbery on the condition that neither the defendant nor his codefendant mention such charges, the trial court properly permitted the State to introduce evidence of the two unrelated crimes where the codefendant "opened the door" to such evidence. *Ibid.*

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

Testimony by an undercover agent who purchased marijuana from defendant on the date in question that he had also purchased marijuana from defendant on an earlier date was admissible to show identity. *S. v. Shields*, 462.

§ 34.6. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent Generally

In a prosecution for the murder of defendant's infant daughter, a portion of defendant's confession relating to acts of abuse toward his other child was competent to show that the injuries to deceased were the result of intentional blows and not of an accidental fall. *S. v. Smith*, 52.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent; Animus, Motive, Malice, Premeditation or Deliberation

Bundles of money found in various parts of defendant's clothing and papers found in defendant's wallet which contained the names of known heroin users with numbers beside some of the names were relevant to show a plan or scheme, guilty knowledge and intent to possess and traffic in heroin. *S. v. Willis*, 23.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Modus Operandi or Common Plan, Scheme or Design

Evidence of defendant's participation in a break-in and theft of a movie camera and projector which were later traded for a shotgun used in the robbery in question was relevant to show a common plan and scheme. *S. v. Pratt*, 579.

§ 35. Evidence that Offense Was Committed by Another or that Defendant Had Been Framed

An officer's proffered testimony that a third person came to the police department and said he had committed the robbery for which defendant was on trial did not come within the hearsay exception for declarations against penal interest. *S. v. Baggett*, 511.

The trial court properly excluded testimony by a witness that he had confessed the day before to the robbery for which defendant was on trial where the witness on voir dire repudiated his confession and testified he had confessed because of threats. *Ibid.*

§ 42.4. Identification of Object and Connection With Crime; Weapons

A shotgun with defendant's initials spray painted on it was relevant and admissible in an armed robbery case although it was not used by the actual perpetrator of the robbery. *S. v. Pratt*, 579.

CRIMINAL LAW — Continued

§ 42.6. Chain of Custody or Possession

The chain of custody of a bag of marijuana purchased from defendant by an undercover officer was not insufficient because the officer placed the bag in a safe in his apartment overnight and his parents had access to the safe. *S. v. Shields*, 462.

§ 43. Maps, Diagrams and Photographs

The trial court did not err in failing to give a limiting instruction at the time certain photographs were received into evidence where appropriate instructions were given in the final charge to the jury. *S. v. Miller*, 1.

§ 51. Qualification of Experts

A sufficient foundation was laid for qualification of a witness as an expert in dyestuffs to permit him to express an opinion about the original color of a binding found around a homicide victim's neck. *S. v. Sandlin*, 421.

The fact that an officer was never tendered as an expert witness did not prevent him from giving opinion testimony. *S. v. Willis*, 23.

§ 51.1. Sufficiency of Qualifications of Expert

The trial court did not err in allowing a forensic chemist to testify as an arson expert. *S. v. Miller*, 1.

§ 63. Evidence as to Sanity of Defendant; Evidence of Mental Condition at Time Other than Commission of Offense

The trial court did not err in failing to allow defendant to testify concerning his mental condition where his testimony did not concern his mental condition at the time of the crime. *S. v. Harris*, 527.

§ 66.4. Lineup Identification

The trial court properly admitted a robbery victim's lineup and in-court identifications of defendant. *S. v. Parker*, 94.

§ 66.9. Identification from Photographs; Suggestiveness of Procedure

A series of photographic lineups were not impermissibly suggestive because defendant's photograph was unique in each of the lineups. *S. v. Battle*, 87.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

Discrepancies in testimony by a victim of an attempted robbery concerning the relative heights of defendant and an accomplice go to the weight rather than the competency of his identification testimony, and the trial court properly found that pretrial photographic identification procedures were not unnecessarily suggestive and that the victim's in-court identification was of independent origin. *S. v. Eure*, 430.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Other Pretrial Identification Procedures

A larceny victim's in-court identification of defendant was independent of and untainted by his possibly improper showup identification of defendant. *S. v. Morrow*, 162.

§ 73.2. Statements Not Within Hearsay Rule

An officer's testimony that an informant identified defendant as "Mike Shields" was not hearsay and was admissible to show the officer's state of mind on the date in question. *S. v. Shields*, 462.

CRIMINAL LAW — Continued

A police officer's testimony that a witness to a robbery told him that he could be 100% positive of the identification of defendant if he could be shown a "more up-to-date picture" was not inadmissible as hearsay. *S. v. Battle*, 87.

§ 75.11. Sufficiency of Waiver of Constitutional Rights

The evidence supported the trial court's determination that defendant was properly informed of his constitutional rights prior to in-custody interrogation, although the investigation had not been clearly focused on him as a suspect at the time the warnings were given, and that defendant voluntarily waived those rights. *S. v. Smith*, 52.

§ 76.5. Voir Dire Hearing Concerning Confession; Necessity for Findings

It was not error for the trial court to admit defendant's confession without making specific findings. *S. v. Mebane*, 316.

§ 76.6. Voir Dire Hearing Concerning Confession; Sufficiency of Findings of Fact

The trial court's findings in its order denying defendant's motion to suppress in-custody statements were sufficient to resolve conflicts in the voir dire evidence. *S. v. Taylor*, 589.

§ 80. Books, Records and Other Writings

An officer who was familiar with persons listed on pieces of paper found in defendant's wallet was properly permitted to identify each such person listed and to explain his knowledge of that person. *S. v. Willis*, 23.

§ 81. Foundation; Authentication

The best evidence rule did not require that the actual serial number inscriptions on four stolen tractors be introduced in a larceny prosecution. *S. v. Powell*, 124.

§ 84. Evidence Obtained by Unlawful Means

A sufficient nexus was established between defendants and seized lottery tickets to survive a motion to suppress the tickets. *S. v. Warren*, 549.

§ 85.1. What Questions and Evidence Are Admissible; Defendant's Evidence

Defendant's character witnesses should have been permitted to testify that they had never heard anything bad about defendant. *S. v. Packer*, 481.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

The trial court in a rape case did not err in ruling that, if defendant took the stand, the State might be permitted to question defendant about a specific act of sexual assault in Pennsylvania in which the charges had been dismissed, two charges of assault on a female to which defendant had entered pleas of guilty, and whether defendant had raped a named female. *S. v. Ward*, 605.

