NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 66

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CITE THIS VOLUME

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

R. A. HEDRICK[1]

Judges

GERALD ARNOLD
JOHN WEBB
HUGH A. WELLS
WILLIS P. WHICHARD
CHARLES L. BECTON
CLIFTON E. JOHNSON
EUGENE H. PHILLIPS
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN[2]
SARAH PARKER[3]
JACK COZORT[4]

Retired Chief Judge

NAOMI E. MORRIS

Retired Judges

HUGH B. CAMPBELL
FRANK M. PARKER
EDWARD B. CLARK
ROBERT M. MARTIN
CECIL J. HILL[5]
E. MAURICE BRASWELL[6]

Clerk

FRANCIS E. DAIL

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Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

---

1. Appointed Chief Judge by Chief Justice Joseph Branch and took office 3 January 1985.
2. Elected Judge 6 November 1984 and took office 2 January 1985.
3. Appointed Judge by Gov. James B. Hunt, Jr. and took office 3 January 1985.
4. Appointed Judge by Gov. James B. Hunt, Jr. and took office 3 January 1985.
5. Retired 31 December 1984.
6. Retired 31 December 1984.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
	THOMAS S. WATTS[1]	Elizabeth City
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3	DAVID E. REID, JR.	Greenville
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	HENRY W. HIGHT, JR.[4]	Henderson
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	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
11	WILEY F. BOWEN	Dunn
12	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	J. MILTON READ, JR.[5]	Durham
15A	D. MARSH MCLELLAND	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16	B. CRAIG ELLIS	Laurinburg

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17B	JAMES M. LONG	Pilot Mountain
18	W. DOUGLAS ALBRIGHT	Greensboro
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	THOMAS W. ROSS	Greensboro
	JOSEPH JOHN[6]	Greensboro
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19B	RUSSELL G. WALKER, JR.	Asheboro
20	F. FETZER MILLS	Wadesboro
	WILLIAM H. HELMS	Wingate

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	WILLIAM H. FREEMAN	Winston-Salem
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	PRESTON CORNELIUS	Mooresville
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	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
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	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	JAMES U. DOWNS	Franklin
	JOSEPH A. PACHNOWSKI[7]	Bryson City

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FRED J. WILLIAMS[8]	Durham
LAMAR GUDGER	Asheville
JANET M. HYATT[9]	Waynesville
DONALD W. STEPHENS[10]	Raleigh

1. Appointed Regular Judge 12/1/84.
2. Appointed 1/1/85 to replace Elbert S. Peel, Jr. who died 10/16/84.
3. Elected 1/3/85 to replace R. Michael Bruce.
4. Appointed 12/1/84.
5. Appointed 1/3/85 to replace John C. Martin.
6. Appointed 12/3/84.
7. Appointed 12/1/84.
8. Appointed 1/1/85 to replace Arthur L. Lane.
9. Appointed 1/8/85 to replace Russell G. Walker, Jr.
10. Appointed 1/1/85 to replace Thomas S. Watts.

EMERGENCY JUDGES

JUDGES	ADDRESS
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HAL H. WALKER	Asheboro

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	ELTON G. TUCKER	Wilmington
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	ROBERT E. BENCINI	High Point
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	RONALD W. BURRIS	Albemarle
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30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
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	DANNY E. DAVIS	Waynesville

---

1. Appointed 1/1/85.
2. Appointed 12/3/84 to replace W. Pope Lyon who retired 11/30/84.
3. Appointed 9/17/84.
4. Appointed Chief Judge 12/3/84 to replace William E. Wood.
5. Appointed 12/3/84 to replace Roy D. Trest.
6. Appointed 12/3/84.
7. Appointed Chief Judge 1/1/85 to replace J. Milton Read, Jr. who went on Superior Court bench.
8. Appointed 12/10/84 to replace William G. Pearson II.
9. Appointed Chief Judge 12/31/84 to replace Joseph R. John who went on Superior Court bench.
10. Appointed 12/3/84 to replace Robert L. Cecil who retired.
11. Appointed 12/3/84 to replace John F. Yeattes, Jr., who retired.
12. Appointed 1/4/85 to replace Joseph R. John who went on Superior Court bench.
13. Appointed 12/3/84.
14. Appointed 9/27/84.
15. Appointed 12/3/84.
16. Appointed 9/28/84.
17. Appointed Chief Judge 12/3/84 to replace Lewis Bulwinkle who resigned 11/30/84.
18. Appointed 12/4/84.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General

LESTER D. ROARK

Special Assistant to the Attorney General

PHILLIP J. LYONS

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ELLEN B. SCOUTEN

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1	H. P. Williams	Elizabeth City
2	Mitchell O. Norton	Williamston
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21	Donald K. Tisdale	Clemmons
22	H. W. Zimmerman, Jr.	Lexington
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27B	Thomas M. Shuford, Jr.	Lincolnton
28	Ronald C. Brown	Asheville
29	Alan C. Leonard	Rutherfordton
30	Marcellus Buchanan III	Sylva

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DISTRICT	PUBLIC DEFENDER	ADDRESS
3	DONALD C. HICKS III	Greenville
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18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

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State v. Cayton	66 N.C. App. 554	Denied, 310 N.C. 746
State v. Davis	66 N.C. App. 137	Denied, 311 N.C. 765
State v. Downing	66 N.C. App. 686	Allowed, 312 N.C. 86
State v. Farrow	66 N.C. App. 147	Denied, 310 N.C. 746 Appeal Dismissed
State v. Fletcher	66 N.C. App. 36	Denied, 310 N.C. 627
State v. Gooden	65 N.C. App. 669	Denied, 311 N.C. 766
State v. Greene	59 N.C. App. 360	Denied, 311 N.C. 404
State v. Gross	66 N.C. App. 364	Denied, 310 N.C. 746
State v. Holloway	66 N.C. App. 491	Allowed as to additional issues, 310 N.C. 746
State v. Jenkins	56 N.C. App. 256	Denied, 312 N.C. 799
State v. Johnson	66 N.C. App. 444	Denied, 310 N.C. 747
State v. Joines	66 N.C. App. 459	Denied, 311 N.C. 405
State v. Lewis	58 N.C. App. 348	Denied, 311 N.C. 766
State v. Myers and State v. Garris	61 N.C. App. 554	Denied, 311 N.C. 767
State v. Nichols	66 N.C. App. 318	Denied, 311 N.C. 406
State v. Partridge	66 N.C. App. 427	Denied, 310 N.C. 629
State v. Phillips	66 N.C. App. 453	Denied, 310 N.C. 747
State v. Riddle	66 N.C. App. 60	Allowed, 310 N.C. 629 Appeal Dismissed
State v. Simmons	66 N.C. App. 402	Denied as to additional issues, 310 N.C. 630 Appeal dismissed as to additional issues

Case	*Reported*	*Disposition in Supreme Court*
State v. Smith	66 N.C. App. 326	Denied, 311 N.C. 406
State v. Smith	66 N.C. App. 570	Denied, 310 N.C. 747
State v. Snyder	66 N.C. App. 191	Allowed, 310 N.C. 480
State v. Snyder	66 N.C. App. 358	Denied, 312 N.C. 897
State v. Stafford	66 N.C. App. 440	Denied, 311 N.C. 406
State v. Turner	66 N.C. App. 203	Denied, 311 N.C. 768
State v. Wright	66 N.C. App. 555	Denied, 310 N.C. 748
Taylor v. Gillespie	66 N.C. App. 302	Denied, 310 N.C. 748
Vance Trucking Co. v. Phillips	66 N.C. App. 269	Denied, 311 N.C. 309
Wise v. Laughridge	66 N.C. App. 378	Denied, 311 N.C. 770

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JOSEPH P. HIGGINS, JR.

No. 8312SC533

(Filed 17 January 1984)

Criminal Law § 33.2— pawn tickets—inadmissibility to show motive for crimes

In a prosecution for breaking or entering and larceny, pawn shop tickets signed by defendant on dates prior to the crimes charged were not admissible to show a motive for such crimes. In this case, the pawn shop tickets were improperly used to impeach collaterally defendant's testimony on cross-examination in which he denied committing other break-ins and pawning items taken during those break-ins.

Judge WHICHARD dissenting.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 16 December 1982 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 9 December 1983.

Defendant was convicted of felonious breaking or entering, felonious larceny, and assault with a deadly weapon with intent to kill inflicting serious injury.

At trial, the state's evidence, in summary, was as follows. On 26 July 1982 at about 5:30 p.m., James Smith upon returning to his home, was surprised by an intruder, whom Smith identified as defendant. According to Smith, defendant was armed with two pistols and shot him twice and then fled from the house. Smith saw defendant face to face for only a matter of seconds, but saw him clearly. Smith described his assailant to police as having

brown hair, in need of a shave, with a mustache. About two weeks later, Smith identified defendant from a line-up of six white males.

Following the shooting, Smith's assailant ran from the house to an automobile parked nearby. A neighbor, Donald Easterling, heard the shots and heard Smith "hollering" for help. Easterling observed a white male getting into a Mercury station wagon. Smith said: "[t]here's the guy that shot me." Easterling testified that "I think the defendant is the man I saw getting into the car." Bob Lund, another neighbor, witnessed the same events as Easterling, but did not get a clear look at Smith's assailant.

Gil Campbell, a detective of the Cumberland County Sheriff's Department, investigated the crime. On 28 July 1982, he went to defendant's residence in Robbins and arrested defendant. Detective William Proctor, who accompanied Campbell to defendant's residence, searched defendant's residence and car. In defendant's car, Proctor found a .22 caliber automatic pistol and an empty .32 caliber Smith and Wesson revolver cartridge shell. At the time of arrest, defendant had a day's growth of beard.

Defendant's evidence, in summary, was as follows. Deborah Wolfe testified that during the summer of 1982, she worked at The Pub, a Fayetteville bar owned by her mother, Mrs. Edwards. On 26 July 1982, she went to The Pub between 2:15 and 2:30 p.m. She recognized defendant in the courtroom. On the afternoon of 26 July 1982, defendant came to The Pub at about 2:30 p.m. Her mother told defendant that The Pub would not be open until 3:00 p.m. Defendant returned shortly after 3:00 p.m. and was there and was still in The Pub when Ms. Wolfe left about 6:00 p.m.

Jeanne Robertson testified that she worked at The Pub. When she arrived there at about 5:00 p.m. on 26 July 1982, Mrs. Edwards, Deborah Wolfe and defendant were there. Defendant left The Pub at about 6:00 p.m. Defendant was clean shaven, except for a mustache.

Virginia Edwards testified that defendant came to The Pub at about 2:30 p.m. on 26 July 1982, but left when told that they didn't open until 3:00 p.m.; that defendant returned shortly after 3:00 p.m. and remained there until about 6:00 p.m.; that she remembered defendant because she tried to convince him to try

Foster's beer, a beer popular with her customers, but that defendant didn't like it; that she talked with defendant off and on during that afternoon because he was the only customer that afternoon; that she watched defendant leave shortly after her daughter left because she wanted to be sure defendant wasn't following her daughter; and that defendant was clean shaven except for a mustache.

Defendant testified that he left his home in Robbins at about 10:00 a.m. on 26 July 1982 and went to the Fayetteville "unemployment office" to look for work. He learned of a possible job at Kelly-Springfield. He left there between 1:30 and 2:30 p.m. and went to lunch, then went to The Pub. He left his car in the parking lot with the key in the ignition because the key couldn't be removed. He remained in The Pub until 6:00 p.m. He owned the .22 caliber pistol found in his car, but had never seen the empty cartridge shell found there. Defendant had met James Smith before and had visited in Smith's home. Defendant denied breaking into Smith's home or stealing anything from it, and denied shooting Smith.

On cross-examination, defendant gave the answers indicated to the following questions.

Q. Was it earlier in the month of July that you had been there? (Fayetteville)

A. Yes, sir.

Q. Had you also been there in June?

A. Yes, sir.

Q. What were you doing in Fayetteville on those days?

A. I don't remember.

Q. Do you recall going to Ace Pawn Shop on June 28?

A. No, sir.

Q. You didn't pawn a Yashica camera at that time?

A. No, sir.

Q. Do you recall going to Rhudy's Pawn Shop on July 12?

A. No, sir.

Q. Do you recall going to Uncle Sam's Pawn Shop on July 20?

A. No, sir.

Q. You don't recall on July 12 pawning a Polaroid EE100 special land camera at Rhudy's?

A. No, sir.

Q. And on July 20 of this year you don't recall pawning a Remington .22 rifle at Uncle Sam's Pawn Shop on Murchison Road?

A. No, sir.

Q. Were you at the Cash Pawn on July 29 of this year?

A. No, sir.

Q. You don't recall pawning a 308 U.S. Springfield rifle on that date?

A. No, sir.

Q. Do you recall going to the Boulevard Pawn Shop on July 20?

A. No, sir.

Q. You don't recall pawning a .30-.30 caliber carbine rifle on that date?

A. No, sir.

Q. Do you recall going to Jim's Pawn Shop on July 20?

A. No, sir.

Q. You don't recall pawning a Marlin 334, .30-.30 caliber rifle?

A. No, sir, I don't remember going to any pawn shops.

. . .

Following this cross-examination, the record discloses the following exchange between the District Attorney, Mr. Boose, the trial judge, and counsel for defendant, Mr. Van Camp:

. . .

MR. BOOSE: May I approach the witness, Your Honor?

(A conference was held at the bench between Court and all counsel.)

COURT: Ladies and gentlemen of the jury, step out for a moment. We'll send for you when we can.

(Jury left courtroom.)

COURT: All right, Now, to repeat what you gentlemen told me here at the bench a moment ago. As I understand it, the solicitor has in hand copies of something. What is that?

MR. BOOSE: Photocopies of six pawn tickets.

COURT: All right. And just by way of summarizing, I surmise that those are allegedly pawn tickets from the pawn shops that you asked him about, the cross examination a few minutes ago?

MR. BOOSE: Yes, sir.

COURT: May I inquire further what is it you would set out to do?

MR. BOOSE: Well, Your Honor, he has denied being there and I want to ask if he recognizes his signature as being his. There is a recent case, *State of North Carolina versus La-Duke.* It says you don't need an expert to establish handwriting. They can look to establish similarity.

COURT: How does that pertain to this?

MR. BOOSE: We have his driver's license. We have his rights form. That will be a known signature witnessed by two officers and each one of these pawn tickets is signed Joseph P. Higgins.

COURT: I understand. I follow you as to what you're saying. Perhaps the logical questions [sic] is for what purpose?

MR. BOOSE: Well, now that he had denied it in Court, try to impeach him as to credibility as a witness.

COURT: All right. I have no problem with that. The only problem is the law says that such things may not be proved extrinsically. That is, by other evidence. It's a misnomer to say you are bound by his answer, but it is not a misnomer to say that you cannot introduce extrinsic evidence to show he's lying. That's a terrible word. To show that he misstated things. You may sift the witness, whatever that phrase may mean, but you cannot yourself introduce evidence contradicting a collateral point. And this is a collateral point, although I can think of some other basis upon which it might well be admissible as substantive evidence in this case.

MR. BOOSE: Your Honor, if you would like, we can call the pawn shop owners and people.

COURT: I understand that it is proving. I don't doubt that you can line up a room full of them. That is likewise—it is likewise extrinsic evidence of what is otherwise a collateral point.

The fact on direct examination he has testified to being in Fayetteville when he was in the service. He has further testified, as I recall, and correct me, that he had been back here very few times, maybe looking for jobs. That was his testimony on direct examination, was it not?

MR. VAN CAMP: I heard him say he was here in June sometime.

MR. BOOSE: On cross.

MR. VAN CAMP: On cross.

COURT: Part of the evidence in this case up 'til now deals with familiarity with the Fayetteville area, travel times back and forth between Robbins and here. So if it's the sole purpose, were impeachment of his credibility, then you're bound by his answer. But if it has another purpose—

MR. BOOSE: Well, Your Honor, also to establish, like you said, that he was here in town.

COURT: Let me have the dates. I'm just asking.

MR. BOOSE: Okay. June 28.

COURT: Of '82?

MR. BOOSE: Yes, sir. July 12, of '82.

COURT: July when?

MR. BOOSE: 12 and July 20 of '82.

COURT: Are they admissible for the sake of showing that he was short of money and needed money and hence evidence tending to show a motive for the crime on the 26th?

MR. VAN CAMP: Because that's not the stated purpose of what the attorney has said.

COURT: I understand that. I stated that if the purpose is—

MR. VAN CAMP: Well, that's not if it's—that's what he said the purpose was and your quotation of law is, I can't say it any better. That is the purpose for which he intended.

COURT: If the purpose is to impeach his veracity, then in a sense you are bound by his answers although you may further sift him again. We save parameters on that, but if the purpose were to show that on three dates prior to, but no date afterward, that on dates prior to July 26 he was selling things in pawn shops or hocking them or whatever you want to call it—very few people take things to pawn shops intend to come back and get them—to show his impoverished condition and therefore show a crime. If he can use that on rebuttal, he would be entitled to inquire about it now.

MR. VAN CAMP: Your Honor, we are assuming a set of circumstances which is not what the State has said they were doing.

There may be—I don't know—for the purpose of argument. I know that for the purposes for which he stated and staked himself out, that is what he intended to do, that it's not admissible. And I don't know that it behooves us to sift the prosecutor or to show him how to try his case; I mean strategy.

MR. BOOSE: If Your Honor like, I'll have the jury come back in, ask him another question and then offer them for yet another purpose and if I could list off some reasons.

COURT: What is this whole pawn shop thing? What did you have there?

MR. BOOSE: Six pawn shop tickets to show he was up here and show his Florida driver's license for identification. There's a signature on these. All these are very similar, all are very similar to the rights form.

COURT: Let me see defendant's Exhibit Number 1. Solicitor, again, this may be totally collateral. The driver's license in this state is for four years.

MR. VAN CAMP: No. It's the next birthday within four years. It's your birthday within four years.

COURT: Okay. That explains something I didn't understand.

MR. BOOSE: Your Honor, he indicated he turned his Florida driver's license in to get that. That issue date is 7-22-82. These are all prior to 7-22-82, which means he would have had to have his Florida driver's license at that time.

MR. VAN CAMP: If Your Honor please, my client was asked if he had been to these various pawn shops to pawn various items of property on various dates. To each question he replied in the negative. The State then got copies of four pawn tickets showing to me, to show that, they were making a statement to me to show that they had a signature, alleged signature with a similarity.

The jury went out and at that time the State asked for what purpose these items, to show that he in fact did do what he is now denying, that he did or words to that effect. That's to answer your question of five minutes ago. Where are we and where are we going.

Your Honor, I contend that that is seeking to prove a totally collateral matter or to disprove a totally collateral matter. I think it's totally improper for the purposes for which he attempts to do it.

COURT: If that is the purpose, then I agree.

MR. VAN CAMP: It's not if, it's what he said.

COURT: I was trying to see—I take it that there's no quarrel but pecuniary need may provide a motive to commit a crime of access?

MR. VAN CAMP: Except my client has denied that he did those things, if Your Honor please.

COURT: I understand.

MR. VAN CAMP: Even if they were to submit those things now, it would be again to prove something he has denied, which would be a collateral matter.

COURT: But the motive—

MR. VAN CAMP: It's not necessary in North Carolina.

COURT: It's not necessary, but it's the circumstantial proving.

MR. VAN CAMP: But that's not what the State said they are seeking to prove.

COURT: I'm not entirely sure. I have asked from time to time. I've heard one basis and then another pop up.

For instance, this morning you advised me of something you wanted to put at some point in the record, which you wanted, if you remember, put in the record.

MR. VAN CAMP: On convictions, Your Honor.

COURT: People have—

MR. VAN CAMP: My thought eminated [sic] from me.

COURT: I understand that. Mr. Solicitor, you have another problem. You have copies there, not the originals. Where are the originals?

MR. BOOSE: Next door in the burglary office.

COURT: Let me just inquire, are those photocopies of things that you have some kind of local ordinance that requires pawn shops to turn in here?

MR. BOOSE: Yes, sir. And also there are indications, notes on here showing that.

COURT: Come up here.

MR. BOOSE: Some of these items were put on hold by the police department here. It also goes to intent, motive, prior commission of same type of crimes.

COURT: The plot thickens. Let's do this. First, I want these six copies put in order of the date. We'll mark them Voir Dire 1 through 6 in the order that they're dated, which presumably is the date of alleged attendance in the place.

. . .

COURT: Everybody take your place, back to your place. All right. At this particular junction, the jury being out and having been out, we will do it in the following posture.

Mr. Solicitor, at this moment if we were to have the originals here of these things that I now have copies of marked V-2 through V-7 or V-6(1) and (2), if the originals were here, for what purpose would you be attempting to use those originals?

MR. BOOSE: Your Honor, to be blunt, several purposes.

COURT: Purposes then.

MR. BOOSE: Okay. One, to show impeachment of credibility as to clearly making a statement.

COURT: That you can't do.

MR. BOOSE: Okay. Second is to show that he was, testified he was unemployed, been looking for a job, show the need for money. He was familiar with how to get money with pawn tickets up here; to show he was familiar with the Fayetteville area, has been to Fayetteville more than he said. Also to show—

COURT: We're not concerned with credibility here.

MR. BOOSE: Also to show motive, why he would break into a house up here in Fayetteville; the fact that he was in need of money.

He's testified on direct that he was in Mr. Smith's house since '75 and '76. Mr. Smith testified that he had.

COURT: It's in the record.

MR. BOOSE: Initially, I asked him. He's had opportunity to observe the items that were taken. There is testimony that it was not ransacked. The items, the silver specifically, was placed, and a handgun, it was all placed in a little bundle ready to go.

COURT: Those are the multitudinous purposes?

MR. BOOSE: And additionally, Your Honor, pending his answers to some questions about the break-ins in Moore County, a Mrs. Raymond and a Mr.—a Mr. and Mrs. Raymond and a Mr. and Mrs. Hussey, as to evidence of what similar crimes.

COURT: They're the alleged homeowners in alleged Moore County?

MR. BOOSE: Right, Your Honor.

MR. VAN CAMP: There is a Moore County.

COURT: Well, I'm not going to assume anything for the sake of argument.

All right. First off the Court will rule at this time that since the evidence is admissible to show motive—listen carefully, Mr. Solicitor, I don't want any mistakes. You going to listen?

MR. BOOSE: Excuse me, your Honor.

COURT: You may ask him about other crimes for impeachment purposes for which you have a good faith basis. It would obviously appear that what you have here would constitute a good faith basis.

Mr. Solicitor, have other people, either you or your detectives, have they examined these pawn shop tickets and compared them with the handwriting available to you either on this driver's license or on your waiver of constitutional rights?

MR. BOOSE: Your Honor, I have looked at it through the—I didn't have the driver's license until he showed it to me a moment ago. I noticed the similarity now. Also the Voir Dire 30, the rights form.

COURT: You have compared that?

MR. BOOSE: Yes, sir.

COURT: In your personal, professional opinion, did one person make all the signatures?

MR. BOOSE: Yes, Your Honor.

COURT: That would appear to constitute a good faith basis of the Moore County things.

. . .

COURT: Well, again being precise, they're not going to put any copies of pawn tickets before the jury; only if they have originals are they going to proceed in any fashion with that for the jury. They'll have lunchtime to find the originals. But even the copies provide them with a good faith basis to inquire into prior bad acts insofar as they may deal with credibility. Now they're bound by what answer they get.

MR. VAN CAMP: Absolutely.

COURT: Will you let me finish.

MR. VAN CAMP: Well, I just wanted to agree with Your Honor.

COURT: No, no, please. Now, that deals with just credibility. We leave open so I can read a few cases and think about it.

In the first place, they don't even begin, from what the solicitor told me, the evidence we leave open, as to whether or not they will be able to deal with other crimes as some evidence tending to show such similarities, MO and the like; but they have it now. I haven't heard it, at least, and they can't ask it, and they're bound by what they deal with on credibility.

. . .

So, we have three possible uses of the evidence. Credibility we have just about exhausted for the moment. Other than you can ask about prior bad acts, but you cannot phrase it in terms of have you been charged with or arrested for. You can phrase it, on X date, did you commit X offense? You are bound by what the answer may be.

When you have originals and you go back to your case, then you may well be able to establish and deal with the terms of motive and we simply hold in abeyance any kind of usage to show—of other crimes to show identity of the perpetrator or anything else.

MR. VAN CAMP: As I understand it, as we've had some confusion with regard to statements in the past, we are not going to go into the area or the State is not to go into this area any further?

COURT: I said on their case.

MR. VAN CAMP: I mean at this time. That's—we're on my case now.

COURT: I understand your case is a different thing altogether.

MR. VAN CAMP: But they cannot go into it at this time?

COURT: No, sir. I said on their case they cannot go, but it may be—

MR. VAN CAMP: I would like to continue then this voir dire and we're not in here having to go on evidentiary points. I don't know where he's going.

COURT: I don't either.

MR. VAN CAMP: I would ask for a voir dire on the whole issue of where the State is going with these pawn tickets.

COURT: Mr. Solicitor, what did you intend to do with the pawn tickets?

MR. BOOSE: Show that he was in Fayetteville on dates. It's not to show he has committed break-ins before.

COURT: You can't use the pawn tickets for the purpose of—you can use the pawn tickets to satisfy yourself in your own mind that there's a good faith basis to ask him about alleged break-ins in Moore County.

MR. BOOSE: And also to show, Your Honor, to show—

COURT: Until you get the originals of the pawn tickets, you can't even begin to use any.

MR. BOOSE: Also, to show that this time period, from June 28 up until July 26, less than a month, he was in need of money; that he visited five or six Fayetteville pawn shops, not just one.

COURT: That would come, Mr. Solicitor, if you have the originals and on your own case, referring to rebuttal, for it would come then, referring to motive. Is that what you're talking about, Mr. Van Camp?

MR. VAN CAMP: I don't know. I'll say this for the record. Up to this point, I think we had a nice, clean trial. If your Honor please, I just hate to see—I think the issue here is one of identity, whether or not this man committed a crime here, and I think they are trying to prove a collateral matter in a wrong way.

COURT: I think I delineated well enough.

MR. VAN CAMP: Your Honor please, I object to any introduction of those tickets or their originals and that they are bound by his answers that he was not at those pawn shops; he did not pawn anything on those dates set forth.

COURT: Anything else?

MR. VAN CAMP: No.

COURT: Let the jury come in. Mr. Solicitor, I repeat, do not use those pawn tickets at this time in the presence of the jury other than perhaps to look at them on your own desk to refresh your recollection as to what questions you may properly ask.

. . .

Cross-examination of defendant was then resumed, showing the following:

Q. Mr. Higgins, do you know a Harold, a Mr. and Mrs. Harold Hussey?

A. No, sir.

Q. Is your wife's maiden name Hussey?

A. Yes, sir.

Q. Do you know if they're related to her in any way?

A. No, sir.

Q. Did you pawn various items belonging to the Husseys?

A. No, sir.

Q. Did you take any household goods from the Hussey residence on July 6 of this year?

A. No, sir.

Q. Did you in fact break and enter the residence of the Husseys on July 6 of this year?

A. No, sir.

Q. Do you know a Mr. and Mrs. Raymond?

A. No, sir.

Q. On or about July 8 of this year, did you take various household items from them?

A. No, sir.

Q. Specifically, did you take a 308 semi-automatic rifle?

A. No, sir.

Q. .38 Winchester Special pistol?

A. No, sir.

Q. Panasonic AM/FM tape player?

A. No, sir.

Q. Pair of Bushnell binoculars, Sony headphones, three hunting knives?

A. No, sir.

Q. A Remington Mark III electric razor?

A. I have never taken anything from anybody's residence.

Q. You also did not break into the residence of the Raymonds?

A. No, sir.

. . .

The following events then occurred.

COURT: All right. Everybody in place. All right. The record would show that we held a brief conference after lunch the upshot of that the Court advised counsel for both sides that the item of pawn tickets and fact, alleged fact that the defendant pawned various items would, on the State's rebuttal, treated as their case in chief, be allowed in evidence in a limited fashion; and that is to say the State would be allowed to show that on the dates most close to the alleged crime of July 26, 1982, that is three or more alleged pawnings on July 20, 1982, the State would be allowed to introduce evidence tending to show that the defendant did in fact pawn items for money on that date for the purpose of the—for the limited purpose of showing that the defendant was a pecuniarialessly [sic] impoverished condition at that time and hence implying a possible motive for the commission of crimes of access with felonious housebreaking and felonious larceny. In that, the Court would treat as remote any alleged pawnings on June 26 and July 6 out of an abundance of caution. The Court noted that it could perversely perhaps be contended by the defendant now or on appeal that pawnings on the earlier dates would be more relevant on the theory that that money had been spent by the 26th, whereas money gained on the 20th would still be in pocket or in hand; and hence provide a counter-motive to the break-in. And counsel for the defendant assured the Court that that was not a con-

tention that would be made now or in the future; although they would object to any evidence, even on the 20th, and the Court further finds, counsel, that while the evidence might tend to show what, by way of characterization is firearms, things were pawned on the 20th, the Court would not allow any evidence showing their character as stolen goods or the like; but would be treated in, like any other respect as honest pawn and simply for the purpose of showing he needed money on the 20th.

. . .

COURT: All right. What must now be done. The State professes its final position of rebuttal evidence to offer into evidence four pawn tickets which are the copies kept by the pawn shops in connection with items allegedly pawned on the 20th of July, 1982, approximately six days prior to the events in question, is that correct, gentlemen?

. . .

COURT: You satisfied that's the way it's done?

MR. VAN CAMP: If Your Honor please. The defense is not going to have any objections to the fact they are copies.

COURT: The basis is simply not probative.

MR. VAN CAMP: It's not competent.

COURT: Your precise basis?

MR. VAN CAMP: Among others to be later enumerated. If Your Honor please, we would contend that what the State is attempting to do at this time is to introduce evidence which would tend or would be or could tend to impeach the defendant's testimony; that they have pursued this matter with regard to the pawn ticket on the basis, did you pawn these items? The answers were no. Did you break into the houses? and some of the names, some of the kinds of items that were stolen were enumerated. Did you pawn, did you take this kind of gun, that kind of gun? He denied that all.

And now, if Your Honor please, this is a collateral matter which the State is intending to introduce evidence on; that collateral matter which tends to impeach that which I say is improper and object.

COURT: I agree with you that it is immaterial and inadmissible for the purpose of impeaching him and his credibility as a witness, but the collateral for the issues involved for this purpose does rule that independent probative value of some evidence tending to show that he was financially embarrassed and impoverished within six days of the alleged crimes, hence was in need of money. That would be evidence tending to show a motive for the crime of felonious housebreaking and felonious larceny, being crimes of acquisition, receivable for that limited purpose alone. And the fact, evidence of Higgins' prior pawnings might be pertinent to, but the Court has ruled and does rule that a probative value of those is outweighed by a possible prejudicial impact. So, we're going to limit it to just the six days before the events in question. And even then it's only admissible for intent to show motive.

. . .

Detective Proctor was then allowed to testify about the pawning activity defendant had denied on cross-examination and the tickets were shown to the jury.

Attorney General Rufus L. Edmisten, by Associate Attorney K. Michele Allison and Special Deputy Attorney General Charles J. Murray, for the State.

Van Camp, Gill & Crumpler, P.A., by James R. Van Camp, for defendant.

WELLS, Judge.

In his first argument, defendant contends that the trial court erred in admitting the pawn shop tickets signed by defendant on the grounds that the pawning of property by defendant would be relevant to show a motive for the crimes for which he was being tried, the effect of such evidence being to improperly impeach defendant and suggest his guilt of other crimes. In his second

argument, defendant contends that the trial court erred in encouraging the State to offer rebuttal evidence which would not have been admissible during the State's case in chief and which was not related to evidence presented in defendant's case in chief. We shall combine these arguments for discussion.

While evidence of motive is not necessary to establish that a criminal offense has been committed, *see* 1 Brandis, North Carolina Evidence, § 83 (2d rev. ed. 1982), such evidence may, in a proper case, be relevant as a circumstance tending to make it more probable that the person accused committed the offense. *Id.* Hence, our appellate courts have held that evidence of pecuniary gain from the commission of an offense may be relevant to help identify the perpetrator, *id.* and cases cited therein. We cannot accept, however, the stretching of this rule of evidence to the extent of allowing evidence of an accused person's general need for money as being relevant or admissible to show motive to commit a robbery or a larceny. To do so would expose all generally needy persons to the risk of a finding of guilt based in part upon their need for the means of sustenance. We must, therefore, hold for the purposes of this case that the pawn shop ticket evidence allowed in the State's rebuttal was not admissible for the purpose of establishing a motive for the crimes for which defendant was being tried. *See* Annot. 36 A.L.R. 3d 839 § 11 (1971 & 1983 Supp.), for a discussion of this issue generally.

It is clear that the district attorney had the pawn shop ticket evidence available to him during the State's case in chief, and that with the help and assistance of the trial judge, the district attorney used the pawn shop ticket evidence to impeach collaterally defendant's responses to the State's cross-examination questions. Defendant having denied on cross-examination the pawning activity, the State was bound by his responses and could not contradict him through extrinsic evidence. *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982) and cases and authorities cited therein.

In this case, defendant had strong alibi evidence. His own credibility was essential to his defense. Admitting the pawn shop ticket evidence on "rebuttal" was prejudicial error.

In his third argument, defendant contends that the trial court erred in the sentencing phase of his trial. Anticipating that such

errors, if any, may not occur on re-trial, we deem it unnecessary to address them.

New trial.

Judge WEBB concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

The majority opinion holds that evidence such as that in question is inadmissible to show motive to commit a robbery or a larceny. I believe the law is to the contrary.

It is that "[t]he existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute." 1 H. Brandis, North Carolina Evidence § 83, at 304 (1982). This Court has held that "evidence of [a] defendant's financial condition was relevant [and admissible] to show a motive for embezzlement." *State v. Pate*, 40 N.C. App. 580, 585, 253 S.E. 2d 266, 270, *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979). Our courts also have allowed evidence that defendant needed money to be introduced as a motive for robbery, *State v. Cain*, 175 N.C. 825, 832, 95 S.E. 930, 933 (1918), and larceny, *State v. Walker*, 6 N.C. App. 740, 743, 171 S.E. 2d 91, 93 (1969).

I do not agree with the statement in the majority opinion that application of the foregoing rule to the facts here stretches the rule. I believe, instead, that the majority opinion attempts to gloss the established rule in a manner which implicitly overrules numerous prior cases, including those cited above.

I agree that the context in which the evidence was admitted is troublesome. It was initially offered to impeach the witness, a purpose for which the State concedes it was inadmissible. The trial court then assumed the role of coach to the prosecution, suggesting that the evidence be offered for other purposes. The effect of admitting the evidence at this juncture was to allow the prosecution to accomplish indirectly what it could not accomplish directly.

Nevertheless, "the incompetency [of evidence] for one purpose will not prevent its admission for other and proper purposes." 1 H. Brandis, North Carolina Evidence § 79, at 292 (1982). For reasons indicated above, I believe the evidence would have been proper, as a part of the State's case in chief, to show motive. The trial court thus had discretion to permit its introduction at any time prior to the verdict. G.S. 15A-1226(b).

While the trial court's gratuitous assumption of the role of coach to the prosecution is of questionable propriety, I am unwilling to raise the impropriety, if any, to the level of an abuse of discretion. I therefore respectfully dissent, and vote to find no prejudicial error in the trial.

There was no evidence that defendant was hired or paid to commit the offense. It was thus improper for the court to find, as an aggravating factor, that the offense was committed for pecuniary gain. *State v. Thompson*, 309 N.C. 421, 422, 307 S.E. 2d 156, 158 (1983); *State v. Abdullah*, 309 N.C. 63, 77, 306 S.E. 2d 100, 108 (1983). The case should, on that account, be remanded for resentencing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

STATE OF NORTH CAROLINA v. THOMAS CARTER

No. 8314SC414

(Filed 17 January 1984)

1. **Criminal Law § 166— criminal appeal—court-appointed counsel only may sign brief**

In any criminal case where the defendant is found to be indigent and receives the services of court-appointed counsel it is only the specifically named counsel (and not the law firm or associates) that has the delegated right and duty to appear and participate in the case; therefore, it was inappropriate for another attorney to sign the brief along with the court-appointed counsel.

2. **Criminal Law § 131.2— motion for appropriate relief—discovery of new evidence**

There was no abuse of discretion in the denial of defendant's motion for appropriate relief which alleged the discovery of new evidence which revealed that, since the trial in which defendant was convicted of second degree murder, defense witness Upchurch made three separate confessions admitting

that he alone committed the murder with which the defendant was charged and that he gave false testimony as a witness when he inculpated defendant Carter. Defendant failed to show that the newly discovered evidence was probably true in that Upchurch made the statements to cellmates of his in the county jail who were "getting on him about being a snitch" and the record evidence of Upchurch's recanting, confessing, tattling, or snitching, was not presented as having been done in remorse and to keep an innocent man from pulling time for a crime which he did not commit.

3. **Criminal Law § 117— *failure to instruct on witness's prior inconsistent statements and prior convictions*—proper—defense witness**

The trial court did not err in limiting defendant's examination of his own witness concerning prior inconsistent statements and prior convictions, and the trial court did not err in refusing to instruct the jury regarding the same matter since a party calling a witness may not impeach that witness and since there was nothing in the record to indicate that defendant was surprised by his own witness's testimony. Further, defendant was not prejudiced by the court's limiting his examination since defendant elicited testimony of similar import without objection.

4. **Criminal Law § 71— opinion concerning wetness of towels—properly admitted**

A witness's testimony that a towel "was wet like someone had used it to dry . . . themselves off after a shower or a bath," was a shorthand statement of fact, and was not an impermissible expression of opinion.

5. **Criminal Law § 53— testimony as to time of death—properly admitted**

The trial court properly allowed a physician to state his opinion as to the time of death of the victim where the record shows that the physician was a medical examiner, had frequently been called to determine the time of death in homicide cases, related to the jury the factors and medical concepts considered in determining the time of death and what he did in this particular case, and stated that he had examined the body at the scene.

6. **Criminal Law § 42.5— admission of towel into evidence—proper**

The trial court properly admitted into evidence a bloodstained towel found under a lifeguard stand at a park's swimming pool which was located approximately 100 yards from where the victim's body was found where there was sufficient evidence to connect the bloodstained towel to defendant.

7. **Criminal Law § 55.1— bloodstain tests performed on defendant's shirt—results properly admitted**

The trial court properly admitted the results of a bloodstain test performed upon defendant's shirt where an analyst testified the results were inconclusive, and where from previous testimony, the jury knew that the defendant's bloodstained shirt had been found at the scene.

ON a writ of certiorari to review Judgment of *Clark (Giles R.), Judge.* Judgment entered 2 March 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 1 December 1983.

Attorney General Edmisten by Assistant Attorney General Grayson G. Kelley, for the State.

R. Hayes Hofler, III, for the defendant.

BRASWELL, Judge.

The jury convicted Thomas Carter of second-degree murder. Mark Upchurch testified that Carter committed the crime. Strangely, it was Carter, and not the State, who called Upchurch to be a witness. Both men had been indicted for the murder of Cynthia Easterling on the night of 17-18 August 1981 at Duke Park in Durham. Only Carter was on trial. The guilty verdict occurred on 23 February 1982 and prayer for judgment was continued. On 26 February 1982, Carter filed a motion for appropriate relief. On 2 March 1982 the motion was denied, active sentence was entered to the presumptive term of 15 years, and Carter appealed.

[1] On 5 November 1982 the original court-appointed counsel for the trial and for the appeal, William Sheffield, was removed by order after a hearing. R. Hayes Hofler, III, was then appointed as counsel to perfect the appeal. [To assure that case and client responsibility is with the court-appointed counsel, we note that Attorney A. Neil Stroud also signed the brief filed in this court for the defendant. The record fails to show any right in Mr. Stroud to appear as counsel. In any criminal case where the defendant is found to be indigent and receives the services of court-appointed counsel it is only the specifically named counsel (and not the law firm or associates) that has the delegated right and duty to appear and participate in the case. We recognize that signing of the brief is authorized under the circumstances permitted in Rule 33(a) of the Rules of Appellate Procedure. However, Rule 33(a) is not applicable in criminal cases involving court-appointed counsel. Why? (1) In the legal process of appointing counsel, the only attorney or attorneys ethically or duty-bound to perform the services of counsel are those specifically included by name in the court's order of appointment. (2) It is the State that pays the attorney fees, and the State is obligated only to those it has appointed to the work. (3) In post trial motions for appropriate relief the indigent defendant can assert that the non-court-appointed-by-name counsel performed ineffective services,

or failed to ever talk to defendant in the attorney-client relationship, or, in some instances, pled the defendant guilty when the named court-appointed attorney said to plead not guilty. The naming of an attorney properly fixes the professional responsibility. (4) If the services of additional counsel are justified, procedure by motion, hearing, and order for additional appointment is always available.] Pursuant to other motions and petition the record was docketed in our court on 18 April 1983.

In the "plain-spoken introduction" to his brief, defense counsel argues that this case is indicative of "one of the basic evils our legal system was designed to thwart: the conviction of the innocent while the guilty go free." On the facts before us and the law applicable thereto, we disagree that there has been shown a miscarriage of justice and affirm the conviction.

[2] The thrust of the issue on appeal alleges reversible error in the denial of the defendant's motion for appropriate relief dated 26 February 1982. The motion alleged the discovery of new evidence which revealed that since the trial defense witness Mark Upchurch made three separate confessions admitting that he alone committed the murder with which the defendant was charged and that he gave false testimony as a witness when he inculpated defendant Carter. The people with whom Upchurch talked were William Thomas Hutson, Dennis Covington, and Eric D. Smith, all of whom were incarcerated in the Durham County Jail along with Upchurch and Carter. After testifying against Carter, although called as his witness, Upchurch was returned to the cell block.

We believe that the jailhouse conversations that were testified to during the hearing on the motion for appropriate relief can best be put in perspective by quoting from the direct examination of the defense witness Dennis Covington: "[Upchurch] said everybody in the cell sixteen was getting on him about saying that he was turning state's evidence on Mr. Carter." During the course of the defense evidence the word "snitch" was also used in reference to the conduct of Upchurch.

It is well-settled law that a motion for a new trial on the ground of newly-discovered evidence is addressed to the discretion of the trial court, and the trial court's denial of the motion will not be disturbed absent a showing of an abuse of discretion.

State v. Beaver, 291 N.C. 137, 229 S.E. 2d 179 (1976). In reviewing orders of the trial court entered pursuant to hearings on motions for appropriate relief, the scope of our review is to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the trial court's order. *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982). The findings of fact, if supported by evidence, are binding, even if the evidence at the hearing is conflicting. *Id.*

We also point out the rule of law that determines when a person has become a party to a criminal act. *State v. Keller*, 268 N.C. 522, 526, 151 S.E. 2d 56, 58 (1966), cited with approval in *State v. Williams*, 299 N.C. 652, 655, 263 S.E. 2d 774, 777 (1980), holds that

> A person is a party to an offense, however, if he either (1) actually commits the offense or (2) does some act which forms a part thereof or (3) if he assists in the actual commission of the offense or of any act which forms part thereof, or (4) directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. (Numbered parentheses added.)

We first review the evidence that was offered at the jury trial. The State's evidence tended to show that on 18 August 1981, shortly after midnight, Sgt. D. M. Laeng of the Durham County Public Safety Department, while on routine patrol of Duke Park in the City of Durham, discovered a white fabric shoe and a handbag, subsequently identified as belonging to Cynthia Easterling, in the parking lot. Sgt. Laeng investigated further and discovered the defendant sleeping on the bench in the picnic shelter. After awakening the defendant, Sgt. Laeng walked behind the shelter and discovered the badly beaten and semi-nude body of a woman, subsequently declared dead and identified as Cynthia Easterling, lying approximately fifteen feet from the shelter. Sgt. Laeng arrested the defendant and radioed for additional help.

The police conducted a search of the picnic shelter and the area around the victim Easterling's body. Near her body, the police found two sections of a leather belt and a piece of what appeared to be a broken table leg. Near a step behind the shelter

was a four-to-five-inch sliver of wood. Under the window inside the shelter where defendant had been sleeping and near his duffle bag was another section of a broken chair or table leg. [Later, Upchurch testified that Carter used the table leg to beat Easterling around the head.] Hanging in the window as if to dry was a damp pink towel. Laying on a bench in the shelter were a brown shirt with a blood-like spot on the collar and a pair of jeans. Both of these were wet and smelled of chlorine. Found in a duffle bag located next to defendant were defendant's army discharge papers, a damp pair of slacks, a plastic bag containing a wet bar of soap, and a damp washcloth, among other things. Later that morning, at approximately 7:00 a.m., the police found a yellow towel containing blood-like stains on the lifeguard stand at the park swimming pool, which was located approximately 100 yards away from the location of the victim's body. This towel was damp. In the meantime, defendant had been taken to the police station. Defendant's hair was fluffy and damp, and defendant smelled of chlorine. A strip search of defendant disclosed that he had no abrasions or marks except for a "strawberry" abrasion on the back of his shoulder.

Dr. Mary Steuterman, a forensic pathologist and Assistant Chief Medical Examiner of the State of North Carolina, performed an autopsy upon Ms. Easterling. Dr. Steuterman noted that Ms. Easterling sustained multiple lacerations, wounds or fractures to the face, head, neck, chest, ribs, and umbilicus. Dr. Steuterman also noted four pairs of linear bruises on the right leg. She testified that the pattern and size of these bruises indicated that they were inflicted by a thin tubular instrument. In her opinion, the blunt injuries to the head and neck caused Easterling's death.

Mr. William Weis, a forensic serologist, performed blood tests on the blood found on a white sock found near the victim's head; on a belt and buckle belonging to Mark Upchurch and found near the victim, on a brown shirt identified as belonging to defendant and found in the shelter, on a yellow towel found on the lifeguard stand, and on a plaid shirt identified as belonging to Upchurch. Based upon a comparison of known blood samples from the victim, defendant, and Upchurch, Mr. Weis concluded that the blood on each item was consistent with the victim's blood.

Defendant presented an alibi defense and also evidence tending to show that Mark Upchurch killed Cynthia Easterling.

Thomas Potts, Upchurch's brother-in-law, testified for the defendant that he observed Upchurch and Cynthia Easterling leave together in Upchurch's '69 Chevrolet Impala on the evening of 17 August 1981. Upchurch was wearing a pair of blue slacks and a plaid shirt when he left. When Upchurch returned to Potts' house that night around 11:30, Upchurch was wearing a different pair of slacks. Upchurch went into the house and washed his hands twice, the second time continuously for fifteen to twenty minutes. Upchurch's face was red and looked as if he had been fighting. Upchurch told Potts that Cynthia Easterling may be dead and that he needed an alibi.

The next day Potts drove Upchurch's car to work and noticed in the car the clothes Cynthia Easterling had been wearing the night before—a pair of blue jeans, a pair of panties, a shoe, and a pair of sunglasses. After Potts called the police and Upchurch's mother, Potts' wife found a blood-spattered plaid shirt belonging to Upchurch. Potts further testified that Upchurch usually kept a two-and-a-half-foot long black wooden table leg in the back seat of the Impala.

The police searched Upchurch's car and found the items Potts mentioned. In addition, the police searched the trunk and discovered that the tire tool was missing.

Upchurch was brought in for questioning. When confronted with his bloodstained shirt, Upchurch became upset and agreed to give a statement.

Mr. Weis, the forensic serologist, testifying for the defendant, concluded that the numerous blood spots on Upchurch's plaid shirt were consistent with the victim's blood, but inconsistent with Upchurch's or the defendant's blood. The blood spots on Upchurch's shirt and belt were medium velocity spatters indicative of blood being thrown off an object as it was being swung or blood being spattered as when an object hits a pool of blood or a saturated bloody object. The blood pattern on the shirt was consistent with the type of spattering which would result from someone beating a human with a tire tool or some other instrument. The bloodstain on the defendant's shirt, however, in his opinion,

did not look like a spatter pattern but "more of a smear or a transfer from one object to another type of bloodstain."

Tim Carter, defendant's younger brother, testified that defendant was at his house from about 5:45 p.m. to 10:15 p.m. on the evening of 17 August 1981. Bryan and Elizabeth Vann testified that they visited Tim Carter that night, and that defendant Thomas Carter was there when they arrived and when they departed at approximately 10:00 p.m.

Defendant testified that he left his brother's house shortly after the Vanns departed and walked to Duke Park where he had left his duffle bag. The bag had been left out in the rain on a previous day and the clothes in the bag were wet. Before going to sleep, he hung a towel that was in the duffle bag on the window to dry. He also laid a shirt on the bench to lie on because the bench was wet, and laid a stick beside him. He had been asleep approximately two to three hours when the police officer awakened him. He had never seen Cynthia Easterling before and he did not see Cynthia Easterling that evening. The first time he had seen Mark Upchurch was when Upchurch was put into the holding cell with him. He did not go over to the swimming pool that evening.

Defendant also called Mark Upchurch to the stand. Upchurch testified that as he and Cynthia Easterling were parked in a church day care center parking lot "making out," a man whom Easterling called "Spooky" and whom Upchurch identified at trial as defendant came and got into the car with them. Following the man's directions, Upchurch drove the car to Duke Park, where the man jerked Ms. Easterling out of the car. The man grabbed a table leg from the car and proceeded to beat Ms. Easterling with it. Ms. Easterling broke free and began to run, and the man gave chase, disappearing from Upchurch's view. The man returned shortly to the car where Upchurch had remained, retrieved Upchurch's belt which was hanging on the rear view mirror, and disappeared into the darkness. Upchurch heard slapping sounds in the distance as if someone was being hit with a belt. The man returned to the car a third time and retrieved a tire tool. This time Upchurch followed him and saw the man beat Easterling with a table leg. Upchurch made a grab for the stick,

and noticed that it was bloody. Panicking, Upchurch ran back to the car and sped away.

Based upon the evidence offered by the defendant at the hearing on the motion for appropriate relief the court made the following findings of fact:

1) That Mark Allen Upchurch has also been indicted for the murder of Cynthia J. Easterling, but has not been brought to trial as of the date of this hearing; that Upchurch is being held in custody of Durham County Law Enforcement officials awaiting trial.

2) At the trial of this case the defendant Thomas Carter called Mark Allen Upchurch as his witness; that Upchurch gave testimony on his direct examination which implicated Carter as the perpetrator of the offense charged against Carter; that Upchurch was not joined for trial with Carter.

3) After the jury returned a verdict finding Carter guilty of second degree murder, some of the jail inmates who were being held in the same cell with Upchurch began "getting on him about being a snitch"; that Upchurch informed the other in-

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mates that he had not testified against Carter and that newspaper accounts reporting that he had done so were incorrect; that Upchurch requested some of the inmates to get in touch with Carter and tell Carter that Upchurch knew Carter had nothing to do with the murder, and that Upchurch had done it alone; Upchurch also told some of the inmates that he wanted to get in touch with his lawyer and come down to Court and tell that he had committed the offense; that he did request his lawyer to come to the jail and did confer with him on February 24, 1982; after this conference Upchurch's lawyer filed a motion with the Court questioning the mental capacity of Upchurch to proceed in said matter and requesting that he be given a mental examination and evaluation.

4) That Mark Allen Upchurch was called as a witness at the hearing of this motion and testified that he was in

Durham County Jail on February 23, 1982; Upchurch then invoked his privileges under the 5th amendment of the United States Constitution, and refused to answer any further questions or give additional testimony; no ruling was made by the Court on the ground of privilege, and no effort was made to further compel testimony from Upchurch.

The trial court, based upon these findings of fact, made the following conclusions of law:

[T]hat the new evidence shown by the defendant is of questionable competency, relevancy and materiality;

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that such evidence does not bear sufficient indicia of truthworthiness to merit the award of a new trial as said statements were allegedly made by Upchurch at a time that he was being accused by his cellmates of having "snitched" on Carter, and

EXCEPTION NO. 30

after he had denied testifying against Carter; that such circumstances would

EXCEPTION NO. 31

constitute probable motive for Upchurch to falsify; that such statements allegedly made by Upchurch would constitute declarations against his penal interest and would be of questionable admissibility if a new trial was allowed in view of its doubtful voluntariness and the existence of probable motive for Upchurch to falsify under

EXCEPTION NO. 32

the circumstances in which the statement was allegedly made; that such evidence contradicts, impeaches and discredits the testimony given by Upchurch at the

EXCEPTION NO. 33

defendant's trial at which Upchurch was called as a witness by the defendant; that the Court is unable to conclude from

the evidence offered at the hearing that such new evidence is probably true or that it is of such nature that a different

EXCEPTION NO. 34

result would be reached at a new trial; and that the motion for appropriate relief should be denied on the grounds of newly discovered evidence.

EXCEPTION NO. 35.

To be entitled to a new trial based upon newly-discovered evidence, the movant must establish the following prerequisites:

> (1) [T]he witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. [Citation omitted.]

State v. Beaver, supra, at 143, 229 S.E. 2d at 183. If the movant fails to show any one of the prerequisites, the motion must be denied. *State v. Martin,* 40 N.C. App. 408, 252 S.E. 2d 859, *disc. rev. denied,* 297 N.C. 456, 256 S.E. 2d 809 (1979).

As indicated by the trial court's conclusions of law, the defendant failed to show that the newly-discovered evidence was probably true. The trial court found as a fact, the only factual finding to which defendant excepted, that some of the cellmates of Upchurch were "getting on him about being a snitch." This finding, however, was supported by the testimony of Dennis Covington, one of the inmates, that he had been asked by Upchurch if he had heard anyone say that he had snitched on Carter, that everyone in his cell was "getting on him" about turning State's evidence against Carter. The record evidence of Upchurch's recanting, confessing, tattling, or snitching, is not presented as having been done in remorse or in order to keep an innocent man from pulling time for a crime which he did not commit. Given the situation of the cell block and jail life, the evidence shows that

Upchurch claimed he was a snitcher for his own well-being. Upchurch, therefore, had a motive to recant in order to avoid falling in disfavor with fellow cell mates as a "snitch."

Further, the court found that Upchurch informed the inmates that he had not testified against Carter. Indeed, one inmate testified on cross-examination that Upchurch had denied testifying at all, when in fact he had. Thus, there was ample support in the record for the trial court's conclusion that the evidence probably was not true. This conclusion alone was sufficient to support the trial court's order denying a new trial. *State v. Martin, supra.*

Moreover, as the trial court found, Upchurch refused to testify, invoking his Fifth Amendment privilege, at the post-trial hearing. Consequently, the only sworn testimony during the motion proceedings that Upchurch alone had committed the crime and that Carter had nothing to do with it was the hearsay testimony of three inmates. The testimony of the three inmates merely tended to contradict, impeach, or discredit the testimony of Upchurch that Carter had killed Ms. Easterling, as the trial court correctly concluded.

Also, defendant failed to show that Mark Upchurch would give any newly-discovered evidence. Unless Upchurch did testify at a new trial it would be impossible to get before the jury any of the alleged confessions of Upchurch. Given the circumstances under which the alleged confessions were made, the alleged confessions lack sufficient trustworthiness to be admissible even as declarations against penal interest. *State v. Haywood,* 295 N.C. 709, 249 S.E. 2d 429 (1978). If he testified and denied the confessions, then the newly-discovered evidence could only be used for purposes of impeachment.

[3] Defendant next contends that the trial court erred in refusing to instruct the jury regarding Upchurch's prior inconsistent statements and Upchurch's prior convictions. He also contends that the trial court erred in limiting his counsel's questioning of Upchurch and others regarding Upchurch's prior inconsistent statements and prior convictions on the ground that it restricted his right to confront his accusers.

In refusing to give the requested instructions and in limiting counsel's questioning, the trial court relied upon the long-standing

rule in North Carolina that a party calling a witness may not impeach that witness. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975). An exception to this rule, however, which allows impeachment upon motion and in the trial court's discretion, is when the calling party has been misled, surprised or entrapped to his prejudice by the witness. *Id.* In some circumstances, the trial court may also allow, upon motion and in its discretion, the calling party to cross-examine a hostile or unwilling witness for the purpose of refreshing the witness's recollection, but the calling party cannot cross-examine the witness to show that the witness is unworthy of belief. *State v. Cope*, 309 N.C. 47, 305 S.E. 2d 676 (1983); *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976), *death sentences vacated*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

In the present case, the requested instructions and the attempted examination regarding prior inconsistent statements were offered for the purpose of showing that Upchurch, the defendant's own witness, was not believable. There is nothing in the record to indicate that defendant was surprised by Upchurch's testimony. Indeed, one of Upchurch's pretrial statements was largely consistent with Upchurch's trial testimony.

In any event, defendant was not prejudiced by the court's limiting his examination. In many instances defendant elicited testimony of similar import without objection. For example, the defendant excepted to the trial court's refusal to allow Detective Harris to read a statement that Upchurch had given him. However, the court later allowed Detective Harris to relate what Upchurch had told him. In addition, Upchurch admitted when confronted by defendant's counsel that he had made a false statement that this man "Spooky" had borrowed his car and driven Easterling to a Dunkin' Donuts store and had returned without Easterling. Upchurch also admitted that he had changed his testimony from the morning session of court to the afternoon session. The jury, therefore, had plenary material before it from which to gauge Upchurch's credibility. We conclude that there was no impermissible infringement upon defendant's right of confrontation.

Upchurch had a prior conviction for embezzlement. Defendant wanted the judge to instruct the jury, in effect, to scrutinize this evidence as it bore on the jury's finding of the witness's credibility. We hold the trial judge properly denied the request.

It must be remembered that Upchurch was the defendant's witness and not the State's witness. While the law allows a party to *enhance* the credibility of his own witness by evidence that he had no prior convictions, the law does not permit an examination for impeachment of one's own witness to show prior convictions. *See State v. Dellinger*, 308 N.C. 288, 299, 302 S.E. 2d 194, 200 (1983).

Defendant's remaining assignments of error relate to the admission of evidence over defendant's objection. We have carefully examined each of them and find no error.

[4] First, defendant contends that the court allowed an impermissible expression of an opinion when a police officer described a towel he had found in the picnic area as being "wet like someone had used it to dry [objection interposed and overruled] . . . themselves off after a shower or bath." The witness had just testified that the towel was wet. Merely stating that the towel was wet was not sufficient to inform the jury whether the towel was soaking wet, dripping wet, damp, or perhaps moist with morning dew. Because of limitations of language, it was difficult for the witness to describe the towel's condition in detail. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The testimony, therefore, was a shorthand statement of fact, and not an impermissible expression of an opinion. *See State v. McGuire*, 49 N.C. App. 70, 270 S.E. 2d 526, *disc. review denied*, 301 N.C. 529, 273 S.E. 2d 457 (1980); *State v. Sterling*, 200 N.C. 18, 156 S.E. 96 (1930).

[5] Secondly, defendant contends that the court erred in allowing a physician qualified only as an expert in the field of general medicine to state his opinion as to the time of death on the ground that the opinion was based upon insufficient data. We reject this argument. The record shows that the physician, a Medical Examiner for Durham County since 1971, has frequently been called to determine the time of death in homicide cases, at a recent rate of six per month. The physician related to the jury the factors and medical concepts considered in determining the time of death and what he did in this particular case. He stated further that a determination of the time of death is only accurate to an hour or so of death. Although Dr. Gore did not conduct every conceivable test upon the victim's body, he examined the body at the

scene, and based upon his knowledge and experience, he estimated the time of the victim's death to be 11:45 p.m. This constituted a sufficient basis for his opinion. *See State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874, 94 S.Ct. 157, 38 L.Ed. 2d 114 (1973).

[6] Thirdly, defendant contends that the court erred in admitting into evidence a bloodstained towel found under a lifeguard stand at the park's swimming pool which was located approximately 100 yards from where the victim's body was found. Defendant contends that the towel was improperly admitted because there was no evidence connecting the towel to defendant, thus leaving it open to conjecture as to the towel's connection to defendant. There was, however, sufficient evidence to connect the bloodstained towel to defendant. Another towel had been found hanging in the picnic shelter where defendant had been sleeping. Found in or around defendant's duffle bag were a damp pair of slacks, a damp shirt with a blood spot, a wet bar of soap, and a washcloth. The water of the nearby pool had been treated with chlorine; defendant's jeans and shirt and defendant himself smelled of chlorine. One officer testified that defendant's hair was fluffy and damp. This evidence was more than sufficient to connect the towel to defendant.

[7] Finally, defendant contends that the trial court erred in admitting the results of a bloodstain test performed upon the defendant's shirt on the ground that the prejudicial effect of the evidence outweighed its probative value. This contention is without merit. The analyst testified that the results were inconclusive—that the blood spot on the shirt was consistent with the blood of defendant, the victim, and 45% of the general population. From previous testimony, the jury knew that the defendant's bloodstained shirt had been found at the scene. The jury knew that the shirt had been submitted for analysis. With that background the jury had a right to know whose blood was on the shirt. The State was entitled to connect up the results of the testing upon the exhibit. Otherwise, it would have been left to the jury to speculate. We fail to see how defendant was prejudiced by the admission of these results.

For the aforementioned reasons, we find

No error.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. JOHNNY LEE FLETCHER

No. 8319SC357

(Filed 17 January 1984)

1. **Criminal Law § 10.1— accessory before the fact—conviction on indictment for principal felony**

The trial court did not err in submitting the issue of accessory before the fact on an indictment charging the principal felony where the offense charged was committed prior to the effective date of former G.S. 14-5.1, which provided that an indictment on the principal felony did not charge accessory before the fact, since prior to the enactment of that statute it was the law in this State that a defendant could be convicted as an accessory on an indictment charging the principal felony.

2. **Corporations § 15.1— criminal liability for corporate malfeasance—insufficient evidence**

The State's evidence was insufficient to support conviction of defendant, a former president of the North Carolina Jaycees, as an accessory before the fact to corporate malfeasance in the misuse of funds of the North Carolina Jaycee Foundation, Inc. where it failed to show that defendant had the intent to injure or defraud or that defendant believed the actual perpetrator had any criminal intent. G.S. 14-54.

APPEAL by defendant from *Smith, Judge.* Judgment entered 15 December 1982 in Superior Court, CABARRUS County. Heard in the Court of Appeals 5 December 1983.

Defendant was charged in proper bills of indictment with corporate malfeasance and conspiracy to commit corporate malfeasance. Defendant was convicted of accessory before the fact to corporate malfeasance and received a sentence of three to five years and a fine of five thousand dollars ($5,000.00). From the judgment entered, defendant appealed.

Attorney General Rufus Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr. and Associate Attorney General Charles H. Hobgood, for the State.

Grant and Hastings, by Wesley B. Grant and Randell F. Hastings, for defendant appellant.

HILL, Judge.

The State's evidence tends to show the following pertinent facts and circumstances. In 1974, the North Carolina Jaycee Foundation, Inc. (hereinafter "the Foundation") was created in conjunction with a statewide project of the North Carolina Jaycees, Inc. (hereinafter "Jaycees"). The Foundation was established to receive tax deductible charitable contributions. Prior to 1977, the Foundation did not have a separate bank account, and monies received for charitable purposes were deposited in the Jaycee checking account but were allocated to the Foundation. Both defendant and Maurice Wilson were members of the Foundation Board by virtue of their offices held in the Jaycees.

Defendant was the president of the Jaycees for the year 1977-78. The duties of his office were ceremonial to a large degree. As president, defendant wanted to break the record set the year before for extensions. An extension was created when a Jaycee chapter went into a community or institution and established a new Jaycee chapter.

The executive vice-president was Maurice Wilson. The Jaycee by-laws provided that the executive vice-president would conduct the business of the Jaycee corporation under the supervision and direction of the president and treasurer.

To create an extension, the by-laws required that the new chapter have 20 members who had paid their dues to the United States Jaycees. The state headquarters would extend credit to an extension for its charter fees and membership dues. The United States Jaycees, however, extended no credit to the North Carolina Jaycees, requiring them to transmit the entire cash amount for charter fees and dues with their extensions. Due to the difference in credit policies, there was always more money transmitted from the North Carolina Jaycees to the United States Jaycees than had been collected by the North Carolina Jaycees for exten-

sions submitted during a particular month, and deficits could occur in the Jaycees' operating account.

Certain incentives were given for Jaycee chapters to create new extensions. These included contests, plaques, certificates and trophies on the regional level. National awards were also given. The top state president received a national award for growth which was based primarily on extensions. Defendant broke the previous year's record for extensions and won a free trip to Johannesburg, South Africa.

In order to win these awards, the Jaycees created false and fictitious chapters known as paper chapters which were made up of nonexistent members. During defendant's year as president, 156 extensions were reported to national headquarters and of these 61 were paper chapters. The creation of these paper chapters created bad debts for the North Carolina Jaycees.

In July 1977, shortly after defendant had been elected president of the Jaycees, Maurice Wilson advised the defendant that the financial condition of the North Carolina Jaycees "wasn't too good at the time" and that he anticipated a cash flow problem for the Jaycees in August 1977. Defendant suggested they go to the bank and borrow the amount needed. Wilson advised defendant that Walt Hinson of the Wilson Jaycee Chapter had $10,000.00 which had been raised by the Foundation through the sale of jelly, and suggested that the state Jaycees borrow that sum and pay it back. The defendant demurred to the proposal, and Wilson said, "We'll have it back before the State Executive Committee meeting." Again defendant questioned the proposal by inquiring, "Don't we need approval?" Maurice replied, "We don't have time. We need the money now to pay the bills." Wilson then suggested, *knowing the history of the Foundation*, that instead of paying interest on a bank loan, defendant should call Walt Hinson and borrow the $10,000.00. Wilson explained that the Jaycees would avoid interest charges, plus it was "what we had done in the past—that's what was done." Thereupon the defendant called Hinson and subsequently told Wilson that Hinson had agreed to make a loan. The money was received by the Jaycees and deposited in the Jaycee Foundation account.

The defendant was advised of the receipt of the funds and that it would appear on the statement presented to the Executive

Committee. The transfer was in direct violation of the Foundation charter. As it turned out, the Jaycees collected sufficient money in August to meet the expenses, and it was not necessary to transfer any funds from the Foundation to the Jaycee account.

In October 1977 the Executive Committee met. Among the items on the agenda was a $26,500.00 debt due by the Jaycees to the Foundation. The Executive Committee voted to charge the Foundation five per cent of its gross jelly sales as expenses and thereby eliminated the debt. This action was based on an opinion by its legal counsel that such action was appropriate and legal. Actually, expenses in connection with jelly sales were incurred by local Jaycee chapters.

In December 1977 the North Carolina Jaycees sent a check to the United States Jaycees in the sum of $8,964.50, covering 26 new extensions, which resulted in an overdraft of the North Carolina Jaycee account. To cover this overdraft Wilson wrote a check in January 1978 for $10,000.00 on the Foundation account payable to the North Carolina Jaycees and instructed Phyllis Councilman, the Executive Secretary, to deposit it in the North Carolina Jaycee Account. She did so and advised the Treasurer. Wilson testified that he made the transfer based on his conversation with the defendant in August 1977 and because he understood the action of the Executive Committee in October 1977 gave him a "green light." The defendant was advised of the transfer and that such transfer would appear in the financial statement at the next executive meeting. In fact, the financial statement for 31 January 1978 showed the transfer as a $10,000.00 note payable, but no note was executed. Nothing in the record reflects any consent by the Foundation.

An audit of the books by a certified public accountant at the end of 1978 showed an account payable of $16,357.00. This item was identified as including the $10,000.00 due the Foundation previously transferred by Wilson in January 1978.

Subsequently a bill of indictment charged the Executive Vice President Wilson and President Johnny Lee Fletcher with corporate malfeasance and conspiracy to commit corporate malfeasance. Wilson became a witness for the State, and we are concerned only with the charge against defendant Fletcher.

[1] Defendant first assigns as error the court's submission to the jury of the issue of accessory before the fact on an indictment charging the principal felony. In support of his argument defendant relies on 1979 N.C. Sess. Laws 965, Ch. 811 (codified at G.S. 14-5.1), which reads as follows:

> § 14-5.1. Indictment on principal felony does not charge accessory before the fact.—Any person who shall be charged with the principal felony in an indictment, presentment or information may not be convicted as accessory before the fact to the principal felony on the same indictment, presentment or information. Accessory before the fact is not a lesser included offense of the principal felony.

G.S. 14-5.1 became effective 1 October 1979.

Prior to the enactment of G.S. 14-5.1, it was the law in this state that a defendant could be tried and convicted as an accessory on an indictment charging the principal felony. *See State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917); *State v. Simons*, 179 N.C. 700, 103 S.E. 5 (1920); *State v. Jones*, 254 N.C. 450, 119 S.E. 2d 213 (1961). In *State v. Jones, supra*, the court stated:

> Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or a less degree of the same crime . . . G.S. 15-170. The crime of accessory before the fact is included in the charge of the principal crime. (Citations omitted.)

Id. at 452, 119 S.E. 2d at 214.

In *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978), the Supreme Court continued to follow this rule but noted that it posed possible problems of double jeopardy. The court suggested that the legislature clarify the matter by abolishing the distinction between accessory before the fact and principal and providing the same punishment for both offenses. *Id.* at 58, 249 S.E. 2d at 387. The legislature responded by enacting G.S. 14-5.1 which instead of abolishing the distinction between accessory before the fact and principal, preserved it by providing that a person indicted for the principal felony could not be convicted as accessory before the fact on the same indictment.

The court first considered the application of G.S. 14-5.1 in *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). In *Small*, the defendant was convicted of murder but the evidence established the defendant's guilt only as an accessory before the fact and not as a principal. The court noted that G.S. 14-5.1 had preserved the distinction between accessories and principals and stated that "[u]nless and until the legislature acts to abolish the distinction between principal and accessory, a party to a crime who was not actually or constructively present at its commission may at most be prosecuted, convicted and punished as an accessory before the fact." *Id.* at 429, 272 S.E. 2d at 141.

Although the defendant in *Small* was indicted on the principal charge of murder, the court upheld his conviction as an accessory before the fact because "[a]t the time of the return of the indictment by the grand jury on 4 December 1978, it was the law in this state that one indicted for the principal felony could nevertheless be convicted upon that indictment as an accessory before the fact." *Id.* at 430, 272 S.E. 2d at 142. The court interpreted the language of G.S. 14-5.1 as evidencing a clear legislative intent that the change in procedure mandated by the statute "apply prospectively only, i.e. to those cases in which the indictment itself is returned on or after 1 October 1979." *Id.*

In reaction to the *Small* decision, the General Assembly repealed G.S. 14-5.1 and enacted G.S. 14-5.2, thereby abolishing any distinction between accessories before the fact and principals. The act of the legislature dated 25 June 1981, found at Ch. 686, 1981 N.C. Sess. Laws 984 (codified at G.S. 14-5.2) states as follows in pertinent part:

> Section 1. Chapter 14 of the General Statutes is amended by adding a new section to read as follows:
>
> § 14-5.2. Accessory before fact punishable as principal felon.—All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. . . .
>
> Sec. 2. G.S. 14-5, G.S. 14-5.1, and G.S. 14-6 are repealed.

Sec. 3. This act does not apply to any offense committed before the effective date of this act, and any such offense is punishable under the laws in effect at the time such offense was committed.

Sec. 4. This act shall become effective on July 1, 1981, and is applicable to all offenses committed on and after that date.

The first question presented by this appeal is whether the court erred in submitting the issue of accessory before the fact on an indictment charging the principal felony in light of G.S. 14-5.1 and G.S. 14-5.2. We agree with the State that G.S. 14-5.1 does not apply to the present case. Session Laws 1981, Ch. 686, Sec. 3 provides that the law to be applied is the law that was in effect at the time the offense was committed.

The fact the court in *Small* tied the application of G.S. 14-5.1 to the time the indictment is returned does not persuade us to hold otherwise.[1] The language of Section 3 of Chapter 686 is clear and unambiguous. When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by a court under the guise of construction. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977).

In the present case, defendant asked Walt Hinson to send the $10,000.00 jelly sale proceeds to state headquarters in July 1977. In January 1978, this money was transferred from the Foundation's account to the Jaycee account. G.S. 14-5.1 was not effective until 1 October 1979 and as was established by *State v. Small, supra*, did not apply retroactively. Therefore, at the time defendant committed the offense charged, the law permitted the court to submit the issue of accessory before the fact on an indictment charging the principal felony.

[2] Defendant next assigns as error the court's denial of his motion to dismiss as to all charges at the close of all the evidence. For reasons following we conclude the court erred in denying defendant's motion. When a defendant moves for dismissal, the court is to determine whether there is substantial evidence (a) of

1. Defendant was indicted on 23 March 1981.

each essential element of the offense charged, or of a lesser included offense, and (b) of defendant's being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E. 2d 649, 651 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Citations omitted.) *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164 (1980).

The bill of indictment directs its charges against the defendant for wrongs allegedly committed by him against the Foundation as an accessory. In order to convict the defendant of being an accessory before the fact the State was required to prove (1) that defendant counseled, procured, commanded, encouraged, or aided another to commit the offense; (2) defendant was not present when the crime was committed; and (3) the principal committed the crime. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977).

A careful scrutiny of the record leads us to conclude that the State has failed to introduce substantial evidence of a conspiracy to violate G.S. 14-254 which read in pertinent part as follows at the time of the offense:

(a) Malfeasance of corporate officers and agents—

> (a) If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, obstruct, or wilfully apply any of the monies, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any officer of the corporation, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony . . . .

The record clearly reveals that the defendant as a newly elected President of the Jaycees would be managing a job largely ceremonial in nature. The affairs of the organization were conducted by Maurice Wilson, the Executive Vice-President, and the Executive Secretary, both of whom were paid on-going employ-

ees. When Wilson presented the shortfall in cash as an immediate problem to the defendant, he identified the acquisition of proceeds from the Wilson chapter as a loan to be repaid, and as something which had been done before. When the defendant raised the question of approval, Wilson not only indicated that the club did not have time, but that the money would be repaid before the Executive Committee meeting, a time only two months away. Again Wilson emphasized, it was "what we have done in the past." The defendant had every legitimate reason to believe that the transfer of funds was a loan to be repaid. Subsequent handling and the certified public accountant audit identified it as a loan, nothing more. What action that was taken by the Executive Committee in October, before the money was used in January, becomes immaterial. There is no evidence that at the time the defendant made the telephone call regarding the transfer of money, he had any criminal intent to injure or defraud; and no evidence exists that defendant believed Wilson had any criminal intent. To render one guilty as an accessory before the fact, he must have had the requisite criminal intent. 22 C.J.S. Crim. Law, sec. 92, p. 271. If the evidence is sufficient only to raise a suspicion as to the commission of the offense, the motion to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 382, 156 S.E. 2d 679, 682 (1967). This is true even though the suspicion so aroused by the evidence is strong. *State v. Evans*, 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971).

This assignment of error has merit, and the defendant's motion to dismiss should have been allowed. The remaining assignments of error become moot.

The decision to deny defendant's motion to dismiss at the close of the evidence is reversed and the judgment entered on the verdict is vacated.

Reversed and vacated.

Chief Judge VAUGHN and Judge BECTON concur.

ZEB G. SHEFF v. CONOCO, INCORPORATED, ASHLAND CHEMICAL COMPANY, WESTERN MARYLAND RAILROAD COMPANY, AND NORFOLK AND WESTERN RAILWAY, AND SOUTHERN RAILWAY

No. 8321SC45

(Filed 17 January 1984)

1. **Master and Servant § 38.2— FELA claim—sufficiency of evidence of negligence**

In an action brought under the Federal Employers' Liability Act, the evidence of negligence on the part of the railroad was sufficient where plaintiff and his supervisor, an experienced inspector, saw escaping fumes from a tank car some 30-40 minutes prior to the removal of the car by "humping" it; defendant's clerk was advised by the plaintiff of the smoking car prior to the "humping" process; the clerk did nothing until after the car was "humped" other than advise plaintiff the car would not be made part of a train to go elsewhere; the tanker was plainly marked as dangerous; the tanker was giving off fumes, indicating that it was leaking; and despite these dangerous forewarnings, the tanker was permitted to sit in the railroad yard until it was bumped by three other cars with nothing done to protect the employees. Plaintiff was not furnished a safe place to work when his fellow employees ignored danger signs completely and allowed a dangerous chemical vapor to descend upon plaintiff and injure him.

2. **Master and Servant § 42— failure to instruct award nontaxable—error**

In an action brought under the FELA, the trial court erred in failing to instruct the jury that any award plaintiff might receive was nontaxable under the Federal Income Tax laws once requested by defendant to do so.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 8 September 1982 in Superior Court of FORSYTH County. Heard in the Court of Appeals 5 December 1983.

Plaintiff seeks recovery under the Federal Employers' Liability Act for injuries allegedly sustained while serving as an apprentice car man for Southern Railway (Southern). He contends he was not provided a safe place to work because of the negligence of the several defendants. The case was dismissed against all defendants except Southern, and issues were submitted to the jury and answered as follows:

> 1. Was the plaintiff, Zeb G. Sheff, injured by the negligence of the defendant, Southern Railway Company?
>
> Answer: Yes.

2. Did the plaintiff, Zeb G. Sheff, by his own negligence, contribute to his injury?

Answer: No.

3. What monetary amount of damages for injury, if any, has the plaintiff, Zeb G. Sheff, sustained as a proximate result of such negligence?

Answer: $30,000.00.

4. What percentage of the plaintiff's damages are attributable to contributory negligence of the plaintiff, Zeb G. Sheff?

Answer: 0%.

Following the jury verdict, the judge recessed the court and met in private with the jurors in the jury room. After the judge and jury returned to the courtroom, defendant Southern moved for a judgment notwithstanding the verdict or in the alternative a new trial, and the motion was denied. Southern gave notice of appeal and subsequently filed notice of appeal for the judgments entered directing verdicts in favor of defendant Conoco, Inc. on the crossclaim filed by defendant Southern, and on the claims of plaintiff against Conoco.

William T. Graham for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr. and M. Ann Anderson; and Brooks, Pierce, McLendon, Humphrey and Leonard by L. P. McLendon, Jr. for Southern Railway Company, defendant appellant.

Perry C. Henson, Jr. and Jill R. Wilson for Conoco, Inc., defendant appellee.

HILL, Judge.

Defendant Southern brings forth six assignments of error concerning the trial judge's ruling on numerous motions, instructions to the jury, and the private conference with the jurors outside the presence of counsel after the jury verdict was rendered. We have examined each of the assignments and conclude the trial judge committed error in failing to instruct the jury concerning

the taxable status of plaintiff's award. Such error necessitates the case be remanded.

The facts are summarized in pertinent part as follows:

The plaintiff was serving as an apprentice car man under the supervision of a superior in the Winston-Salem railroad yards where a train of cars is broken down from a location on a main or lead line and shifted onto spur lines to become parts of new trains which are routed to different geographic locations. Plaintiff's duty, among other things, was to inspect freight cars in transit, and to notify a superior if any were defective.

On 7 May 1978 plaintiff and his superior, Mr. Harry Scott, began inspecting cars in the Salem yard. They walked on opposite sides of the trains. When they noted a defective car, they gave it a "bad order" designation and marked it for repair or other proper designation. Both plaintiff and Mr. Scott noticed a tank car smoking near the dome on the center of the car. There was a "just visible" amount of smoke which was drifting off to the side of the car. Further inspection revealed the car was "flagged" with a red tag denoting it contained muriatic or hydrochloric acid, a dangerous substance.

The car belonged to Conoco, Inc. It had been leased to Ashland Chemical Co. and filled with the chemical. Thereafter the car had been shipped through two intermediate carriers, Western Maryland Railway and Norfolk and Western Railway to Southern Railway.

Plaintiff and Mr. Scott walked back to a shed on the railroad yard known as the "shanty." The cloud over the car had almost dissipated when plaintiff arrived at the shanty. Upon arrival plaintiff reported the smoking car to the clerk, Ken Moore, who advised him the car would not be part of any train leaving that day, but rather would remain locally. Plaintiff then stated he would "look the other way" since the car was not his responsibility.

As plaintiff sat in the shanty he observed the work crew cut loose three cars which rolled down the track, bumping the tank car. This activity is called "humping," and its purpose is to move idle cars into position for coupling with other cars making up a

train. Upon impact the contents of the tank car splashed, and a fog, ". . . not a great deal, but right much . . . ." came out of the dome. The wind took the cloud in a southwesterly direction toward the plaintiff. Plaintiff testified he felt a coolness upon his face "like a little fine rain." A few seconds later he noticed a burning sensation on his nose, hands, neck and arms. He continued to sit at the shanty some five or ten minutes. Plaintiff was wearing a helmet provided by the railroad, a long sleeve shirt, long pants, long tube socks, boots, and safety glasses. He had taken off his gloves. Plaintiff further testified he observed no smell or odor, but he had never smelled muriatic acid. He never got closer than 70 to 80 feet from the tank car.