§ 87. Direct Examination of Witnesses Generally; What Witnesses May Be Called; List of Witnesses

The trial court did not err in permitting an interpreter to translate the trial testimony of a homicide victim's Vietnamese mother. *S. v. Sandlin*, 421.

Where the State first learned of a potential witness during the voir dire examination of the witness as a member of the jury panel, the State could properly call the prospective juror as a witness at trial. *S. v. Miller*, 1.

CRIMINAL LAW — Continued

§ 91. Speedy Trial

The trial judge was incorrect in treating defendants' cases as being joined in computing the excluded days pursuant to the Speedy Trial Act, but the trials of both defendants began within 120 days from their indictment when the proper exclusions were considered. *S. v. Capps*, 225.

Where cases against defendant and a co-defendant had not been formally joined for trial during a time when the co-defendant was unavailable for trial because of pregnancy, the trial judge erred in excluding such time from defendant's statutory speedy trial period. *S. v. Marlow*, 300.

§ 91.7. Continuance on Ground of Absence of Witness

The denial of defendant's motion for a continuance because of the absence of witnesses did not deprive him of his constitutional right to confront his accusers. *S. v. Davis*, 522.

§ 92.1. Consolidation of Charges Against Multiple Defendants Proper; Same Offense

Defendant was not deprived of a fair trial by the denial of his motion to sever his trial from that of his codefendant who was also charged with burning a building under construction. *S. v. Miller*, 1.

§ 92.4. Consolidation of Multiple Charges Against Same Defendant Proper

The trial court properly consolidated solicitation to commit arson and burning of a building charges against the same defendant. *S. v. Miller*, 1.

§ 98.2. Sequestration of Witnesses

The trial court did not err in failing to sequester a 12-year-old defense witness during his mother's testimony as a witness for the State. *S. v. Keaton*, 279.

§ 99. Conduct of Court

Defendant was not prejudiced by a bench conference held by the trial judge with a juror who had asked to be excused from deliberating in the case. *S. v. Miller*, 1.

§ 99.2. Questions, Remarks and Other Conduct of Trial Court

The trial court did not express an opinion as to defendant's guilt in stating, before the jury was impaneled, that defendant "allegedly lived on Magnolia Street in Sanford." *S. v. Battle*, 87.

§ 101.4. Conduct or Misconduct Affecting, or During, Deliberation of Jury; Custody of Jury

The trial court had no authority to permit the jury to examine or take to the jury room lineup photographs which had not been introduced into evidence. *S. v. Parker*, 94.

§ 102.6. Particular Conduct and Comments in Argument to Jury

In a prosecution for the murder of defendant's infant daughter, improper remarks by the prosecutor in his jury argument that "if you believe it was an accident, then find him not guilty and let him go back to his other children" were cured by the trial court's allowance of a motion to strike and instructions to the jury. *S. v. Smith*, 52.

The prosecutor's jury argument that persons whose names were written on papers found in defendant's wallet were known heroin users and that numbers

beside the names of some of the persons represented a record of defendant's sales was supported by the evidence. *S. v. Willis*, 23.

§ 105.1. Making and Renewal of Motion to Dismiss

Where defendant assigned as error the denial of his motion to dismiss at the close of the State's evidence but where defendant did not make a similar motion at the close of all the evidence, he waived his right to assert the denial as error on appeal. *S. v. Boyd*, 238.

§ 107.2. Variance Held Not Fatal

A variance between indictment and proof as to the date of a solicitation to commit arson was not fatal in this case. *S. v. Miller*, 1.

§ 112.1. Instructions on Reasonable Doubt

The trial court did not err in refusing to give defendant's requested instruction on reasonable doubt. *S. v. Mebane*, 316.

§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence

The trial court properly refused to instruct on "no eyewitness testimony or direct evidence" where an officer testified that he saw defendant throw a package containing heroin from a car. *S. v. Willis*, 23.

§ 112.6. Charges on Affirmative Defenses

The trial court's instructions concerning defense of accident were proper in a second degree murder case. *S. v. Smith*, 52.

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions

The trial court did not express an opinion in its instructions in a kidnapping case that defendant's purpose to terrorize would be established if the jury found that defendant made certain threatening statements. *S. v. Baldwin*, 688.

§ 115. Instructions on Lesser Degrees of Crime

The court did not err in instructing the jury to consider the lesser included offenses only after acquitting defendant of the greater charge. *S. v. Jacobs*, 610.

§ 117.3. Charge on Credibility of State's Witnesses

There was no prejudicial error in the trial court's failure to instruct the jury that two State's witnesses were testifying under a grant of immunity from prosecution for offenses in another county prior to testimony by the witnesses where the grant of immunity to the witnesses was sufficiently explained to the jury in the court's final charge. *S. v. Miller*, 1.

§ 118.2. Particular Charges on Contentions of Parties as Not Erroneous or Prejudicial

In a second degree murder prosecution in which defendant claimed self-defense, the trial court's instruction that defendant contended "that you should not believe what the State's witnesses have said about it" was not erroneous on the ground that defendant's contentions were consistent with much of the testimony of the State's witnesses. *S. v. Wood*, 446.

§ 121. Instructions on Defense of Entrapment

The court's instructions placing on defendant the burden of showing entrapment to the satisfaction of the jury were correct. *S. v. Parker*, 585.

CRIMINAL LAW — Continued

§ 122.1. Jury's Request for Additional Instructions

There was no merit to defendant's contention that he was not given the opportunity to object to the jury's request for additional instructions out of the jury's presence. *S. v. Parker*, 585.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

The trial court's additional instructions urging the jury to agree were not erroneous. *S. v. Sandlin*, 421.

§ 124. Sufficiency and Effect of Verdict

The verdict conformed to G.S. 15A-1237 even though it was signed by a juror different from the juror who had earlier responded orally to the judge that he was the foreman. *S. v. Miller*, 1.

§ 126. Unanimity of Verdict, Polling Jury, and Acceptance of Verdict

A juror was not coerced into assenting to the verdict where the record disclosed that when the juror said "not guilty" in response to the polling of the jury, she was asking if the clerk's question was whether she voted guilty or not guilty. *S. v. Davis*, 522.

The trial court's instruction that the jury should begin its deliberations with a view toward "reaching a unanimous verdict because it will not be a verdict until the twelve of you agree" did not imply that the option of not reaching a unanimous verdict was unavailable. *S. v. Parker*, 94.

§ 128.2. Particular Grounds for Mistrial

The trial court did not abuse its discretion in denying defendant's motion for mistrial because of the absence of a subpoenaed alibi witness. *S. v. Carr*, 402.