One or two minutes after the tanker had been cut loose from the "humping" process, Ken Moore asked the conductor to take the car down to the far end of the yard so they would not have to smell the odor. Prior to the impact of "humping" no fumes had escaped from the car. Moore further testified the fog or cloud came out of the little dome in the top of the car. He did not know the cloud was dangerous, but he followed the usual procedure taken when an employee sees something which might be dangerous or different: "he gets it stopped until he can get the right official to take care of it." Plaintiff's trainer knew the car was smoking thirty to forty minutes between the time he first observed it and saw it the second time. He entered the smoking car in his log book in the locker room.

Plaintiff remained at the shanty some five or ten minutes, then went to the locker room where he ate supper. He had trouble swallowing. Later he felt dizzy, nearly passed out, hyperventilated, and became extremely nervous and weak. He had difficulty speaking. Plaintiff was taken to the hospital, released, and returned to his job for the balance of the shift when he was taken home by another employee. He lost time and wages totalling $2,500.00 but thereafter continued his employment with Southern. Subsequently he developed injuries to his eye, which he contends arose as a result of exposure to the acid. His wages have increased substantially since the accident. Plaintiff also contends he lost a second job at McLean Trucking Company, but the damages arising therefrom appear insignificant.

Southern notified Conoco of the damaged tanker. The following day a Conoco representative removed the metal dome to expose a valve. When the valve was exposed, a ruptured disc was discovered. The disc had performed its function satisfactorily. The purpose of the disc was to rupture in case of pressure buildup which could result in going from one climate to another. Once it was ruptured, it must be replaced. The representative worked directly over the vent with no protective clothing. He was in no manner affected by the vapors or the acid.

I. Ruling on the Motions

[1] For its first assignment of error Southern contends the court erred in denying its motion for a directed verdict made at the conclusion of plaintiff's evidence and renewed at the conclusion of all the evidence of any actionable negligence on the part of Southern.

The section of the Federal Employers' Liability Act (FELA) under which plaintiff seeks to recover provides as follows:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works . . . or other equipment.

45 U.S.C. Sec. 51 (1976).

Although the decisions under the Act are most liberal in allowing recovery for employees, the Act does not make an employer an absolute insurer of the safety of his employees. Rather, for an employee to recover under the FELA, the employee must prove the occurrence of negligence on the part of the employer. *Bennett v. R.R.*, 245 N.C. 261, 96 S.E. 2d 31, *cert. denied*, 353 U.S. 958, 1 L.Ed. 2d 909, 77 S.Ct. 865 (1957); *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 294 S.E. 2d 750, *disc. rev. denied*, 307 N.C. 270, 299 S.E. 2d 215-16 (1982). If the evidence shows nothing more than a fortuitous injury, a directed verdict

for the railroad is proper. *Camp v. R.R.*, 232 N.C. 487, 61 S.E. 2d 358 (1950).

The thrust of Southern's argument is that plaintiff was provided with a safe place to work; that the tank car which caused plaintiff's alleged injuries was a standardized one and equipped with a standard disc designed to rupture and thereby prevent substantial damage. Plaintiff's argument misses the mark.

Defendant Southern's employee Harry Scott, an experienced inspector, saw the escaping fumes from the tank car some thirty to forty minutes prior to the removal of the car by "humping" it. Ken Moore was advised by the plaintiff of the smoking car prior to the "humping" process. Moore did nothing until after the car was "humped" other than advise plaintiff the car would not be made part of the train to go elsewhere. The tanker was plainly marked as dangerous. The tanker was giving off fumes, indicating it was leaking. Despite these danger forewarnings, the tanker was permitted to sit in the railroad yard until it was bumped by three other cars with nothing done to protect the employees. Plaintiff was not furnished a safe place to work when his fellow employees ignore danger signs completely and allow a dangerous chemical vapor to descend upon another employee and injure him. Southern's conduct or lack thereof manifested a "failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 87 L.Ed. 610, 617, 63 S.Ct. 444, 451 (1943). Therefore, injury to plaintiff has "result[ed] in whole or in part from the negligence of . . . employees of such carrier [Southern Railway] . . . ." 45 U.S.C. Sec. 51 (1976). This assignment of error is overruled.

Defendant Southern also contends the trial judge erred in denying its motions to set aside the verdict and for judgment notwithstanding the verdict, or in the alternative, a new trial. We have reviewed the records and briefs of the parties and find the assignment to be without merit.

We find no error by the trial judge in granting defendant Conoco's motion for a directed verdict. The disc ruptured as it was intended to do, and the rupture was not the proximate cause of plaintiff's injury.

Nor do we find error by the trial judge in granting a directed verdict in favor of the defendants Norfolk and Western Railway and Western Maryland Railroad Company at the close of appellee Sheff's evidence. No evidence of negligence existed in regard to these intermediate carriers.

II. Jury Instructions

Defendant Southern assigns as error the trial judge's refusal to instruct the jury that Southern had no duty to inspect a car received from a connecting carrier to ascertain whether a disc was defective. We agree with Southern's contention that a railroad has the duty to reasonably inspect cars in its possession to ascertain "fairly obvious" defects in its construction or state of repair which constitutes a likely source of danger. *See Ambrose v. Western Maryland Rwy. Co.*, 368 Pa. 1, 81 A. 2d 895 (1951). However, failure to so instruct the jury is not prejudicial error. The tanker was filled with a dangerous substance; the placard plainly denoted the dangerous contents. The tanker was emitting a gaseous vapor, indicating the chemical was escaping. The vapor was seen by the employees. Whether the leak was from an obvious defect such as a crack in the car or from an unrevealed broken disc is immaterial. The railroad was on notice of a dangerous situation and should have taken the necessary steps to protect its employees. This assignment of error is overruled.

[2] Defendant Southern also requested the Court to instruct the jury that any award plaintiff might receive was nontaxable under the Federal Income Tax laws. Specifically, the following instruction was requested and denied by the court:

> I charge you, as a matter of law, that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this Court in measuring those damages, and in no event should you either add to or subtract from that award an account of federal income taxes.

This being an FELA case, we feel bound by the ruling in another FELA case, *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed. 2d 689, 100 S.Ct. 755, *reh'g denied*, 445 U.S. 972, 64

L.Ed. 2d 250, 100 S.Ct. 1667 (1980). In that case the U. S. Supreme Court held a state trial court erred in refusing to instruct the jury as to the nontaxability of a FELA damage award, since such instruction would eliminate an area of doubt or speculation that might have an improper impact on the computation of the award.

We distinguish the foregoing case from *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E. 2d 843, *disc. rev. denied*, 306 N.C. 744, 295 S.E. 2d 480 (1982), cited by plaintiff as rejecting *Liepelt. Scallon* was a wrongful death action arising out of an automobile collision. The court ruled that in wrongful death actions brought under our state statutes, the consideration of income tax consequences is too conjectural or speculative a factor. Consideration of the tax issue as it relates to each beneficiary would ordinarily involve abundant and intricate evidence and jury instruction on present and future tax and nontax liabilities of each beneficiary, resulting in manifest complications in determining present monetary value of the decedent to the beneficiaries. Such is not the case before the court where the injured party is the direct recipient of any award.

This assignment of error has merit and the case must be remanded for a new trial as to the measure of damages alone, as the error creating the reason for the new trial is confined to one issue. *See Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974).

III. The Jury Conference

Defendant Southern argues the trial judge erred by going to the jury room in the absence of attorneys following the return of the jury's verdict and before their discharge, but prior to hearing and passing on Southern's post-verdict motions. At the time, the jury had been polled and counsel for both plaintiff and defendant had indicated nothing further was required of the jury. Defendant Southern contends the judge who rules on a motion for judgment notwithstanding the verdict should not be exposed to the jury's rationale for their ruling before making his decision; that such actions certainly could be the basis of suspicion. While it would have been the better practice to go to the jury room, if at all, after all post-trial motions were disposed of, there is nothing in the record showing any basis for question. Defendant does not

challenge the integrity and honesty of the trial judge. This assignment of error is overruled.

For the reasons set out herein we affirm that portion of the judgment holding defendant Southern negligent, but vacate the award of damages and remand the case on the question of damages alone.

Affirmed in part and vacated in part and remanded.

Chief Judge VAUGHN and Judge BECTON concur.

R. E. MENZEL, M.D. v. METROLINA ANESTHESIA ASSOCIATES, P.A. AND H. A. FERRARI, M.D.

No. 8226SC1207

(Filed 17 January 1984)

1. **Rules of Civil Procedure § 41— nonjury trial—motion for involuntary dismissal**

A motion for a directed verdict is proper only in a jury trial; the proper motion in a nonjury trial is one for involuntary dismissal under G.S. 1A-1, Rule 41(b).

2. **Contracts § 27.2; Master and Servant § 8— employment contracts—employer's loss of contract with another—breach of contract by employee**

The trial court erred in finding that defendant employer breached a contract employing plaintiff as an anesthesiologist when the employer lost its contract to provide anesthesia services to a hospital even if the employer's contract with the hospital was the major inducement for plaintiff's entering the employment contract. Rather, plaintiff breached the contract when he entered into a new employment agreement with the hospital before determining whether his contract with defendant employer had been terminated.

3. **Master and Servant § 8— breach of employment contract—severance pay provision inapplicable**

A breach of an employment contract would not trigger provisions requiring defendant employer to pay plaintiff two months severance pay if defendant terminated the contract.

4. **Master and Servant § 8— breach of contract by employee—counterclaim for prepaid insurance premiums—dismissal by court**

The trial court properly dismissed defendant employer's counterclaim for professional liability insurance premiums it had prepaid for plaintiff prior to plaintiff's breach of the employment contract.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 15 July 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 November 1983.

Defendant appeals from a judgment awarding plaintiff $14,333.13 for damages sustained due to defendant's breach of an employment contract entered into between the parties.

The pertinent facts are:

In 1975, defendant corporation, a North Carolina corporation, solely owned and directed by defendant Herbert Alfred Ferrari, M.D., contracted with Charlotte Memorial Hospital to perform anesthesia services. Under the contract, defendant corporation could perform services for other individuals or institutions as well as Charlotte Memorial Hospital. The contract could be terminated by either party by giving the other party at least ninety days written notice.

The contract between defendant and the hospital was in effect on 29 June 1979, when plaintiff, an anesthesiologist, entered into an employment contract with defendant, to take effect in September, 1979. The employment contract provided that plaintiff would receive a base salary of $75,000 plus certain fringe benefits and discretionary bonuses in return for rendering his medical services for the business and benefit of defendant. The contract did not specify where plaintiff would work. Paragraph four of the contract provided:

> 4. *Working Facilities.* Employee shall be furnished with offices, stenographic help, anesthesia supplies, equipment and facilities, and such other facilities and services as may be required for the performance of his duties. Employer shall also: provide Employee with adequate professional liability insurance (coverage of at least $1 million if commercially available); pay for Employee's membership in professional organizations, including the American Medical Association, State Medical Society, County Medical Society, ASA, IARS, N. C. Society of Anesthesiologists and the Medical Auxiliary; and pay for such other professional related expenses as the Board deems reasonable. All professional equipment, books, office equipment and other property furnished by Employee shall remain his individual property.

The parties' contract was for an initial one-year term, and after the first year, was to continue indefinitely subject to the contract provision for termination. Paragraph twelve, the termination provision, provided in pertinent part:

> 12. *Termination of Employment.* Employee and Employer shall have the right to terminate this agreement as of the last day of any month by giving written notice at least thirty (30) days prior to the proposed termination; provided, however, Employer shall have the right to terminate this agreement only upon written notification to Employee that Employer's Board of Directors, upon recommendation of the Professional Affairs Committee, has approved such termination by a unanimous vote of all members other than Employee, if a Director. Upon such termination by Employer, Employer shall pay Employee two (2) months base salary as severance pay . . . .

The parties performed the contract until February 1980. On Saturday, 9 February 1980, plaintiff was vacationing in Linnville, North Carolina, when he heard on the evening news that the contract between Charlotte Memorial Hospital and defendant had been terminated. On Sunday, 10 February, plaintiff returned to Charlotte and wrote a letter to defendant's attorney requesting his severance pay.

On Monday, 11 February, plaintiff went to work at Charlotte Memorial Hospital. Some time thereafter, plaintiff entered into a contract with the hospital to provide anesthesia services in return for compensation of $155,000 per year beginning on 10 February 1980.

On 29 February 1980, defendant wrote plaintiff a letter stating that defendant's attorneys had learned from Charlotte Memorial Hospital that on Sunday, 10 February, the hospital had offered plaintiff employment and that on Monday, 11 February, plaintiff had accepted employment with the hospital, effective retroactively as of 6:00 p.m., 9 February 1980. By accepting such employment, defendant informed plaintiff, plaintiff had terminated employment with defendant. Defendant sent plaintiff a payroll statement computed on the basis of services rendered through 9 February 1980. Said statement contained deductions for expenses prepaid by defendant for the proration of plaintiff's 1980

medical dues, plaintiff's calculator, plaintiff's February car lease, and for overage due on the car lease.

Plaintiff instituted action against defendant corporation and defendant individually, alleging, in essence, that he sustained $33,433.67 in damages due to defendant corporation's breach of the parties' employment contract. Defendant corporation counterclaimed for the unearned portion of a premium totalling $712 paid by defendant for plaintiff's professional liability insurance.

The judge, sitting without a jury, dismissed defendant's counterclaim and concluded that defendant had and plaintiff had not breached the parties' employment contract. Plaintiff was awarded $14,333.33 in damages, which covered two months severance pay and payments improperly deducted from plaintiff's last paycheck. Since defendant, Dr. H. A. Ferrari, the sole owner of Metrolina Anesthesia Associates, stipulated before trial that he would be financially responsible for any judgment plaintiff might receive, we will hereinafter refer to defendant in the singular.

Warren & McKaig, P.A., by Joseph Warren, III, and India Early Keith, for plaintiff appellee.

Walker, Palmer & Miller, P.A., by James E. Walker, and June E. Jensen, for defendant appellants.

VAUGHN, Chief Judge.

[1] Defendant contends that the trial court erred by denying its motion for a directed verdict made at the close of all the evidence. A motion for a directed verdict is proper only in a jury trial; the proper motion in a nonjury trial is one for involuntary dismissal under Rule 41(b). *Bryant v. Kelly,* 10 N.C. App. 208, 178 S.E. 2d 113 (1970), *reversed and remanded,* 279 N.C. 123, 181 S.E. 2d 438 (1971). Accordingly, we will treat defendant's motion as one for involuntary dismissal.

Rule 41(b) provides for a motion for dismissal at the close of plaintiff's evidence; it does not provide for such motion at the close of *all* the evidence. *Reid v. Midgett,* 25 N.C. App. 456, 213 S.E. 2d 379 (1975). As our Supreme Court has explained: "There is little point in such a motion at the close of all the evidence, since

at that stage the judge will determine the facts in any event. . . ." *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E. 2d 1, 7 (1973), *quoting* Wright, Law of Federal Courts § 96, at 428-29 (1970). In the case *sub judice*, the trial judge entered judgment on the merits. Defendant's motion and the judge's ruling thereon were, therefore, of little consequence. *See Land Co. v. Wood*, 40 N.C. App. 133, 252 S.E. 2d 546 (1979). Defendant's first contention has no merit.

[2] Defendant next contends that the trial court's findings of fact relating to the performance and breach of the contract in dispute are not supported by adequate evidence. As to this contention, we agree.

In a nonjury trial, the court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, even if the evidence could sustain contrary findings. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). In the case *sub judice*, the trial court, in essence, found only that defendant had and plaintiff had not breached the employment contract in dispute. There were no findings of fact as to how or in what way the breach occurred. Even so, upon review of the Record, we find *no* evidence to support the court's ultimate findings.

The evidence showed, in essence, that on Saturday, 9 February 1980, plaintiff heard on the news that the contract between Charlotte Memorial and defendant had been terminated. On Sunday, 10 February 1980, plaintiff wrote a letter to defendant's attorney, requesting severance pay owed him under the termination clause of plaintiff's contract with defendant. On Monday, 11 February 1980, without contacting defendant, plaintiff went to work at Charlotte Memorial Hospital and thereafter entered into an employment contract with the hospital, effective 9 February 1980.

Contrary to the trial judge's findings, we find the evidence shows that plaintiff, not defendant, breached the parties' contract when he went to work for and signed a new employment contract with Charlotte Memorial Hospital.

Defendant did not do or say anything prior to the time plaintiff entered into his new contract with the hospital to indicate

that the contract between plaintiff and defendant had been terminated. Termination of defendant's contract with the hospital had no effect on defendant's separate, distinct contract with plaintiff. While the contract between plaintiff and defendant provided that plaintiff would be furnished with offices, supplies, equipment, and facilities, it did not specify their location. The general rule is that the breach of one contract does not justify an aggrieved party in not performing another separate and distinct contract. *National Farmers Org'n v. Bartlett & Co., Grain*, 560 F. 2d 1350 (8th Cir. 1977); 3A A. Corbin, Contracts, § 696 (1960); *Cf. Baker v. Lumber Co.*, 183 N.C. 577, 112 S.E. 241 (1922).

Even if defendant's contract with the hospital was the major inducement for plaintiff's entering the contract with defendant, plaintiff was not justified in terminating the contract with defendant. In *Harris v. Atlantic-Richfield Co.*, 469 F. Supp. 759 (E.D.N.C. 1978), defendant oil company entered into a fifteen-year requirements contract with plaintiff, a North Carolina distributor. Four years later, defendant ceased advertising and doing business in North Carolina. Plaintiff sued defendant for breach of contract, alleging that the major inducement for entering into the fifteen year contract was defendant's marketing and advertising program. The court, applying North Carolina law, held that defendant's withdrawal from doing business in North Carolina did not amount to a breach of contract with plaintiff. Similarly, here, defendant's cancellation with Charlotte Memorial Hospital did not amount to a breach of its separate contract with plaintiff.

The evidence showed that defendant did not have any contracts with hospitals or patient facilities other than Charlotte Memorial. Nevertheless, even a reasonable belief that defendant would not be able to carry out its part of the bargain did not justify plaintiff's entering into a contract with the hospital before determining whether his contract with defendant had been terminated. "[T]he law does not relieve a man from a contractual obligation because he believes with good cause the person with whom he has contracted will not be able to perform." *Coonan v. Cape Girardeau*, 149 Mo. App. 609, 620, 129 S.W. 745, 748 (1910). Plaintiff was still obligated to perform services for defendant, his employer, when he went to work for and signed the contract with Charlotte Memorial Hospital, thereby breaching his contract with defendant.

Since the trial court's factual findings are unsupported by the evidence, its legal conclusions, based on such findings, must be reversed. Plaintiff, having breached the contract, is not entitled to damages.

Even if the trial court's findings of fact had been supported by competent, credible evidence, its legal conclusions would, nevertheless, be in error. Had defendant breached the contract with plaintiff, plaintiff would only be entitled to recover damages sustained. Under plaintiff's contract with defendant, plaintiff earned an annual base salary of $75,000. Under plaintiff's contract with the hospital, plaintiff earned an annual base salary of $155,000. We fail to see how plaintiff was damaged.

[3] Although the termination clause in the parties' contract provided that defendant would pay plaintiff two months severance pay if defendant terminated the contract, defendant did not terminate plaintiff pursuant to such clause. A breach of contract would not trigger the severance pay provisions of the contract. Plaintiff, therefore, was not entitled to severance pay, in any event. In order to maintain an action for breach of contract, plaintiff must show that the alleged breach caused him injury. *Santana, Inc. v. Levi Strauss and Co.*, 674 F. 2d 269, 275 (4th Cir. 1982).

[4] Defendant also contends that the trial court erred when it dismissed its counterclaim for professional liability insurance premiums that had been prepaid by defendant. We find no error.

At the close of all the evidence, plaintiff made a motion for a directed verdict on the basis that there was no evidence of a requirement to prorate the benefits in dispute. Treating plaintiff's motion as one for involuntary dismissal, we find that the trial judge was correct in granting plaintiff's motion even though he made no findings of fact thereon. Ordinarily, it is incumbent upon the trial judge, whether on a motion to dismiss or at the close of all the evidence to specifically state his findings of fact. *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Helms v. Rea, supra.* The purpose of the rule is to enable the reviewing court to determine whether the order represents a correct application of the law to the evidence, it being the function of the trial court to document the evidence underlying its order. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). In the case *sub judice*, the trial

judge made no findings of fact in regard to defendant's counterclaim, but neither did defendant present any evidence from which to make such findings. Defendant's sole evidence was its question to plaintiff on recross-examination:

> Q: Dr. Menzel, when your liability insurance coverage was purchased for you, it was purchased for a period from September 4, 1979, through September 4, 1980. That is correct, isn't it?
>
> A: I believe that it is usually purchased for a year.

Defendant presented no evidence that it sustained damages as a result of plaintiff's breach. It would be an empty ritual, when a party presents no evidence, to require the trial judge to state his findings of fact. *See Coble v. Coble, supra.* Defendant's counterclaim was properly dismissed.

As to plaintiff's claim, however, we reverse.

Reversed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. WILLIAM RAY RIDDLE

No. 8329SC460

(Filed 17 January 1984)

1. **Criminal Law § 22— no record of arraignment—no prejudicial error**

Although the record was silent as to whether or not defendant had a formal arraignment, the judge in his charge to the jury said, "The defendant, by his plea of not guilty, has denied his guilt," the defendant was in court, his attorney participated in the trial, and defendant called witnesses who testified in the defense of the defendant, and defendant was in no way prejudiced by the lack of formal arraignment and could not now claim reversible error. G.S. 15A-941; G.S. 15A-945.

2. **Criminal Law § 77.1— defendant's statement as to age, height, and weight—admissible**

There was sufficient evidence and testimony in support of the trial court's findings of fact and subsequent conclusion that defendant was not under arrest, that he was not threatened, coerced or intimidated in any manner, and

no promises or threats were made, that defendant was free to leave at any time, and that it was not necessary or required that *Miranda* warnings be given him when he stated his date of birth, sex, race, age, height, weight, color of eyes, color of hair and nickname.

3. **Criminal Law § 102.7— closing argument—prosecutor's comments not prejudicial error**

A prosecutor's comments in his closing argument which, in essence, constituted an argument to the jury that they should not believe defendant's evidence of alibi represented a reasonable comment on the evidence and was not prejudicial error.

Judge BECTON dissenting.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 3 December 1982 in Superior Court of MCDOWELL County. Heard in the Court of Appeals 5 December 1983.

Defendant was convicted of second degree burglary and received an active sentence. He appeals.

The facts pertinent to this appeal can be summarized as follows: During the early morning hours of 21 July 1982, Howard Lee Hollifield awoke to find an intruder crawling on his hands and knees in his bedroom. Hollifield turned on the light, the intruder jumped up, and Hollifield got a "pretty good look at him."

After the intruder left, Hollifield noticed his wallet was missing from his trousers. He called the sheriff's department and described the intruder as being six feet tall, weighing 130 to 140 pounds, of slender build, thin faced, with dark brown hair of medium length. The intruder was wearing Levis, possibly tennis shoes, and a red headband, but not a shirt.

A bloodhound traced the intruder toward the residence of Barry Hensley, but lost the scent at the paved road. Hensley was known to wear a headband, was of similar build as defendant, and had been seen in the area previously. The investigating officer noted initially the main suspect was Barry Hensley.

On the evening of the break-in, both Hensley and the defendant, Hollifield's neighbor, were at the residence of Morris Radford, next door to Hollifield, shooting pool and drinking beer. There was evidence that defendant left the Radford residence between 2:00 and 2:30 a.m., saying he was going home to bed, and that Hensley left at 4:00 a.m. However, a witness for the State

testified she saw a car leave defendant's mother's house at approximately 3:30 a.m. The car went to a point in the general neighborhood where the motor was cut off and started up again approximately half an hour later. The car then returned to the Riddle residence.

Two photographic line-ups were conducted. Hollifield failed to identify defendant in the first group of pictures; but did identify him from a later photographic line-up, at which time defendant's photograph had been added.

On 6 August 1982 officers of the McDowell County Sheriff's Department were "on the lookout" for defendant throughout the county and saw the defendant riding with a Miss Nesbitt in Marion. The officer pulled the Nesbitt car over and advised the defendant that "we needed to talk to him." The officers followed defendant to the courthouse where Officer Cline interviewed him, asking questions concerning defendant's height, weight and employment. Thereafter, Officer Cline advised defendant of his rights to remain silent and to have counsel, and defendant declined to make any statement.

Hollifield identified the defendant sitting in the courtroom as the intruder. Defendant did not take the witness stand in his defense, but offered evidence through other witnesses tending to show alibi.

Attorney General Rufus L. Edmisten by Assistant Attorney General Guy A. Hamlin for the State.

Goldsmith and Goldsmith, by C. Frank Goldsmith, Jr. for defendant appellant.

HILL, Judge.

[1] For his first assignment of error, defendant contends his statutory and constitutional rights were violated because he was not arraigned in open court. Arraignment is mandatory unless waived in writing prior to the day for which arraignment is calendared in the manner provided by statute. G.S. 15A-945. An arraignment is a proceeding whereby a defendant is brought before a judge having jurisdiction to try the offense, so that the defendant may be formally apprised of the charges pending against him

and directed to plead to them. G.S. 15A-941. Should the defendant fail to plead after the prosecutor has read the charges or otherwise fairly summarized them, the court must record the fact, and defendant must be tried as if he had entered a plea of not guilty. "Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *State v. Smith*, 300 N.C. 71, 73, 265 S.E. 2d 164, 166 (1980).

Here the record is silent as to any arraignment. However, the judge in his charge to the jury said, "The defendant, by his plea of not guilty, has denied his guilt . . . ." The defendant was in court, his lawyer participated in the trial, and defendant called witnesses who testified in the defense of the defendant. Defendant in no way was prejudiced by the lack of formal arraignment and cannot now claim reversible error. *State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975). This assignment of error is overruled.

[2] Defendant claims the trial court erred in admitting his custodial statements because he was not warned of his *Miranda* rights and was seized without probable cause. Over defendant's objections Officer Cline was permitted to testify to the jury that defendant had stated his height to be six feet, his weight 150 pounds, and that he had stated he was unemployed. Defendant contends the questions and answers were relevant to the identity of the defendant as being the intruder seen by Mr. Hollifield, and to defendant's possible motive for having taken Mr. Hollifield's billfold. We disagree.

A *voir dire* was heard to consider the admissibility of the challenged statement. Defendant on *voir dire* testified that he had not understood he was free to leave at the time he was being questioned at the sheriff's department by armed officers who were identified to him as detectives. The defendant, in fact, understood that he was coming to the courthouse, in addition to being directed by the officer to go there, to turn himself in on a probation violation. Officer Cline admitted defendant told him when he came to the sheriff's department "that he knew that there was a warrant or was going to be a warrant issued on him for a probation violation."

At the conclusion of the *voir dire*, the trial court found as fact that the defendant was not under arrest, that he was not threatened, coerced, or intimidated in any manner, that no promises or threats were made, that defendant was free to leave at any time, and that it was not necessary or required that the *Miranda* warnings be given him as "*Miranda* warnings and waiver of counsel are required when, and only when, the defendant is being subjected to custodial interrogation." *State v. Sykes*, 285 N.C. 202, 205, 203 S.E. 2d 849, 851 (1974). Defendant was not in custody at the time he answered the questions. Such personal data was nothing more than a general investigation of the offense. Defendant voluntarily came to the sheriff's office. He was free to leave. Therefore, the court concluded defendant's statement as to date of birth, sex, race, age, height, weight, color of eyes, color of hair and nickname to be properly admissible.

The trial judge made findings of fact and rendered his conclusions thereon. If supported by competent evidence, the findings of fact are conclusive and binding on the appellate courts. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975). The record reveals sufficient evidence and testimony in support of the findings of fact. They in turn support the conclusions. We find no error in the ruling by the trial judge on this point.

[3] Defendant contends that the prosecutor's statements made in his closing argument constituted prejudicial error. In the present case the defendant had presented to the jury evidence tending to show alibi. The prosecutor made statements suggesting that more evidence tending to show alibi would have been produced had certain witnesses testified. While it is improper for a lawyer in his argument to assert his opinion that a witness is lying, "he can argue to the jury that they should not believe a witness. . . ." *State v. Noell*, 284 N.C. 670, 696, 202 S.E. 2d 750, 767 (1974). In essence, the prosecutor's comments constituted an argument to the jury that they should not believe defendant's evidence of alibi, and therefore, the remarks represented a reasonable comment on the evidence.

We have examined defendant's remaining assignments of error and find them without merit.

No error.

Chief Judge VAUGHN concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Although N.C. Gen. Stat. § 84-14 (1981) permits counsel to argue the "whole case as well of law as of fact . . . to the jury," counsel may not inject into the trial his beliefs and personal opinions which are not supported by the evidence. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *see also State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978). Believing that the argument made by the prosecuting attorney in this case transcends the bounds of propriety and fairness, I dissent.

In his closing argument, the assistant district attorney told the jury that he had not called a Mrs. Teague to testify during the State's case in chief because "I knew that if I put Mrs. Teague on, this line of six witnesses [the defendant's witnesses] . . . would explain that away too." Although the trial court sustained defendant's objection to that argument and instructed the jury not to consider it, the assistant district attorney later made the same argument to the jury, using slightly different words:

> Members of the jury, you will recall that this morning I put on testimony relating to the headband and defendant's witnesses took the stand and they said, 'Oh, yes, Barry Hensley had on a headband.' In light of that, I waited to put the other witness on and I submit to you that if I had put Mrs. Teague on this morning, in all likelihood, the evidence would be, 'Oh, yes, Barry Hensley was driving that car that night.'
>
> MR. GOLDSMITH: Objection.
>
> THE COURT: Overruled.
>
> Or somebody would say, 'Oh, yes, I took the car about quarter til four in the morning just exactly like that lady said I took the car and went down this road and on down here several miles to visit some friend of mine.' I submit to you, members of the jury, that that would have been covered also.

To put the prosecutor's argument in context, it should be noted that Barry Hensley, according to the investigating officer,

was initially the "main suspect." The facts which suggest that Barry Hensley was the main suspect are adequately detailed by the majority, ante pp. 1, 2. That some of defendant's alibi witnesses also testified that Barry Hensley was wearing a red headband on the night in question does not make the prosecutor's argument proper. After all, the investigating officer was well aware of the fact that Barry Hensley had been seen wearing a headband.

It was quite proper for the State, once defendant had presented evidence that he was at home at the time of the crime, to put on rebuttal evidence by Mrs. Teague that she saw a car leave the defendant's mother's house at approximately 3:30 a.m. and drive to some point in the general neighborhood, where she heard the car motor cut off and start up again approximately half an hour later and that the car returned to defendant's residence. It was improper, however, for the assistant district attorney to suggest that he decided not to call Mrs. Teague in the State's case in chief because the defendant's witnesses would have, in effect, lied. To permit the prosecutor to explain his trial strategy to the jury by suggesting that the order of his witnesses was dictated by his personal belief that otherwise "in all likelihood" the defendant's witnesses would have conformed their stories to fit what they had heard, is improper. In *State v. Locklear*, the defendant's conviction was reversed for improper remarks by the district attorney concerning the credibility of the defendant. Moreover, Disciplinary Rule 7-106(c)(4) of the North Carolina Code of Professional Responsibility (1974) forbids a lawyer from asserting his personal opinion "as to the justness of a cause, as to the credibility of a witness, . . . or as to the guilt or innocence of an accused. . . ." Indeed, our Supreme Court in *State v. Locklear*, quoting from the *Standards Relating to the Prosecution Function and Defense Function* § 5.8(b), at 126 (Approved Draft 1971), stated: "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." 294 N.C. 210, 216, 241 S.E. 2d 65, 69.

I believe the prosecutor's argument was improper and prejudicial. I, therefore, vote for a new trial.

STATE OF NORTH CAROLINA v. LARRY JAMES ATKINS

No. 838SC517

(Filed 17 January 1984)

1. **Criminal Law § 122— additional instructions concerning inability to reach verdict—no prejudicial error**

Although it would have been the better practice for the trial court to give an additional instruction requested by defendant that in the event that the jurors were unable to reach a unanimous decision, they should communicate it to the court, and the court would take appropriate action, the trial court's failure to give such instruction did not constitute prejudicial error under the circumstances of the case since the jury had been gone only 37 minutes when they returned with a question, and the charge the court gave made it clear that a juror was to discuss the matter with the other jurors and to reconcile their differences, but not to surrender his convictions purely for the sake of arriving at a unanimous verdict.

2. **Criminal Law § 122.2— inquiry into numerical division of jury—proper**

A judicial inquiry into the numerical division of the deliberating jury after the jury had been deliberating only 37 minutes was not coercive and did not affect the jury's verdict.

3. **Criminal Law § 138— second degree sexual offense—aggravating factor that offense especially heinous, atrocious, or cruel properly submitted**

In a prosecution for a second degree sexual offense, the aggravating factor that the offense was especially heinous, atrocious, or cruel was supported by the evidence where the record showed that the prosecutrix sustained several small fissures in the skin around her anus and one fairly large fissure at the posterior wall of the anus and that a pillow was placed over the prosecutrix's head while the offense was being committed.

4. **Criminal Law § 138— aggravating factor—prior convictions properly submitted**

There was no merit to defendant's argument that the trial court erred in finding as an aggravating factor that defendant had prior convictions for offenses punishable by more than 60 days' imprisonment where defendant did not object to the admission of evidence of his prior convictions and did not raise the issue of indigency and lack of counsel at the sentencing hearing.

Judge EAGLES concurring in part and dissenting in part.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 20 October 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 December 1983.

Defendant was tried and convicted of felonious breaking and entering and second degree sexual offense. He was sentenced to

consecutive prison terms of eight years for breaking and entering and of sixteen years for second degree sexual offense.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Kucharski, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for the defendant.

HILL, Judge.

Defendant brings forward four assignments of error relating to the trial court's instructions to a "deadlocked" jury and to the trial court's findings of factors in aggravation pursuant to the Fair Sentencing Act. We have reviewed each of these assignments and find no error.

The State's evidence tends to show that at approximately 6:20 a.m. on 22 May 1982, the prosecutrix was awakened by a man sitting on the edge of her bed. When the prosecutrix screamed, the intruder attempted to cover her mouth and told her he was going to hurt her if she did not shut up. After a two minute struggle with the prosecutrix, the man made the prosecutrix turn over on her stomach, placed a pillow over the back of her head and a sheet over her, and entered her rectum with his penis. After the man left, the prosecutrix went to her next door neighbor's and had her next door neighbor call the police.

The prosecutrix described her assailant to the first reporting police officer, Sgt. Sharp, as being approximately 5'10" tall, and 185 pounds in weight. The assailant was wearing bright red pants and a dark-colored shirt. The assailant had long, curly hair.

While taking the prosecutrix to the hospital, Sgt. Sharp observed a black man fitting the description given by the prosecutrix exiting a convenience store a short distance from the prosecutrix's apartment. Sgt. Sharp asked the prosecutrix if that man was her assailant and she said, "Yes, that's him." The man, the defendant, had on red knit pants, and a dark colored shirt. He had long curly hair and the zipper on his pants was open. The prosecutrix identified the defendant in court as her assailant.

A rectal examination performed upon the prosecutrix later that morning revealed several small fissures in the skin around

the prosecutrix's anus and one fairly large fissure in the posterior wall of the anus. A rectal smear taken from the prosecutrix and the prosecutrix's t-shirt that she was wearing at the time of the attack both tested positive for the presence of spermatozoa.

Defendant presented no evidence, except to question the prosecutrix's identification of her assailant, by showing through cross-examination, that the bedroom was not well-lighted by the morning sun, that the prosecutrix was disoriented, having just been awakened, and that the prosecutrix only observed her assailant for two minutes while struggling with him.

After retiring to deliberate at 4:05 p.m., the jury returned to the courtroom at 4:42 p.m. and asked the trial judge whether they would have to find the defendant guilty if they were unable to reach an unanimous verdict. The court told the jurors that any decision they made, whether guilty or not guilty, had to be unanimous. When the jury foreman indicated that the court's response did not answer the jury's question, the court further instructed the jury as follows:

> Now ladies and gentlemen, your foreman has informed me that so far you have been unable to reach a verdict in this case. I want to emphasize to you the fact it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women, and to reconcile your differences, if you can, without the surrender of any conscious conviction. No juror should surrender his honest conviction to the weight of the effect of the evidence solely because of the opinion of his fellow jurors as to the mere purpose of returning a verdict. I will let you now resume your deliberations to see if you cannot reach a verdict.

After ascertaining the numerical division of the jury, 6-6, the trial court dismissed the jurors at 4:47 p.m. to deliberate further. The jurors deliberated until 5:19 p.m., when they were excused to go home. The next morning the jurors began deliberations at 9:31 a.m. and returned with their verdict of guilty on both charges at 9:54 a.m.

[1] Defendant contends that the trial court erred in refusing to give his requested instruction that in the event that the jurors were unable to reach a unanimous decision, they should com-

municate it to the court, and the court would take appropriate action. Defendant also argues that the court should have instructed the jury that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors.

Although it would have probably been better practice for the trial court to have given the aforementioned instructions, the trial court's failure to give them does not constitute prejudicial error under the circumstances of this case. *See State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). The jury had been gone only 37 minutes when they returned with a question. This hardly indicates that the jury was hopelessly deadlocked. The charge the court gave made it clear that a juror was to discuss the matter with the other jurors and to reconcile their differences, but not to surrender his convictions purely for the sake of arriving at an unanimous verdict. This Court recently upheld a charge identical to the one given in the present case in *State v. Sandlin*, 61 N.C. App. 421, 300 S.E. 2d 893, *disc. rev. denied*, 308 N.C. 679, 304 S.E. 2d 760, *cert. denied*, 52 U.S.L.W. 3422, 78 L.Ed. 2d 685, 104 S.Ct. 491 (1983). The charge contains no element of coercion which would require a new trial.

[2] We also reject defendant's argument that a judicial inquiry into the numerical division of a deliberating jury has a coercive effect and should be prohibited in every case. This argument was not made the subject of any assignments of error or exceptions in the record, and therefore this issue is not properly before this Court. N.C. App. R. 10(a); *State v. Kidd*, 60 N.C. App. 140, 298 S.E. 2d 406 (1982), *disc. rev. denied*, 307 N.C. 700, 301 S.E. 2d 393 (1983). Even if the issue was properly raised, this Court rejected an identical argument in *State v. Yarborough*, 64 N.C. App. 500, 307 S.E. 2d 794 (1983). In *Yarborough* we held that the appellate court must examine the trial court's inquiry in the context of the totality of the circumstances to determine whether the trial judge's inquiry was coercive or whether the jury's verdict was in any way affected by the inquiry. Considering the circumstances of this case, of a 6-6 vote after only 37 minutes of deliberation, we conclude that the trial court's inquiry was not coercive and did not affect the jury's verdict.

Defendant's remaining assignments of error relate to the trial court's findings of factors in aggravation pursuant to the Fair Sentencing Act. These assignments are overruled.

[3] Defendant first contends that the trial court erred, in sentencing defendant for second degree sexual offense, in finding as an aggravating factor that the offense was especially heinous, atrocious or cruel, on the ground that the finding was not supported by a preponderance of the evidence. We disagree.

In *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983) our Supreme Court recently announced a test for determining whether an offense was especially heinous, atrocious, or cruel for the purposes of the Fair Sentencing Act. The Court stated that "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" (Emphasis theirs.) 309 N.C. at 414, 306 S.E. 2d at 786. The court went on to state, "we do not consider it inappropriate in any case to measure the brutality of the crime by the extent of the physical mutilation of the body of the deceased or surviving victim." 309 N.C. at 415, 306 S.E. 2d at 787.

For the purposes of sentencing under the Fair Sentencing Act, a preponderance of the evidence

> does not mean number of witnesses or volume of testimony, but refers to the reasonable impression made upon the [mind] of the [sentencing judge] by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and means of knowledge, and other attending circumstances. . . .

State v. Ahearn, 307 N.C. 584, 596, 300 S.E. 2d 689, 697 (1983), quoting 2 Stansbury's North Carolina Evidence § 212 (Brandis Rev. 1973). Unquestionably, the prosecutrix's anus was mutilated as the record shows that the prosecutrix sustained several small fissures in the skin around her anus and one fairly large fissure at the posterior wall of the anus. The placement of the pillow over the prosecutrix's head, thereby adding to the prosecutrix's ordeal, was an activity not normally present in a sexual offense. The prosecutrix could have smothered to death. Finally, the sentencing judge was best able to judge the demeanor of the victim. We

hold that the trial court's finding was supported by the preponderance of the evidence.

[4] Defendant's final argument is that the trial court erred in finding as an aggravating factor that defendant had prior convictions for offenses punishable by more than 60 days imprisonment because there was no evidence or findings of fact as to defendant's indigency or representation by counsel at the time of the prior convictions. We reject this argument since defendant did not object to the admission of evidence of his prior convictions and did not raise the issue of indigency and lack of counsel at the sentencing hearing. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

In the trial and sentence of defendant, we find

No error.

Judge HEDRICK concurs.

Judge EAGLES concurs in part and dissents in part.

Judge EAGLES concurring in part and dissenting in part.

I concur with the majority that the trial was without prejudicial error but respectfully dissent from the portion of the majority opinion which holds that the trial court could properly consider as an aggravating factor its finding that "the offense was especially heinous, atrocious or cruel."

The loathsome nature of the defendant's misconduct is without dispute but in light of our Supreme Court's decisions in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), and *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), I am constrained to say that the conduct of the defendant, while repulsive, brutal, painful and injurious to the victim, was nevertheless not "especially heinous, atrocious or cruel" for purposes of the Fair Sentencing Act. The majority seems to disregard the *Blackwelder* requirement that "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" (Emphasis theirs.) --- N.C. at ---, 306 S.E. 2d at 786.

While an assault culminating in forced non-consensual anal intercourse under the facts here is undoubtedly physically painful, psychologically damaging and dehumanizing, there is no evidence in this record to show that the misconduct here was any worse than "normally present in that offense." I would vote to remand for resentencing.

LEONARD E. WARNER, INC. v. NISSAN MOTOR CORPORATION IN U.S.A. AND TRIAD DATSUN, INC.

No. 8221SC1320

(Filed 17 January 1984)

1. **Injunctions § 16; Rules of Civil Procedure § 65— recovery on bond posted for temporary restraining order**

The trial court properly allowed the intervenor to recover damages of $15,000.00 from plaintiff pursuant to plaintiff's bond posted for a temporary restraining order prohibiting the national distributor of Datsun automobiles from establishing the intervenor or anyone else as a dealer in plaintiff's alleged sales area where plaintiff voluntarily withdrew its request for a preliminary injunction, since such voluntary withdrawal should be construed as the equivalent of a final determination that plaintiff was not entitled to the temporary restraining order. G.S. 1A-1, Rule 65.

2. **Injunctions § 16; Rules of Civil Procedure § 65— bond for temporary restraining order—recovery by intervenor—motion to intervene allowed after order expired**

An intervenor was not ineligible for recovery on plaintiff's bond posted for a temporary restraining order prohibiting the national distributor of Datsun automobiles from establishing the intervenor or anyone else as a Datsun dealer in plaintiff's alleged sales area because the motion to intervene was not granted, and the intervenor was thus not a named party, until after the temporary restraining order had expired.

APPEAL by plaintiff from *Brewer, Judge.* Order entered 20 September 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 November 1983.

This is an appeal from that part of an order allowing the intervenor, Triad Datsun, to recover damages from plaintiff in the sum of $15,000.00 pursuant to plaintiff's bond posted for a temporary restraining order.

Hutchins, Tyndall, Doughton and Moore, by Richard Tyndall, for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by David W. Moore, II and Stephen W. Earp, for defendant Nissan Motor Corporation.

White and Crumpler, by Randolph James and Craig B. Wheaton, for intervenor appellee.

HILL, Judge.

On 14 March 1980, plaintiff filed a complaint alleging that the defendant, Nissan Motor Corporation (hereinafter "Nissan"), the national distributor of Datsun vehicles, had (1) violated a franchise agreement between Nissan as franchisor and plaintiff as franchisee by refusing to supply plaintiff with an adequate supply of Datsun vehicles and by granting an additional franchise in plaintiff's sales locality; (2) violated G.S. 20-305(5) by granting this additional franchise before a hearing could be held by the Division of Motor Vehicles; and (3) violated G.S. 75-1.1 by engaging in unfair methods of competition and deceptive business practices. Plaintiff requested monetary relief and a permanent injunction prohibiting Nissan from violating the franchise agreement by establishing or supplying another dealer in plaintiff's sales locality. Plaintiff asked that its complaint be treated as a motion and affidavit for a temporary restraining order pursuant to G.S. 1A-1, Rule 65(c) of the North Carolina Rules of Civil Procedure.

On this same day, the court granted plaintiff's motion and issued a temporary restraining order which restrained Nissan from establishing Triad Datsun, Inc. (hereinafter "Triad"), or any other dealer in plaintiff's alleged sales area, and from shipping or delivering any Datsun vehicles, parts or accessories to Triad or any other dealer in this area. The court ordered that plaintiff set a $3,000.00 bond pursuant to Rule 65(c). The order was to expire on 24 March 1980 but was eventually extended until 1 April 1980.

On 17 March 1980, Triad, although not a named party to the lawsuit on that date, was served with the temporary restraining order and was notified that a hearing had been scheduled to determine whether a preliminary injunction should issue during the pendency of plaintiff's action. The Restraining Order provided the defendant be restrained: "9. From doing any act which could or

might aid Triad Datsun, Inc. in opening its doors for the sales and/or service of Datsun vehicles, parts and accessories." From the time of service Triad was on notice the Restraining Order affected it specifically. Having been placed on notice, it thereafter would have been subject to the provisions of the order as a basis for contempt. See *Cotton Mills v. Local 578*, 251 N.C. 218, 111 S.E. 2d 457 (1959). Two days later, Triad filed a motion to intervene pursuant to G.S. 1A-1, Rule 24(a)(2) claiming that its interests were not being adequately represented by the existing parties. Triad claimed it was to have opened for business on 17 March 1980 and would suffer monetary losses each day until the restraining order expired. Triad also moved that plaintiff's bond be increased to $40,000.00.

The court on its own motion ordered that the bond be increased to $15,000.00 and that it be "extended in all respects to protect the defendant and any other parties which the law might allow." Beginning 1 April 1980, the court heard Triad's motion to intervene, plaintiff's motion for a preliminary injunction, and a later motion by plaintiff that a preliminary injunction not be entered until after the Division of Motor Vehicles had held the hearing required by G.S. 20-305(5) to determine whether Nissan should be allowed to grant an additional franchise near plaintiff's sales locality. During the course of the hearings, the court indicated its willingness to grant a preliminary injunction for a limited period of time conditioned upon a substantially higher bond.

In a comprehensive order dated 9 April 1980, the court ordered: (1) that the Division of Motor Vehicles hold the required hearing within thirty days to determine the franchise rights of the parties; (2) that Triad's motion to intervene be granted; (3) that plaintiff's motion to defer a ruling on the preliminary injunction be denied; and (4) that plaintiff's motion that a preliminary injunction not issue be granted. Subsequently, the Division of Motor Vehicles held the required hearing and determined the issues adversely to the plaintiff.

Next, both Nissan and Triad filed motions for summary judgment which were granted in part by the court in its order dated 20 September 1982. The only issue left for dispute was whether Nissan breached its franchise agreement by failing to supply

plaintiff with an adequate supply of Datsun vehicles. In this order, the court granted a motion by Triad to recover damages of $15,000.00 pursuant to plaintiff's bond. Plaintiff appealed.

Plaintiff assigns as error the court's granting of Triad's motion to recover damages pursuant to plaintiff's bond. This appeal requires that we consider Rule 65(c) of the North Carolina Rules of Civil Procedure which reads as follows in pertinent part:

> (c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

G.S. 1A-1, Rule 65. Rule 65(e) provides that damages may be awarded without a showing of malice or want of probable cause on the part of the plaintiff in the procurement of the restraining order. G.S. 1A-1, Rule 65(e).

The purpose of the security requirement is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief. *Keith v. Day,* 60 N.C. App. 559, 299 S.E. 2d 296 (1983). Similarly, it has been suggested that the purpose of the bond is to require that the plaintiff assume the risk of paying damages he causes as the "price" he must pay to have the extraordinary privilege of a temporary restraining order or preliminary injunction. Dobbs, Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?, 52 N.C. L. Rev. 1091, 1149 (1974).

The question of when recovery on a bond posted under Rule 65 is proper has rarely been addressed by our courts. It has been held that in interpreting Rule 65(c) we may look to federal decisions for guidance. *See Keith v. Day, supra* at 560-61. In *Page Communications Engineers, Inc. v. Froehlke,* 475 F. 2d 994 (4th Circuit, 1973), it was held that the court in considering the matter of damages is bound to effect justice between the parties, avoiding any result that would be inequitable or oppressive for either party. 475 F. 2d at 997. However, our research has disclosed that the precise issues raised by the plaintiff here have not been addressed by the federal courts. Therefore, we must consider the

issues raised herein on the basis which provides the result most consonant with proper public policy and the purpose of the rule.

[1] In its first argument, plaintiff contends the court erred in awarding Triad recovery on the bond without determining that plaintiff was not entitled to the temporary restraining order or that circumstances existed equivalent to a final judgment that the order was wrongfully issued. We disagree.

It is established that recovery under Rule 65 may not be granted until "the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision." *Blatt Co. v. Southwell*, 259 N.C. 468, 471, 130 S.E. 2d 859, 861 (1963). *Blatt* was decided under the old North Carolina provisions concerning the recovery of security posted on restraining orders. *See former* G.S. 1-496, 1-497. But the Supreme Court has indicated in *Electrical Workers Union v. Country Club East*, 283 N.C. 1, 194 S.E. 2d 848 (1973), by quoting the *Blatt* decision that case authority decided under the former provisions is controlling as to cases arising under the current Rule 65.

In *Blatt*, the court cited numerous jurisdictions for the proposition that "the voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought." 259 N.C. at 472, 130 S.E. 2d at 862. This proposition has been accepted in certain federal courts as well. *See Middlewest Motor Freight Bureau v. U.S.*, 433 F. 2d 212 (8th Circuit, 1970), *cert. denied*, 402 U.S. 999, 29 L.Ed. 2d 165, 91 S.Ct. 2169 (1971); *Golden Gate Mechanical Contractors Association v. Seaboard Surety Co.*, 389 F. 2d 892 (9th Circuit, 1968).

In the present case, the court gave the following reasons for the granting of Triad's motion: (1) Triad had been restrained pursuant to Rule 65; (2) had sustained damages in at least the sum of $15,000.00; and (3) plaintiff had withdrawn its request for a preliminary injunction. Plaintiff argues the 20 September 1982 order of the court was not a final adjudication that plaintiff was not entitled to the temporary restraining order, nor was it equivalent to such a decision. Plaintiff contends that because no such finding of wrongful or improvident enjoinment was made, it was error for the court to allow recovery on the bond.

We reject plaintiff's argument because it totally ignores the effect of plaintiff's voluntary withdrawal of its request for a preliminary injunction. Such voluntary withdrawal in the circumstances of this case should be treated similarly to a voluntary dismissal and construed as the equivalent of a final determination that plaintiff was not entitled to the restraining order. It is clear from plaintiff's actions that it was unwilling to post the higher bond required by the court because of its lack of faith in its claims. This is indicated in part by the plaintiff's desire to have the court's ruling on the issuance of the preliminary injunction deferred until after the Division of Motor Vehicles had determined the merits of plaintiff's claims. Additionally, the fact the Division of Motor Vehicles decided the issues adversely to plaintiff supports a conclusion that the restraint was wrongful. We hold that plaintiff's voluntary withdrawal of its request in the circumstances of this case was sufficient to permit the court to allow recovery on the bond.

[2] Secondly, plaintiff argues the court erred in determining that Triad was eligible under Rule 65 for recovery on the bond when Triad's motion to intervene was not granted until after the temporary restraining order had expired. Rule 65(c) provides the bond is posted for the payment of such damages as may be incurred "by any *party* who is found to have been wrongfully enjoined or restrained." (Emphasis added.) The essence of plaintiff's argument is that Triad should not be allowed to recover on the bond because it was not a named party in the action until after the temporary restraining order had expired. This argument is meritless.

It would defeat justice and the very purpose of the bond to bar Triad from recovery merely because the court was unable to hear its motion to intervene until after the order had expired. By intervening, Triad became a party to the action and thus was eligible for recovery under Rule 65. After intervention, an intervenor is as much a party to the action as the original parties are and has rights equally as broad. 59 Am. Jur. 2d Parties § 177, § 181 (1971).

Although Nissan was technically the party restrained by the restraining order, Triad was also restrained as a practical matter. Triad was totally precluded from conducting its business and suf-

fered severe monetary losses as a direct result of such restraint. It is apparent that the court intended Triad to be a party to the bond itself. In the Order filed 25 March 1980 the trial judge found, *inter alia*, ". . . that the Court heard from the plaintiff and the defendant and from Triad Datsun, Incorporated, who has filed a Motion to Intervene and argued for an increase in the bond heretofore posted . . . ." In the order proper the judge decreed ". . . that the Bond heretofore posted and hereby increased to the sum of $15,000.00 is hereby extended in all respects to protect the defendant *and any other parties* which the law might allow . . . ." (Emphasis ours.)

Prior to the rules, an intervenor was forced to "take the case as he finds it," meaning he could not enlarge on the issues then existing. This is no longer true. Once an intervenor becomes a party, he should be a party for all purposes. *See generally* Shuford, *N.C. Civil Practice and Procedure*, § 24-11, p. 203. *In re Raabe, Glissman & Co., Inc.*, 71 F. Supp. 678 (S.D.N.Y. 1947).

The Order of the court granting Triad recovery on the bond is

Affirmed.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. SAMUEL L. LOFTON

No. 8212SC1200

(Filed 17 January 1984)

1. Receiving Stolen Goods § 5.1— possession of stolen property—sufficiency of evidence

The evidence was sufficient to convict defendant of possession of stolen property under G.S. 14-71.1 or possession of a stolen vehicle under G.S. 20-106 where the evidence tended to show that defendant had a key which he used to unlock the vehicle's trunk; defendant's clothing was in the trunk; his checkbook and loan agreement bearing defendant's address were in the glove compartment; and although defendant was never seen actually driving the vehicle, the evidence showed that defendant, whether alone or in conjunction with his brother, had control and possession of the vehicle. Further, there was

plenary evidence that defendant knew or had reason to believe that the vehicle was stolen, and the most damaging evidence was the fact that when a deputy sheriff pulled into the parking lot where the stolen vehicle was, defendant fled.

2. **Criminal Law § 111— instructions from Bible—no reversible error**

Although the trial judge's recitation of a proverb in his charge to the jury on the legal implications of defendant's flight was inappropriate, the judge's charge, as a whole, was fair and clear, and defendant failed to meet his burden of showing prejudice.

3. **Criminal Law § 138— aggravating factor—false testimony at trial—improperly considered**

The trial judge erred in concluding that defendant gave false testimony and in considering this as an aggravating factor in sentencing where the only evidence that defendant lied was the contradictory testimony given by the State's witnesses.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 15 July 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 31 August 1983.

Defendant was charged with possession of stolen property. After a jury trial, defendant was convicted and sentence imposed. Defendant appeals.

The State's evidence tended to show:

Roosevelt Benjamin Chisolm, part-time owner of T & B Auto Sales, testified that some time between 9:00 p.m. on 22 June 1981 and 8:00 a.m. on 23 June 1981, a brown, two-door, 1975 Toyota Celica serial number RA22000404, was stolen from his lot. On 24 November 1981, Chisolm spotted the stolen Toyota parked next to a Seven-Eleven Store. Chisolm recognized the car, which had been his son's, despite numerous cosmetic changes that altered the car's appearance and lessened its fair market value from about $3,000 to $500. The radio, carpet, exterior stripes, and body side molding had been removed. The console, right front fender, and tires had been exchanged. Chisolm reported his find to the highway patrol and to the Deputy Sheriff.

Chisolm and Deputy Sheriff Raymond L. Davis further examined the vehicle. The serial numbers on the windshield and door had been removed, but the number on the hood, still intact, was RA22000404, the serial number of Chisolm's stolen Toyota.

Chisolm was able to open the door with the keys from the stolen Toyota.

Deputy Sheriff Davis checked and discovered that the tags were registered to a "Jerry Lofton" on a 1974 Toyota and that the serial number belonged to a stolen vehicle.

Chisolm opened the trunk and inside found military clothing bearing the name "Lofton." In the glove compartment was defendant's checkbook, and life and automobile insurance policies bearing the name "Jerry Lofton."

Chisolm and Davis waited to see who would claim the vehicle. At around 12:30 p.m., a car carrying defendant and two friends pulled into the Seven-Eleven parking lot. Defendant alighted, and using a key, unlocked the Toyota's trunk. He then removed some military clothing from the trunk and put them into his friend's car. Defendant was standing in the Seven-Eleven parking lot when his friend's car began to pull away.

Deputy Sheriff Davis pulled up at that point, and defendant fled. After chasing defendant on foot for over seven hundred yards, Davis caught and arrested him.

Upon arrest, Davis removed from defendant's person a military identification card bearing the signature "Jerry Lofton" but the photograph of defendant, Samuel Lofton.

Detective William W. Shuman testified that the insurance policy found in the car insured Jerry Wadale Lofton, Company C, Second 508 Infantry. Although he visited the CID unit at Fort Bragg, a search for a serviceman by that name proved unfruitful. The loan agreement, also found in the car, belonged to Jerry Wadale Lofton, whose listed address was that of defendant. Shuman testified that the photograph on the military identification card bearing Jerry Lofton's name was that of defendant.

Defendant's evidence tended to show: Defendant testified that his brother, Jerry W. Lofton, visited him in March, 1981 and stayed for four or five months. During his stay, Jerry drove a brown, two-door, Toyota Celica. On the morning of 24 November 1981, Jerry telephoned defendant, whereupon defendant asked his brother to return some clothing he had borrowed. Jerry told defendant that the clothing was in his car, parked at the Seven-

Eleven. Defendant's friends drove him to the Seven-Eleven, where defendant took his clothing from his brother's trunk and put them into his friend's car. Defendant testified that he opened the trunk without a key. He did not return to his friend's car because he was to be picked up later by someone else. Defendant fled when he saw the Deputy Sheriff because he wanted to avoid any trouble in which his friends might be involved.

Defendant's testimony was corroborated, in part, by Felix Torez, defendant's friend, who testified on cross-examination that defendant told him he had a brother and that on 24 November, Torez was in the room when defendant's brother called. After the call, defendant asked Torez to drop him off at the Seven-Eleven in order to pick up some clothes. Torez also testified that during the month of November, 1981, he had to pick up defendant for work because defendant had no transportation.

Defendant testified that he and his brother had similar builds and looks. His brother was born in 1952 and defendant was born in 1953. His brother was six feet and defendant was five feet, eleven inches. Their social security numbers and blood types were different.

Jacquelyn Lofton, defendant's wife, testified that defendant's brother, Jerry Lofton, stayed with her and her husband in late February, 1981, and that at that time, he had a brown, two-door, Toyota Celica. Upon defendant's arrest on 24 November, she and Jerry argued. She told Jerry to leave, and he never returned.

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

Richard B. Glazier, Assistant Public Defender, for defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant contends that the trial court erred in denying his motion for dismissal at the close of the State's case, there being insufficient evidence to take the case to the jury. We find no error.

Our scope of review on a motion for dismissal is to determine whether the State produced substantial evidence that the offense

charged was committed and that defendant was the perpetrator. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *see State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence, whether direct, circumstantial, or both, must be viewed in the light most favorable to the State. Only evidence favorable to the State is to be considered, and any contradictions or discrepancies are for the jury to resolve. *State v. Henderson*, 276 N.C. 430, 173 S.E. 2d 291 (1970).

A defendant charged with possession of stolen property under G.S. 14-71.1 or possession of a stolen vehicle under G.S. 20-106 may be convicted if the State produces sufficient evidence that defendant possessed stolen property (i.e. a vehicle), which he knew or had reason to believe had been stolen or taken. A defendant may be convicted under these statutes even if the State has insufficient evidence to prove the underlying larceny. *See State v. Kelly*, 39 N.C. App. 246, 249 S.E. 2d 832 (1978). This may occur, as in the case *sub judice*, when the State has no evidence as to who committed the larceny, and, due to the passage of time, has lost the probative benefit of the doctrine of possession of recently stolen property. *Id.* Although defendant contends otherwise, we find that the State produced plenary evidence of both possession and knowledge.

As to the element of possession, the evidence showed that defendant had a key which he used to unlock the vehicle's trunk. Defendant's clothing was in the trunk. His checkbook and a loan agreement bearing defendant's address were in the glove compartment. Although defendant was never seen actually driving the vehicle, the evidence showed that defendant, whether alone or in conjunction with his brother, had control and possession of the vehicle.

There was also plenary evidence that defendant knew or had reason to believe that the vehicle was stolen. Although defendant testified that his brother was driving a brown, two-door, Toyota Celica when he came to visit in March, the vehicle was not stolen until June. The State's evidence suggested that defendant, who had control and possession of the vehicle, had reason to believe, from the numerous cosmetic changes altering the car's appearance and lowering its fair market value, that the vehicle was stolen. Since June, the radio, carpet, exterior stripes, and body

side molding had been removed; the console, right front fender, and tires had been exchanged. Further question of defendant's guilty knowledge was raised by the fact that the car had been parked, unauthorized, in a Seven-Eleven parking lot.

Finally, and most damaging was the fact that when Deputy Sheriff Davis pulled into the Seven-Eleven parking lot on 24 November, defendant fled. While flight is not, in itself, an admission of guilt, it is a fact which, once established, may be considered along with other circumstances in determining a defendant's guilt. *State v. Stewart*, 189 N.C. 340, 127 S.E. 260 (1925); *State v. Swain*, 1 N.C. App. 112, 160 S.E. 2d 94 (1968); 2 Brandis on North Carolina Evidence § 178 (1982). The collective evidence, viewed in the light most favorable to the State, was not merely speculative, but substantial. Defendant's motion for dismissal was properly denied.

[2] Defendant next contends that the trial judge committed reversible error by intimating his opinion in his charge to the jury on the legal implications of defendant's flight.

As part of his charge, the trial judge instructed:

> Evidence of flight may be considered by you, the jury, together with all other facts and circumstances in this case in determining whether or not the combined circumstances amount to an admission or show a consciousness of guilt. This principle of law is illustrated by the Biblical Proverb, "That the wicked flee when no man pursuieth, [sic] but the righteous are as bold as a lion." However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

Defendant contends that the insertion of the biblical proverb into the otherwise patterned jury instruction was highly prejudicial to him.

It is well settled in this jurisdiction that a defendant has a right to trial before an impartial judge, and any expression or intimation of an opinion by the judge which prejudices the jury against defendant is grounds for a new trial. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982); G.S. 15A-1222 and 1232. The charge, however, must be viewed contextually, and whether a de-

fendant was unduly prejudiced by the trial judge's remarks is determined by the probable effect on the jury in light of all the attendant circumstances, the burden being on defendant to show prejudice. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971).

Although the judge's recitation of the proverb was inappropriate, expressions which may be erroneous when isolated are not grounds for reversal if, when considered contextually, the charge presents the law fairly and clearly. *State v. McWilliams, supra; see Rock v. Ballou*, 22 N.C. App. 51, 205 S.E. 2d 540, *modified and affirmed*, 286 N.C. 99, 209 S.E. 2d 476 (1974).

At the close of his charge, the judge explained to the jury his duty of impartiality:

> The presiding judge is to be impartial. Therefore, you are not to draw any inference from any ruling that I may have made during the course of this trial or from any inflection in my voice or from any clarifying questions I may have asked a witness on the stand or from anything else I may have said or done during this trial that I either have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved or as to whether any fact has or has not been proven or as to what your finding or verdicts ought to be. It is your exclusive province to find the true facts in this case and it is your sworn duty to render a verdict reflecting the truth as you find it to be.

The judge's charge was, as a whole, fair and clear. Defendant has not met his burden of showing prejudice.

While we find no error in the trial proceedings, there was error in defendant's sentencing hearing. Defendant's motion for appropriate relief is, therefore, granted.

In sentencing defendant in excess of the presumptive term, the trial judge found as aggravating factors defendant's prior convictions, and, in the judge's opinion, his false testimony, at trial.

Defendant argues that evidence of defendant's prior convictions was improperly admitted since there was no evidence that defendant was not indigent or that he was represented by coun-

sel. Defendant, however, had the burden at the sentencing hearing to object or move to suppress this evidence. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). Defendant, not having met his burden, cannot raise this issue on appeal.

[3] Defendant next argues that the trial judge erred in finding as an aggravating factor that defendant gave false testimony at trial. With this contention, we agree. The only evidence that defendant lied was the contradictory testimony given by the State's witnesses. On these facts, the trial judge erred in concluding that defendant gave false testimony and in considering this an aggravating factor in sentencing. *State v. Setzer*, 61 N.C. App. 500, 301 S.E. 2d 107, *review denied*, 308 N.C. 680, 304 S.E. 2d 760 (1983). We, therefore, vacate the sentence imposed and remand for a new sentencing hearing.

No error in the trial.

Remanded for resentencing.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. GEORGE WILLIAM BEAN

No. 834SC176

(Filed 17 January 1984)

1. **Criminal Law § 118— charge on contentions of the parties**

While the trial judge is not required to state the contentions of the parties, when he undertakes to do so, he must give equal stress to the contentions of both parties. Even when the defendant presents no evidence, the trial judge must summarize the evidence in the case that is favorable to the defendant, including contentions arising from defendant's plea of not guilty, from the State's evidence, and from defendant's cross-examination of the State's witnesses.

2. **Criminal Law § 118.2— charge on defendant's contentions—no expression of opinion**

The trial court's attribution to defendant of contentions that defendant was in the service and it was not uncommon for persons in the service to keep unreasonable hours and that testimony against him by the State's witness was an attempt to be vindictive and get back at defendant for something that oc-

curred between them was a legitimate attempt to develop fully the contentions of a defendant who offered no evidence and did not constitute an expression of opinion. G.S. 15A-1222 and G.S. 15A-1232.

3. **Criminal Law § 118.4— failure to state contention—error cured by instruction**

Any error in the court's failure to restate defense counsel's jury argument that the State's chief witness had arranged for defendant to be set up and wrongfully implicated was cured by the court's supplementary instruction following the recapitulation of defendant's contentions that "contentions argued to you by the attorneys and legitimately warranted by the evidence are to be considered by you in arriving at your verdict."

4. **Criminal Law § 91— speedy trial period—beginning date after appellate review**

The speedy trial time limit begins to run after appellate review on the date that the opinion of the appellate division is certified to the superior court.

5. **Criminal Law § 91— speedy trial period—delays from plea bargaining and absence of State's witness**

The trial judge properly excluded from the 120 day speedy trial period a delay of 17 days resulting from defendant's action in indicating to the district attorney that he would accept a plea arrangement and a delay of 33 days caused by the unavailability of the State's essential witness. G.S. 15A-701(b)(1) and (3); G.S. 15A-701(c).

Judge PHILLIPS concurring.

APPEAL by defendant from *Small, Judge.* Judgment entered 25 August 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 21 October 1983.

In 1980, defendant was indicted for felonious possession with intent to manufacture, sell and deliver more than one ounce of marijuana. Defendant was tried before a jury and found guilty on 18 December 1980. Defendant appealed from judgment imposing a prison sentence, and on 15 December 1981, the North Carolina Court of Appeals awarded him a new trial. The North Carolina Supreme Court denied the State's petition for discretionary review on 3 March 1982. *State v. Bean,* 55 N.C. App. 247, 284 S.E. 2d 760 (1981), *rev. denied,* 305 N.C. 303, 290 S.E. 2d 704 (1982). The Supreme Court's order denying discretionary review was certified to the Onslow County Superior Court on 12 March 1982.

Defendant was retried at the 15 August 1982 session of Onslow County Superior Court. The State presented evidence to show that defendant arranged a drug transaction with Pat Rodriguez and, pursuant to that arrangement, delivered a brown paper

bag containing marijuana to the Onslow County public landfill. Defendant offered no evidence at trial. The jury found defendant guilty, and on 25 August 1982, the trial judge sentenced him to a split term of a six month active sentence and a three to five year suspended sentence with supervised probation. On 7 September 1982, defendant filed a motion for appropriate relief, which was denied on 25 October 1982.

From judgment and denial of his motion for appropriate relief, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Barry S. McNeill, for the State.

Cameron and Cameron, by W. M. Cameron, III, for defendant-appellant.

EAGLES, Judge.

Defendant first assigns as error the trial judge's recapitulation of defendant's contentions to the jury. Defendant alleges that the trial judge attributed to the defendant contentions based on material facts not in evidence and contrary to the arguments made to the jury by defendant's attorney. We are not persuaded.

[1] A trial judge is required to "declare and explain the law arising on the evidence" and to state the evidence only to the extent necessary to explain the application of the law to the evidence. G.S. 15A-1232. While the trial judge is not required to state the contentions of the parties, when he undertakes to do this, he must give equal stress to the contentions of both parties. *State v. Spicer*, 299 N.C. 309, 315, 261 S.E. 2d 893, 897 (1980). Even when, as here, the defendant presents no evidence, the trial judge must summarize the evidence in the case that is favorable to the defendant. This includes contentions that arise from defendant's plea of not guilty, from the State's evidence, and from defendant's cross examination of the State's witnesses. *Id.* In so doing, the trial judge may not express an opinion on the evidence. G.S. 15A-1222 and 15A-1232. Our Supreme Court, recognizing the tension between the requirement to give equal stress to the contentions of both parties and the requirement that no opinion be expressed, has held that a trial judge may seek to "fully develop"

the contentions of a defendant who has offered no evidence. *State v. Spicer*, 299 N.C. at 317, 261 S.E. 2d at 899.

Defendant's counsel argued to the jury that the State's major witness, Rodriguez, gave defendant's name to law enforcement officers as his alleged source and "set up" defendant to deliver more marijuana, pursuant to a plea bargain whereby Rodriguez would receive probation for pleading guilty to the offense of sale and delivery of marijuana. Defendant's counsel asserted that Rodriguez arranged for marijuana to be placed at the public landfill during the evening of 3 September 1980 and then lured defendant to the landfill during the early morning hours of 4 September 1980.

[2] The trial judge attributed the following contentions to the defendant: that defendant was not involved with illegal drug activities; that he went to the landfill early on 4 September 1980 for valid and lawful reasons, i.e., to dump his trash; that he was in the service and that it was not uncommon for persons in the service to keep unreasonable hours; that he dumped his trash early on 4 September 1980; that he did not use the landfill as a drop point for illegal drugs; that Rodriguez had been a friend of his; that Rodriguez's testimony must be an attempt to be vindictive and to get back at defendant for something that occurred between them; and that defendant was entitled to a presumption of innocence.

[3] Defendant argues that there was no evidence that military personnel keep irregular hours or that Rodriguez's actions were vindictive. We find no prejudicial error in either of these statements but, rather, a legitimate attempt to fully develop the contentions of a defendant who has offered no evidence. Defendant also asserts that the trial judge erred in failing to restate defense counsel's jury argument that Rodriguez had arranged for defendant to be set up and wrongfully implicated. We find that any error in this regard was clearly cured by the trial judge's supplementary instruction which followed his recapitulation of defendant's contentions. He instructed the jury that:

> The attorneys for the State and the Defendant are officers of the court. They have a duty. And that one of their duties is to argue to you the contentions that are warranted by the evidence. And I would instruct you that these contentions argued to you by the attorneys and legitimately warranted

by the evidence are to be considered by you in arriving at your verdict.

The trial judge reemphasized this instruction to the jury after a request to do so by defendant's attorney. We therefore hold that the trial judge's instructions were free of opinion and did not prejudice the defendant.

Defendant's next assignment of error is that the trial court erred in denying his motion to dismiss for violation of the Speedy Trial Act. G.S. 15A-701, *et seq.* Defendant contends that the provision of G.S. 15A-701(a1)(5) requiring that the trial of a defendant shall begin "within 120 days from the date the action occasioning the new trial becomes final" dictates that the 120 days should begin to run on 3 March 1982, the date when the Supreme Court denied his petition for discretionary review. We do not agree.

[4, 5] The time limit begins to run after appellate review on the date that the opinion of the appellate division is certified to the superior court. See, *State v. Morehead,* 46 N.C. App. 39, 44, 264 S.E. 2d 400, 403, *rev. denied,* 300 N.C. 201, 269 S.E. 2d 615 (1980). The Supreme Court's order denying discretionary review was certified to the North Carolina Court of Appeals on 9 March 1982 and was certified by the Court of Appeals to the Onslow County Superior Court on 12 March 1982. Therefore, the time limit began to run on 12 March 1982. At the hearing on defendant's speedy trial motion, the trial judge properly excluded the following periods of time from computation of the 120 days: seventeen days, between 17 May 1982 and 3 June 1982, because the delay resulted from defendant's action in indicating to the district attorney that he would accept a plea arrangement (see G.S. 15A-701(b)(1) and G.S. 15A-701(c)); thirty-three days, between 3 June 1982 and 6 July 1982, because of the unavailability of the State's essential witness, Rodriguez (see G.S. 15A-701(b)(3)); and thirty-five days, between 19 July 1982 and the trial date of 23 August 1982, which defendant agrees were properly excluded. When the case came on for retrial on 23 August 1982, seventy-nine includable days had passed, a time period well within the 120 day limit specified by G.S. 15A-701(a1)(5). We find no error in the trial court's denial of defendant's motion to dismiss for violation of the Speedy Trial Act.

Defendant's final assignment of error is that the trial court improperly denied his motion for appropriate relief based on improper jury instructions. G.S. 15A-1414(b)(1)(d). We disagree. As noted above, any error in the trial judge's recapitulation of defendant's contention was cured by the judge's supplementary instruction. We find no error in the trial court's denial of defendant's motion for appropriate relief.

No error.

Judges WEBB and PHILLIPS concur.

Judge PHILLIPS concurring.

The defendant's contention that he was irretrievably prejudiced by the judge misstating his contentions gives rise to the following observations: Judicial misstatements, whether of the evidence or positions taken by a litigant, that are just begun and that are corrected at the time are usually much less harmful than those that are fully stated and corrected later; and while interrupting trial judges is neither the safest nor most pleasant task required of a trial lawyer, there are times when it cannot be avoided without harm to either the client or the process, or both. The record shows that the claimed misstatements were not called to the judge's attention until all of the several contentions mistakenly given were completed and the regular charge was over, and that the judge then told counsel he would make such corrective instructions as were requested and in fact did so. If the judge's misstatements were such that they could not be satisfactorily corrected by supplementary instructions later, counsel should have corrected the court, it seems to me, the instant that that became apparent to him, which must have been shortly after the judge took a wrong turn. Under those circumstances, which are not to be compared with routinely excepting to a portion of the charge, waiting until the charge was completed, if not a waiver, was at least an indication that the mistake was not as grievous as now contended.

STATE OF NORTH CAROLINA v. LONNELL McCONNAUGHEY

No. 8327SC219

(Filed 17 January 1984)

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

The evidence was sufficient to withstand defendant's motion to dismiss a charge of second degree murder where one witness testified that defendant pointed and fired his gun in the direction of the victim when the two were three or four feet apart, before they started wrestling, and where there was evidence that defendant may have provoked the assault by the victim, thus removing any claim of self-defense.

2. **Homicide § 30.3— failure to instruct on voluntary and involuntary manslaughter—error**

The trial judge erred in failing to instruct on voluntary manslaughter and involuntary manslaughter where defendant, in response to a request for payment by the owner of a drinking establishment, pulled out a gun and a fight ensued; where defendant and several witnesses testified that defendant did nothing to provoke the fight; that defendant neither pulled the gun out in a threatening manner nor used threatening or provoking language; that defendant testified that he did not know why the owner/victim charged toward him; where testimony from several witnesses indicated that the gun discharged during the time that defendant and the victim were wrestling; and where there was evidence tending to show that the victim was a bigger, stronger man than defendant and that the victim had a blood alcohol level of 0.14%.

APPEAL by defendant from *Saunders, Judge.* Judgment entered 5 November 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 26 October 1983.

On 13 September 1982, defendant was indicted for second degree murder in connection with the death of Joe Benny Hogue. At trial, the State and the defense presented conflicting evidence. The details of the conflicts and inconsistencies in the evidence will be discussed as necessary below. The evidence tends to show basically the following:

On 3 June 1982, defendant and several friends went to a "liquor house" owned and operated by Joe Benny Hogue, the deceased victim. Hogue was not then present but the house was being operated by another man, Tony Giles, who was Hogue's neighbor. Defendant had approximately $130.00 in cash with him. He put $40.00 in his front jeans pocket and gave his wallet, containing the rest of the money, to one of his friends to hold.

Defendant bought his friends some liquor from Giles and began playing cards. Hogue came in a short while later. Hogue had been drinking and a *post mortem* medical report showed his blood alcohol to be 0.14%.

Defendant lost some money at cards and quit playing. He ordered a round of beer for himself and his friends. The beer was delivered by Giles while Hogue was in another room. When Hogue returned, he asked who was going to pay for the beer that defendant ordered. Defendant, who was seated at the time, indicated that he had Hogue's pay, stood up and reached into the front pocket of his jeans for the money and pulled out a gun. Hogue then charged at defendant and the two of them wrestled around the room for about a minute. Sometime during the scuffle the gun discharged, wounding Hogue. Hogue and defendant fell on the floor with Hogue on top of defendant. They stopped wrestling and the gun was taken from them. Only after the wrestling had stopped did anyone realize that Hogue had been shot. When defendant saw this, he became upset and pleaded with Hogue not to die, stating that he had not meant to shoot him. Hogue bled to death within a few minutes.

Defendant and Hogue had known each other for most of defendant's life. There was testimony that there had been no previous disagreement between them and that they were in fact friends.

At the close of the State's evidence and again at the close of all evidence, defendant moved for dismissal of the second degree murder charge. The motion was denied both times. Counsel for defendant requested a jury instruction on manslaughter, but the request was denied. The jury returned a verdict of guilty on the charge of second degree murder and defendant was sentenced to fifteen years imprisonment. Motions to set the verdict aside and to declare a mistrial were denied. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Assistant Public Defender Rebecca K. Killian for defendant appellant.

EAGLES, Judge.

I

By his first assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge of second degree murder. Defendant contends that the evidence does not establish an intent to kill from which the jury could infer the malice necessary to support the charge.

In a motion to dismiss, the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). In order to withstand a motion to dismiss, the State's evidence as to each element of the offense charged must be substantial. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Substantial evidence in this context means more than a scintilla. *Id.; see State v. Weinstein*, 224 N.C. 645, 31 S.E. 2d 920, 156 A.L.R. 625 (1944) *cert. denied sub nom. Weinstein v. State*, 324 U.S. 849 (1945) (same test in motion for nonsuit). The evidence, considered in the light most favorable to the State and indulging every inference in favor of the State, must be such that a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, *reh. denied*, 444 U.S. 890 (1979); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981).

Second degree murder is the unlawful killing of a person with malice but without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). Malice may be inferred from evidence tending to show an intentional taking of human life without justification or excuse. *State v. Fleming, supra.* When a person intentionally fires a gun in the direction of another person, thereby causing the death of the other person, the killing is intentional. *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971).

[1] In the present case, there is competent eyewitness testimony from State's witness John Ross that defendant pointed and fired his gun in the direction of Hogue when the two were three or four feet apart, before they started wrestling. There is also evidence that defendant may have provoked the assault by

Hogue, thus removing any claim of self-defense. This evidence is legally sufficient to establish the necessary malice or intent to kill for a charge of second degree murder. *See State v. Woods, supra.* (Evidence that defendant pointed rifle at victim but "aimed to miss" permits inference of malice. New trial awarded on other grounds.) Construed in the light most favorable to the State, this evidence is sufficient to withstand defendant's motion to dismiss. The trial court's denial of the motion was therefore not error and defendant's first assignment is overruled.

II

[2] Defendant's second and third assignments of error concern the trial court's failure to instruct the jury on manslaughter in spite of defendant's counsel's request for the instructions. Defendant brings these assignments of error forward and addresses them separately in his brief. However, because of the similarity of the issue presented by each, we will consider them together. Defendant contends that the evidence at trial required the judge to submit to the jury the charges of voluntary manslaughter and involuntary manslaughter and to instruct the jury accordingly. We agree.