§ 138. Severity of Sentence and Determination Thereof

In imposing a sentence upon defendant's plea of guilty to second degree murder, the trial court erred in finding as an aggravating factor that defendant used a deadly weapon since use of the weapon was an element of the offense under the circumstances of this case. *S. v. Gaynor*, 128.

In imposing a sentence upon defendant for second degree murder by shooting the victim with a rifle, the trial court erred in finding as an aggravating factor that the victim was very old. *Ibid.*

The trial court could properly find that premeditation was an aggravating factor when imposing a sentence upon defendant for second degree murder. *Ibid.*

In imposing a sentence upon defendant upon his plea of guilty of second degree murder, the trial court properly found as an aggravating factor that defendant was armed with or used a deadly weapon at the time of the crime since defendant's use of the deadly weapon in this case was not necessary to prove the element of malice. *S. v. Hough*, 132.

In imposing a sentence for second degree murder, the trial court properly considered as an aggravating factor defendant's prior convictions which were not related to the crime of second degree murder. *Ibid.*

The trial court did not err in giving the presumptive sentence without making findings as to mitigating or aggravating circumstances. *S. v. Shepard*, 159.

In imposing a sentence for felonious hit and run driving, the trial court did not err in finding that the offense was committed for the purpose of avoiding arrest. *S. v. Simpson*, 151.

CRIMINAL LAW — Continued

The trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offenses to a law officer at an early stage of the criminal process. *S. v. Graham*, 271.

The trial court properly considered defendant's prior convictions as an aggravating factor upon the basis of a deputy's testimony as to what he had learned about defendant's prior convictions from others. *Ibid.*

In imposing a sentence for second degree murder, the trial court erred in finding as an aggravating factor that defendant used a deadly weapon. *S. v. Keaton*, 279.

The trial court erred in finding prior convictions as an aggravating factor where there was no evidence as to whether defendant was represented by counsel or waived counsel with respect to the prior convictions. *Ibid.*

Defendant was not denied his right to the effective assistance of counsel when both he and his codefendant were represented by the same attorney at an armed robbery sentencing hearing on the ground that this joint representation prohibited counsel from mentioning defendant's lesser culpability. *S. v. Willis*, 244.

In imposing a sentence for attempted common law robbery, the trial judge erred in finding as aggravating factors that defendant brutally beat the victim with his fist and that the victim was threatened by defendant. *S. v. Eure*, 430.

The trial court did not err in concluding that defendant had not provided such substantial assistance to the State so as to entitle him to a reduction of the minimum sentence for drug trafficking. *S. v. Myers and S. v. Garris*, 554.

The trial court did not err in finding that murder by strangulation was an especially heinous and cruel crime which outweighed defendant's lack of a criminal record. *S. v. Sandlin*, 421.

The trial court erred in finding as an aggravating factor that defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants. *S. v. Setzer*, 500.

In imposing a sentence for armed robbery, the trial court erred in finding as aggravating factors that the crime was committed for pecuniary gain and that defendant used a deadly weapon. *Ibid.*

A trial court cannot find as an aggravating factor that the defendant did not testify truthfully when the only evidence of his untruthfulness is his contradicted testimony. *Ibid.*

The trial court erred in failing to find as mitigating factors that defendant voluntarily acknowledged wrongdoing prior to arrest and that defendant had a good reputation in the community in which he lived. *S. v. Wood*, 446.

The fact that defendant's claim of self-defense was rejected by the jury in a homicide case did not prohibit defendant from claiming that strong provocation existed for the shooting in order to lessen his sentence. *Ibid.*

In imposing a sentence for discharging a firearm into occupied property, the trial court erred in finding as an aggravating factor that defendant was armed with or used a deadly weapon. *S. v. Brooks*, 572.

Defendant's failure to object to the introduction of his criminal record at a sentencing hearing constituted a waiver of the right to object. *Ibid.*

In imposing a sentence upon defendant for assault with a deadly weapon inflicting serious injury, the trial court erred in finding as aggravating factors that defendant was guilty of heinous, atrocious and cruel behavior and that defendant used a deadly weapon. *S. v. Hammonds*, 615.

CRIMINAL LAW — Continued

The trial court erred in finding as an aggravating factor that defendant had prior convictions for offenses punishable by more than 60 days' confinement where there was no evidence as to whether defendant was indigent and was represented by or waived counsel at his prior trials, but such error was not prejudicial under the circumstances of this case. *S. v. Locklear*, 594.

§ 138.11. Different Punishment on New or Second Trial

Defendant's rights were not violated by the superior court's imposition of a more severe sentence for a second offense of drunk driving upon trial de novo than the sentence imposed in the district court. *S. v. Daughtry*, 320.

§ 139. Sentence to Maximum and Minimum Terms

The trial court erred in imposing an indeterminate sentence for crimes which occurred after 1 July 1981. *S. v. Leggett*, 295.

§ 143. Revocation of Probation or Suspension of Judgment or Sentence

Where there were discrepancies between a probation revocation order and judgment, the judgment controlled. *S. v. Williamson*, 531.

§ 143.7. Violation of Probation Conditions; Wilfulness and Lack of Lawful Excuse

The trial judge did not abuse his discretion in failing to state in his findings in a probation revocation judgment that he had considered and evaluated defendant's evidence of inability to make required payments and found it insufficient to justify breach of the probation condition. *S. v. Williamson*, 531.

§ 143.10. Probation Revocation, Violation of Condition as to Payments

An order revoking defendant's probation is vacated and remanded where the trial court's findings failed to show that the court had considered and evaluated defendant's evidence of a legal excuse for her failure to comply with the conditions of probation. *S. v. Sellars*, 558.

§ 145.5. Parole

The trial court properly ordered defendant to make partial restitution to a hit and run victim as a condition of work-release or parole, but the court erred in ordering defendant to pay one-half of his earnings while on work-release or parole without fixing a maximum supported by the record. *S. v. Simpson*, 151.

§ 155.1. Docketing of Transcript of Record in Court of Appeals

Appeal is dismissed for failure of appellant to file the record on appeal in the appellate court within 150 days after giving notice of appeal. *S. v. Ward*, 747.

§ 162.2. Time for Objection; Generally

Defendant's objection to a similar line of testimony did not prevent his need to object to specific testimony which he contends was erroneously admitted where the trial court properly overruled his objection to the previous line of questioning. *S. v. Battle*, 87.