It is well established in North Carolina that a judge presiding over a jury trial must instruct the jury as to a lesser included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense. *State v. Wallace,* 309 N.C. 141, 305 S.E. 2d 548 (1983); *State v. Redfern,* 291 N.C. 319, 230 S.E. 2d 152 (1976). The judge is required to submit to the jury all lesser included offenses of which there is some evidence in the record. *State v. Palmer,* 293 N.C. 633, 239 S.E. 2d 406 (1977).

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Fleming, supra.* A person who kills another is guilty of manslaughter and not murder if the killing was committed under the influence of passion or in a state of heated blood brought on by adequate provocation. *State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135 (1971). An actual or threatened assault on the defendant constitutes sufficient provocation to induce the heated state necessary to reduce a killing from murder to manslaughter. *State v. Watson,* 287 N.C. 147, 214 S.E. 2d 85 (1975).

A closely related concept is that of imperfect self-defense. A person who kills another is not guilty of murder if the killing was an act of self-defense. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). The right to kill another in self-defense arises when the killing is or reasonably appears to be necessary in order to prevent death or great bodily harm. *Id.* Where a person who kills another in self-defense uses more force than is necessary, his right of self-defense becomes imperfect and he is guilty of voluntary manslaughter. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981); *State v. Burden*, 36 N.C. App. 332, 244 S.E. 2d 204, *rev. denied*, 295 N.C. 468, 246 S.E. 2d 216 (1978).

Involuntary manslaughter has been defined as the unlawful and unintentional killing of a human being, without malice and without premeditation and deliberation, proximately caused by (1) an unlawful act not amounting to a felony nor normally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Fleming; State v. Redfern*, both *supra*. The killing of a human being proximately resulting from the wanton or reckless handling of a firearm but without the intent to discharge the firearm is involuntary manslaughter. *State v. Wallace, supra; State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). Careless handling of a loaded firearm has been held to constitute culpable negligence. *State v. Wallace, supra*.

With these concepts in mind, we turn to the instant case. There we find evidence from which a jury could reasonably have concluded that the killing of Hogue was either voluntary or involuntary manslaughter instead of second degree murder. Defendant and several witnesses testified that defendant did nothing to provoke the fight; that defendant neither pulled the gun out in a threatening manner nor used threatening or provoking language. Defendant testified that he did not know why Hogue charged toward him. Testimony from several witnesses indicates that the gun discharged during the time that defendant and Hogue were wrestling. There is evidence tending to show that Hogue was a bigger, stronger man than defendant and could have beaten defendant in a fight. There is evidence that Hogue had been drinking and expert testimony that he had a blood alcohol level of 0.14%.

Assuming that defendant pulled the trigger and that he meant to kill or injure Hogue, there is sufficient evidence for a jury to find that defendant, having been assaulted by Hogue, was acting either in self-defense or under the influence of passion or in a heated state of blood. A verdict of guilty of voluntary manslaughter was possible and the jury should have been so instructed.

That defendant and Hogue wrestled over the gun is not in dispute. There is conflicting testimony as to who actually had control of the gun during the fight. Several witnesses testified that Hogue grabbed defendant's hands and there is testimony that the gun discharged during the fight and that, after the fight, the gun was taken from both defendant and Hogue or from Hogue alone.

Our Supreme Court has held that submission to the jury of a charge of involuntary manslaughter is prejudicial error where there is no evidence that the killing was accidental and defendant is asserting self-defense with respect to greater degrees of homicide. *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980). In that case and in subsequent cases, *e.g.*, *State v. Cason*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981); *State v. Brooks*, 46 N.C. App. 833, 266 S.E. 2d 3 (1980), the evidence shows that the defendants deliberately engaged in an act likely to result in death or serious injury. Other than the defendants' assertions that they had not meant to kill, there was no evidence that the killings were accidental. In these situations our courts have held that the resulting homicide was at least voluntary manslaughter and that submission of a charge of involuntary manslaughter was error. *Id.*

There is evidence here, however, tending to show that the gun could have discharged accidentally and that defendant did not intend to kill or injure Hogue. Here, it would have been possible to find that defendant acted carelessly and recklessly in his handling of the gun and that his actions proximately resulted in Hogue's death. The jury could have found defendant guilty of involuntary manslaughter and should have been given appropriate instructions. *State v. Wallace, supra.*

For the above reasons, we find merit in defendant's second and third assignments of error and accordingly award defendant a

New trial.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RODNEY MICHAEL DAVIS

No. 8321SC484

(Filed 17 January 1984)

1. **Arrest and Bail § 3.2; Searches and Seizures § 9— probable cause to stop vehicle—seizure of shotgun in plain view**

An officer had probable cause to stop the vehicle operated by defendant and to arrest defendant for operating the vehicle without a license upon the basis of information obtained from a computer check with the Department of Motor Vehicles that defendant had no driver's license. Even if the stop had been based solely on information received from two unnamed informants, such information was sufficiently reliable under the totality of the circumstances to provide support for a lawful detention of defendant where the police independently verified information given to them by the informants naming defendant as an alleged robber and describing defendant and the color, make and location of the car defendant was driving, and where the informants gave police accurate details of a robbery which had not been reported in the newspapers. Therefore, the officer lawfully seized without a warrant a sawed-off shotgun which he observed in plain view protruding from underneath the front seat of defendant's car when he asked defendant to exit the car. G.S. 20-183.

2. **Searches and Seizures § 34— seizure of shotgun from car—inadvertent discovery**

An officer's discovery of a sawed-off shotgun in defendant's car was inadvertent within the meaning of the plain view doctrine where the officer stopped defendant for operating a motor vehicle without a license and observed the barrel of the shotgun sticking out from under the front seat when he asked defendant to exit the car, notwithstanding the officer had received information from a radio broadcast that the person driving the car in question was considered to be armed and dangerous.

APPEAL by defendant from *Rousseau, Judge.* Judgments entered 9 December 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 December 1983.

Defendant was indicted on seven counts of armed robbery, one count of larceny of an automobile, two counts of first degree kidnapping and one count of first degree murder. Prior to trial

defendant moved to suppress evidence seized from an automobile he was driving when stopped by police officers on 17 August 1982. This motion was denied, and defendant thereafter pleaded guilty to the robbery and larceny counts, to second degree kidnapping and to accessory after the fact of murder. He was sentenced to a total of 108 years in prison.

Defendant appeals from the denial of his motion to suppress evidence found in the automobile and from the judgments and commitments.

Attorney General Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

B. Jeffrey Wood, for defendant appellant.

ARNOLD, Judge.

During the hearing on defendant's motion to suppress, the following evidence was presented: Prior to 17 August 1982 the Winston-Salem Police Department was investigating several armed robberies that had occurred in the eastern part of the city. Around noon on 17 August Detective Branscome contacted two individuals who lived in the area and questioned them about the robberies. They informed Branscome that the defendant Rodney Davis had told them about robbing people and placing them in the trunk of a vehicle. They also mentioned the robbery of an elderly man at a bus station.

At the time they were being questioned, information of the bus station robbery had not been reported in the news. Defendant was described as a black male, dark complected, 18 to 20 years of age, and between 5'6" and 5'7". Branscome was told that defendant drove a gold 1969 Plymouth and where it was parked. Branscome and other law enforcement officers later observed an automobile fitting this description and parked in the location given by the individuals. After checking with the Department of Motor Vehicles, the officers learned that the vehicle did not belong to defendant and that he did not have an operator's license. The officers watched the car for about thirty minutes and left. When they returned, it was gone. An all-points bulletin was then issued directing police to be on the lookout for a 1969 gold Plymouth with license #AES-44, driven by a person with defend-

ant's characteristics and wearing a red sweater. The police were further informed that the driver had no license and was armed.

Around 9:00 p.m. Officer Twitty spotted the Plymouth parked at a local restaurant. He observed defendant walk out of the restaurant and drive away in the Plymouth. Officer Twitty then stopped defendant for operating a motor vehicle without a license. As defendant was stepping out of the car, Twitty observed the barrel of a shotgun protruding from under the front seat. He pulled the gun out and discovered that it was a sawed-off shotgun. Defendant was arrested for driving without a license, possession of a weapon capable of mass destruction and carrying a concealed weapon. Several days later he was indicted on the armed robbery, larceny and murder charges.

In his order denying the motion to suppress evidence of the shotgun, the trial judge made findings of fact consistent with the foregoing evidence. He concluded that since Officer Twitty had probable cause to believe that defendant was operating a motor vehicle without a license, he had a right to stop defendant; and that after stopping defendant and observing the shotgun in plain view, Officer Twitty had a right to arrest defendant and to search the vehicle. The trial judge further concluded that the arrest of defendant and the seizure of the shotgun were lawful; and that none of defendant's constitutional rights were violated.

Defendant argues that his arrest was unlawful, and that the search of the automobile and seizure of items therein were unlawful. He contends that his arrest was unlawful on two grounds: (1) The police did not have probable cause to stop the vehicle operated by defendant because the information upon which they relied came from unreliable informants; and (2) defendant's arrest for a traffic violation was a mere pretext to furnish police with the opportunity to stop the automobile and to seize the shotgun without a warrant. We find no merit to either ground and affirm the denial of defendant's motion to suppress.

[1] Defendant's first ground is fallacious because the evidence showed, and the trial judge found, that Officer Twitty stopped defendant's car based upon information that defendant was driving without a license. This information was obtained from a computer check with the Department of Motor Vehicles and not from the two informants. Pursuant to G.S. 20-183, law enforcement of-

ficers have the power to stop any motor vehicle for the purpose of determining whether the vehicle is being operated in violation of the Motor Vehicle Act and to arrest on sight or upon warrant any person found violating this Act.

Even if the stop had been based solely on the information received from the unnamed informants, we believe this information was sufficiently reliable to provide support for a lawful detention of defendant. "(A) law officer . . . may lawfully detain a person where there is a need for immediate action, if, upon personal observation or reliable information, he has an honest and reasonable suspicion that the suspect either has committed or is preparing to commit a crime." *State v. Bridges*, 35 N.C. App. 81, 84, 239 S.E. 2d 856, 858 (1978). Under the totality of circumstances presented here, the informant's information was sufficiently reliable.

In a recent decision, the United States Supreme Court held that a "totality of circumstances" standard was proper for determining probable cause for issuance of a search warrant based on information received from informants. *Illinois v. Gates*, --- U.S. ---, 76 L.Ed. 2d 527, 103 S.Ct. 2317 (1983). While this decision deals with information received from an informant and its reliability to support a search warrant, we believe that the same analysis applies to a determination of the reliability of an informant's tip to support a suspect's detention.

In *Gates* the affidavit submitted in support of a search warrant was based upon an anonymous letter mailed to police. The author of this letter indicated that Gates and his wife were engaged in drug trafficking. He also gave details of an alleged imminent drug transaction. These details were later corroborated through independent police investigation. The state courts held that the letter and affidavit were inadequate to sustain a determination of probable cause for the issuance of a search warrant under the "two-pronged test" established in *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969). Under this test the affidavit must reveal the informant's basis of knowledge and provide sufficient facts to establish either the informant's credibility or reliability of the information. The Gates Court abandoned the "two-pronged test" and replaced it with a

"totality of circumstances" analysis. The Court emphasized that the informant's veracity, reliability or basis of knowledge are merely "relevant considerations in the totality of circumstances analysis." *Illinois v. Gates, supra*, --- U.S. at ---, 76 L.Ed. 2d at 545, 103 S.Ct. at ---.

Another relevant consideration emphasized by the *Gates* Court was corroboration of details in an informant's tip by independent police work. The United States Supreme Court reversed the judgment of the Illinois Supreme Court, noting that the magistrate correctly found probable cause to issue a search warrant based on the anonymous letter. The Court reasoned that this letter had been corroborated in substantial part by police efforts and contained information of a character likely obtained only from Gates or from someone familiar with Gates' plans.

Like *Gates*, the information received from the unnamed individuals in the case on appeal was substantially corroborated by an independent police investigation. The trial judge found that after the police were given defendant's name as the alleged robber, a description of defendant, and the color, make and location of the car defendant was driving, they independently verified all of this information. The trial judge further found that the informants gave the police accurate details of a robbery which had not been reported in the newspapers. This corroboration coupled with information that was of a character likely obtained from the defendant himself or from someone familiar with him, was clearly sufficient to support a lawful detention of defendant.

[2] We next find no merit to defendant's argument that his arrest on a traffic violation was a mere pretext for the officers to gain access to the automobile where they knew a shotgun would be hidden; and that his arrest and seizure of the gun were therefore unlawful. The trial judge found that Officer Twitty stopped defendant for operating a motor vehicle without a license; and that when he asked defendant to exit the car he observed the barrel of a shotgun sticking out from under the front seat. The evidence and law clearly support the conclusion that the gun was in plain view; and that the officers had a right to seize it.

The four elements of the plain view doctrine are a prior valid intrusion, inadvertent discovery, a nexus between the items and criminal behavior and plain view. *State v. Wynn*, 45 N.C. App.

267, 262 S.E. 2d 689 (1980). As earlier noted, Officer Twitty possessed the authority to stop defendant pursuant to G.S. 20-183. Defendant now argues that the "inadvertent discovery" element was not met, because the unnamed individuals had told police that a sawed-off shotgun would be underneath the front seat of the Plymouth automobile. Officer Twitty, however, testified that he stopped defendant after receiving a radio broadcast that a black male was driving a gold Plymouth without an operator's license and that he was armed and dangerous. At the time Twitty stopped defendant he did not know he was a robbery suspect or that he was armed with a sawed-off shotgun. "[T]he mere expectation that the evidence will be discovered does not negate the inadvertency element." *Id.* at 269, 262 S.E. 2d at 692. Here, Officer Twitty expected that defendant would be armed but not that he would be in possession of an illegal weapon.

This Court recently found that the inadvertency requirement of plain view was met where police officers received a telephone call from an "unknown tipster" who reported that a house near a dairy farm in Lenoir County was full of marijuana; that the officers went to the vicinity of the farm to conduct an investigation and that while looking through the screen door of a house they observed marijuana inside. *State v. Prevette*, 43 N.C. App. 450, 259 S.E. 2d 595 (1979), *disc. review denied*, 299 N.C. 124, 261 S.E. 2d 925, *cert. denied*, 447 U.S. 906, 64 L.Ed. 2d 855, 100 S.Ct. 2988 (1980). In concluding that the inadvertency requirement was met, this Court cited the following language in *State v. Howard*, 274 N.C. 186, 202, 162 S.E. 2d 495, 506 (1968): "If the officers' presence was lawful, the observation and seizure of what was then and there apparent could not in itself be unlawful." This statement equally applies to the situation here.

The denial of defendant's motion to suppress evidence seized from the automobile is

Affirmed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. PEGGY ANN HAIGHT

No. 8312SC354

(Filed 17 January 1984)

1. Homicide § 21.9— voluntary manslaughter—sufficiency of evidence

The trial court properly submitted the issue of voluntary manslaughter to the jury where the evidence tended to show that defendant was the sole proprietor of a bar in which the victim was a customer; that the victim got rowdy and defendant called a friend to come and help her close early; that as the bar was being closed, the victim started shouting at defendant and other patrons; that defendant started to swing her shotgun towards the victim, and it hit a friend on the leg and her friend "grabbed a hold of it"; that her friend pointed the gun at the victim and told him to let things cool down; that her friend put the gun in the car and started to walk around the back of the car to get into it; that defendant who, in the meanwhile had entered the front seat of the car, picked up the gun, stood up with one foot on the ground, raised the gun up and shot, hitting the victim in the chest; that the victim, although mortally wounded, chased the defendant as she ran backwards, caught her about the center of the street and began to beat defendant with his hands and fists until he fell down and died; and that defendant testified that the victim was wearing a jacket that covered his belt, and as he came toward the car he stuck his hand down in the shirt and defendant thought he was reaching for a weapon. From all the evidence it was reasonable for the jury to infer that the defendant killed the victim with a deadly weapon; that at the moment of pulling the trigger she acted in the heat of passion engendered by the victim's words and threatening behavior; and that she felt anger, rage, or furious resentment which rendered her mind incapable of cool reflection. The second theory of voluntary manslaughter, that the defendant was the aggressor without murderous intent, was supported by the fact that defendant had already gotten into her friend's automobile for the purpose of leaving the scene, that no overt act was being committed against her at the moment she picked up the gun in the car, that she had to partially step out of the car, and that she shot at close range. The third theory of voluntary manslaughter, the defendant's use of excessive force, also became a question for the jury to decide.

2. Homicide § 28.3— instructions concerning defendant as aggressor and fact that victim unarmed—no plain error

The trial court's instructions to the jury to consider whether the defendant was the aggressor and to consider whether the victim was in fact armed were not "plain error" since the evidence supported the charge. Further, no objection was made to the charge given.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 1 September 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 November 1983.

Attorney General Edmisten by Assistant Attorney General Lucien Capone, III for the State.

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

BRASWELL, Judge.

A single shot fired from a .410-gauge shotgun held in the hands of the defendant brought death to Winston McKenzie. The shooting occurred outside the Tee Pee Lounge on Gillespie Street in Fayetteville after it was closed for business, about 1:00 a.m. on 22 April 1982. From her conviction of voluntary manslaughter defendant appeals.

Since defendant admitted the shooting her brief states that the issue at trial was not who did it, but rather why it happened. She contended she acted in self-defense. The issues raised in the appeal question the sufficiency of the evidence to permit a reasonable jury to find the defendant guilty of voluntary manslaughter, and asks whether it was "plain error" for the judge to instruct the jury to consider whether the defendant was the aggressor and to consider whether McKenzie was in fact armed. We find no reversible error.

On the issue of the sufficiency of the evidence to support the conviction of voluntary manslaughter the scope of our review is established by *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930):

> The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

This case must be analyzed in conjunction with *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560, *rehearing denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed. 2d 126 (1979), and other modern cases. *State v. Earnhardt*, 307 N.C. 62, 66-67, fn. 1, 296 S.E. 2d 649, 652 (1982). In approaching this task "all of the evidence favorable to the State, whether competent or incompetent, must be deemed true; discrepancies and contradictions

therein are disregarded, and the State is entitled to every favorable inference of fact reasonably deduced from the evidence." *State v. Hageman*, 56 N.C. App. 274, 281, 289 S.E. 2d 89, 94, *affirmed*, 307 N.C. 1, 296 S.E. 2d 433 (1982).

As we look to the evidence we find it is undisputed that the defendant fired the shot from her .410-gauge shotgun, a deadly weapon, which killed McKenzie. The shot to the chest perforated the vena cava and the right lung, leading to death from bleeding and shock. To Officer Tiernan she said, "I shot him." The shot pattern indicated to an S.B.I. firearms expert that the .410-gauge shotgun was fired from a distance of three to eight feet from the victim.

Among the possible verdicts submitted to the jury were guilty of second-degree murder or voluntary manslaughter. Malice is an element of second-degree murder. It is the law that when a defendant admits, or when the State proves beyond a reasonable doubt that a killing is done with a deadly weapon, that a jury may infer that such killing was both unlawful and done with malice. The State's evidence did not reveal the issue of self-defense or heat of passion. The State's evidence was fully sufficient to take the case to the jury on second-degree murder.

It was through the defendant's evidence that the offense is shown to have been mitigated to voluntary manslaughter, which offense does not require malice, but which may be evidenced by a showing that the defendant acted in the heat of passion upon adequate provocation. In addition, "[v]oluntary manslaughter is . . . committed if the defendant kills in self-defense but uses excessive force under the circumstances or was the aggressor without murderous intent in bringing on the fight in which the killing took place." N.C.P.I. Crim. 206.10, p. 8 (Replacement June 1983).

[1] The sufficiency of the evidence for voluntary manslaughter is demonstrated through the testimony of three eyewitnesses offered by the defendant, and by the defendant herself, all taken in conjunction with the State's evidence.

Defendant was the sole proprietor of the Tee Pee Lounge. McKenzie came as a customer about 9:00 p.m. Donna Nobles, another customer, bought McKenzie two beers, and when she refused to buy him a third, was called a "fat bitch." Things then got

rowdy. Twice defendant called McKenzie down for harassing other customers. As defendant got concerned that McKenzie might cause more trouble, she called her close friend William McLaughlin to come and help her close early.

McLaughlin arrived about 1:00 a.m., and he and defendant closed the business. As McLaughlin was locking the front door, McKenzie grabbed Donna Nobles by the shoulders and shook her, saying words to the effect that she should tell her friends, "you been shook by a nigger." Nobles then got into the back seat of McLaughlin's automobile, parked a few feet from the front door of the Lounge.

McKenzie turned his verbal abuse to the defendant and was moving toward her as she and McLaughlin started to the car. Defendant was carrying her shotgun. McLaughlin was carrying the daily receipts and a paper bag with some beer. McKenzie referred to the shotgun as a "pea shooter," and commented "[t]hat ain't shit. I'll take it and ram it up your ass." He also crudely proposed to have sexual intercourse with the defendant's "gray-headed mammy." He was calling her "all kinds of bitches and things."

In the face of this background defendant started to swing her shotgun toward McKenzie. The gun hit McLaughlin on the leg, and he "grabbed a'hold of it." McLaughlin guessed she was going to shoot McKenzie "because he was calling her all kinds of bitches and things, you know." McLaughlin pointed the gun at McKenzie and told him to "[l]et's let things cool down and you go on home and we'll go on home." McKenzie pushed the gun away, told McLaughlin he was afraid to shoot and "didn't have nerve enough," calling McLaughlin's bluff. McLaughlin put the gun in the car and started to walk around the back of the car and get into it. The defendant who, in the meanwhile had entered the front seat of the car, picked up the gun, stood up with one foot on the ground, raised the gun up and shot, hitting McKenzie in the chest. After the shooting, McKenzie, although mortally wounded, chased the defendant as she ran backwards. He caught her about the center of the street and began to beat defendant with his hands and fists, and then fell down and died.

The defendant explained that McKenzie was wearing a jacket that covered his belt. As he came toward the car he stuck his hand down in his shirt. Defendant, thinking he was reaching for a

weapon, was afraid that the victim was going to harm her seriously and that in order to stop him she had to shoot him. No weapon was found afterwards.

From all the evidence we hold that it was reasonable for the jury to infer that the defendant killed McKenzie with a .410-gauge shotgun, a deadly weapon; that at the moment of pulling the trigger she acted in the heat of passion engendered by the victim's words and threatening behavior; and that she then felt anger, rage, or furious resentment which rendered her mind incapable of cool reflection. Her fear of a threatened assault also provided the basis for heat of passion action upon adequate provocation, which negated the malice of second-degree murder and supported the first theory of voluntary manslaughter. *See State v. Pope*, 24 N.C. App. 217, 222, 210 S.E. 2d 267, 271 (1974), *cert. denied*, 286 N.C. 419, 211 S.E. 2d 799 (1975); *State v. Spicer*, 50 N.C. App. 214, 273 S.E. 2d 521, *appeal dismissed*, 302 N.C. 401, 279 S.E. 2d 356 (1981).

The second theory of voluntary manslaughter, that the defendant was the aggressor without murderous intent, is supported by the fact that the defendant had already gotten into McLaughlin's automobile for the purpose of leaving the scene, that no overt act was being committed against her at the moment she picked up the gun in the car, that she had to partially step out of the car to shoot, and that she shot at close range. The victim was also unarmed. Proper instructions on self-defense were given, and it was for the jury to decide if she became the aggressor. Likewise, on the third theory of voluntary manslaughter, the defendant's use of excessive force, also became a question for the jury to decide. As an issue of fact, only the jury could properly determine the reasonableness of the force used. Under any of the three theories, the evidence was sufficient to permit a reasonable jury to find the defendant guilty of voluntary manslaughter.

[2] As to the second issue presented for review, we hold that the trial court's instructions to the jury to consider whether the defendant was the aggressor and to consider whether McKenzie was in fact armed were not "plain error." In fact, it was not any brand of error because the evidence supported the charge. Furthermore, we note that after the jury had been charged, but before their deliberations or verdict, the trial judge immediately stated outside the presence of the jury:

COURT: Gentlemen, you may now state your objections to errors, omissions, and misstatements, or raise any other matter concerning the instructions that you desire. Mr. Richardson.

MR. RICHARDSON: Your Honor, the State is content.

COURT: Mr. Brady. [The trial counsel, there being different counsel on appeal.]

MR. BRADY: *We have no objections, your Honor, at all.* [Emphasis added.]

The brief makes plain that the objection to the instruction concerning the aggressor is bottomed on an allegation of the insufficiency of the evidence. We merely point to the recital of the evidence earlier to demonstrate a sufficiency of facts to support the charge. In giving this instruction the judge was properly applying the law to the evidence. We observe that in neither *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), which opinion created the "plain error" rule as to Rule 10(b)(2), N.C. Rules of App. Proc., nor *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), which extended the "plain error" rule to encompass Rule 10(b)(1), N.C. Rules of App. Proc., did the Supreme Court find "plain error" to exist.

The challenge to the instruction that the jury was to consider whether the victim had a weapon is without merit. Although the evidence shows no weapon was found on or belonging to the victim, the defendant and another witness had testified to seeing McKenzie stick his hands down in his shirt. This fact inferentially caused the defendant to reasonably apprehend and fear an assault upon her. The instruction as given sufficiently covered the doctrine of apparent necessity in the overall instructions on self-defense. As further stated in *Odom, supra*, at 660-61, 300 S.E. 2d at 378, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."

No error.

Judges ARNOLD and HILL concur.

WILLENE PATTERSON v. DAC CORPORATION OF NORTH CAROLINA, FIRST SECURITY AND MORTGAGE COMPANY, ALVIN LONDON, MID-SOUTH COMMERCIAL COMPANY, ALLAN MILES, LOGAN PORTER AND SALLIE B. PORTER

No. 8219DC1317

(Filed 17 January 1984)

1. Appeal and Error § 6.2— summary judgment for fewer than all defendants—appeal not premature

Where plaintiff alleged that each defendant is liable on each claim and that defendants' actions were interrelated, plaintiff had a substantial right to have all her claims against all defendants considered together, and the trial court's order allowing summary judgment for fewer than all defendants affected a substantial right of plaintiff and was immediately appealable because of the possibility of a second trial on the same issues and of inconsistent verdicts in the two trials. G.S. 1-277; G.S. 7A-27(d).

2. Mortgages and Deeds of Trust § 39— action for wrongful foreclosure—statute of limitations

Plaintiff's claim for wrongful foreclosure was barred by the statute of limitations where it was filed more than three years after the property was transferred to a third party.

3. Consumer Credit § 1— action for truth-in-lending violations—statute of limitations

Plaintiff's claim based on alleged violations of the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, was barred by the statute of limitations where it was commenced more than one year after the transactions were entered into, and plaintiff's contention that her claim was in the nature of a counterclaim and should be allowed even though barred by the statute of limitations was untenable.

4. Usury § 4— statute of limitations for usury

Plaintiff's claim to recover a penalty for usurious interest on a loan secured by a deed of trust on plaintiff's home was barred by the statute of limitations where it was commenced more than two years after plaintiff's last payment on the loan. Where the lender foreclosed on plaintiff's property and conveyed its interest to a third party, and plaintiff and the third party entered into an agreement a month later for plaintiff to repurchase the home, the repurchase agreement did not constitute a continuation of the original loan so that payments under such agreement constituted payments on the original loan for statute of limitations purposes.

5. Unfair Competition § 1— unfair trade practices—statute of limitations

Plaintiff's claim based on unfair and deceptive trade practices was barred by the 4-year statute of limitations of G.S. 75-16.2 where the alleged misrepresentations occurred almost six years prior to the commencement of the action.

6. Consumer Credit § 1— violations of Consumer Finance Act—claim barred by statute of limitations

Plaintiff's claim based on alleged violations of the North Carolina Consumer Finance Act, G.S. 53-164 *et seq.*, was barred by the statute of limitations of G.S. 1-52(2) where the events which formed the basis of the claim occurred more than three years prior to institution of the action.

APPEAL by plaintiff from *Montgomery, Judge.* Judgment entered 26 August 1982 in District Court, CABARRUS County. Heard in the Court of Appeals 15 November 1983.

Plaintiff appeals from allowance of defendants' motions for summary judgment.

Legal Services of Southern Piedmont, Inc., by Nancy C. Northcott and Mary Margaret Flynn, for plaintiff appellant.

Burke & Donaldson, by Arthur J. Donaldson, for DAC Corporation of North Carolina, defendant appellee.

Williams, Grady & Tuttle, by Thomas M. Grady, for Allan Miles and First Security and Mortgage Co., defendant appellees.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding and Henry C. Byrum, Jr., for Alvin London, defendant appellee.

Rutledge, Friday, Safrit & Smith, by Reginald K. Smith, for Midsouth Commercial Co., defendant appellee.

WHICHARD, Judge.

I.

Plaintiff and her husband obtained a loan in the amount of $1,400 from defendant DAC Corp. on 25 February 1975. The loan was arranged by defendant Miles in the offices of defendant First Security and Mortgage Co. It was secured by a deed of trust on plaintiff's home, which already was mortgaged to Citizens Savings and Loan Association. Defendant London was the trustee under the deed of trust. Plaintiff also purchased credit life, health, and accident insurance from Union Security Life Insurance Co.

Plaintiff and her husband subsequently fell in default on their loan payments, and the property was foreclosed on under the power of sale contained in the DAC deed of trust. The property

was purchased at the foreclosure sale on 10 October 1975 by defendant DAC Corp. for $1,948. On 29 October 1975 defendant London transferred the property to defendant DAC Corp. Thereafter on 6 November 1975 defendant DAC Corp. transferred the property to defendant Sallie Porter. She and her husband then negotiated an executory contract with plaintiff whereby plaintiff would repurchase the property. After plaintiff fell in arrears, the Porters filed an action for summary ejectment. Plaintiff alleges that the Porters' relationship with defendant Midsouth Commercial Co. is such that it renders "the actions of each of them attributable to all of them."

Plaintiff filed an answer and asserted several counterclaims in response to the summary ejectment action. She then filed a complaint asserting her claims against the other defendants and dismissing the counterclaims in favor of the claims asserted in the complaint. Plaintiff's complaint includes the following claims: wrongful acceleration and foreclosure, breach of fiduciary duties, unjust enrichment, truth-in-lending violation, usury, unfair and deceptive trade practices, and North Carolina Consumer Finance Act violation.

Plaintiff appeals from summary judgment for all defendants except the Porters.

II.

[1] Since summary judgment was granted for fewer than all defendants, and the court did not certify that there was "no just reason for delay" pursuant to G.S. 1A-1, Rule 54(b), the first issue is whether plaintiff's appeal is premature. It is "unless the order allowing summary judgment affected a substantial right." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E. 2d 405, 408 (1982); *see also* G.S. 1-277, 7A-27(d).

In deciding what constitutes a substantial right, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978). Examples of when a substantial right is affected include cases where there is a possibility of a second trial on the same issues, *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E. 2d

593, 595 (1982), and where there is a possibility of inconsistent verdicts. *Bernick, supra.*

Here, plaintiff's complaint alleges that each defendant is liable on each claim. No distinction between defendants is made. Moreover, she alleges that the defendants' actions were interrelated. Thus, if plaintiff's appeal is not allowed she may face a second trial based on the same issues. There is also a possibility of inconsistent verdicts in the two trials.

We thus hold that plaintiff has a substantial right to have her claims against all defendants considered together, and we allow the appeal.

III.

[2] Plaintiff's first and second claims are based on wrongful acceleration and foreclosure. Plaintiff now contends that these claims are based upon breach of contract. Although not conclusive, her complaint denominates the claim as wrongful foreclosure, and that theory was argued in the court below. Prior to her brief on appeal, plaintiff had not argued that her claim was based on breach of contract.

Further, "[i]t has long been a general rule that in determining the applicable statute of limitations, the focus should be upon the nature of the right which has been injured and not the remedy therefor." *Holley v. Coggin Pontiac,* 43 N.C. App. 229, 241, 259 S.E. 2d 1, 9, *disc. rev. denied,* 298 N.C. 806, 261 S.E. 2d 919 (1979). Here, plaintiff's injured right is the right not to have her property wrongfully foreclosed upon.

A claim for wrongful foreclosure accrues when the mortgagee conveys the property to a third party. *Davis v. Doggett,* 212 N.C. 589, 594, 194 S.E. 288, 291 (1937). The claim is actually based on fraud. *Massengill v. Oliver,* 221 N.C. 132, 134, 19 S.E. 2d 253, 255 (1942). Thus, the statute of limitations is three years from the date of transfer of the property to a third party, *Davis, supra,* unless plaintiff demonstrates "that she first discovered facts about the transaction which would constitute fraud within the three years prior to the filing of [the] action." *Poston v. Morgan-Schultheiss, Inc.,* 46 N.C. App. 321, 323, 265 S.E. 2d 615, 616, *cert. denied,* 301 N.C. 95 (1980). Plaintiff has failed to do this, and the

court was correct in granting defendants' motion for summary judgment as to the first two claims, which were instituted more than three years after the date of the transfer.

IV.

Plaintiff does not address in her brief the correctness of the court's ruling on her third claim, that for unjust enrichment. Any questions raised by her assignments of error as to this claim are thus deemed abandoned. N.C. R. App. P. 28(a).

V.

[3] Plaintiff's fourth claim is based on truth-in-lending violations. She contends that neither the deed of trust nor her contract with the Porters contained the disclosures required by the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* and Regulation Z, 12 C.F.R. § 226.

The applicable statute of limitations, however, is "one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). The date the transaction is entered into is the date of the violation. *Bartholomew v. Northampton National Bank of Easton*, 584 F. 2d 1288, 1296 (3d Cir. 1978); *Chevalier v. Baird Savings Assoc.*, 371 F. Supp. 1282, 1284 (E.D. Pa. 1974). Plaintiff's action was commenced more than one year after the transactions were entered into, and it thus is barred by the statute of limitations.

Plaintiff contends her claim is in the nature of a counterclaim and should be allowed even though barred by the statute of limitations. 15 U.S.C. § 1640(e); *see also* G.S. 1-47(2). Although failure to denominate a claim as a counterclaim does not preclude its treatment as such, *McCarley v. McCarley*, 289 N.C. 109, 114, 221 S.E. 2d 490, 494 (1976), plaintiff's claim clearly is not a counterclaim. Plaintiff originally filed an answer and counterclaim in response to the summary ejectment action, but she dismissed them. She then filed the complaint which instituted this action. Until plaintiff filed her complaint, there was no action pending in which defendants for whom summary judgment was granted were involved.

Plaintiff's contention that her claims should be treated as a counterclaim is untenable. The court thus was correct in allowing

defendants' motion for summary judgment as to plaintiff's fourth claim.

VI.

[4] Plaintiff's fifth claim is based on usury. She contends that the interest rate on the loan obtained from DAC Corp. exceeded the legal rate. G.S. 1-53(2) provides that an action to recover the penalty for usurious interest must be brought within two years from the time a cause of action accrues. The action accrues at the time the payment is made. *Henderson v. Finance Co.*, 273 N.C. 253, 264, 160 S.E. 2d 39, 47 (1968). Here, plaintiff's last payment under the DAC loan was made more than two years prior to the commencement of this action. The action is thus barred by the statute of limitations.

Plaintiff contends, however, that the executory contract she entered with defendants Porter was actually a continuation of the DAC loan. Since plaintiff made a payment to defendants Porter within two years prior to the commencement of this action, she argues her claim is not barred, citing *Henderson v. Finance Co., supra.*

Henderson clearly is distinguishable, however. Defendant there foreclosed on plaintiff's property, and contemporaneously therewith entered into a "rent" agreement with plaintiffs. The Court held that the "rent" agreement was in reality a continuation of the mortgage. *Id.* at 261, 160 S.E. 2d at 45.

Here, defendant DAC Corp. foreclosed on plaintiff's property and conveyed its interest to defendant Sallie Porter. Almost a month later plaintiff entered into an agreement with defendants Porter. We thus hold that the agreement with defendants Porter was not a continuation of the DAC loan. Plaintiff's fifth claim is barred by the statute of limitations, and the court was correct in granting summary judgment thereon.

VII.

[5] Plaintiff's sixth claim is based on unfair and deceptive trade practices. She contends defendants induced her to execute the note and deed of trust by misrepresenting that the insurance contract would cover any loan payments plaintiff was unable to make because of death, illness, or disability.

The statute of limitations on this claim is four years. G.S. 75-16.2. Since the alleged misrepresentations occurred almost six years prior to commencement of this action, plaintiff's sixth claim is barred by the statute of limitations.

VIII.

[6] Plaintiff's seventh claim alleges violations of the North Carolina Consumer Finance Act, G.S. 53-164, *et seq.* Since the Act establishes a private right of action for its violation, and does not prescribe a different period of limitation, the action is one created by statute which is subject to a three year statute of limitations. G.S. 1-52(2). The alleged events which form the basis of this claim occurred more than three years prior to institution of the action, and this claim thus is also barred by the statute of limitations.

For the foregoing reasons, we hold that the court correctly granted defendants' motions for summary judgment.

Affirmed.

Judges HEDRICK and BECTON concur.

PAUL STAM, JR., AND WIFE, DOROTHY MILLS STAM v. JAMES B. HUNT, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA AND DIRECTOR OF THE BUDGET; JOHN A. WILLIAMS, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS STATE BUDGET OFFICER; GEORGE LAMBERT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS STATE DISBURSING OFFICER; RUFUS EDMISTEN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; SARA MORROW, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA; JOHN SYRIA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF SOCIAL SERVICES OF THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 8310SC55

(Filed 17 January 1984)

Statutes § 1— action seeking injunction against expenditures for abortions—summary judgment proper

The trial court properly granted summary judgment in favor of defendants in an action brought by plaintiffs seeking to declare unlawful any expendi-

tures in excess of $1 million for abortions during fiscal year 1982-83 and an injunction against such expenditures since the June 1982 appropriations act, on its face, shows that it was signed by both the President of the Senate and the Speaker of the House of Representatives; these presiding officers expressly indicated in the act that it was read three times in the General Assembly and ratified on 22 June 1982; the certified State budget for the Department of Human Resources shows, on its face, that an additional $374,500.00 was appropriated to the State Abortion Fund for fiscal year 1982-83; and according to the law set out in *Carr v. Coke*, 116 N.C. 223 (1895), the ratified appropriation act and certified State budget are complete and unimpeachable. They cannot be altered by the affidavit of any legislator or taxpayer or the House and Senate journals. The courts also possess no power to inquire into the intentions of the Legislature when ratifying an act.

APPEAL by plaintiffs from *Bailey, Judge.* Order entered 22 December 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 6 December 1983.

Plaintiff taxpayers initiated this action against the State of North Carolina, the North Carolina Department of Human Resources and various State officials. They alleged in their complaint that the North Carolina General Assembly appropriated no more than $1,000,000 for the State Abortion Fund for fiscal year 1982-83; and that any expenditure by defendants in excess of this sum violated certain provisions of the Constitution, Session Laws, General Statutes and Administrative Rules of North Carolina. They sought a judgment declaring unlawful any expenditures in excess of $1,000,000 for abortions during fiscal year 1982-83 and an injunction against such expenditures.

The State Abortion Fund consists of funding for medically unnecessary abortions for indigent women. Our Court upheld the lawfulness of this Fund in *Stam v. State*, 47 N.C. App. 209, 267 S.E. 2d 335 (1980), *reversed in part on other grounds*, 302 N.C. 357, 275 S.E. 2d 439 (1981).

In their answer to plaintiffs' complaint, defendants alleged that the North Carolina General Assembly duly and lawfully appropriated $1,374,500 for the State Abortion Fund for fiscal year 1982-83; and that this figure was provided to the State Budget Office by the General Assembly and is set out in the certified State budget for fiscal year 1982-83. Defendants further alleged that this appropriations act and certified budget are conclusive, irrebuttable and unimpeachable evidence of the General Assem-

bly's appropriation of $1,374,500 for the State Abortion Fund during fiscal year 1982-83.

On 6 December 1982, defendants moved for summary judgment. Based upon the pleadings, various legislative documents and supporting affidavits, the trial court granted summary judgment in defendants' favor.

Plaintiff appellants pro se.

Attorney General Edmisten, by Assistant Attorney General Steven Mansfield Shaber, for the State of North Carolina, appellee.

ARNOLD, Judge.

Plaintiffs assign error to the entry of summary judgment in defendants' favor. They argue that the uncontradicted evidence shows that the Governor formally requested the General Assembly to appropriate $1,000,000 for the State Abortion Fund; and that the General Assembly never reduced or increased this proposed appropriation before enacting the appropriation act in question. We believe that the evidence and prevailing law instead entitle defendants to judgment in their favor.

The uncontradicted evidence shows that in 1981 Governor Hunt submitted the State budget to the General Assembly for the 1981-82 biennium, pursuant to G.S. 143-11. Therein he requested $1,000,000 for the State Abortion Fund for each year of the biennium. The 1981 General Assembly appropriated $64,280,031 to the Department of Human Resources, Division of Social Services for fiscal year 1981-82 and $61,686,277 for fiscal year 1982-83. Each appropriation to the Division of Social Services included $1,000,000 for the State Abortion Fund.

In June 1982, the General Assembly returned to Raleigh for a "short session" to consider a supplemental appropriations bill for fiscal year 1982-83. In the appropriations act ratified during this session on 22 June 1982 the funds to the Division of Social Services were increased from $61,686,277 to $63,733,294. The certified budget for the Department of Human Resources, Division of Social Services, breaks down this appropriation into line items and shows that $374,500 was appropriated to Abortion Services for fiscal year 1982-83.

In support of their motion for summary judgment, defendants filed affidavits of a member of the General Assembly's Fiscal Research Division, the State Budget Officer and a member of his staff. These affidavits, along with the ratified appropriation act and certified budget of the Department of Human Resources conclusively show that the 1982-83 increase in funding to the Department of Social Services included a $374,500 increase to the Abortion Fund.

Robert Daughtry, a fiscal analyst and member of the Fiscal Research Division, swore that his duties "include the responsibility of record-changes affecting the Department of Human Resources made in the proposed State budget by the General Assembly in the course of its annual action on the appropriations act." He swore that this information was available to members of the General Assembly during deliberation of the appropriations act. Daughtry further swore:

> 3. On or prior to June 12, 1982, I recorded the addition of $374,500.00 to the appropriation for the Department of Human Resources, Division of Social Services, to annualize the base budget for the State Abortion Fund for F.Y. 1982-83. This change was one of several changes in the budget for the Division which increased its total appropriation for F.Y. 1982-83 from $61,686,277.00 (as shown in Chapter 859 of the 1981 Session Laws) to House Bill 61, later ratified as Chapter 1282 of the 1981 Session Laws.) This change was recorded by me approximately ten days before the General Assembly passed and ratified Chapter 1282.

John A. Williams, Jr., State Budget Officer, swore that one of his duties was to certify the State budget to the various State departments and agencies. He swore that information given to his staff by the Fiscal Research Division shows that the increased appropriation for the Division of Social Services during the June 1982 "short session" included an increase of $374,500 for the State Abortion Fund.

In response to defendants' motion for summary judgment, plaintiffs filed two affidavits. Plaintiff Paul Stam, Jr. swore that Daughtry had informed him that he had received a copy of a 10 June 1982 letter written to a member of the House of Representatives by the Secretary of the Department of Human Resources;

and that this letter and subsequent conversations with the representative were the sole reason for Daughtry's adding $374,500 to the State Abortion Fund.

Ralph Edwards, a member of the House of Representatives, swore that he was present in the House during the discussion of the appropriations bill in June 1982. He swore that during the discussion of this bill, the Chairman of the Expansion Budget Committee was asked if there was an increase in the amount appropriated for the State Abortion Fund and that he responded "no."

Plaintiffs would now have us go behind the ratification of this appropriations act and certified State budget to determine whether an increase in the State Abortion Fund was intended by the General Assembly and whether the proper procedure for ratification was carried out. The law of this State does not allow such an examination.

In 1895 our Supreme Court was confronted with the question of whether it, as a coordinate branch of the government, could look behind the record of a duly ratified act and investigate the manner in which the record was established by the Legislature. *Carr v. Coke*, 116 N.C. 223, 22 S.E. 16 (1895). The act in question purported to make void as to existing creditors all security interests in the State. The plaintiff alleged that the Journals of both Houses showed that the bill had not been read three times as required by the Constitution. Instead the bill was fraudulently enrolled and mistakenly signed by the President of the Senate and Speaker of the House of Representatives, and certified to the Secretary of State. The trial court dismissed the action noting that it could not go behind the ratification of the act as it appeared in the Office of the Secretary of State.

The Supreme Court affirmed the dismissal noting that any remedy to remove the act as law would have to come from the legislative branch. The Court emphasized, "[I]f we can open the door and permit every act of the Legislature to be inquired into, behind the record, for any of the causes alleged in the complaint, then the State will be plagued with all the evils of a veritable Pandora's box." *Id.* at 233, 22 S.E. at 17. In his concurring opinion Justice Montgomery wrote:

> The question at issue brought to the light the more than possibilities of two most serious menaces to popular government. The first one, that of the power of a corruptible or incompetent clerical force or that of a depraved and hired set of lobbyists, or both together, to tamper with the acts and proceedings of the Legislature and have that certified to be law which was never in fact enacted; the second, that of the power of defeated and unscrupulous politicians, when stung by loss of office or a desire for revenge on their political enemies, to practically repeal the legislation of their successful opponents by resorts to the courts upon mere allegations that there was fraud in the passage of the acts or in their ratification, and by procuring injunctions upon affidavits obtained possibly through bribery or through the ignorance of carelessness of the oath-maker. By the decision of the Court the latter danger, the far most to be dreaded, is avoided.

Id. at 241, 22 S.E. at 19.

The June 1982 appropriations act, on its face, shows that it was signed by both the President of the Senate and Speaker of the House of Representatives. These presiding officers expressly indicated in the act that it was read three times in the General Assembly and ratified on 22 June 1982. The certified state budget for the Department of Human Resources shows, on its face, that an additional $374,500 was appropriated to the State Abortion Fund for fiscal year 1982-83. According to the law set out in *Carr v. Coke*, the ratified appropriation act and certified state budget are complete and unimpeachable. They cannot be altered by the affidavit of any legislator or taxpayer or the House and Senate Journals. The courts also possess no power to inquire into the intentions of the legislators when ratifying an act.

> It must be presumed that they knew what they were doing and that they meant to do what they did. The act was perfectly regular on its face, had passed its several readings and was duly ratified, and no proof as to mistake or error can now be heard in this Court to contradict its provisions.

Russell v. Ayers, 120 N.C. 180, 187, 27 S.E. 3d 133, 134 (1897).

In light of our ruling on plaintiffs' first assignment of error, we find it unnecessary to discuss plaintiffs' remaining arguments.

Summary judgment in defendants' favor is

Affirmed.

Judges JOHNSON and PHILLIPS concur.

SIDNEY RONALD STANLEY v. RETIREMENT AND HEALTH BENEFITS DIVISION, DEPARTMENT OF STATE TREASURER, STATE OF NORTH CAROLINA

No. 8310SC17

(Filed 17 January 1984)

Interest § 1; Retirement Systems § 5— State Employees' Retirement System—interest on death benefits

The Teachers' and State Employees' Retirement System of North Carolina is an agency or instrumentality of the State so that the System was not required to pay interest on death benefits for a deceased teacher from the date of the teacher's death in the absence of statutory or contractual authorization for such interest. Art. IV, § 6(2) of the N.C. Constitution; G.S. 135-5(1); G.S. 143A-34.

APPEAL by petitioner from *Hobgood (Robert H.), Judge.* Judgment entered 4 November 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 1 December 1983.

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

J. Douglas Moretz by J. Douglas Moretz for petitioner-appellant.

BRASWELL, Judge.

Shortly after the death on 9 October 1974 of his wife, a teacher and member of the Teachers' and State Employees' Retirement System of North Carolina, petitioner filed a claim for death benefits under G.S. 135-5(1). He was eventually determined to be entitled to the death benefit by this Court. *See, Stanley v. Retire-*

ment and Health Benefits Division, 55 N.C. App. 588, 286 S.E. 2d 643, *disc. rev. denied*, 305 N.C. 587, 292 S.E. 2d 571 (1982). Respondent thereupon paid the principal amount of the death benefit to petitioner. On 13 July 1982, petitioner moved for "entry of the attached judgment" for the principal amount plus interest from 9 October 1974. From the denial of that motion, as it relates to interests, as set out in the judgment of 4 November 1982, petitioner appealed.

The issue is whether plaintiff is entitled to *interest* from the date of his wife's death. For the reasons that follow, we hold that he is not.

A long-standing rule in this State is that the State is not required to pay interest on its obligations unless authorized by contract or statute. *Cannon v. Maxwell, Comr. of Revenue*, 205 N.C. 420, 171 S.E. 624 (1933); *Teer Co. v. Highway Comm.*, 4 N.C. App. 126, 166 S.E. 2d 705 (1969). Hence, the threshold inquiry is whether the Teachers' and State Employees' Retirement System of North Carolina (System) is an agency or instrumentality of the State. We hold it is.

Several factors tend to indicate that the System is an agency or instrumentality of the State of North Carolina. The System was legislatively established by the General Assembly in 1941, G.S. 135-2, and the terms and provisions under which it operates are detailed in Article One of Chapter 135 of the North Carolina General Statutes. The System's membership is composed of public school teachers and administrators and State employees of the State of North Carolina. G.S. 135-3, G.S. 135-2, G.S. 135-1(25). The System is administered by a 13 member Board of Trustees, whose membership includes the State Treasurer and Superintendent of Public Instruction, and nine members appointed by the Governor and confirmed by the Senate of North Carolina. G.S. 135-6(a), (b).

The Board formerly included a member of the House of Representatives, appointed by the Speaker of the House, and a member of the Senate, appointed by the President of the Senate. G.S. 135-6(b)(4) (1981). In 1982, however, the General Assembly amended G.S. 135-6(b)(4) to provide for two members of the Board of Trustees to be appointed by the General Assembly; one member upon the recommendation of the Speaker of the House and the other board member upon the recommendation of the President

of the Senate. G.S. 135-6(b)(4) (Cum. Supp. 1983). As the legislative history to the amendment indicates, the change, which eliminated the requirement that two members of the General Assembly be appointed, was enacted pursuant to the Separation of Powers Act of 1982. 1981 N.C. Sess. Laws (Reg. Sess. 1982), Ch. 1191, § 11. This tends to indicate that the General Assembly, the System's creator, considered the System to be a State agency or instrumentality.

Members of the Board of Trustees are compensated at the rate established for members of State Boards or Commissions. G.S. 135-6(c). The State Treasurer is ex officio chairman of the Board of Trustees, and custodian of its several funds. G.S. 135-6(g), G.S. 135-7(c). Records of the Board are required to be open for public inspection. G.S. 135-6(i). The Attorney General, who represents all State Departments, agencies, commissions, and bureaus, G.S. 114-2(2), is the Board's legal advisor. G.S. 135-6(j). These provisions are all indicia of the System's status as a State agency or instrumentality.

Like the Board of Governors of the University of North Carolina, the Retirement System is a corporation and a "body politic and corporate." G.S. 135-6(a), G.S. 116-3. Significantly, the Board of Governors has been considered an agency of the State for purposes of sovereign immunity, although it is a "corporation." *See MacDonald v. University of North Carolina*, 299 N.C. 457, 263 S.E. 2d 578, *rehearing denied*, 300 N.C. 380 (1980).

This Court, without expressly stating that the Retirement System is a State agency or instrumentality, has implicitly treated the System as such in the past. For example, in *In re Ford*, 52 N.C. App. 569, 279 S.E. 2d 122 (1981), this Court applied the Administrative Procedure Act, G.S. Chapter 150A, in reviewing a ruling of the Board of Trustees of the Retirement System.

Petitioner cites several constitutional and statutory provisions in support of his arguments that the System is not a State agency. We have reviewed each of them and find them unpersuasive.

Article V, Section 6(2) of the Constitution of North Carolina, which provides that System funds shall not be used "for any purpose other than retirement system benefits and purposes, ad-

ministrative expenses and refunds" and that the funds, for investment purposes, "shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer or public employee," does not suggest that the System is not a State agency or instrumentality. This constitutional provision is simply intended to insure the financial soundness of the System by keeping the contributions of members of the System separate from State funds. Simply requiring the System funds to be kept separate from general State funds is not sufficient to remove the System from the umbrella of the State.

Similarly, G.S. 135-5(1), which established the death benefit, does not support petitioner's position. Although the death benefit plan was established "as an employee welfare benefit plan that is separate and apart from the Retirement System," the provisions of the Retirement System pertaining to administration, G.S. 135-6, and management of funds, G.S. 135-7, apply to the death benefit plan. G.S. 135-5(1) (1981). Further, the death benefit is not payable until the Board of Trustees is provided with satisfactory proof of death, in service, of a member of the Retirement System. *Id.* In addition, we note that the version of G.S. 135-5(1) in effect at the time of Mrs. Stanley's death did not contain a provision that the employee benefit plan was separate and apart from the Retirement System. G.S. 135-5(1) (1974).

Finally, the Type II transfer of the Retirement System and the Board of Trustees to the Department of State Treasurer pursuant to G.S. 143A-34 does not support petitioner's argument. Although under a Type II transfer, a transferred agency exercises its prescribed statutory powers independently of the head of the principal department, the transferee's "management functions" are performed "under the direction and supervision of the head of the principal department." G.S. 143A-6(b). The term "management functions" is defined as "planning, organizing, staffing, directing, coordinating, reporting and budgeting." G.S. 143A-6(c). The System therefore remains largely under the control of the Department of the State Treasurer.

Based upon the foregoing, we conclude that the Retirement System is a State agency or instrumentality. We can find no statutory or contractual authorization for the System to pay interest on the death benefit. If the General Assembly had intended

to allow interest on the System's death benefit, it would have so provided, as it has for interest payments on death benefits from private insurers pursuant to G.S. 58-205.3. The State has not waived its sovereign immunity and the doctrine fully applies here. *See Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983).

Petitioner concedes that the statutes do not specifically state that he is entitled to interest but he nonetheless argues that the statutes create a debtor-creditor relationship between the System and its members requiring the payment of interest because the System was obligated to pay petitioner's decedent a retirement allowance and other benefits and to pay interest on petitioner's decedent's mandatory contributions to the System. We reject this argument. The System met its obligations when it paid the interest on the contributions pursuant to G.S. 135-7(b) and the principal amount of the death benefit. We can find nothing in the statutes authorizing the payment of interest on the principal of the death benefit.

We also reject petitioner's argument that the non-payment of interest on the death benefit amounted to a taking of property without just compensation. Under G.S. 135-8(b)(2), deductions from a System member's salary are credited, along with the regular interest allowed by G.S. 135-7(b), to the member's individual account. Upon proof of the death prior to retirement of a member, the member's beneficiary or personal representative is paid the amount of the member's accumulated contributions plus regular interest at the time of the member's death, unless the alternate benefit under G.S. 135-5(m) is elected. G.S. 135-5(f). On the other hand, the death benefit under G.S. 135-5(1) is not payable unless the member had been a member for at least one calendar year, had been below a certain age, and whose last day of actual service had not been more than 90 days before the date of his death. The payment of a death benefit is not guaranteed. It therefore cannot be said that there was a "taking."

We hold that the trial court's denial of interest from the date of petitioner's decedent's death was proper. While we sympathize with petitioner, we think any change in the law should be made by the General Assembly.

Affirmed.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. ISAAC KEMP MASSENBURG

No. 8310SC447

(Filed 17 January 1984)

1. **Searches and Seizures §§ 11, 34— warrantless search of locked glove compartment in automobile—proper**

After approaching an automobile in a public parking lot and smelling marijuana, officers had probable cause to arrest defendant. Further, after the lawful arrest of the occupant of the automobile, the police properly made a contemporaneous warrantless search of the locked passenger compartment of the automobile where they found heroin. The scope of the search is not defined by the nature of the container in which the contraband is secreted but is defined by the object of the search and the places in which there is probable cause to believe it may be found.

2. **Narcotics § 4.7— failure to charge on lesser offenses proper**

In a prosecution for possession of four grams or more but less than 14 grams of heroin in violation of G.S. 90-95(h)(4), the trial court properly failed to instruct on the lesser included offense of simple possession of heroin where the State's evidence clearly showed that defendant possessed 5.4 grams of heroin and an FBI chemist testified that the substance was weighed on an electronic balance, which scale was serviced once a year, and that he did not calibrate the machine immediately prior to weighing the substance.

3. **Criminal Law § 99.3— allowing district attorney to distribute exhibits to jury—no expression of opinion by court**

The court's action in ordering the district attorney who prosecuted the case to distribute exhibits to the jury rather than ordering the courtroom personnel to perform the task was in no way an expression of opinion as to defendant's guilt or innocence.

APPEAL by defendant from *Britt (Samuel E.), Judge.* Judgment entered 4 January 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 2 December 1983.

Defendant was tried on an indictment charging him with possession of four grams or more but less than fourteen grams of heroin in violation of G.S. 90-95(h)(4). The evidence tends to show that on 29 September 1981 at 2:00 p.m., defendant and two of his

friends went in defendant's automobile to a shopping center at the intersection of Oakwood and Hill Street in Raleigh. Immediately prior to defendant's arrival at the shopping center, two detectives of the Raleigh Police Department's Drug and Vice Division came to the area. One of the detectives, Detective Longmire, had worked in the area of Oakwood and Hill Street before and knew that it had a reputation for having heroin available there.

At the shopping center, the detectives observed defendant arrive and park his car. They watched the vehicle for a few minutes and saw a number of persons walking up to the vehicle, standing a short period of time and then leaving. Detective Longmire recognized the defendant as a person he had arrested for possession of marijuana several years earlier. Based on this information, the detective concluded there was a possibility that the occupants in the vehicle were selling some type of drug.

The detectives then approached the car and upon doing so, smelled the odor of burning marijuana. The detectives ordered the occupants to get out of the car which they did. As defendant got out of the automobile, he placed the car keys in his pocket. When told by the detectives that they were going to search the car as an emergency search, defendant said they would only find a "little bit" of marijuana. Upon searching the car, the detectives did find a small amount of marijuana.

During this initial search, the detectives did not open a locked glove compartment in the car. They asked defendant for the keys to the glove compartment but defendant refused to give them to the detectives. The detectives thereupon arrested defendant for possession of marijuana and seized the keys. Upon opening the glove compartment, the detectives found a material which was later determined to be heroin.

At trial the State introduced into evidence the heroin found in the glove compartment of defendant's automobile. Defendant denied knowledge that the heroin was in the car and stated that other persons had access to his car and its keys. The jury found defendant guilty as charged. From the conviction and the sentence imposed thereon, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

DeBank, McDaniel, Heidgerd and Holbrook, by C. D. Heidgerd, for defendant appellant.

WEBB, Judge.

[1] Defendant assigns as error the admission into evidence of the heroin found in the locked glove compartment of his automobile. He first argues, relying on *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776, *cert. denied, Thompson v. North Carolina*, 444 U.S. 907, 100 S.Ct. 220, 62 L.Ed. 2d 143 (1979), that the officers had no right to approach his automobile. *Thompson* deals with the right of officers to approach and detain persons suspected of crime. It has no application to the approach of the officers to the defendant's car in this case. The automobile was in a public parking lot. "No one is protected by the Constitution against the mere approach of police officers in a public place." *United States v. Hill*, 340 F. Supp. 344 (E.D. Pa. 1972). After approaching the automobile and smelling marijuana, the officers had probable cause to arrest the defendant, which they did.

Secondly, defendant argues the seizure of the heroin from the glove compartment of his car violated his rights under the fourth amendment to the United States Constitution against unreasonable search and seizure.

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768, *reh'g denied*, 453 U.S. 950, 102 S.Ct. 26, 69 L.Ed. 2d 1036 (1981), *remanded, People v. Belton*, 55 N.Y. 2d 49, 432 N.E. 2d 745, 447 N.Y.S. 2d 873 (1982), the Supreme Court held that when a police officer makes a lawful arrest of the occupant of an automobile, he may make a contemporaneous warrantless search of the passenger compartment of the automobile. Defendant argues the Court in *Belton* did not extend the search incident to arrest principle to permit the warrantless search of a locked glove compartment in the automobile. We disagree.

The Supreme Court in *Belton* stated: "It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also

will containers in it be within his reach." *New York v. Belton*, 453 U.S. at 460, 101 S.Ct. at 2864, 69 L.Ed. 2d at 775. In a footnote to the passage quoted above, the Court explained further:

> "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

Id. at 460, n. 4, 101 S.Ct. at 2864, n. 4, 69 L.Ed. 2d at 775, n. 4.

While we admit there is some difference between a locked glove compartment and a closed but unlocked one, we do not believe the Supreme Court intended to make a distinction between them with respect to a search incident to arrest. In the recent case of *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 2d 572 (1982), the Supreme Court held that where police officers have probable cause to search a vehicle, they may conduct a warrantless search of every part of the vehicle, including all containers and packages within it, that may conceal the object of the search, that is, as thorough as a magistrate could authorize in a warrant particularly describing the place to be searched. The scope of the search is not defined by the nature of the container in which the contraband is secreted but is defined by the object of the search and the places in which there is probable cause to believe it may be found. *United States v. Ross, supra* at 824, 102 S.Ct. at 2172, 72 L.Ed. 2d at 593. Furthermore, the Court stated: "A lawful search of fixed premises generally extends to the entire area in which the object may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *Id.* at 820-821, 102 S.Ct. at 2170, 72 L.Ed. 2d at 591.

We conclude from our reading of these two cases that the Supreme Court has evidenced an intent to allow a warrantless search of a locked glove compartment pursuant to a lawful arrest. For this reason, we reject defendant's second argument and hold that the heroin seized from the glove compartment was properly admitted into evidence.

[2] Next, defendant contends the court erred in refusing to submit to the jury the lesser included offense of simple possession of heroin. In support of this contention, defendant cites the testimony of an SBI chemist which revealed that the electronic scale on which the heroin was weighed had not been calibrated by the chemist immediately prior to weighing the heroin. The court is not required to submit lesser degrees of the offense to the jury when the State's evidence is positive to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime. *See State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972) and cases cited therein. The State's evidence clearly shows that defendant possessed 5.4 grams of heroin. The witness testified that the substance was weighed on an electronic balance which is based on an electronic impulse, which scale was serviced by a company in Georgia once a year. The machine was calibrated "either in August or September." We do not believe the witness' statement on cross-examination that he had not calibrated the machine immediately prior to weighing the substance rises to the level of evidence to support a lesser included offense. This assignment of error is overruled.

[3] Defendant further contends the court erred in ordering the district attorney who prosecuted the case to distribute the exhibits to the jury rather than ordering the courtroom personnel to perform this task. He argues the court's action could have led the jury to believe the court was giving greater deference to the State's position than to defendant's position, thus prejudicing the jury against defendant. We do not believe the court's action was in any way an expression of opinion as to defendant's guilt or innocence. This assignment of error is overruled.

Defendant assigns as error the court's refusal to allow him on redirect examination to state that he had been a patient at Dorothea Dix Hospital and had been diagnosed as "manic depressant." Defendant wished to offer such evidence to explain his testimony on cross-examination wherein he denied that he was guilty of certain other crimes of which he had been convicted. He argues the jury should have been allowed to consider evidence of his mental illness in evaluating his credibility. Assuming, *arguendo*, that the court erred in excluding this evidence, we believe

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

No error.

Judges WELLS and WHICHARD concur.

BUTLER SERVICE COMPANY v. BUTLER SERVICE GROUP, INC.

No. 8326SC64

(Filed 17 January 1984)

1. **Rules of Civil Procedure § 41— dismissal of claim for failure to prosecute—plaintiff's counsel trying another case in district court**

The superior court erred in dismissing plaintiff's complaint with prejudice for failure to prosecute when plaintiff's counsel was trying a non-jury case in the district court at the time plaintiff's superior court trial was to begin where plaintiff, through its officers and representatives, was standing outside of the superior courtroom ready and willing to prosecute its case at the time the case was dismissed; plaintiff was never given an opportunity to preserve its claim by taking a Rule 41(a) voluntary dismissal; and plaintiff's counsel had taken no action to thwart the progress of the case.

2. **Rules of Civil Procedure § 41— dismissal of claim for failure to prosecute—mere lapse of time**

When plaintiff's counsel has not been lacking in diligence, a mere lapse of time does not justify a dismissal.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 11 August 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 December 1983.

Paul L. Whitfield, for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William L. Rikard, Jr., for defendant appellee.

BECTON, Judge.

Substantively, this case involves the alleged use by the defendant of a corporate name reserved for the exclusive use of the plaintiff appellant without the plaintiff's knowledge, consent, or permission. Plaintiff's appeal, however, does not relate to the

merits of the case. The appeal relates to the procedural dismissal with prejudice of plaintiff's complaint under Rule 41(b) of the North Carolina Rules of Civil Procedure for failure to prosecute.

Plaintiff's case, the second jury case on the 12 July 1982 Superior Court calendar, was called for trial in Mecklenburg County Superior Court, room 304, at 9:30 a.m. on 13 July 1982. At that time, plaintiff's counsel was trying a non-jury case in Mecklenburg County District Court, room 210, said case having begun at 9:00 that morning. Judge Claude Sitton dismissed plaintiff's case for plaintiff's failure to prosecute. Plaintiff timely filed a motion under Rules 59 and 60 of the North Carolina Rules of Civil Procedure for relief from Judge Sitton's order, and plaintiff's motion was subsequently denied by Judge Frank Snepp. From Judge Snepp's order failing to grant plaintiff relief, plaintiff appeals.

I

Neither Judge Sitton nor Judge Snepp found facts regarding plaintiff's failure to appear in Superior Court at 9:30 a.m. on 13 July 1982. It is undisputed, however, (1) that plaintiff's attorney was called on Monday afternoon, 12 July 1982, by the clerk in the civil session of the superior court and told that plaintiff's case would begin at 9:30 a.m. on the following day; (2) that at approximately the same time the clerk in the district non-jury court called to advise plaintiff's attorney that his two district court cases would be called at 9:00 and 9:30 the following morning; (3) that plaintiff's attorney advised both of the courtroom clerks who had called him of the conflict, and asked them to advise the respective judges of the demands of both courts; (4) that prior to either court convening on the morning of Tuesday, 13 July 1982, plaintiff's attorney went by the superior courtroom and found no one in attendance and then went by the Civil Department to talk with the clerk for the superior court about his problem; (5) that plaintiff's attorney thereafter went to district courtroom 205, informed Judge Lanning that he was supposed to be in superior court at 9:30 a.m.; (6) that Judge Lanning, nevertheless, advised plaintiff's counsel that the first of his district court cases would be called at 9:00 a.m.; (7) that plaintiff's attorney's first non-jury district court case was called at 9:00 a.m. and was being actively prosecuted, when, at approximately 9:27 a.m., Judge Lanning interrupted court and handed plaintiff's counsel a note advising

that plaintiff's superior court case would be dismissed within five minutes if plaintiff's counsel failed to appear; and (8) that plaintiff's attorney went to the superior court, with Judge Lanning's permission, to explain his absence.[1]

While not questioning the accuracy of plaintiff's attorney's factual representations, Judges Sitton and Snepp obviously felt that those facts were of little consequence. In response to plaintiff's attorney's statement, that he could not be in two places at one time, Judge Sitton said: "Well, this Court takes priority over the District Court, and that is the rule that this Court is going by. So I hope that you will adhere to that in the future." In his order denying plaintiff's motion for relief from the judgment, Judge Snepp found that "the trial judge's dismissal of plaintiff's action was made in his discretion will [sic] full knowledge of the circumstances of plaintiff's counsel's absence. . . ."

II

No one questions the inherent authority of trial judges to control the conduct of litigation before them. They are responsible for the operation of courts in a judicious and orderly manner. Moreover, no one contends that the trial of a non-jury matter in district court takes precedence over a superior court trial. The General Rules of Practice for the Superior and District Courts supplemental to the Rules of Civil Procedure adopted pursuant to N.C. Gen. Stat. § 7A-34 (1981) clearly state that "when an attorney has conflicting engagements in different courts, priority shall be as follows: appellate courts, superior court, district court, magistrate's court." Rule 3 (amended 1973). However, this Rule does not definitely address the "Catch 22" plaintiff's counsel found himself in—having his case called upstairs for superior court while he was downstairs trying a case in district court.

1. In explaining his absence, plaintiff's attorney told Judge Sitton, in open court, that when he came back to his office around 3:30 p.m. he received

> a second phone call from your Clerk saying that the case would be called this morning at 9:30. I received [another] phone call at the same time from Judge Lanning's Clerk saying that my cases at 9:00 and 9:30 would be called in the District Court. I shared my problems with the Clerks in both courts and also with Judge Lanning, and he chose to call my case at 9:00. I asked him if I could come here at 9:30, and he said that under the local rules that the first case called was the one that required my attention. So I had to start down there at 9:00.

Moreover, the local rules promulgated to control the trials of cases in the courts of Mecklenburg County are obviously subject to differing interpretations.[2]

[1] We cannot interpret a local rule, the terms of which are not before us. Nevertheless, we are able to say with certainty—without pointing the finger of blame at the superior court, the district court, or plaintiff's attorney, who obviously knew that all three of his cases were, or were likely to be, calendared and called for trial—that the plaintiff should not have had its case dismissed. Court imposed sanctions against attorneys, if the facts warrant it, are clearly more palatable than the Rule 41(b) dismissal in this case. The harshness of a Rule 41 dismissal with prejudice is seldom more apparent than on the facts of this case. Plaintiff, through its officers and representatives, was standing outside of superior courtroom #304, ready and willing to prosecute its case at the time the case was dismissed. The dismissal with prejudice is especially disturbing for another reason—plaintiff was never given an opportunity to preserve its claim by taking a Rule 41(a) voluntary dismissal, which would have allowed it to refile its suit within a year's time.

This case does not involve an attorney who has repeatedly taken action to delay the trial of his case. In fact, the record suggests that plaintiff's counsel had taken no action to thwart the progress of this case toward its conclusion prior to 13 July 1982.

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2. No "local rules" governing the trial of cases in Mecklenburg County were included in the Record On Appeal. However, plaintiff's attorney's affidavit, which appears in the Record, contains the following averment:

> Judge Lanning advised the counsel for the plaintiff that his case would be called at 9:00 a.m. in District Court #210, and further, that under the rules of practice in the District and Superior Courts for Mecklenburg County, that if the District Court case were called first by Judge Lanning, that plaintiff's counsel was required to be in District Court #210 rather than in Superior Court.

This averment is no different than plaintiff's attorney's explanation given in open court to Judge Sitton, ante, p. 3. Contrasted with plaintiff's counsel's averment of Judge Lanning's interpretation of the local rules is Judge Snepp's conclusion that

> 2. The trial judge's dismissal of plaintiff's action was made in his discretion will [sic] full knowledge of the circumstances of plaintiff's counsel's absence and is not contrary to the practices or procedures of this Court in calendaring, setting or calling for trial cases in this judicial district.

This case is not about an attorney opting to try district court cases in one county when he has a case for trial on a superior court calendar in another county. Plaintiff's counsel had district court cases on the second floor and a superior court case on the third floor of the Mecklenburg County Courthouse on the same day. Coordination and cooperation by all is needed.

The record suggests that plaintiff's counsel is a sole practitioner. We are loathe to fashion a rule that would require sole practitioners, whenever they have a case calendared for trial in superior court, to continue all scheduled matters in district court for that week. Local rules, strictly adhered to, requiring either that the case started first should continue to conclusion or that counsel is entitled to an automatic continuance in district court if he has a superior court case, seem more advisable. We hasten to add, however, that the burden of scheduling or continuing cases is on the attorney. Advising courtroom clerks of conflicts is not sufficient. The attorney must do more; otherwise, an impractical and impossible burden will be placed on our district and superior court judges. In this case, when plaintiff's attorney was unable to find the superior court judge in courtroom #304, he went to the Civil Department and then to the district court. When he advised the district court judge of his problem, the district court judge *required* him to start a non-jury trial at 9:00 a.m. The district court judge had options—he did not have to (and most district court judges would not) call plaintiff's non-jury case for trial. Plaintiff's counsel had no choice but to proceed, once the case was called for trial.

[2] The law is clear. When plaintiff's counsel has not been lacking in diligence, a mere lapse of time does not justify dismissal. "Courts are, and should be, primarily concerned with trial of cases on their merits." *Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E. 2d 13, 15, *disc. review denied*, 304 N.C. 195, 285 S.E. 2d 99 (1981). In this case, plaintiff's counsel's failure to proceed did not arise out of a deliberate attempt to delay the progress of the action to its conclusion, but rather, arose out of a very typical and practically expected situation that was handled in an atypical manner.

In his attempt to be relieved from the judgment, plaintiff's counsel specifically moved, pursuant to Rule 60(b) of the North

Carolina Rules of Civil Procedure, to be relieved from the judgment entered, citing subsections 1, 4 and 6. Those subsections read as follows: "(1) Mistake, inadvertence, surprise, or excusable neglect; (4) The judgment is void; (6) Any other reason justifying relief from the operation of the judgment." Without deciding whether there was excusable neglect which would require a finding of a meritorious defense, and without considering whether the judgment was void, we hold that plaintiff presented sufficient "other reasons justifying relief from the operation of the judgment."

Reversed.

Chief Judge VAUGHN and Judge HILL concur.

STATE OF NORTH CAROLINA v. JAMES THOMAS DAVIS

No. 839SC463

(Filed 17 January 1984)

1. **Criminal Law § 91— speedy trial—time computed from date of indictment and not service of indictment**

Defendant's contention that the judge's order of 20 August 1981 to exclude the period from 17 August 1981 to 5 October 1981 for speedy trial purposes was void for lack of jurisdiction because the bill of indictment was not served on defendant until 26 August 1981 was without merit since the day of indictment rather than service of indictment is the event which triggers the computation of speedy trial limitations. G.S. 15A-701(a1)(1).

2. **Criminal Law § 91— motion for dismissal of charge not equivalent to motion for prompt trial**

Defendant's "motion and request for dismissal of charge" was not equivalent to the "motion for prompt trial" required by G.S. 15A-702; therefore, the trial judge did not err in failing to set defendant's trial within the 30 day time of 15A-702 or the six month period set by 15A-711. G.S. 15A-701, G.S. 15A-703, and G.S. 15A-711(c).

3. **Criminal Law § 66.7— photographic identification—properly admitted**

There was no error in the trial judge's allowing a photographic identification into evidence where the witness expressed no doubt as to her identification of the defendant as the perpetrator of the crime.

4. Criminal Law § 112.1— failure to instruct on reasonable doubt—no request

Without a request to instruct on reasonable doubt, the trial court is not required to define it.

5. Criminal Law § 62— motion to require State's witness to submit to polygraph test properly denied

The trial judge properly denied defendant's motion to require the State's witness to submit to a polygraph test since (1) defendant has no right to require that a witness for the State submit to a polygraph examination, and (2) the Supreme Court has recently stated that polygraph evidence is not admissible in any trial.

6. Constitutional Law § 48— ineffective assistance of counsel—insufficiency of evidence

Defendant failed to show that his attorney was incompetent in that he did not prepare a defense before trial, he did not submit proposed instructions to the trial judge, and he filed a motion for a continuance since the record showed on its face that defendant's attorney provided an adequate defense through objections to evidence and cross-examination of witnesses, failure to submit proposed instructions did not adversely affect defendant's rights, and merely asking for a continuance, nothing else appearing, cannot be characterized as attorney incompetence.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 9 December 1982 in Superior Court, PERSON County. Heard in the Court of Appeals 6 December 1983.

Defendant was indicted on 17 August 1981 for armed robbery of $2,327.00 from Brenda Love, a clerk at a Pantry, Inc. store on 28 June 1981. He was found guilty of armed robbery at the 2 September 1982 Criminal Session of Person County Superior Court and was sentenced to seven years in prison on 9 December 1982. Defendant appeals.

Attorney General Edmisten, by Associate Attorney John R. Corne, for the State.

Ronnie P. King, for defendant-appellant.

EAGLES, Judge.

I.

Defendant's first assignment of error is that the trial court erred in denying his motion to dismiss for failure to comply with the Speedy Trial Act. He asserts three errors in the trial court's application of the Speedy Trial Act: (1) that an order dated 20

August 1981 to exclude the period from 17 August 1981 to 5 October 1981 was void because jurisdiction had not attached, making defendant's includable time more than 120 days, in violation of G.S. 15A-701; (2) that the trial court failed to set defendant's case for trial after his motion for a speedy trial pursuant to G.S. 15A-702(b); and (3) that defendant was not tried within six months of his request for trial pursuant to G.S. 15A-711(c). We find no merit in these assertions.

[1] Defendant contends that the judge's order of 20 August 1981 to exclude the period from 17 August 1981 to 5 October 1981 was void because the bill of indictment was not served on defendant until 26 August 1981. Contrary to appellant's contentions, *service* of an indictment is not the key to jurisdiction. While a "valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant," *State v. Ray*, 274 N.C. 556, 562, 164 S.E. 2d 457, 461 (1968), *service* of indictment is no longer the event which triggers the computation of speedy trial limitations. The clear language of the statute requires a trial to begin within 120 days from the date the defendant "is arrested, served with criminal process, waives an indictment, or *is indicted*, whichever occurs last." G.S. 15A-701 (a1)(1) (emphasis added). Before the 1977 amendment, the speedy trial statute referred to the date the defendant was "*notified* pursuant to G.S. 15A-630 that an indictment has been filed against him," G.S. 15A-701(a1)(1) (1973) (amended 1977) (emphasis added), but the amended version applies here.

Jurisdiction attached upon the return of a true bill of indictment on 17 August 1981. Consequently, the judge's order of 20 August 1981 was not jurisdictionally flawed, and it properly excluded the period of 17 August 1981 through 5 October 1981, pursuant to G.S. 15A-701(b)(8).

The period from 11 December 1981 through 1 March 1982 was also properly excluded, pursuant to G.S. 15A-701(b)(8). The period from 15 February 1982 through 2 May 1982 was excludable pursuant to G.S. 15A-701(b)(1), because of the pendency of defendant's motion seeking dismissal of charges. The period from 3 May 1982 until the trial date was properly excluded, pursuant to G.S. 15A-701(b)(1), because of defendant's motion for a continuance. Defendant's includable time for speedy trial purposes was the

sixty-six days from 6 October 1981 through 10 December 1981, well within the 120 day limit.

[2] G.S. 15A-702 provides that for cases in which venue for trial is in a county with a limited number of court sessions, a defendant can file a motion for a prompt trial and the judge "may order the defendant's case be brought to trial within not less than 30 days." Defendant's 15 February 1982 "motion and request for dismissal of charge," is not equivalent to the "motion for prompt trial" required by G.S. 15A-702. Because defendant moved for dismissal, not a prompt trial, the trial judge did not err in failing to set defendant's trial as contemplated by G.S. 15A-702. Even if defendant had filed a proper "motion for prompt trial," setting a trial date within not less than 30 days is permissive rather than mandatory for the judge under G.S. 15A-702. See, *State v. Cornell*, 51 N.C. App. 108, 275 S.E. 2d 857 (1981). Sanctions, including dismissal, are available under G.S. 15A-703 if defendant is not tried within the time set by the trial judge under G.S. 15A-702 (if he enters a prompt trial order) or the time limits set by G.S. 15A-701.

Relying on G.S. 15A-711, defendant also contends that his trial should have been held within six months of his 15 February motion to dismiss. G.S. 15A-711(c) provides that an imprisoned defendant who has other charges pending against him, may:

> [B]y written request filed with the clerk of court where the other charges are pending, require the prosecutor prosecuting such charges to proceed. . . . If the prosecutor does not proceed . . . within six months from the date the request is filed with the clerk, the charges must be dismissed.

Because defendant's "motion and request for dismissal of charge" is not the equivalent of a request to proceed under G.S. 15A-711, there was no error in failing to set defendant's trial within six months of 15 February 1982.

II.

[3] Defendant assigns as error the admission into evidence of a photographic identification and an in-court identification of defendant. As to admissibility of photographic identifications, our Supreme Court has stated the appropriate standard:

> Identification evidence must be excluded as violating a defendant's rights to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification.

State v. Barnett, 307 N.C. 608, 627, 300 S.E. 2d 340, 350 (1983). Defendant asserts that the store clerk's testimony showed that she was unable to identify defendant's picture until she saw defendant in person, and that the photographic identification was tainted by a subsequent one-on-one confrontation. In fact, Ms. Love's testimony was that she told a detective that defendant's face "stood out" in the photographs and that: "I wasn't sure that I had to see the person in person to make sure of the height and all of that." At the pre-trial photographic lineup, Ms. Love expressed no doubt as to her identification of the defendant as the perpetrator of the crime. We find no error in the trial judge's ruling that allowed the photographic identification into evidence. Ms. Love's testimony supports the trial court's conclusion that there was nothing "impermissibly suggestive" about the pre-trial photographic identification procedure here.