§ 163. Exceptions and Assignments of Error to Charge; Necessity of

Defendant waived his right to assign error to the failure of the trial court to summarize the evidence by failing to object to this omission before the jury retired. *S. v. Owens*, 342.

CRIMINAL LAW — Continued

§ 163.3. Assignment of Error Based on Failure to Charge

Defendant could not properly assign as error the failure of the trial court to recapitulate certain evidence where defendant made no objection to the charge before the jury retired. *S. v. Setzer*, 500.

§ 166. The Brief

Where defendants file a stenographic transcript of the trial proceedings, the appellate court will not consider assignments of error not supported by an appendix in the brief or by a verbatim reproduction of the necessary portions of the transcript in the body of the brief. *S. v. Willis*, 244.

§ 169.7. Error Cured by Other Evidence or Instructions

Failure of the trial court to allow a defense witness on redirect examination to answer whether another man looked anything like defendant was not prejudicial error. *S. v. Davis*, 522.

§ 173. Invited Error

Defense counsel invited any error in an officer's reading of a portion of an affidavit for a search warrant which recited defendant's previous convictions. *S. v. Carr*, 402.

Any error in permitting an SBI agent to testify on redirect that certain articles tending to show other crimes were found in a search of defendant's house was invited by defendant's cross-examination of the witness. *S. v. Dortch*, 608.

§ 181.3. Review of Judgment Entered at Hearing

Defendants' ignorance of the mandatory minimum sentence for armed robbery could not have reasonably affected their decision to plead no contest to armed robbery charges, and the trial court erred in vacating their pleas. *S. v. Richardson*, 284.

DAMAGES

§ 11.1. Circumstances Where Punitive Damages Appropriate

Plaintiff's evidence was sufficient to support his claim of fraud and a verdict awarding him punitive damages for defendant's representation that she possessed a deed to a tract of land which the parties had agreed to purchase for resale. *Carter v. Parsons*, 412.

Plaintiff's evidence was sufficient to support an award of punitive damages in an action against two police officers for assault and battery. *Kuykendall v. Turner*, 638.

§ 11.2. Circumstances Where Punitive Damages Inappropriate

The trial judge did not err in failing to submit an issue of punitive damages on defendant's counterclaim for assault, battery and destruction of personal property in light of the undeniable evidence of defendant's provoking conduct. *Mazza v. Huffaker*, 170.

§ 12.1. Pleading Punitive Damages

Plaintiff's complaint in a medical malpractice action was insufficient to state a claim for punitive damages where it alleged gross negligence and willful and wanton conduct but failed to allege any fact showing any aggravating circumstances. *Henry v. Deen*, 189.

DEEDS

§ 19.3. Restrictive Covenants; Real Covenants

In an action by plaintiff developer of a condominium project for a judgment quieting title to a 2.646 acre portion of the project and a decree that plaintiff has the right to construct additional condominium units on that tract, the evidence supported the trial court's submission of issues as to (1) whether the intent of language in the Declaration of Unit Ownership was that the 2.646 acres were to be part of the common area of the existing condominiums, and (2) whether the Declaration of Unit Ownership gave plaintiff the right to construct additional units on the 2.646 acres. *Southland Associates v. Peach*, 676.

DIVORCE AND ALIMONY

§ 2.1. Pleadings; Complaint

A complaint for divorce must be verified at the time it is filed in order to be valid, and it is not sufficient to obtain verification after it is filed but before it is served on the defendant. *Boyd v. Boyd*, 334.

§ 14.2. Adultery; Competency of Testimony by Spouses

Testimony by the wife and by the husband on cross-examination about his admitted adulterous affairs in counseling sessions with the parties' minister and later in answer to the wife's request for further information about these affairs was inadmissible to prove indignities. *Spencer v. Spencer*, 535.

§ 19. Modification of Alimony

An order modifying a prior order for alimony and child support pendente lite is remanded to the district court for more definite findings as to the needs and resources of the parties and what the court intended to set out as appropriate child support. *McCall v. McCall*, 312.

§ 21. Enforcement of Alimony Awards

Defendant's forecast of evidence that he entered a separation agreement because plaintiff had threatened to prosecute him for assault was insufficient to support his defense of duress. *Stewart v. Stewart*, 112.

§ 21.2. Enforcement of Alimony Awards; Burden of Proof

The trial court did not err in ordering specific performance of a separation agreement although defendant was only one payment in arrears. *Stewart v. Stewart*, 112.

§ 24.1. Determining Amount of Support

The trial court did not err in failing to give defendant credit on child support payments for the time the child spends with him some four to five weeks each year. *Evans v. Craddock*, 438.

A child support proceeding is remanded for a determination as to whether private school tuition is a reasonable need of the child. *Ibid.*

§ 24.9. Support; Findings

A child support proceeding is remanded for appropriate findings and conclusions on issues of defendant father's income and expenses and the reasonable needs of the child. *Evans v. Craddock*, 438.

§ 27. Attorney's Fees and Costs

The trial court in a child support proceeding erred in refusing to permit plaintiff to amend her complaint to include allegations concerning attorney fees and in

ESCHEATS

§ 2. Assertion of Claims for Property

Unrefunded ticket proceeds for concerts by Elvis Presley which were cancelled because of Presley's death did not constitute derelict property subject to be delivered to the Escheat Fund. *N.C. State Treasurer v. City of Asheville*, 140.

ESTOPPEL

§ 5.1. Parties Estopped; Government

A county board of education was not estopped from applying provisions of the N.C. Administrative Code in dismissing a career teacher. *Burrow v. Board of Education*, 619.

EVIDENCE

§ 45. Evidence as to Value

Nonexpert witnesses were properly permitted to give their opinion as to the equality in value of several parcels of land involved in a partitioning proceeding. *Powers v. Fales*, 516.

The trial court properly permitted defendant to give opinion testimony as to the fair market value of his television set, boat trailer, lumber and electrical equipment. *Allen v. Allen*, 716.

§ 56. Testimony as to Value

An appraiser's testimony and a written appraisal were properly admitted where they were based upon a survey of damages conducted by the appraiser's employees under his supervision and control. *Shields v. Nationwide Mut. Fire Ins. Co.*, 565.

FRAUD

§ 12. Sufficiency of Evidence

Plaintiff's evidence was sufficient to support his claim of fraud and a verdict awarding him punitive damages for defendant's representation that she possessed a deed to a tract of land which the parties had agreed to purchase for resale. *Carter v. Parsons*, 412.