As to the in-court identification of defendant by Ms. Love, defendant failed to object. It is a well-established rule that, nothing else appearing, admission of evidence that may be incompetent is not prejudicial error when there was no objection at the time the evidence was offered. *State v. Hammond*, 307 N.C. 662, 300 S.E. 2d 361 (1983). Accordingly, we find no error here.

III.

[4] Defendant assigns as error the trial judge's failure to instruct the jury on "reasonable doubt." Without a request to instruct on reasonable doubt, the trial court is not required to define it. *State v. Wells*, 290 N.C. 485, 492, 226 S.E. 2d 325, 330 (1976); *State v. Joyner*, 37 N.C. App. 216, 245 S.E. 2d 592 (1978). Because there was no request by defendant, we find no error in the judge's failure to instruct the jury on reasonable doubt.

[5] Defendant also cites as error the trial judge's denial of defendant's motion to require the State's witness, Ms. Love, to submit to a polygraph test. Defendant has no right to require that a witness for the State submit to polygraph examination. Further,

our Supreme Court has recently stated that polygraph evidence is not admissible in any trial. *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983). Although defendant's trial occurred before *Grier* was decided, the policy against using polygraphic evidence that led to the *Grier* decision is applicable here.

> The validity of the polygraphic process is dependent upon . . . a large number of variable factors, many of which are extremely difficult, if not impossible, to assess.

Id. at 645, 300 S.E. 2d at 360. We find no error in the trial judge's denial of defendant's motion to require a State's witness to submit to a polygraph test.

IV.

[6] Defendant assigns as error that he was denied his constitutional right to effective assistance of counsel. In *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), our Supreme Court adopted the *McMann* standard in determining what constitutes ineffective assistance of counsel, i.e., whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970). Defendant asserts that his attorney was incompetent in that he did not prepare a defense before trial, he did not submit proposed instructions to the trial judge, and he filed a motion for a continuance. The record shows on its face that defendant's attorney provided an adequate defense through objections to evidence and cross examination of witnesses. Failure to submit proposed instructions did not adversely affect defendant's rights. The trial judge gave adequate instructions without submissions from defendant. Merely asking for a continuance, nothing else appearing, cannot be characterized as attorney incompetence. The facts are not sufficient to support a conclusion that the performance of his attorney was not within the range demanded of criminal defense attorneys.

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

No error.

Judges HEDRICK and BRASWELL concur.

CAROLYN BENFIELD CARTER v. DEBORAH JEAN CYRUS POOLE

No. 8310SC80

(Filed 17 January 1984)

1. **Automobiles and Other Vehicles § 62.2— striking of pedestrian—negligence and contributory negligence—issues for jury**

In an action to recover for injuries received by plaintiff when she was struck by defendant's automobile while crossing the road to return to her home after having gone to her mailbox, the forecast of evidence on motion for summary judgment was sufficient to permit a finding that defendant was negligent in failing to keep a proper lookout, failing to slow down and failing to sound her horn to warn plaintiff and was insufficient to show contributory negligence as a matter of law by plaintiff in failing to see defendant's approaching automobile; therefore, it was error to grant defendant's motion for summary judgment.

2. **Automobiles and Other Vehicles § 89.4— last clear chance—sufficiency of forecast of evidence**

In an action to recover for injuries received by plaintiff when she was struck by defendant's automobile while crossing the road to return to her home after having gone to her mailbox, the forecast of evidence on motion for summary judgment was sufficient to permit a finding that, even if plaintiff was contributorily negligent, defendant had the last clear chance to avoid the accident where it tended to show that the accident occurred on a clear and sunny day; plaintiff had on a white uniform; defendant had a view of 1,200 to 1,500 feet before the collision; defendant did not slow down or blow her horn before the collision; and plaintiff was looking at her mail, oblivious to defendant's approach.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 22 October 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 8 December 1983.

On 8 September 1978, plaintiff was struck by defendant's automobile on a rural paved road in Wake County. Plaintiff filed her complaint in this action on 26 August 1981 alleging actionable negligence on the part of defendant. Defendant's answer, filed 19 October 1981, denied plaintiff's allegations and pled contributory negligence. In her reply, plaintiff alleged that defendant had the last clear chance to avoid the collision.

Defendant filed a motion for summary judgment, which was granted on 22 October 1982. From this judgment, plaintiff appeals.

Blanchard, Tucker, Twiggs, Denson & Earls, by Charles F. Blanchard and Irvin B. Tucker, Jr., for plaintiff-appellant.

LeBoeuf, Lamb, Leiby & MacRae, by I. Edward Johnson and Joseph E. Johnson, for defendant-appellee.

EAGLES, Judge.

Plaintiff's sole assignment of error is that the trial judge erred in granting defendant's motion for summary judgment. Plaintiff contends that defendant failed to show that there was no genuine issue of material fact for trial. We agree.

Rule 56 of the North Carolina Rules of Civil Procedure provides for summary judgment when the moving party can show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party that moves for summary judgment has the burden of clearly establishing the lack of any triable issue of fact. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). In ruling on a motion for summary judgment, the trial court considers the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. N.C. R. Civ. P. 56(c). The trial court must look at the record in the light most favorable to the non-moving party, and all inferences are resolved against the movant. *Flippin v. Jarrell*, 301 N.C. 108, 111, 270 S.E. 2d 482, 485 (1980). If the evidentiary materials filed by the parties indicate that there is a genuine issue of material fact, the motion for summary judgment must be denied. *Vassey v. Burch, supra.*

Summary judgment is rarely appropriate in a negligence action, because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). Although issues of negligence and contributory negligence are rarely appropriate for summary judgment, where the uncontroverted evidence indicates that plaintiff failed to use ordinary care, that want of due care was at least one of the proximate causes of the injury, and that plaintiff was contributorily negligent as a matter of law, summary judgment may be proper. *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982).

[1] In considering defendant's motion for summary judgment, the trial court had before it the pleadings, plaintiff's deposition, and defendant's deposition. Plaintiff's pleadings and deposition tended to show: that the collision occurred at about 4:15 p.m. on a clear day on a rural section of an open highway; that the posted speed limit was 55 m.p.h.; that plaintiff could see 800 to 1,000 feet; that plaintiff had crossed the road to her mailbox, had gotten her mail, and had begun to cross the road again when she was struck by defendant's automobile; that defendant had adequate time, opportunity and distance to avoid the collision; and that as a result of the collision, plaintiff received numerous bodily injuries.

Defendant's pleadings and deposition tended to show: that defendant had a view of 1,200 to 1,500 feet before reaching the mailbox location; that it was a clear and sunny day; that plaintiff was wearing a white nurse's uniform; that defendant was traveling at a speed of 40 to 45 m.p.h.; that defendant saw plaintiff look both ways, cross the road to her mailbox, look at her mail, and step out into the road; that when plaintiff stepped into the road, plaintiff was one or two car lengths in front of defendant's automobile; that defendant did not put on her brakes until the moment of impact; that defendant swerved her car just before impact; that plaintiff was hit with the right front fender of defendant's car; that defendant did not blow her horn; and that plaintiff's failure to keep a proper lookout contributed to her injuries.

While these forecasts of evidence could lead a jury to find: (1) lack of negligence on the part of defendant, (2) contributory negligence on the part of plaintiff, or (3) that the last clear chance doctrine was not applicable to these facts, we hold that granting defendant's motion for summary judgment was improper. In order for summary judgment to be proper, the evidentiary materials must show that there can be no other evidence from which a jury could reach a different conclusion as to a material fact. *Goode v. Tait, Inc.*, 36 N.C. App. 268, 270, 243 S.E. 2d 404, 406, *rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978). When these pleadings and depositions are viewed in the light most favorable to plaintiff, there is evidence from which a jury could have found for plaintiff on all the dispositive issues.

A jury could have found that defendant was negligent in not keeping a proper lookout, not slowing down, and not sounding her horn to warn plaintiff, who was apparently oblivious to the approach of defendant's automobile. In *Williams v. Henderson*, 230 N.C. 707, 55 S.E. 2d 462 (1949), our Supreme Court reviewed the evidence in a case where a plaintiff's decedent was struck on the highway by a truck and concluded:

> As the road was straight he [defendant] saw or should have seen the deceased on the shoulder of the highway standing at the mailbox. . . . She [plaintiff's decedent] had her back to him and was apparently oblivious of his approach. Yet he did not slacken his speed or apply his brakes or sound his horn. These circumstances present a case for the jury.

Id. at 709, 55 S.E. 2d at 464. The similar circumstances in the present case likewise present a case for the jury on defendant's negligence.

Further, a jury could have found that plaintiff's failure to see defendant's approaching automobile was not a proximate cause of her injuries. In *Williams*, our Supreme Court said:

> Of course it was the duty of the deceased to look before she started back across the highway. Even so, under the circumstances here disclosed, her failure to do so may not be said to constitute contributory negligence as a matter of law. It is for the jury to say whether her neglect in this respect was one of the proximate causes of her injury.

Id. at 709, 55 S.E. 2d at 464. Contributory negligence is a jury question unless the evidence is so clear that no other conclusion is possible. *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 326, 291 S.E. 2d 287, 290 (1982). The evidentiary materials in the present case do not show contributory negligence as a matter of law.

[2] Finally, the projected evidence raises an issue as to whether the defendant had the last clear chance to avoid the collision. Since it was a clear and sunny day, the plaintiff had on a white uniform, the defendant had a view of 1,200 to 1,500 feet before the collision, the defendant did not slow down or blow her horn before the collision, and the plaintiff was looking at her mail,

oblivious to defendant's approach, there was sufficient evidence for a jury to find that, even if plaintiff was contributorily negligent, defendant had the last clear chance to avoid the collision.

For the foregoing reasons, summary judgment for defendant is

Reversed.

Judges HEDRICK and BRASWELL concur.

STATE OF NORTH CAROLINA v. WARREN GREGORY FARROW, JR.

No. 835SC525

(Filed 17 January 1984)

1. **Criminal Law § 102.6— comment on failure to rebut State's case in argument**

A statement in a prosecutor's closing argument was not a comment on defendant's failure to take the stand in violation of G.S. 8-54, rather the remark was directed solely toward defendant's failure to offer evidence to rebut the State's case and did not constitute an impermissible comment on defendant's failure to testify.

2. **Criminal Law § 138— aggravating factor that defendant possessed stolen property—not based improperly on hearsay testimony**

A court's finding as an aggravating factor that defendant possessed stolen property was not improperly based on hearsay testimony where defendant chose not to contest the evidence offered by the State, despite ample opportunity to do so.

3. **Criminal Law § 138— *aggravating factor related to offenses***

The fact that defendant used a stolen vehicle in committing the burglaries for which he was convicted was related to those offenses in that it pointed to his propensity to steal and was properly considered as an aggravating factor.

4. **Criminal Law § 138— *error to increase presumptive sentence for two burglary counts with single aggravating factor***

The trial court erred in increasing the presumptive sentence for both burglary counts by using a single aggravating factor.

State v. Farrow

APPEAL by defendant from *Small, Judge.* Judgment entered 6 January 1983 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 December 1983.

Defendant was tried on bills of indictment charging him with two counts of breaking and entering and felonious larceny. On 9 September 1982, at approximately 3:00 a.m., Wilmington police officers were dispatched to the University Arms Apartments after residents had observed an unfamiliar automobile with Florida tags in the parking lot. While waiting in a nearby wooded area, the officers discovered defendant carrying a stereo to the car. The officers ordered defendant to halt, but he threw down the stereo and escaped into the woods. The theft of the stereo, which was recovered, was reported the next day.

Police received another report on 9 September that an apartment in the College Manor Apartments had also been broken into during the previous night. In that instance, three dollars were allegedly taken from a wallet owned by the complainant.

Testimony was introduced by the State at trial showing that fingerprint impressions taken at both scenes matched. Defendant offered no evidence and was found guilty of two counts of first degree burglary and felonious larceny. The court found no statutory mitigating or aggravating factors, but found as an additional written finding in aggravation in each case that:

> The defendant placed a license tag issued to him by the State of Florida upon a stolen Pontiac Automobile registered in the State of Florida to Warren Studstill and was in possession of this stolen 1979 vehicle at the times of the commission of the crimes and used and intended to use such vehicle for transportation to and from the crimes of 1st Degree Burglary and for the purpose of transporting personal property stolen pursuant to the 1st Degree Burglary. The defendant also possessed other stolen property while committing this felony.

The presumptive sentence is 15 years for first degree burglary and 3 years for felonious larceny. Defendant was sentenced to 25 years in prison on each burglary count, to run consecutively, and 10 years in prison on each felonious larceny count, to run concurrently with its respective burglary count. From these proceedings defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

William Norton Mason for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in denying his motion for mistrial in that the district attorney, in his closing argument to the jury, referred to defendant's failure to testify and offer evidence. Defendant's contention is based on the following exchange, which occurred as the prosecutor was addressing the police officers having identified defendant as being the person they observed near the scene of the crime:

> MR. SMITH: . . . They know they can identify him and you have heard the two officers testify. If *he* can prove *he* was somewhere else, *he* can prove that tomorrow, the day after, whenever, and destroy the reputation of two uniformed police officers. (Emphasis added.)
>
> MR. MASON: Objection, your Honor. Objection. Motion for a mistrial.
>
> . . . .
>
> MR. SMITH: I'm sorry. I didn't intend to do it.
>
> MR. MASON: You can dance around it all day long, but the Jurors are still getting the message. He's trying to stay away from it he says. Directly or indirectly but I argue to you that's twice and I think it's reversible error your Honor. I think the court should grant a mistrial.

Defendant contends that, by referring to his inability to account for his whereabouts at the time in question, the district attorney, in effect, commented on defendant's failure to take the stand in violation of G.S. 8-54. We do not agree.

The prosecutor's remark was directed solely toward defendant's failure to offer evidence to rebut the State's case and not at defendant's failure to take the stand himself. The statement did not constitute an impermissible comment on defendant's failure to testify. *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982).

[2] Defendant makes several arguments with regard to the court's finding as an aggravating factor that he possessed stolen property. He first alleges that this factor was improperly found in that it was based on hearsay testimony. We disagree with defendant's contention.

Formal rules of evidence are not applicable in sentencing hearings. *State v. Locklear*, 34 N.C. App. 37, 237 S.E. 2d 289, *cert. denied*, 293 N.C. 591, 238 S.E. 2d 150 (1977), *reversed on other grounds*, 294 N.C. 210, 241 S.E. 2d 65 (1978). *See* G.S. 15A-1334(b). It is, therefore, not required that all information in a presentence report be free of hearsay, but defendant must be given the opportunity to controvert any hearsay allegations which lead to an aggravation of punishment. *State v. Locklear, supra.*

In the case at bar, defendant chose not to contest the evidence offered by the State, despite ample opportunity to do so. His claim that he was unable to contradict the evidence without, at the same time, waiving his Fifth Amendment right to remain silent is meritless since he could have rebutted that evidence without taking the stand himself. Furthermore, every defendant who chooses not to testify does so at the risk of being unable personally to contradict unfavorable evidence.

[3] Defendant next contends that even if the sentencing hearing was properly conducted the aggravating factor found by the court was not transactionally related to the offenses for which he was convicted. *See State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). We find, however, that the fact that defendant used a stolen vehicle in committing the burglaries is related to those offenses in that it points to his propensity to steal. Moreover, the factor is reasonably related to the purposes of sentencing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[4] Defendant's final exception to the sentencing procedure taken by the trial court is his contention that the court erred in increasing the presumptive sentence for both burglary counts because of the finding of a single aggravating factor. We agree with defendant's contention and order that the case be remanded for resentencing.

In *State v. Ahearn, supra*, the Court stated the following:

> [W]e must first emphasize the inherent difficulties present in this appeal resulting from the trial court's failure to list separately the aggravating and mitigating factors for each of the two offenses. Separate findings as to the aggravating and mitigating factors for each offense will facilitate appellate review. Further, in the interest of judicial economy, separate treatment of offenses, even those consolidated for hearing, will offer our appellate courts the option of affirming judgment for one offense while remanding for resentencing only the offense in which the error is found. . . . We therefore hold that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense. *Id.* at 598, 300 S.E. 2d at 698.

Although after examining these and defendant's remaining contentions we find that the trial of defendant was error-free, the court's improper use of a single aggravating factor to increase defendant's sentencing beyond the presumptive term with regard to the multiple offenses compels us to remand this case for resentencing.

No error in the trial.

Remanded for resentencing.

Judges JOHNSON and PHILLIPS concur.

IN THE MATTER OF: BOND FORFEITURES OF LEXINGTON MALCOLM DUNLAP, II, AND BROOKS ALAN MOORE

No. 825SC1363

(Filed 17 January 1984)

Arrest and Bail § 11.3— transfer of cases to another county—which county entitled to bail bond forfeitures

The county in which defendants committed the crimes charged and were indicted rather than the county to which their cases were transferred for trial was entitled to bail bond forfeitures when defendants failed to appear for trial.

APPEAL by petitioners New Hanover County and New Hanover County Board of Education from *Llewellyn, Judge.* Order entered 6 August 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 29 November 1983.

Lexington Malcolm Dunlap, II and Brooks Alan Moore were indicted in Brunswick County on illicit drug trafficking charges. Before they were released from the Brunswick County jail they were required to post appearance bonds, Dunlap in the amount of $150,000 and Moore $75,000. Later an order was entered joining the two cases with those of four other co-defendants for trial; and by separate order the various cases were transferred to New Hanover County because of the backlog of cases in Brunswick County and also because its courtroom was inadequate to handle the trial of more than one defendant at a time. When the cases were called for trial in New Hanover County neither Moore nor Dunlap appeared and their bail bonds were forfeited. Several months later Dunlap was apprehended, an order was entered reducing his bond liability to a certain extent, and his case was transferred back to Brunswick for either trial or sentencing. Moore has not been apprehended and his case is still pending in New Hanover County.

Petitions claiming the forfeited bonds were filed jointly by New Hanover County and the New Hanover County Board of Education, and separately by the Brunswick County Board of Education. After a hearing on the various petitions, an order was entered directing that the forfeitures be turned over to the Brunswick County Board of Education.

Hogue, Hill, Jones, Nash & Lynch, by William L. Hill, II, for petitioner appellant New Hanover County Board of Education.

Robert W. Pope and Robert T. Davis, Jr. for petitioner appellant New Hanover County.

Prevatte and Prevatte, by James R. Prevatte, Jr. and R. Glen Peterson, for petitioner appellee Brunswick County Board of Education.

PHILLIPS, Judge.

Which county is entitled to the forfeited bail bonds? Brunswick County, where the crimes were committed and the defendants were indicted, or New Hanover County, where the trial was to occur and the defendants failed to appear? That is the sole question for our determination; one that has not been answered by either of our appellate courts since such laws as now relate to the situation involved were adopted or enacted.

In seeking guidance from the law we start and almost end with a provision of the North Carolina Constitution that, in somewhat the same form, was first adopted in 1868. Article IX, Section 7 provides that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." The words "clear proceeds" in this section have been construed by our Supreme Court to mean the total amount of the fine, penalty, or forfeiture, less only the cost of collection, which, for a bail bond, is the cost of citing and issuing process against the bondsman in the usual manner. *Hightower v. Thompson*, 231 N.C. 491, 57 S.E. 2d 763 (1950). But neither the Constitution nor any statute enacted by the General Assembly states which county is entitled to receive forfeitures in cases that are started in one county and removed to another; and the only case in our appellate jurisprudence in which the question was presented, though relied on by each of the parties for different reasons, has no precedential value, because the circumstances that existed when that case was decided do not exist now, and the laws that applied then have been replaced by other laws.

In *Findley v. Erwin*, 6 N.C. (2 Mur.) 244 (1813), the contesting counties were Wilkes, where certain persons had been indicted for a criminal conspiracy committed there, and Burke, where the case was transferred to, and the prize sought was the fines that the criminal defendants paid the Burke court after their conviction. That the prize there was a fine, whereas here it is a forfeiture, is inconsequential; fines and forfeitures now have the same footing under the Constitution and before the constitutional provision was adopted they had the same footing under the statutes. It is significant, though, that at that time each county defrayed the cost of operating its courts and criminal justice system; the criminal case transfer statute required transferring counties to pay trial counties for all prosecution expenses not collected from transferred defendants; and the statute permitting counties to keep fines and forfeitures did not specify how the funds so received had to be used. In holding that Wilkes County, which commenced the prosecution, rather than Burke, which finished it, was entitled to the fines, the Court concluded that fines had been given to the counties by the Legislature in order to enable them to pay court and prosecution expenses that could not be collected from parties, and that since transferring counties had to pay for transferred cases that were lost, it was only right that they receive the collections when the cases were won. The Court also said that awarding the fines to the county where the crime was committed would serve public policy by encouraging counties to expose and suppress crime; a point of doubtful value, it would seem, since it is just as likely that giving the fines to counties that convict and punish those guilty of crime would serve public policy equally as well by encouraging other counties to do likewise. But the ground that the decision rested upon was the transferring county's liability for uncollected prosecution and court expenses.

But the case presented to us is entirely different from *Findley*. Under the unified court system that has existed since 1965, the State, rather than the counties, defrays the expense of operating the courts and the criminal justice system. G.S. 7A-300(a). Though the counties furnish the facilities for the courts, they are reimbursed for their use by a certain part of the court costs in criminal cases, G.S. 7A-304, and the only obligation a county that transfers a criminal case now has is to pay the receiving county the prisoner's "jail expenses, unless they are collected

from the prisoner." G.S. 6-40. A prisoner's jail expenses are now $5 a day. G.S. 7A-313. And unlike the earlier statute which did not specify how fines and forfeitures had to be used, under the constitutional provision now in force fines and forfeitures must be used for the public schools.

In this instance, nothing is owed New Hanover County, since neither criminal defendant was jailed there before the bonds were forfeited; but even if the defendants had been jailed there it would be irrelevant to this case, in our opinion, since there is simply no legal or logical relationship between a transferring county's contingent liability for jail fees and a forfeited bail bond that cannot be used to pay jail fees or any other court expenses but goes to the school fund.

In this uncharted situation the only beacon left to guide us is public policy, and we decide the case on that basis. Public policy, we think, requires that the forfeitures be awarded to Brunswick County, the transferring county, for one transcendent reason. Neither justice nor policy requires that counties be rewarded for the slight inconveniences that they suffer when criminal cases from other counties are transferred to them for trial; other counties reciprocate and such things are compensated for in the long run by the public good, which inures to transferring and receiving counties alike. But justice does require, we think, that counties whose peace and dignity have been violated by criminals be compensated therefor whenever payment is made by the violators. Fines and forfeitures are, in effect, payments extracted from violators of the penal laws; and the counties entitled to them, we believe, are those whose penal laws have been violated. It seems to us that the idea of payment for violation of the penal laws is inherent in the policy of giving fines and forfeitures to the counties, and has been from the beginning. Certainly, we see no constitutional or statutory purpose, or any reason for one, of providing random windfalls for receiving counties, like New Hanover in this instance, which have suffered no injury.

The order awarding the forfeitures involved to the Brunswick County Board of Education is therefore affirmed.

Affirmed.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. ROY CECIL BALDWIN

No. 8323SC122

(Filed 17 January 1984)

Narcotics § 5— failure to consider ameliorating circumstance under leniency provision of drug trafficking law error

The trial court erred in failing to consider defendant's aid to law enforcement officers as an ameliorating circumstance under the leniency provisions of the Drug Trafficking law, G.S. 90-95(h)(5), where defendant had rendered substantial assistance to law enforcement officials in four states and his efforts had resulted in several arrests and drug charges and had endangered defendant's life. The trial court erroneously read the statute to limit its consideration of defendant's "substantial assistance" to assistance in the case being heard only.

Judge HEDRICK dissents.

APPEAL by defendant from *Mills, Judge.* Judgment entered 23 September 1982 in Superior Court, WILKES County. Heard in the Court of Appeals 18 October 1983.

Attorney General Edmisten, by Associate Attorney General Walter M. Smith, for the State.

William C. Gray, Jr., for defendant appellant.

BECTON, Judge.

Defendant appeals from judgment imposing a seven-year prison sentence for violations of the Drug Trafficking laws and the denial of his motion for appropriate relief based on the trial court's failure to consider his aid to law enforcement officers as an ameliorating circumstance under the leniency provision of the Drug Trafficking law, N. C. Gen. Stat. § 90-95(h)(5)[1] (Supp. 1983).

I

On 10 May 1982, defendant, Roy Baldwin, a Virginia resident, and two co-defendants, Dean and Taylor, were arrested when

1. The current G.S. § 90-95(h)(5) is an amended version of G.S. § 90-95(h)(6). Because of confusion as to the effective date of the amendment at the time of publication, the 1981 edition of Volume 2C of the N. C. General Statutes, containing G.S. § 90-95, referred to both versions.

they tried to sell State Bureau of Investigation agents a quarter pound of cocaine in an undercover drug buy.

After defendant's arrest, John Stubbs, a Special Agent with the State Bureau of Investigation, along with law enforcement officers from the Wilkes County Sheriff's Department and from Virginia, arranged for defendant to return to Virginia to help them in a "joint effort." The law enforcement officials gained defendant's assistance by suggesting that the sentencing judge would have the discretion to impose a trafficking sentence below the statutorily mandated minimum based on defendant's assistance.

Defendant infiltrated a motorcycle gang active in Virginia and Tennessee. His efforts resulted in several arrests and drug charges. Taylor, his co-defendant, who had also offered to aid law enforcement officials, ended defendant's effectiveness in the motorcycle gang and endangered defendant's life when he told the gang members about defendant's cooperation with the police.

Moreover, defendant aided law enforcement officials by making a statement at the time of his arrest which detailed the roles of each co-defendant and implicated Dean as the source of the cocaine seized. The defendant's statement compelled Dean to give the authorities his source in Florida and names of persons in other states.

On 21 September 1982, defendant pled guilty to one count of felonious conspiracy to traffic in cocaine and one count of felonious trafficking in cocaine by possession and transportation. As part of the plea bargain, the charges were consolidated for the purpose of sentencing and another trafficking charge was dismissed. After the sentencing hearing, defendant was sentenced to seven years, the mandatory minimum, and fined $50,000. Defendant filed a motion for appropriate relief, requesting a plenary hearing and to have the plea stricken or, in the alternative, to post appeal bond and appeal to the appellate court for an interpretation of G.S. § 90-95(h)(5). Defendant's attorney argued that, in plea bargaining, defendant had been under the impression that his aid to law enforcement officials would qualify under G.S. § 90-95(h)(5). The evidence at the sentencing hearing and the plenary hearing tended to show that defendant had rendered substantial assistance to law enforcement officials in North Carolina, Virginia, Tennessee and Florida. From the trial court's

denial of defendant's motion and request for a new trial, defendant appeals.

II

Defendant first assigns error to the trial court's interpretation of the phrase "any accomplices, accessories, co-conspirators, or principals" in G.S. § 90-95(h)(5). G.S. § 90-95(h)(5) reads, in pertinent part, as follows:

> [T]he 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.

Here the trial court, in denying defendant's motion for appropriate relief, made the following finding of fact:

> (4) That the defendant did furnish aid to the officers in the State of North Carolina, States of Virginia, Tennessee and Florida concerning drug law violations; however, this assistance did not deal with the identification, arrests, or conviction of any accomplices, accessories, co-conspirators or principals in these cases.

It is clear from the trial court's comments during the sentencing hearing and its finding of fact number 4 that the court read the statute to limit its consideration of defendant's "substantial assistance" to assistance in the case being heard. Defendant argues that the "accomplices, accessories, co-conspirators, or principals" need not be involved in the case for which the defendant is being sentenced, and that G.S. § 90-95(h)(5) therefore permits the trial court to consider defendant's "substantial assistance" in other cases. We agree.

Criminal statutes must be strictly construed. *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967). The ambiguity inherent in the phrase "any accomplices, accessories, co-conspirators, or principals" must be resolved by judicial construction to ascertain the

legislative intent. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978). The legislative intent

> is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and other like means. . . .

Id. at 239, 244 S.E. 2d at 389 (quoting *State v. Partlow*, 91 N.C. 550, 552 (1884)).

To discern the legislative intent underlying G.S. § 90-95(h)(5), we look first at the legislative intent in enacting the trafficking statutes, N. C. Gen. Stat. §§ 90-95(h) and (i). Our legislature enacted the trafficking statutes in 1979 under the title "An Act to Control Trafficking in Certain Controlled Substances." 1979 N.C. Sess. Laws, Ch. 1251. The title of the act and the mandatory sentences coupled with harsh fines for the sale, manufacture, delivery, transportation or possession of larger amounts of certain controlled substances or conspiracy to do any of the above reveal the legislative intent to deter drug-trafficking networks. "Our legislature has determined that certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. . . . The penalties for sales of such amounts, therefore, are harsher. . . ." *State v. Tyndall*, 55 N.C. App. 57, 60-61, 284 S.E. 2d 575, 577 (1981).

Yet, at the same time, our legislature recognized that the system of mandatory sentences coupled with harsh fines is not alone sufficient to "deter the corrupting influence of drug dealers and traffickers." *State v. Anderson*, 57 N.C. App. 602, 606, 292 S.E. 2d 163, 165, *disc. review denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982). The nature of the crime—"the mischief to be remedied"—dictates the methods used. Trafficking relies on complex, interwoven networks. A principal in one network may be an accomplice in another. To effectively combat trafficking, police authorities need information on, and access to, the myriad of drug-dealing activities in the various networks. Built into the trafficking statutes is a bargaining tool, G.S. § 90-95(h)(5), a provision exchanging potential leniency for assistance from those who have easy access to drug networks. It is the only provision in the traf-

ficking statutory scheme which gives a sentencing judge the discretion not to impose the statutorily mandated minimum sentence and fine.

We are reinforced in our interpretation of the leniency provision in our trafficking statutes by the Florida Supreme Court's analysis of the purpose behind that state's similar trafficking statutes. *See State v. Benitez*, 395 So. 2d 514 (Fla. 1981). The Florida Supreme Court discussed the Florida leniency provision,[2] in light of the overall intent of its trafficking statutes:

> Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the 'pusher' on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers.

Id. at 517.

In upholding the constitutionality of the leniency provision, the *Benitez* court stated: "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." *Id.* at 519 (emphasis added). The Florida Supreme Court's refusal to limit the application of the leniency provision to "substantial assistance" in the same case mirrors what we perceive to be our legislature's intent.

The trial court's failure to exercise its discretion under G.S. § 90-95(h)(5), based on a misinterpretation of the statute, constitutes error. *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980).

2. Fla. Stat. Ann. § 893.135(3) (West 1983) reads, in pertinent part, as follows:

> (3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals.

Since there was evidence of defendant's "substantial assistance" before the trial court, the error was prejudicial. We, therefore, order the matter remanded for a new sentencing hearing. We need not address defendant's other assignments of error.

Remanded for resentencing.

Judge EAGLES concurs.

Judge HEDRICK dissents.

LILLIAN H. ROSE v. JULIAN B. ROSE

No. 828DC1263

(Filed 17 January 1984)

Husband and Wife § 13— obligation of separation agreement—enforcement by specific performance

Defendant's obligation under a property settlement provision of a separation agreement to make arrangements to have a $100.00 payment drafted from his retirement check on a monthly basis for 39 months to pay part of a debt was properly enforced by specific performance since a damage award, defendant being insolvent, will not compensate plaintiff or compel defendant to perform his part of the bargain.

APPEAL by defendant from *Jones, Arnold O., Judge.* Judgment entered 20 July 1982 in District Court, WAYNE County. Heard in the Court of Appeals 24 October 1982.

Defendant appealed from a judgment ordering him to specifically perform a provision of a separation agreement wherein defendant, husband, had agreed to assign to plaintiff, wife, $100 from his monthly retirement check for a period of thirty-nine months for the purpose of paying part of a debt.

On 10 December 1981, plaintiff and defendant entered into a separation agreement. Paragraph 4(b) of the agreement provided in pertinent part:

> Husband further agrees that he will make the necessary arrangements to have said $100.00 a month payment drafted

from and against his retirement check on a monthly basis to insure the payment of said amount.

On 16 December 1981, a consent judgment was rendered whereby the court recited the agreement of the parties and ordered defendant to pay plaintiff through an allotment check, $100 per month, to be paid on or before the tenth day of each month, commencing in January, 1982, and continuing each month thereafter through March, 1985.

On 3 March 1982, plaintiff filed a motion to have defendant held in contempt for failing to make his February 1982 payment. On 2 April 1982, the court dismissed plaintiff's motion, after concluding, as a matter of law, that the 16 December consent judgment was not an order for support, and, therefore, was not subject to the court's contempt power.

On 16 April 1982, plaintiff instituted the present action for specific performance of paragraph 4(b), *supra*, of the separation agreement. Defendant, in his answer to plaintiff's complaint, stated that the remedy of specific performance was unavailable since plaintiff had an adequate remedy of law in that she could obtain a money judgment against defendant. Defendant also stated, in his answer, that he had insufficient property to pay any money judgment and would declare all property in his possession exempt under Chapter 1C of the North Carolina General Statutes.

At the hearing on 6 July 1982, plaintiff moved to amend her complaint to allege anticipatory breach of contract and prayed for the entire sum of $3,900.00 in damages. Defendant did not object and the court granted plaintiff's motion. The court concluded that defendant had failed to make the $100 payments in February through July and to take necessary steps for his allotment to be drafted as agreed. The court further concluded that plaintiff had performed her obligations under said separation agreement and was ready, willing and able to continue doing so. The court, therefore, ordered defendant to specifically perform paragraph 4(b) of the separation agreement by paying plaintiff $100 per month for the months of February through July 1982 and by taking necessary steps to have $100 per month drafted against his retirement check on a monthly basis to insure total payment of $3,900.00. Defendant appeals from this order.

Everett & Womble, by Timothy I. Finan, for plaintiff appellee.

Hulse & Hulse, by Donald M. Wright, for defendant appellant.

VAUGHN, Chief Judge.

It is now recognized in North Carolina that a contractual obligation to pay support arising out of a separation agreement which has not been incorporated into a court order may be equitably enforced by an order of specific performance enforceable through contempt proceedings. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979); *McDowell v. McDowell*, 55 N.C. App. 261, 284 S.E. 2d 695 (1981). The issue in this case is whether defendant's contractual obligation to make monthly payments for a period of five years arising out of a property settlement provision of a separation agreement not incorporated into a court order was properly enforced by an order of specific performance. Defendant contends that the trial court order of specific performance in this matter constituted reversible error.

A marital separation agreement is generally subject to the same rules of law regarding its enforcement as any other contract. *Moore, supra.* To be entitled to the equitable remedy of specific performance, therefore, plaintiff must establish the inadequacy of her legal remedy. *Id.* In the instant case, the separation agreement specified that defendant would pay plaintiff $100 per month for thirty-nine months, such sum to be drafted from and against his monthly retirement check. At trial, the parties stipulated that plaintiff was entitled to a judgment on the theory of anticipatory breach for the entire amount of $3,900.00. Our inquiry is whether this remedy would adequately compensate plaintiff.

The question of adequacy is one of fact, to be analyzed and determined in each case. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 273 S.E. 2d 281 (1981). It is not enough that there is some remedy at law; equity will intervene if the legal remedy is not as efficient and practical to meet plaintiff's needs. *Id.* We note that this case differs from past cases in which we have allowed specific performance where a plaintiff would otherwise have to bring successive

lawsuits or wait until defendant's death to bring a suit in order to collect a money judgment. *See Moore, supra; Lalanne v. Lalanne,* 52 N.C. App. 558, 279 S.E. 2d 25 (1981). In this case, plaintiff's damages were ascertainable in total. Nevertheless, we find the equitable remedy of specific performance to be the most practical and efficient means of compensating plaintiff.

> There is no general formula for determining when a legal remedy is inadequate. However, there are some common patterns in the cases. The legal remedy is usually inadequate, and the equitable remedy granted, in cases like these: . . . (3) The plaintiff is entitled to either money or certain performance by the defendant. Money, recoverable at law, would be an entirely adequate remedy, but the defendant is insolvent and it is not collectable. However, the defendant is still capable of rendering the performance to which the plaintiff is entitled as an alternative to the money. Equity may be willing to order the performance.

D. Dobbs, The Law of Remedies, 2.5 (1976). Defendant, though insolvent, was capable of rendering the performance for which the parties had contracted.

Defendant argues that allowing specific performance in this case will lead to unwarranted orders of specific performance in cases involving insolvent, defaulting debtors. Our decision today does not go that far. Mere insolvency of a debtor does not show the inadequacy of the remedy at law so as to invoke specific performance.

Defendant was not an ordinary debtor and the separation agreement involved herein was more than a mere agreement for the payment of money. As has been said by our sister court, such agreement was "a complete property settlement between the parties, under the terms of which defendant agrees to perform certain positive acts and plaintiff, in turn, releases defendant from further claims or demands." *Burke v. Burke,* 32 Del. Ch. 320, 327, 86 A. 2d 51, 54 (1952). In return for plaintiff's consideration, defendant agreed to "make the necessary arrangements to have said $100.00 a month payment drafted from and against his retirement check on a monthly basis to insure the payment . . ." A damage award in this case, defendant being insolvent, will not compensate plaintiff nor compel defendant to perform his part of

the bargain. The parties' contract had clear and definite terms. The remedy of specific performance, therefore, does no more than "compel [defendant] to do precisely what he ought to have done without being coerced by the court." *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E. 2d 44, 53 (1952), *quoted* in *Munchak Corp., supra*, at 694, 273 S.E. 2d at 285.

The Court ordered:

> 2. That the Defendant will specifically perform paragraph 4.(b) of the Separation Agreement between the parties by taking all necessary steps to have said $100.00 per month payment drafted from and against his retirement check on a monthly basis to insure the total payment of $3,900.00.

That is specifically what defendant contracted to do. It lies within his present means. He has only to sign the papers he agreed to sign. The quoted portion of the order is manifestly correct and defendant ignores it at his peril.

Affirmed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. RICHARD RAYMOND SILER, III

No. 8321SC512

(Filed 17 January 1984)

1. Narcotics § 4.7— failure to instruct on lesser offenses proper

In a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine in violation of G.S. 90-95(h)(3)(b), the trial court properly failed to instruct the jury with reference to possession of cocaine in violation of G.S. 90-95(b)(2) since the only evidence as to the amount of cocaine possessed by defendant was to the effect that defendant possessed cocaine in excess of 28 grams.

2. Narcotics § 4— sufficiency of evidence

In a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine in violation of G.S. 90-95(h)(3)(b), the evidence was sufficient to be sent to the jury where the evidence tended to show that defendant arranged to purchase between eight and twelve ounces of cocaine, and he was in the process of doing exactly that when he was arrested.

3. Narcotics § 3.1— competency of evidence

The trial court properly allowed a witness to explain that a code was used by the witness and defendant in discussing cocaine over the telephone.

Judge BECTON dissenting.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 9 December 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 December 1983.

Defendant was charged with and convicted of conspiracy to traffic in cocaine and trafficking in cocaine in violation of G.S. 90-95(h)(3)(b). He appeals from judgments entered on the verdicts of the jury. Facts necessary for the decision will be set out in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Philip A. Telfer for the State.

Bruce C. Fraser for defendant appellant.

HILL, Judge.

[1] The first question presented in this case is whether the trial court erred in refusing to instruct the jury on lesser included offenses. Defendant asserts as error the trial judge's refusal to submit to the jury, as a possible lesser included offense, misdemeanor and felonious possession of cocaine pursuant to G.S. 90-95(d)(2).

The principle of defendant being entitled to have different permissible verdicts arising on the evidence presented to the jury under proper instructions applies when, and only when, there is evidence of guilt of the different permissible degrees. *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931). "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954) (original emphasis).

Applying this rule to the facts of this case, we find that the record is void of any evidence tending to show that defendant may be guilty of a lesser included offense. The evidence is briefly summarized as follows: On 11 May 1982, defendant telephoned an acquaintance, asking, "Can we play eighteen holes of golf this afternoon?" Based on prior communications, the acquaintance interpreted the inquiry as a request for cocaine. He told defendant he would know later that day, and upon calling back, said he could secure eight ounces of cocaine. Defendant requested four additional ounces. Subsequently the two met at a designated place. Defendant used cocaine in the acquaintance's car, knew about cocaine in the front seat of the car, and knew the purpose of the meeting. Defendant and his acquaintance were arrested and eleven ounces of cocaine were seized from the car. The only evidence as to the amount of cocaine possessed by defendant is to the effect that defendant possessed cocaine in excess of 28 grams. There is not a scintilla of evidence from which the jury could conclude that defendant possessed cocaine in an amount less than 28 grams. Hence, the court properly refused to instruct the jury with reference to G.S. 90-95(d)(2).