GAMBLING

§ 3. Lotteries

A criminal summons sufficiently charged defendant with the offense of possession of illegal punchboards without an allegation that defendant operated these devices. *S. v. Warren*, 549.

HOMICIDE

§ 20.1. Photographs

Even if the court erred in admitting three photographs of a murder victim as he appeared before an autopsy to illustrate a detective's testimony, such error was harmless beyond a reasonable doubt. *S. v. Keaton*, 279.

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was sufficient to support conviction of defendant for second degree murder of his infant daughter. *S. v. Smith*, 52.

INFANTS

§ 6.3. Facts Material to an Award of Custody; Contests Between Parent and Third Party

The trial court properly awarded custody of an 11-year-old child to its paternal aunt and uncle rather than to its natural mother. *Comer v. Comer*, 324.

§ 17. Juveniles; Confessions and Other Forms of Self-Incrimination

The trial court in a juvenile delinquency proceeding erred in admitting a statement made by the juvenile during custodial interrogation without making findings that the juvenile knowingly, willingly and understandingly waived his rights. *In re Riley*, 749.

INSANE PERSONS

§ 2.3. Removal of Guardian

A superior court judge was not required to make findings of fact in his order reversing an order of the clerk of court refusing to remove respondent as a co-guardian of an incompetent. *Parker v. Barefoot*, 232.

Findings made by the clerk supported a superior court judge's conclusion that respondent should be removed as co-guardian of an incompetent for wasting or converting the estate or money of the ward to his own use. *Ibid.*

INSURANCE

§ 79.1. Automobile Liability Insurance Rates; Approval or Disapproval by Commissioner

The Commissioner of Insurance had no authority to designate a hearing officer who was a Deputy Commissioner of Insurance as the official to make the final agency decision on a filing by the N.C. Rate Bureau for a revised safe driver plan. *State ex rel. Commissioner of Insurance v. N.C. Rate Bureau*, 262.

§ 121. Fire Insurance; Provisions Excluding Liability

Mere overvaluation by the insured, absent a showing of bad faith, does not constitute willful misrepresentation so as to avoid a fire insurance policy. *Shields v. Nationwide Mut. Fire Ins. Co.*, 565.

The evidence did not establish as a matter of law that plaintiff willfully concealed or misrepresented a material fact or committed any false swearing in his claim so as to avoid the policy. *Ibid.*

§ 136. Actions on Fire Policies

Only one claim existed to recover under a fire insurance policy for the loss of both real and personal property in a fire. *Mangum v. Nationwide Mut. Fire Ins. Co.*, 721.

§ 147. Aircraft Insurance

An accident involving an airplane rented from the insured was excluded from coverage under an aircraft insurance policy by a requirement that the pilot of an aircraft leased from the insured have a current medical certificate meeting FAA regulations. *Bellefonte Underwriters Insur. Co. v. Alfa Aviation*, 544.

JUDGMENTS

§ 1. Nature, Requisites, and Modification of Judgments in General

Where there were discrepancies between a probation revocation order and judgment, the judgment controlled. *S. v. Williamson*, 531.

JUDGMENTS — Continued

§ 36.5. Contracting Parties Generally; Insured and Insurer

Plaintiffs' action to recover under a fire insurance policy for the loss of personal property in a fire in their home was barred under the doctrine of res judicata by the judgment in a prior action in which plaintiffs sought damages against defendant insurer for the loss of their home. *Mangum v. Nationwide Mut. Fire Ins. Co.*, 721.

JURY

§ 5.1. Selection Generally

The trial court did not err in allowing the State to reopen its voir dire of one juror and to challenge the juror peremptorily after the jury had been passed by the State. *S. v. Miller*, 1.

KIDNAPPING

§ 1. Definitions; Elements of Offense

An indictment was insufficient to charge defendant with first degree kidnapping where it failed to allege that the victim was either not released by defendant in a safe place, was seriously injured, or was sexually assaulted. *S. v. Baldwin*, 688.

§ 1.2. Sufficiency of Evidence

The removal of a victim of an armed robbery at gunpoint from a store after defendant had taken money from the victim and his father at gunpoint supported a conviction of kidnapping. *S. v. Battle*, 87.

There was sufficient evidence of restraint or asportation for the purpose of facilitating the commission of the felony of rape to support conviction of defendant for kidnapping. *S. v. Alston*, 454.

The State's evidence was sufficient for the jury to find that defendant unlawfully confined, restrained and removed three young men from one place to another for the purpose of terrorizing them so as to support defendant's conviction of three charges of kidnapping. *S. v. Baldwin*, 688.

§ 1.3. Instructions

The trial court's instruction that the State must prove "that the defendant removed [the victim] from one place to another for the purpose of facilitating flight after committing a felony" was sufficient for the jury to understand that it must find that the removal was separate and apart from the other felony in order to find defendant guilty of kidnapping. *S. v. Battle*, 87.

LARCENY

§ 7.4. Possession of Stolen Property

The State's evidence was sufficient for the jury in a prosecution for felonious larceny of four tractors. *S. v. Powell*, 124.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

Plaintiff's action to recover damages for defects in glass panels manufactured by one defendant and used by the other defendants in the construction of plaintiff's building was barred under the provisions of former G.S. 1-15(b) and the three-year

MASTER AND SERVANT — Continued

§ 68.1. Asbestosis and Silicosis

An employee may receive disability compensation for asbestosis without showing that he has suffered diminished capacity to earn an income. *Roberts v. Southeastern Magnesia and Asbestos Co.*, 706.

§ 68.3. Compulsory Change of Occupation

The Industrial Commission properly ordered plaintiff to refrain from exposing himself to the hazards of asbestosis in his employment. *Roberts v. Southeastern Magnesia and Asbestos Co.*, 706.

§ 73.1. Loss of Vision or of Eye

An injury to plaintiff truck driver's cranial nerve which causes plaintiff to have double vision under certain circumstances was compensable under G.S. 97-31(24) as an injury to an important part of the body, and it was proper for the Industrial Commission to consider diminution of earning capacity in making an award for permanent partial disability resulting from such injury. *Key v. McLean Trucking*, 143.

§ 78. Enforcing Payment of Award

Where a self-insured employer was ordered by a federal bankruptcy court not to pay workers' compensation claims in this state, the Industrial Commission erred in ordering the surety on the bond filed with the Industrial Commission by the employer to bring to a conclusion all the worker's compensation claims outstanding against the employer. *In re Bankruptcy of Spector-Red Ball*, 745.

§ 80. Rates and Regulation of Compensation Insurers

The Commissioner of Insurance had no authority to designate a hearing officer who was a Deputy Commissioner of Insurance as the official to make the final agency decision on a filing by the N.C. Rate Bureau for workers' compensation rates. *State ex rel. Commissioner of Insurance v. N.C. Rate Bureau*, 506.

§ 87. Claim Under Compensation Act as Precluding Common Law Action

When an employee's injuries are compensable under the Workers' Compensation Act, the employee's spouse is prohibited from maintaining an action for loss of consortium resulting from such injuries. *Sneed v. CP&L*, 309.

§ 91. Filing of Claim Generally

Defendants were not estopped from asserting that plaintiff failed to file his claim for an occupational disease within the time permitted by statute because defendant employer had prior knowledge of plaintiff's occupational disease. *Clary v. A. M. Smyre Mfg. Co.*, 254.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

A finding by the Employment Security Commission that claimant was discharged from his employment for using drugs on company property was supported by the testimony of an undercover agent, and such finding supported the Commission's conclusion that claimant was discharged for "misconduct connected with his work" and was disqualified for unemployment benefits. *Hester v. Hanes Knitwear*, 730.

MORTGAGES AND DEEDS OF TRUST

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

The trial court properly affirmed an order of the clerk permitting plaintiff to foreclose under a deed of trust. *Thompson v. Wrenn*, 582.

MUNICIPAL CORPORATIONS

§ 2. Annexation

Any number of separate qualifying areas may be annexed in a single ordinance. *McKenzie v. City of High Point*, 393.

§ 2.3. Compliance with Statutory Requirements

An annexation ordinance was not invalid on the ground that the areas annexed failed to meet the "adjacent or contiguous" requirement because the area of the city adjacent and contiguous to the areas annexed by the ordinance were unlawfully annexed. *McKenzie v. City of High Point*, 393.

§ 4.5. Powers in Housing and Urban Development

A decision by the Supreme Court in this case did not require a municipal board of aldermen to accept plaintiff's highest bid for property being sold by a redevelopment commission but permitted the board either to accept plaintiff's bid or to reject all bids. *Builders, Inc. v. City of Winston-Salem*, 682.

§ 28. Payment and Enforcement of Assessment of Lien

It was proper for a city to attach a condemnation proceeds check due defendants as partial payment of unpaid special assessments. *City of Durham v. Herndon*, 275.

§ 30.9. Comprehensive Plan; Spot Zoning

The rezoning of property to accommodate the owner's plans to relocate his grain bin operation constituted unlawful spot zoning. *Godfrey v. Union Co. Bd. of Commissioners*, 100.

§ 31.1. Standing to Appeal or Sue

Petitioners were not "aggrieved parties" and had no standing to seek review of a decision of a municipal zoning board of adjustment to grant a special use permit for the construction of multi-family housing. *Heery v. Zoning Board of Adjustment*, 612.

NARCOTICS

§ 3.1. Competency and Relevancy of Evidence Generally

Testimony by an undercover agent who purchased marijuana from defendant on the date in question that he had also purchased marijuana from defendant on an earlier date was admissible to show identity. *S. v. Shields*, 462.

The chain of custody of a bag of marijuana purchased from defendant by an undercover officer was not insufficient because the officer placed the bag in a safe in his apartment overnight and his parents had access to the safe. *Ibid.*

Testimony by an undercover agent that preliminary tests performed on white powder purchased by him from defendant showed that it was opium was harmless error. *S. v. Dortch*, 608.

§ 4. Sufficiency of Evidence

The State's evidence was sufficient for the jury to find defendant guilty of trafficking in heroin by possessing between 4 and 14 grams thereof. *S. v. Willis*, 23.

The State's evidence was sufficient to support conviction of defendant for possession of more than 100 pounds of marijuana found in bags in a field of growing marijuana. *S. v. Bond*, 739.

NARCOTICS — Continued

§ 4.6. Instructions as to Possession

Where defendant was convicted of possession of cocaine with intent to sell and deliver and sale and delivery of cocaine, the trial court did not err in failing to submit an issue as to defendant's guilt of possession of less than one gram of cocaine. *S. v. Parker*, 585.

§ 4.7. Instructions as to Lesser Offenses

In a prosecution for trafficking in heroin by possessing between four and fourteen grams thereof, evidence that the white powder possessed by defendant weighed 13.2 grams and contained approximately 30% of pure heroin did not require the trial court to instruct the jury on simple possession of heroin. *S. v. Willis*, 23.

The trial court was not required to submit to the jury the lesser included offense of trafficking in less than 10,000 dosage units of methaqualone because only 20 of the more than 30,000 tablets seized by undercover agents were actually determined by chemical analysis to be methaqualone. *S. v. Myers and S. v. Garris*, 554.

§ 5. Verdict and Punishment

The subsection of the heroin trafficking statute which permits the trial judge to impose a more lenient sentence on a defendant who provides substantial assistance in the identification, arrest or conviction of other persons involved in the crime is not unconstitutional on the theory that it coerces a defendant to abandon his Fifth Amendment rights against self-incrimination. *S. v. Willis*, 23.

The mandatory minimum sentence and fine provision of a subsection of the heroin trafficking statute does not violate a defendant's equal protection rights and the separation of powers clause of the North Carolina Constitution on the theory that it places impermissible legislative restraints on the judiciary and places sentencing power in the hands of the prosecutor. *Ibid.*

The statute defining the offense of trafficking in heroin does not violate a defendant's equal protection rights because it penalizes possession of a particular amount of any mixture containing heroin without regard to the percentage of heroin in the mixture. *Ibid.*

NEGLIGENCE

§ 16. Sudden Peril or Emergency as Affecting Question of Contributory Negligence

The Industrial Commission erred in finding that a highway patrolman was negligent in "swerving" his automobile into the left lane of a highway where it struck decedent's motorcycle where the evidence indicated that the officer exercised reasonable care to avoid a collision when he locked his brakes and lost control of his automobile in the face of a sudden emergency created when a turning vehicle blocked his lane of travel. *Riggan v. Highway Patrol*, 69.

PARENT AND CHILD

§ 1. Creation and Termination of Relationship

The trial court did not err in granting petitioner's motion to exclude respondent from the courtroom while respondent's 11-year-old son testified in a proceeding to terminate parental rights. *In re Barkley*, 267.

In a proceeding to terminate parental rights, the trial court properly allowed testimony concerning respondent's lack of contact with her children after they had

ROBBERY

§ 2. Indictment

An indictment for armed robbery sufficiently alleged that money was taken from the person named in the indictment. *S. v. Setzer*, 500.

§ 4.2. Common Law Robbery Cases Where Evidence Held Sufficient

The State's evidence was sufficient for the jury in a prosecution for common law robbery of a Pizza Hut employee at the night depository of a bank. *S. v. Capps*, 225.

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

The State's evidence was sufficient to show a danger or threat to the life of a robbery victim so as to support defendant's conviction of robbery with a dangerous weapon, a wedge-axe. *S. v. Fedoris*, 165.

The evidence, including lineup and in-court identifications of defendant by the victim, was sufficient to support conviction of defendant for the armed robbery of a convenience store employee. *S. v. Parker*, 94.

The State's evidence was sufficient to establish that a dangerous weapon was used and that the life of the victim was endangered or threatened by use of this weapon so as to support conviction of defendants for armed robbery. *S. v. Willis*, 244.

§ 4.4. Attempted Robbery Cases Where Evidence Held Sufficient

The State's evidence was sufficient for the jury in a prosecution for attempted common law robbery of a store employee. *S. v. Eure*, 430.

RULES OF CIVIL PROCEDURE

§ 3. Commencement of Action

The trial court erred in refusing to dismiss plaintiffs' action against defendant on the ground of a prior pending action by defendant against plaintiffs in another county because summons was first served in plaintiffs' action where the complaint was first filed in defendant's action. *Atkins v. Nash*, 488.

§ 4. Process

Where the last alias and pluries summons was not served within 90 days, the action was discontinued, and plaintiff's subsequent service of process by publication did not revive the action. *Brown v. Overby*, 329.

§ 13. Counterclaim and Crossclaim

The trial court should have treated defendant's motion to dismiss plaintiffs' claims on the ground of a prior pending action as a motion under Rule 13(a) and should have allowed the motion with leave to file such claims as counterclaims in defendant's prior action. *Atkins v. Nash*, 488.

§ 15.1. Discretion of Court to Grant Amendments

The trial court erred in not permitting plaintiff to amend his complaint pursuant to Rule 15(a). *Henry v. Deen*, 189.

§ 24. Intervention

In an action to perfect a statutory lien on a motor vehicle, an intervenor defendant could properly present evidence that plaintiff surrendered possession of the vehicle so that he lost his lien right so far as the intervenor defendant was concerned. *Harrington v. Overcash*, 742.

RULES OF CIVIL PROCEDURE — Continued

§ 41.1. Voluntary Dismissal

When plaintiff took a voluntary dismissal without prejudice of his claims against defendant, he destroyed his right to appeal a prior adverse ruling allowing summary judgment on one count of the complaint. *Lloyd v. Carnation Co.*, 381.

§ 43. Evidence

Where defendant did not ask the court to rule that a witness was "unwilling or hostile" and he was not such as a matter of law, there was no error in the trial court's refusal to permit defendant to impeach the witness with questions regarding prior criminal convictions. *Shields v. Nationwide Mut. Fire Ins. Co.*, 365.

§ 50. Motions for Directed Verdicts and Judgments Notwithstanding Verdicts

The trial judge acted in accordance with Rule 50(a) when he granted directed verdicts while the jury was still deliberating. *Kuykendall v. Turner*, 638.

§ 50.2. Directed Verdict Against Party With Burden of Proof

In an action to recover the unpaid balance in defendant's commodity futures account, plaintiff's evidence was manifestly credible, and the trial court properly directed a verdict in favor of plaintiff. *E. F. Hutton & Co. v. Stanley*, 331.

§ 52.1. Findings by Court

A superior court judge was not required to make findings of fact in his order reversing an order of the clerk of court refusing to remove respondent as a co-guardian of an incompetent. *Parker v. Barefoot*, 232.

§ 55. Default

An entry of default was not improper because plaintiff failed to file an affidavit attesting to defendant's failure to answer. *Silverman v. Tate*, 670.

Proof of jurisdiction over a non-appearing defendant is required only when a default judgment is to be entered against such defendant but is not required for an entry of default. *Ibid.*

§ 55.1. Setting Aside Default

Defendant failed to show good cause for setting aside an entry of default against him on the ground that he had taken the complaint and summons to his insurance agent who assured him that everything would be taken care of. *Silverman v. Tate*, 670.

§ 60.2. Grounds for Relief from Judgment

The heirs at law of a testatrix could properly file with the clerk of court a motion in the cause under Rule 60(b)(6) to vacate the executor's final account on the ground that the executor had misconstrued testatrix's will and had made improper distribution of real property assets. *In re Estate of Heffner*, 646.

SALES

§ 17.1. Sufficiency of Evidence in Cases Involving Express Warranties

The evidence was sufficient to support the trial court's determination that defendants justifiably revoked their acceptance of a combine purchased from plaintiff within a reasonable time after defects therein were not cured and that the remedy provided by an express warranty failed in its essential purpose. *Ayden Tractors v. Gaskins*, 654.

SALES — Continued

§ 22. Actions for Personal Injuries Based on Negligence, Defective Goods or Materials

Plaintiff's action to recover damages for defects in glass panels manufactured by one defendant and used by the other defendants in the construction of plaintiff's building was barred under the provisions of former G.S. 1-15(b) and the three-year statute of limitations of G.S. 1-52(5). *Blue Cross and Blue Shield v. Odell Associates*, 350.

SCHOOLS

§ 13.2. Principals and Teachers; Dismissals

A career teacher who had pleaded no contest to involuntary manslaughter in the shooting death of her husband and who would have been on work release or parole while teaching was properly dismissed from employment by a county board of education. *Burrow v. Board of Education*, 619.

A county board of education was not estopped from applying provisions of the N.C. Administrative Code in dismissing a career teacher. *Ibid.*

SEALS

§ 1. Generally

The affixation of a corporate seal to defendant corporation's contract to provide architectural services to plaintiff did not create an instrument under seal to which the 10-year statute of limitations applied. *Blue Cross and Blue Shield v. Odell Associates*, 350.

SEARCHES AND SEIZURES

§ 8. Warrantless Arrest

The intensity of a search of defendant's person as an incident to his lawful arrest for a narcotics offense, during which bundles of money were found in various parts of his clothing and four papers were found in his wallet, was reasonable and lawful. *S. v. Willis*, 23.

§ 11. Search and Seizure of Vehicles

An officer of Pender County had probable cause to believe that defendant's automobile contained stolen firearms at the time he observed it in New Hanover County, and his seizure and removal of the automobile to the Pender County Sheriff's Department were reasonable and authorized under the Fourth Amendment. *S. v. Carr*, 402.

§ 12. "Stop and Frisk" Procedures

Defendant was lawfully seized upon a reasonable and articulable suspicion that he was engaged in criminal activity at an airport and thereafter voluntarily relinquished his briefcase and accompanied officers to their office. *S. v. Sugg*, 106.

§ 15. Standing to Challenge Lawfulness of Search

Defendant relinquished his reasonable expectation of privacy in a suitcase so that an officer's warrantless search of the suitcase was lawful. *S. v. Teltser*, 290.

SEARCHES AND SEIZURES — Continued

§ 24. Warrant; Cases where Probable Cause Sufficient; Information from Informers

An officer's affidavit based on information received from a confidential informant was sufficient to justify a finding of probable cause for issuance of a search warrant. *S. v. Estep*, 495.

An affidavit for a search warrant was not inadequate because it failed to disclose clearly on its face that knowledge of the informant's statements was obtained by the affiant through another officer. *Ibid.*

An affidavit for a warrant to search for lottery tickets based upon information received from a confidential informant was sufficient to establish reasonable grounds to believe that contraband was present in the place to be searched and to establish the reliability of the informant. *S. v. Warren*, 549.

§ 33. Plain View Rule

Officers lawfully seized cocaine from defendant's briefcase pursuant to the "plain view" doctrine after defendant was lawfully detained at an airport and exposed the cocaine to the view of officers after requesting and receiving permission to remove some personal papers from his briefcase. *S. v. Sugg*, 106.

§ 40. Items Which May Be Seized

An officer's testimony concerning his observation of a wallet and a jar containing coins during his search of defendant's automobile pursuant to a warrant which listed firearms as the items to be seized was admissible under the "plain view" doctrine. *S. v. Carr*, 402.

Two stolen vehicles were lawfully seized by officers under the "plain view" doctrine during a search of defendant's premises pursuant to a warrant to search for narcotics. *S. v. Estep*, 495.

§ 43. Motions to Suppress Evidence

A sufficient nexus was established between defendants and seized lottery tickets to survive a motion to suppress the tickets. *S. v. Warren*, 549.

STATE

§ 8. Negligence of State Employee

The Industrial Commission misinterpreted the evidence and misapplied its findings to the law in arriving at its conclusion that the negligence of a highway patrolman was a proximate cause of the collision in question and the resulting death of the decedent. *Riggan v. Highway Patrol*, 69.

TAXATION

§ 31.1. Sales and Use Taxes; Particular Transactions and Computations

Petitioner had a right to rely on a regulation from the Secretary of Revenue concerning the use tax on a sale of mill machinery to an asphalt plant, and the purchase of machinery by petitioner to make asphalt to be used principally in the performance of its asphalt paving contracts was subject to a maximum use tax of $80.00. *Oscar Miller Contractor v. Tax Review Board*, 725.

§ 32. Taxes on Solvent Credits and Intangibles

A law firm is liable for the intangibles tax on claims arising from work it has done for clients although the claims have not progressed to the point at which the law firm is ready to submit bills for them. *Moore and Van Allen v. Lynch*, 601.

TELECOMMUNICATIONS

§ 1.2. Determination of Rate Charged by Public Utility

The Utilities Commission properly included the revenues and expenses associated with yellow page directory advertising in computing a telephone company's gross revenues and expenses for ratemaking purposes. *State ex rel. Utilities Comm. v. Carolina Telephone*, 42.

The Utilities Commission properly excluded all imputed interest expense related to the Job Development Income Tax Credit in determining a telephone company's income tax expense for ratemaking purposes. *Ibid.*

TORTS

§ 7.5. Release; Covenant Not to Sue or Settlement by One of Joint Tort-feasors

A release of the original tort-feasors who caused injuries to decedent did not bar a wrongful death action against a surgeon based on negligent treatment of the injuries caused by the original tort-feasors. *Warren v. Canal Industries*, 211.

TRESPASS

§ 7. Sufficiency of Evidence and Nonsuit

Plaintiff's evidence was sufficient to show an unauthorized entry into her home by defendant police officers so as to support submission of an issue of trespass. *Kuykendall v. Turner*, 638.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

Summary judgment was properly entered in favor of defendants in plaintiff's action to recover damages for conspiracy to commit unfair trade practices by attempting to force plaintiff out of certain marketing territories. *Lloyd v. Carnation Co.*, 381.

UTILITIES COMMISSION

§ 20. Regulation of Telegraph and Telephone Companies

The Utilities Commission properly included the revenues and expenses associated with yellow page directory advertising in computing a telephone company's gross revenues and expenses for ratemaking purposes. *State ex rel. Utilities Comm. v. Carolina Telephone*, 42.

The Utilities Commission properly excluded all imputed interest expense related to the Job Development Income Tax Credit in determining a telephone company's income tax expense for ratemaking purposes. *Ibid.*

VENDOR AND PURCHASER

§ 4. Title and Restrictions

The visible easement rule did not apply to the contract to convey land involved in this case, and the trial court properly held that a power company easement on the land constituted a breach of the conditions of the contract. *Waters v. Phosphate Corp.*, 79.

WILLS

§ 68. Title and Rights of Devisees and Legatees

A one-ninth interest in the homeplace devised to testatrix in her mother's will was not disposed of by a provision of her will bequeathing her "other personal belongs," testatrix died intestate as to such interest, and the proceeds of a sale of the homeplace after the death of the testatrix should have been distributed to the heirs at law of the testatrix. *In re Estate of Heffner*, 646.

WITNESSES

§ 1. Competency of Witness

The trial court did not err in permitting an interpreter to translate the trial testimony of a homicide victim's Vietnamese mother. *S. v. Sandlin*, 421.

§ 6. Evidence Competent to Impeach or Discredit Witness

Cross-examination of the agent who placed a fire insurance policy as to whether he had errors and omissions coverage and the deductible thereon was admissible to show bias or financial interest on the part of the witness. *Shields v. Nationwide Mut. Fire Ins. Co.*, 365.

§ 6.3. Conviction of Crime; Arrest, Accusation, or Prosecution

Where defendant did not ask the court to rule that a witness was "unwilling or hostile" and he was not such as a matter of law, there was no error in the trial court's refusal to permit defendant to impeach the witness with questions regarding prior criminal convictions. *Shields v. Nationwide Mut. Fire Ins. Co.*, 365.

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