[2] Defendant next submits that the court should have granted his motion to dismiss. This assignment of error challenges the sufficiency of the evidence for the State, which viewed in a light most favorable to the State shows that defendant arranged to purchase between eight and twelve ounces of cocaine. He was in the process of doing exactly that when he was arrested. The evidence is clearly sufficient to support a guilty verdict. This assignment of error is without merit.

[3] Defendant next contends that the trial court erred in allowing the prosecuting witness to interpret conversations he had with the defendant. Defendant asserts such testimony was inadmissible in that it invaded the jury's province as fact-finder. We disagree.

The testimony elicited from the witness merely explained that a code was used by the witness and the defendant in discussing cocaine over the telephone. The trial judge allowed the witness to relate what the conversations meant to him. Without such testimony the jury would not have understood the significance of the conversations. When the jury is not as well qualified

as the witness to draw inferences and conclusions from the facts, opinion testimony is admissible. *E.g., State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975); *see also* 1 Stansbury's North Carolina Evidence § 124 (Brandis Rev. 1973). This assignment of error is overruled.

We have carefully examined defendant's other contentions and find no basis for reversal. The defendant has received a fair and impartial trial, free from prejudicial error.

No error.

Chief Judge VAUGHN concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

I disagree with the majority's statements that "the record is void of any evidence tending to show that defendant may be guilty of a lesser included offense" and that "[t]here is not a scintilla of evidence from which the jury could conclude that defendant possessed cocaine in an amount less than 28 grams." Ante p. 2. I, therefore, respectfully dissent.

All of the approximately 11 ounces of cocaine involved in this case was found in a car driven by co-defendant, Luke Caudle. No cocaine was found in the car in which defendant Siler had been a passenger. The only testimony regarding defendant's knowledge and intent to traffic in cocaine was the testimony of the State's witness, co-defendant Luke Caudle.

The following facts are undisputed. Approximately four ounces of cocaine was found under the driver's seat, the remainder of the cocaine was found in the trunk of Caudle's car. Of the approximately four ounces found under the driver's seat, over three ounces was found in a blue bank bag, and the remainder was found in a small separate plastic baggie. Defendant, himself, testified that after he got in Caudle's car, he snorted cocaine that Caudle gave him from the small plastic baggie.

Significantly, defendant testified that he knew nothing about the cocaine in the blue bank bag under the driver's seat nor the

cocaine in the trunk of the car. He testified that the cocaine he snorted was the only cocaine he knew about. There was no evidence offered as to the amount of cocaine in the small bag; indeed, the substance in the small bag was not analyzed.

Like the majority, I find Caudle's testimony clearly sufficient to support the charges of trafficking in cocaine and conspiracy to traffic in cocaine. However, I cannot, as the majority must have done, and as a jury is free to do, reject as untrue, defendant's testimony that he only knew about the small amount of cocaine in the plastic baggie. As significant as the fact that the State had the burden of proving the nature of the substance and its weight is the testimony of Caudle suggesting that the small amount of cocaine in the plastic baggie was for his personal use, not for "trafficking."

The evidence, in my view, supports the submission to the jury of the lesser included charges of felony possession of cocaine or misdemeanor possession of cocaine. When there is evidence from which the jury can find that a crime of a lesser degree has been committed, then the trial court must instruct the jury as to the lesser included crime or crimes. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954). Defendant presented evidence that the only cocaine he was aware of was the small amount in the plastic baggie and that he knew nothing of the approximately 11 ounces found elsewhere in Caudle's car. "The *presence of such evidence* is the determinative factor," and compels this dissent. *Id.* at 159, 84 S.E. 2d at 547. I vote for a

New trial.

C. C. WALKER GRADING & HAULING, INC. v. S. R. F. MANAGEMENT CORP., A/K/A SITTING ROCK MANAGEMENT CORP., AND HELEN C. STANLEY, TRUSTEE FOR THE BENEFIT OF THE CHILDREN OF JOHN DAVID STANLEY

No. 8317SC70

(Filed 17 January 1984)

1. **Rules of Civil Procedure § 15.2— affirmative defense raised at summary judgment hearing—amendment of answer**

The trial court did not err in permitting defendant to amend her answer to include the affirmative defense of noncompliance with the general contractors' licensing requirements which had been raised for the first time in a hearing on a motion for summary judgment. G.S. 87-1.

2. **Contracts § 6.1— clearing and grading work on farm—general contractor—absence of license**

Plaintiff was a general contractor in performing clearing and grading work required for agricultural purposes on a farm and was not entitled to recover for such work where it was not licensed as required by G.S. 87-1.

Chief Judge VAUGHN dissents.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 18 October 1982 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 7 December 1983.

Plaintiff commenced this action on 27 January 1982 by the filing of a complaint alleging defendant's breach of a contract entered into by plaintiff and John David Stanley. Plaintiff asserted that defendant Helen C. Stanley in her capacity as trustee for the benefit of the children of John David Stanley is vested with title to real property known as Sitting Rock Farms. Plaintiff alleged that defendant S. R. F. Management Corporation, an entity headed by John David Stanley, is the agent for Helen C. Stanley, and this entity is vested with the authority to manage the premises of Sitting Rock Farms.

In her answer, defendant Helen C. Stanley alleged that plaintiff's negotiations with respect to improvements of the farm were made with S. R. F. Management Corporation and John David Stanley, and that no agency relationship existed between Helen C. Stanley and S. R. F. Management Corporation. In her amended answer, defendant alleged as a defense that at no time during the course of the improvements did plaintiff have a North Carolina

General Contractors license required by Chapter 87 of the General Statutes, and thus plaintiff is barred from recovery.

On 1 September 1982, defendant filed a motion for summary judgment. Summary judgment was granted in favor of defendant. Plaintiff appealed.

Leigh Rodenbough for plaintiff appellant.

John T. Weigel, Jr. for defendant appellee.

HILL, Judge.

[1] Plaintiff first contends that the trial court erred when it allowed defendant to amend her answer to include a defense raised for the first time in a hearing on motion for summary judgment. Five days prior to the hearing of this cause, defendant learned of the fact that plaintiff was not a licensed contractor during the time improvements were made to the farm. The court allowed defendant to amend her answer to include an additional affirmative defense of noncompliance with the licensing requirements of G.S. 87-1.

Failure to be properly licensed is an affirmative defense which normally must be specifically pleaded. G.S. 1A-1, Rule 8(c). However, "the nature of summary judgment procedure (G.S. 1A-1, Rule 56), coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment." *Barrett, Robert & Woods v. Armi*, 59 N.C. App. 134, 137-38, 296 S.E. 2d 10, 13, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982), *quoting, Cooke v. Cooke*, 34 N.C. App. 124, 125, 237 S.E. 2d 323, 324, *disc. rev. denied*, 293 N.C. 740, 241 S.E. 2d 513 (1977). *Accord, Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). The trial judge properly allowed defendant's amendment to her answer to include the licensing defense.

[2] The imperative question then to be addressed is whether the plaintiff by entering into the contract to improve the farm became a general contractor within the meaning of G.S. 87-1 and was thus barred from recovery on his claim because of his failure to have the license required by Chapter 87 of the General Statutes. G.S. 87-1 defines a "general contractor" as one

> . . . who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct . . . any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more . . . .

The plaintiff contends the nature of the work it performed is not enveloped by the statutory language, nor is the purpose of G.S. 87-1 of "protect[ing] the public from incompetent builders," *Builders Supply v. Midyette,* 274 N.C. 264, 270, 162 S.E. 2d 507, 511 (1968), applicable to plaintiff's agricultural activities. We do not agree.

Plaintiff's president, in his deposition, explains that the agreement required his company

> to clear it [the land], put some roads in it, and seed it. . . . I was going to clear some property for fifteen thousand dollars, grade around the edge for fifteen hundred dollars, do the contours and terracing for three thousand dollars, and plowing seeding fertilizer and lime for thirteen thousand two hundred dollars, and some culverts, for a total contract cost of thirty-three thousand dollars.

We find it very difficult to make a meaningful distinction between the work performed by the plaintiff under the agreement from the "grading or any improvement" language of G.S. 87-1. Furthermore, G.S. 87-1 specifically exempts certain activities from the applicability of the statute. Agricultural activities are not among them. The statute is equally applicable to the clearing and grading required for agricultural purposes as it is to the clearing and grading required for building purposes. One correctly stated purpose of protection from incompetent builders does not lessen purposes of protection from incompetence in the other enumerated activities of G.S. 87-1.

Plaintiff was a "general contractor" in this State within the statutory definition. Plaintiff thereby became subject to the licensing requirements of G.S. 87-10. The rule is well established in North Carolina that unless a general contractor has substantially complied with the licensing provisions of G.S. 87-10, it may not recover against the owner either under its contract or in *quantum meruit. Builders Supply v. Midyette, supra; Holland v. Walden,* 11

N.C. App. 281, 181 S.E. 2d 197, *cert. denied*, 279 N.C. 349, 182 S.E. 2d 581 (1971). The summary judgment appealed from is

Affirmed.

Judge BECTON concurs.

Chief Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. AMEEN KAREEM ABDULLAH

No. 8326SC436

(Filed 17 January 1984)

1. **Criminal Law § 66.3— denial of defendant's motion for a lineup to test the identifications made by witnesses—no error**

There was no error in the trial court's denial of defendant's motion for a lineup to test the identification made of him by the State's witnesses where defendant's identification did not depend upon just the victim's testimony at trial but where defendant was identified by many people who saw him at the scene of the robbery, during a chase immediately after the robbery, and upon his removal from a dumpster where he hid from the people chasing him. G.S. 15A-281.

2. **Criminal Law § 138— aggravating factor of prior convictions—properly considered**

The trial court properly considered defendant's prior convictions which were punishable by more than 60 days as a factor in aggravation, and the court did not err in questioning defendant as to whether he had been represented by counsel in each of those cases. G.S. 15A-1340.4(e).

APPEAL by defendant from *Sitton, Judge.* Judgment entered 2 September 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 December 1983.

Defendant was convicted of armed robbery. The State's evidence tended to show that: When Patricia Luther went to her car in her employer's parking lot at dusk on December 4, 1981, she was approached by defendant, who stuck a small caliber pistol in her side, obtained her car keys and pocketbook, and undertook to drive her car away, but was prevented from doing so by a fellow employee of Ms. Luther, who placed her car in his path and

attracted several other employees and passers-by to the scene by hollering and sounding the horn of her car; defendant then fled the parking lot on foot hotly pursued by several people who trailed him a block and a half to a dumpster in which he hid; his captors kept him in the dumpster until the police arrived a few minutes later and also found a gun in the dumpster that was like the one used in the robbery; upon being removed from the dumpster defendant was identified by the victim and several of those who helped catch him; and the same persons identified defendant at the probable cause hearing about three weeks later and at trial. Defendant presented no evidence.

On the eve of trial, approximately nine months after his arrest, defendant filed a motion for a pre-trial lineup procedure pursuant to G.S. 15A-281, which was denied by the judge.

In the sentencing hearing the judge found as an aggravating factor that defendant had previously been convicted of offenses punishable by confinement in excess of sixty days, found no mitigating factors, and sentenced him to forty years in prison, whereas the presumptive sentence for armed robbery under G.S. 14-87 is fourteen years.

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

Assistant Public Defender Grant Smithson for defendant appellant.

PHILLIPS, Judge.

The defendant contends that the trial court erred, first, in denying his motion for a lineup to test the identifications made of him by the State's witnesses, and, second, in exceeding the presumptive sentence for the crime involved. In our opinion neither act by the court was erroneous.

[1] G.S. 15A-281 provides:

> A person arrested for or charged with an offense punishable by imprisonment for more than one year may request that nontestimonial identification procedures be conducted upon himself. If it appears that the results of specific nontestimonial identification procedures will be of material aid in

> determining whether the defendant committed the offense, the judge to whom the request was directed must order the State to conduct the identification procedures.

In denying defendant's motion the court concluded that defendant had failed to show that a lineup would materially aid the jury in determining whether defendant committed the offense involved. There is nothing in the record to indicate that the judge should have concluded to the contrary. Defendant's identification did not depend upon just the victim's testimony at trial, as is so often the case; immediately after the crime he was identified by a host of people who saw him at the scene of the robbery, during the chase, and upon his removal from the dumpster. These same people, while they were chasing him, saw defendant throw away the stolen pocketbook and a distinctive jacket that he was wearing, and after defendant was removed from the dumpster they helped find the robbery weapon in the refuse. The possibility that the witnesses had confused defendant with someone else was too slight to measure, and the court's conclusion that a lineup would not materially aid the jury in determining the case was clearly correct. Our decision is in accord with *State v. Yancey*, 58 N.C. App. 52, 293 S.E. 2d 298 (1982), where it was ruled that a lineup was not required since there was substantial identification evidence, apart from the victim's ability to identify defendant at trial. The other evidence identifying this defendant as the criminal was also quite substantial.

[2] In pertinent part G.S. 15A-1340.4(e) states that: "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." In the sentencing hearing the State presented proof that defendant had been convicted of three crimes that were punishable by more than sixty days confinement, but did not show that defendant either was represented by or waived counsel on those occasions. The court then asked defendant whether he was represented by counsel in each of those cases and defendant answered that he was. Defendant cites the court's questioning of him as error. This contention is based upon the premise that the above statute requires the State to prove a defendant was not indigent or was represented by or waived counsel before a prior conviction can be taken into account in the Fair Sentencing proc-

ess. If our Supreme Court had not decided *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), defendant's point would be well taken. Before that case was decided different panels of this Court ruled on several occasions that the statute does require the State to show that a prior conviction was properly obtained before it can be considered in the sentencing process. *See State v. Callicutt*, 62 N.C. App. 296, 302 S.E. 2d 460 (1983); *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920 (1983); *State v. Locklear*, 61 N.C. App. 594, 301 S.E. 2d 437, *rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983); *State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29 (1983); *State v. Farmer*, 60 N.C. App. 779, 299 S.E. 2d 842 (1983). But upon the Supreme Court reviewing the Court of Appeals decision in *Thompson*, it was held that the State is only required to prove a prior conviction and that it was punishable by more than sixty days confinement and that it is up to the defendant to show that some statutory ground exists for disregarding the conviction. This view is not only authoritative, it is perhaps also more sound, since court judgments have been presumed to be correct since time immemorial and those contending to the contrary have been obliged to prove it.

Since defendant's convictions were duly proven and thus supported the factor in aggravation found by the court, even if the court had erred in questioning defendant about the convictions, the error would have been harmless. But the court did not err. The record makes plain that the questions were not asked for the purpose of augmenting the State's proof, but were asked in a good faith effort to ascertain if any reason existed to disregard the convictions.

No error.

Judges ARNOLD and JOHNSON concur.

THE PRESBYTERIAN HOSPITAL v. CORNELIUS EUGENE McCARTHA AND SALLY W. McCARTHA

No. 8326SC90

(Filed 17 January 1984)

Husband and Wife § 1.1— wife not liable for husband's medical expenses

Defendant wife was not liable for hospital services rendered to her husband where she was not present when her husband was admitted to the hospital and she neither requested nor contracted for the services.

APPEAL by defendant Sally W. McCartha from *Kirby, Judge.* Judgment entered 2 December 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 December 1983.

Defendants are husband and wife. Plaintiff seeks a joint and several judgment against them for hospital services rendered to defendant husband, who confessed judgment for the $27,492.11 claimed, and has not participated in the case since then. The complaint alleges in Count I that the services were rendered pursuant "to the request of and under express contract" with both defendants, and in Count II that the services were rendered at the request of both defendants and for their benefit and were fairly worth the amount sued for. Defendant Sally W. McCartha denied liability and particularly denied that she either entered into an express contract with the plaintiff for the services rendered, or that the services were rendered at her request or for her benefit, as the complaint alleged. Mrs. McCartha admitted, however, both in her answer to the complaint, in answering plaintiff's interrogatories, and in her affidavit supporting her motion for summary judgment, that plaintiff rendered the services alleged to Cornelius Eugene McCartha and was entitled to collect the amount claimed from him.

Plaintiff moved for judgment against Mrs. McCartha on the pleadings, pursuant to the provisions of Rule 12(c) of the North Carolina Rules of Civil Procedure, and she moved for summary judgment, under the provisions of Rule 56(b). Upon the motions being heard an order was entered denying Mrs. McCartha's motion for summary judgment and granting plaintiff's motion for judgment on the pleadings in the amount of $27,492.11. Both rulings were appealed by the defendant Sally W. McCartha.

Miller, Johnston, Taylor & Allison, by Robert J. Greene, Jr. and Paul A. Kohut, for plaintiff appellee.

Warren C. Stack for defendant appellant Sally W. McCartha.

PHILLIPS, Judge.

Although the order appealed from recites that judgment on the pleadings was being rendered against the defendant appellant, since it also recites that matters other than the pleadings were considered, it must be treated as an order of summary judgment, as Rule 12(c), itself, provides. This does not affect our decision, however, as the plaintiff was not entitled to judgment on either basis.

The case has been presented to us by both parties as though it depends upon our power or inclination to extend the common law doctrine of necessaries, which makes a husband liable for necessaries supplied to the wife, so as to hold the wife liable for necessaries furnished the husband. But we do not so consider the case, because under the circumstances of record the necessaries doctrine would not apply even if the services had been furnished to the wife and the hospital was attempting to recover from the husband. Thus, the question posed for our consideration by the parties will have to await an appeal that raises it, which this one fails to do. Nevertheless, we must say we are really at a loss to understand how it could be thought that the naked, unadorned allegations in the complaint that defendant jointly contracted for or requested the hospital services along with her husband, which were met by an answer categorically denying those allegations, raised the necessaries doctrine or entitled plaintiff to judgment on the pleadings.

In any event, "[t]he 'Doctrine of Necessaries' . . . is used to hold a husband liable to merchants and other outside parties who have furnished necessaries to the wife. Necessities or necessaries 'are those things which are essential to her [a wife's] health and comfort according to the rank and fortune of her husband.' " *Cole v. Adams*, 56 N.C. App. 714, 715, 289 S.E. 2d 918, 919-920 (1982), *quoting* 2 Lee, North Carolina Family Law § 132 (4th ed. 1980). The husband's liability, of course, is based upon his legal duty to support his wife; and when he fails or refuses to perform his

duties and other persons provide the necessaries the husband can be held liable. 41 C.J.S. *Husband and Wife* § 50 (1944). But our law, with rare exceptions, has always permitted parties to make their own contracts; and when someone furnishes or sells anything to a party in reliance only upon that party's promise or credit, it is hornbook law that the creditor must look to the one contracted with, and nothing else appearing, cannot require others to pay when the one relied upon fails to do so. Thus, when anyone sells or furnishes necessaries to a married woman in her individual capacity, and in reliance upon her separate estate or credit, it is the law in most jurisdictions that the husband is not liable, and that the creditor must seek payment from the one contracted with. 41 C.J.S. *Husband and Wife* § 56 (1944). Though *Batts v. Batts*, 198 N.C. 395, 151 S.E. 868 (1930) is one of the many decisions cited by that treatise in support of the proposition stated, we do not so understand the case. Nevertheless, the proposition that those who contract only with one party and in reliance upon that party's credit cannot later hold another liable with respect thereto is so manifestly sound that we do not hesitate to follow it.

In this case the uncontroverted evidence was that: Mrs. McCartha was not present on either of the occasions when Mr. McCartha was admitted to the hospital; she neither requested nor contracted for the services; and, for that matter, did not even learn about his hospitalization until after plaintiff had admitted him. Nothing else appearing, and nothing else does appear in the record, this evidence clearly manifests an intention by the hospital to rely upon the separate credit or estate of Mr. McCartha to collect the bill, and shows that at that time it had no thought of requiring payment by the wife. This situation does not give rise to the necessaries doctrine; and it would not arise even if the gender of the parties was reversed and the hospital had contracted only with the wife. Nor does the record establish any other theory which could entitle plaintiff to collect the bills involved from the appellant. Thus, the judgment holding defendant appellant liable for her husband's hospital bills was without basis and must be reversed.

But since appellant's evidence showed that, contrary to plaintiff's allegations, she had neither contracted for nor requested the services involved and plaintiff presented no evidence to the con-

trary, the court also erred in denying her motion for summary judgment. *Watson v. Watson*, 49 N.C. App. 58, 270 S.E. 2d 542 (1980).

This cause is remanded to the Superior Court for the entry of an order reversing the judgment against the appellant, Sally W. McCartha, and dismissing plaintiff's claim against her.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

CAROLINA EASTERN, INC. v. BENSON AGRI SUPPLY, INC., DONALD PARKER, EXECUTOR OF THE ESTATE OF WILLIAM MICHAEL MATTHEWS, DECEASED, AND JANET J. MATTHEWS

No. 8311SC13

(Filed 17 January 1984)

Guaranty § 1— guaranty agreement—no consideration—directed verdict for defendant proper

In an action based on a guaranty agreement, the trial court properly granted a directed verdict in defendant-guarantors' favor where there was no evidence of consideration supporting the guaranty agreement. The guaranty contract stipulated that the consideration was plaintiff's extension of credit to defendant corporation for goods sold; however, plaintiff did not sell any goods nor extend any credit to defendant corporation after the guaranty contracts were executed.

APPEAL by plaintiff from *Bowen, Judge.* Judgment entered 12 October 1982. Heard in the Court of Appeals 30 November 1983.

The question in this case concerns defendants' liability as the alleged guarantors of a debt owed plaintiff. The trial court directed a verdict in favor of defendants and plaintiff appeals.

The pertinent facts are: Between December 1977 and December 1979, defendant, Benson Agri Supply Company, a North Carolina Corporation, purchased agricultural materials on credit from plaintiff, a South Carolina corporation. Defendant corpora-

tion made several payments; however, on 28 January 1980, it still owed plaintiff a balance of $33,580.76.

On 28 January 1980 and on 1 March 1980, defendants, W. M. Matthews, now deceased, and Janet J. Matthews signed identical guaranty agreements, which stated in pertinent part:

> In consideration of Carolina Eastern, Inc. (herein called "SELLER") extending credit to Benson Agri Supply of Benson, North Carolina (herein called "Purchaser") for goods that have been or may be sold by SELLER to the Purchaser, or entering into contracts (as hereinafter set forth) with Purchaser, the undersigned, and each of them, jointly and severally, unconditionally guarantee to SELLER the payment of the purchase price as and when the same is or becomes due for all goods for which credit has been or is so given together with any interest thereon, and also the payment on their respective due dates of any notes or other obligations which have or may be given by Purchaser . . .

After the guaranty agreements were executed, defendant corporation made no further payments to plaintiff and plaintiff extended no further credit to defendant corporation.

On 3 April 1981, plaintiff instituted action against the debtor corporation and defendants as guarantors. Proceedings against defendant corporation were subsequently suspended after it filed a petition under Chapter Eleven of the Federal Bankruptcy Code.

On 11 June 1982, the executor of the estate of W. M. Matthews was substituted as defendant for W. M. Matthews.

On 12 October 1982, after hearing plaintiff's evidence, the trial court denied plaintiff's motion for a directed verdict and granted defendants' motion for a directed verdict.

The guaranty agreements stipulated that they would be governed by the laws of South Carolina. It is our duty, therefore, to apply the substantive law of South Carolina.

Harris, Cheshire, Leager & Southern, by Samuel R. Leager, for the plaintiff appellant.

Clifton & Singer, by Benjamin F. Clifton, Jr., for defendant appellees.

VAUGHN, Chief Judge.

Defendants' motion for a directed verdict tests the legal sufficiency of plaintiff's evidence to take the case to the jury and support a verdict for plaintiff. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). A directed verdict, thus, is proper when plaintiff's evidence is insufficient to establish a valid contract. *See, e.g., Stewart v. Insurance Co.*, 20 N.C. App. 25, 200 S.E. 2d 434 (1973), *cert. denied*, 284 N.C. 623, 202 S.E. 2d 278 (1974). Since consideration is essential to a valid guaranty contract and since we find no evidence of consideration supporting the guaranty agreements hereunder, we hold that the trial court was correct in granting defendants' motion for a directed verdict.

A guaranty contract is supported by sufficient consideration if it is based on a benefit passing to the guarantor or a detriment to the guarantee. *Lowndes v. McCabe Fertilizer Co.*, 157 S.C. 371, 154 S.E. 641 (1930). When the guaranty, as in this case, involves a pre-existing debt, it must be supported by some new consideration other than the original debt. *Id.* Plaintiff contends that the guaranty contracts were supported by consideration in the form of plaintiff's forbearance to sue until 3 April 1981, almost fourteen months after the execution of said guaranty contracts. We find no merit in plaintiff's contention.

The guaranty contracts stipulated that the consideration therefore was plaintiff's extension of credit to defendant corporation for goods sold. Plaintiff, however, did not sell any goods nor extend any credit to defendant corporation after the guaranty contracts were executed. Defendants received no benefit; plaintiff suffered no detriment. Plaintiff contends, nevertheless, that it extended credit and, therefore, consideration by its forbearance to sue. We disagree. The contract terms regarding consideration were clear and unambiguous. We are, therefore, powerless to interpolate into the contract the condition or stipulation that "credit" included plaintiff's willing forbearance to sue. *Proffitt v. Sitton*, 244 S.C. 206, 136 S.E. 2d 257 (1964).

Although forbearance may constitute valid legal consideration, it must be based on a promise to forbear made at the time of the parties' contract. *Duncan & Shumate v. Heller*, 13 S.C. 94 (1879); *McCelvy v. Noble*, 47 S.C.L. 330 (1866); *Thomas v. Croft*, 32 S.C.L. 40 (1846). Plaintiff hereunder presented no evidence of an

agreement that would have prevented plaintiff from bringing suit earlier. It is incumbent upon plaintiff to prove the consideration supporting a guaranty contract for a pre-existing debt; the law does not presume such consideration. *Lowndes v. McCabe Fertilizer Co., supra.* Plaintiff, not having proved any agreement to forbear, failed to prove the consideration essential to the underlying contract. A directed verdict, therefore, in defendants' favor was entirely proper.

At trial, the court sustained defendants' objection when plaintiff's witness was asked why plaintiff waited so long to bring suit. Plaintiff contends that the trial court erred in excluding such testimony. The Record shows that the witness would have testified that plaintiff waited to sue

> (b)ecause our company had a very long standing relationship with Mr. Matthews, and, of course, we had tried to work with them any way we possibly could to, not only for our benefit of the debt but hopefully, you know, to work with them in the future and we did not begin legal action because we were relying on their guaranty to protect the old debt.

We agree with plaintiff that the excluded testimony was competent and should have been admitted. Nevertheless, its exclusion was harmless error. The excluded testimony did not infer any agreement to forbear made by plaintiff at the time the guaranty contracts were executed. It did not establish the necessary element of consideration to show the contracts' validity and change the results at trial.

Affirmed.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. SCOTT ANDREW BOGIN

No. 8329SC519

(Filed 17 January 1984)

Searches and Seizures §§ 14, 33— consent to enter home—seizure of marijuana in plain view

Consent for officers to enter defendant's home was given freely and voluntarily where officers went to defendant's home with a warrant for the arrest of another person; defendant's father invited the officers into the home and told them he would show them where the arrestee was; defendant stated that she might be in his room and opened the door to his room; and when defendant opened the door, an officer smelled a warm, humid and woody odor and saw a bag of marijuana, growing marijuana plants, and drug paraphernalia in defendant's room. Therefore, the officers were in a place where they had a right to be when they observed the marijuana in plain view and lawfully seized it without a search warrant.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 17 November 1982 in Superior Court, HENDERSON County. Heard in the Court of Appeals 8 December 1983.

On 20 March 1982, Deputy Crowder of the Henderson County Sheriff's Department went to the home of Stella Ruff with a warrant for her arrest, which charged that she had failed to appear in court to answer a misdemeanor traffic charge. After twice failing to find Ms. Ruff at home, Deputy Crowder received information that she had gone to a nearby house, the home of defendant.

Deputy Crowder and another officer, Deputy Allen, went to the home of defendant and knocked on the door. When defendant's father answered the door, Deputy Crowder asked if Ms. Ruff was there and said that he had a warrant for Ms. Ruff's arrest. After some discussion about the arrest warrant for Ms. Ruff and about whether Stella Ruff was also known as "Sissy Ruff," defendant's father invited the officers to come into his home and said "something to the effect of 'Come on in, I'll show you where she's at.' " Upon entering the residence, the officers went with defendant's father into a hallway, where defendant was standing. Defendant volunteered that Ms. Ruff might have gone into his room. He then stepped to the doorway of his room and opened the door. When defendant opened the door, Officer Crowder, without entering, looked into the room to see if Ms. Ruff was

there. When the door was opened, Officer Crowder noticed that the room was warm and humid with a woody odor, and when he looked into the room, he saw, in plain view, what appeared to be a bag of marijuana, a number of marijuana plants, and drug paraphernalia. The room was lighted with extremely bright fluorescent lights in a "hothouse" frame in which there were plants growing. Deputy Crowder arrested defendant on charges of felonious possession and manufacture of marijuana. Deputy Allen found Ms. Ruff in another room at defendant's home. After her arrest, Ms. Ruff was released at the sheriff's office with leave to pay off the traffic ticket.

At defendant's trial, the trial judge denied defendant's motion to suppress evidence. The jury found defendant guilty of felonious possession and manufacture of marijuana. The trial judge sentenced defendant to two years imprisonment on each count, to run consecutively. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Walter M. Smith.

George Daly; Bennett and Lawson by Jean Lawson; and Stephen Franks, for defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the trial judge's denial of defendant's motion to suppress evidence. He contends that the marijuana seized when the officers searched his home pursuant to an arrest warrant for Ms. Ruff should not have been introduced into evidence because it was the product of an illegal search and seizure. We do not agree. We find that there was competent evidence upon which the trial court could find that the officers obtained valid consent to enter defendant's home.

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits entry into the home of a person not named in an arrest warrant to search for the person named in the warrant, absent consent or exigent circumstances. *Steagald v. United States*, 451 U.S. 204 (1981). Because there were no exigent circumstances in the present case, we focus on whether there was legally effective consent given to justify entry of the officers into defendant's

home on the strength of an arrest warrant for a person other than the defendant. The trial judge was required to determine whether, under the totality of the circumstances, the consent to enter defendant's home was freely and voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Upon the *voir dire* to determine whether the consent to search was voluntarily given, the weight to be given the evidence is peculiarly a determination for the trial judge, and his findings are conclusive when supported by competent evidence. *State v. Long*, 293 N.C. 286, 294, 237 S.E. 2d 728, 733 (1977).

Deputy Crowder testified that defendant's father (at defendant's suggestion) invited the officers into the house and told them that he (defendant's father) would show them where Ms. Ruff was; that defendant said, "Maybe she's in my room" and opened the door to his room; and that when defendant opened the door, Deputy Crowder smelled the warm, humid, woody air and saw the marijuana and paraphernalia in plain view. There was competent evidence that the officers were in a place where they had a right to be when they observed marijuana that was in plain view. We hold that this is sufficient to support the trial judge's determination that the consent to enter defendant's home was voluntarily and freely given.

Contrary to defendant's assertions, this case is unlike *Bumper v. North Carolina*, 391 U.S. 543 (1968), where the United States Supreme Court found that there was no consent when admittance was preceded by an officer announcing that he had authority to search a home under a search warrant, a situation the court characterized as "instinct with coercion." 391 U.S. at 550. According to *Bumper*, mere "acquiescence to a claim of lawful authority" to search, nothing else appearing, is insufficient to justify a search. *Id.* at 549. Here, the officers announced their authority to *arrest*, not to search, and in a spirit of cooperation the defendant's father voluntarily invited the officers into his home and said he would show them where Ms. Ruff was. Further, the record is undisputed that defendant's room door was opened by him without any request or suggestion from the officers. This is clearly a factual situation beyond the mere "acquiescence to a claim of lawful authority" to search.

For the reasons stated, we find in the trial

No error.

Judges HEDRICK and BRASWELL concur.

STATE OF NORTH CAROLINA v. LESLIE IRVING BUNN

No. 8325SC473

(Filed 17 January 1984)

1. **Criminal Law § 161— "broadside" assignments of error—ineffectual**

Defendant's "broadside" assignment of error and "shotgunning" approach to questions were both ineffectual and without merit.

2. **Assault and Battery § 14.5— assault with a deadly weapon with intent to kill—sufficiency of evidence**

The evidence was sufficient to support a verdict of assault with a deadly weapon with intent to kill where the evidence showed two altercations with the same victim, the first in which the victim was struck by a stick, and the second in which defendant pulled his knife and stabbed and cut the victim.

3. **Assault and Battery § 15.6— instructions on self-defense—proper**

The trial judge properly submitted the issue of self-defense to the jury where the record showed seven paragraphs on self-defense, plus an inclusion of the subject in the final mandate, and it was not error to fail to submit self-defense as a separate verdict, or issue, on the verdict sheet for the jury to separately answer since never is it required to have a jury answer on a written verdict sheet whether they separately found each element proven or each defense unproven. G.S. 15A-1235(a).

4. **Criminal Law § 138— presumptive sentence—no aggravating or mitigating factors required**

It is only when the actual sentence deviates from the presumptive that the law requires a judge to find either mitigating or aggravating factors. G.S. 15A-1340.4(b).

5. **Criminal Law § 142.3— recommendation for work release—restitution—evidence supporting recommendations**

Ample evidence supported the court's recommendations that defendant be available for work release and that defendant pay restitution of $971.85 in medical expenses "or any remaining amount of monies not covered by [the victim's] medical insurance." G.S. 148-33.2(c).

APPEAL by defendant from *Beaty, Judge.* Judgment entered 9 December 1982 in the Superior Court, CALDWELL County. Heard in the Court of Appeals 6 December 1983.

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

W. P. Burkhimer for defendant appellant.

BRASWELL, Judge.

Wayne Hampton emerged from a fight in the Two Spot Lounge with multiple stab wounds in the left shoulder and in the right side. His injuries were so substantial that the first treating doctor called upon the services of an experienced surgeon. Leslie Irving Bunn, defendant, was convicted of the felony of making an assault upon Hampton with a deadly weapon inflicting serious injury, and was given the presumptive sentence of three years with a recommendation for work release and payment of medical expenses. Defendant appeals.

While the defendant purports to raise five questions in his brief, and laboriously argues them, we find no merit to any of his assignments of error. The labels to his questions concern (1) "admission, exclusion, etc., of evidence," (2) a failure to "dismiss the charges," (3) error in jury instructions, (4) "errors in his sentencing of defendant," and (5) violation of his constitutional rights.

[1] Under the fifth "question" counsel recites the time-honored phrases "due process of law" and "law of the land" as having been violated, and alleges, "[t]his Question involves all Assignments of Error." Having read and considered the argument we hold this to be in the nature of a "broadside" assignment of error and find it to be without merit. *Compare, State v. Fennell,* 51 N.C. App. 460, 463, 276 S.E. 2d 499, 501, *further review denied,* 303 N.C. 316, 281 S.E. 2d 655 (1981); *State v. McCoy,* 303 N.C. 1, 19, 277 S.E. 2d 515, 529 (1981).

The first three questions presented can best be summarized as a product of the same shotgunning approach as the fifth question above. By his resort to shotgunning, the appellant has scattered numerous pellets of legal generalities in an attempt to strike targets of admission and exclusion of evidence and sufficiency of evidence; and by shooting at jury instructions without having made any objection at trial, the appellant has made an ineffectual presentation of error to this Court. *State v. McCoy, supra,* at 19, 277 S.E. 2d at 529.

Question one encompasses four assignments of error, one of which deals with the defendant's objections to the admissions of evidence which were actually sustained, but to which the judge gave no cautionary instructions. Other subjects include cross-examination (the court properly denied repetitious cross-examination), self-defense (exclusion of what another witness "thought"), and exclusion of evidence of medical costs to defendant (not the victim), for his own injuries.

[2] Under the second question, the motion of defendant "to dismiss the charges" was properly denied. The State's evidence clearly established each element of the one offense submitted to the jury. The evidence shows two altercations. Hampton was the victim on each occasion. During the first altercation, the State's evidence showed Hampton was struck by a stick, whereas defendant's evidence showed the defendant only hit Hampton with his hand. The defendant then left the club. Upon the defendant's later return into the club and after an exchange of words, the defendant's evidence showed he hit Hampton with a mop handle. As they fought, the defendant pulled his knife and stabbed and cut Hampton. Subsequently, the judge included instructions on self-defense, which was favorable to the defendant under the facts. The defendant's argument to dismiss is not supported by the facts. The State met its burden. *See State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

[3] It is the judge's jury instructions which form the third question in the brief. Under this, defendant discusses what he has named as Assignment of Error No. 7. At one point the allegation is: "The error is the ruling of His Honor that he would not submit an issue of self-defense to the jury." Four paragraphs later the allegation is: "ASSIGNMENT OF ERROR 7 . . . is to Judge's failure to submit issues of fact for jury determination as to whether there was a deadly weapon, whether there were serious injuries, and whether Bunn acted in self-defense." It is difficult to perceive how counsel could put forth such a question. Any plain reading of the judge's charge, which is set out in full in the record, shows seven paragraphs on self-defense, plus an inclusion of the subject in the final mandate. If the defendant's argument can be read to infer that it was error not to submit self-defense as a separate verdict, or issue, on the verdict sheet for the jury to separately answer, then we hold this contention to be foreign to our criminal

law and procedure. Never is it required to have a jury answer on a written verdict sheet whether they separately find each element proven or each defense unproven. Our statute, G.S. 15A-1235(a) requires only a verdict of guilty or not guilty.

Although the defendant now seeks to inject numerous exceptions into the record as to portions of the judge's charge to the jury, the record shows conclusively that none were taken at trial.

> THE COURT: Out of the presence of the jury I will inquire whether any corrections or additions to the charge which I gave to the jury.
>
> MR. PEARCE: None for the State.
>
> MR. BURKHIMER: None from the defendant.
>
> THE COURT: Let the record show out of the presence of the jury the Court inquired of the State and the defendant whether any additions or corrections of the charge given to the jury and both parties replied, "None."

We are aware of *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) (and *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), construing Rule 10(b)(1), N.C. Rules of App. Proc.), and hold that the trial and record before us does not require such application of the rules. We have examined the remaining assignments of error relating to jury instructions and find all of them to be without merit.

[4] As to the alleged sentencing errors under question four, defendant contends that the judge wrongly considered the victim's hospital bills as aggravating factors and that he failed to consider evidence of mitigating factors. By raising this question the defendant completely overlooks the plain words of the State's Fair Sentencing Act. Here, the presumptive sentence was imposed. It is only when the actual sentence deviates from the presumption that the law requires a judge to find either mitigating or aggravating factors. G.S. 15A-1340.4(b).

[5] After making a recommendation for work release, which itself was an exercise of judicial discretion favorable to defendant, the court recommended restitution of $971.85 in medical expenses, but coupled this by adding "or any remaining amount of

monies not covered by Mr. Hampton's medical insurance." The evidence disclosed that Mr. Hampton did have medical insurance, and that probably 80% of the total amount would be paid by insurance, if any was so paid. The series of medical bills supporting the amount were present at court. Ample evidence supported the court's recommendation. G.S. 148-33.2(c); *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978).

No error.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. KEVIN W. SNYDER

No. 8312SC399

(Filed 17 January 1984)

1. **Criminal Law § 43; Narcotics § 3.1— competency of photographs as substantive evidence**

Photographs found in an apartment of which defendant was a co-lessee and in which marijuana was found were properly admitted as substantive evidence to establish defendant's connection with the premises and to establish his *animus* or state of mind with regard to possession and consumption of marijuana. Any error in allowing a witness to speculate as to what the photographs showed was harmless in light of the record as a whole. G.S. 8-97.

2. **Narcotics § 4.3— constructive possession of marijuana in apartment—sufficiency of evidence**

The State's evidence was sufficient to permit the jury to find that defendant was in constructive possession of marijuana found in an apartment, although defendant was not present when the marijuana was discovered in a search by the police, where it tended to show that defendant and another person co-leased the apartment and both paid the monthly rent; three persons told a State's witness that they purchased controlled substances at the apartment from defendant and the co-lessee; defendant paid rent on the apartment the month of the search; defendant had been present at the apartment on the date of the search; and defendant had several items of personal effects at the apartment.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 16 November 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 30 November 1983.

Defendant appeals from a judgment of imprisonment entered upon his conviction of felonious possession of marijuana with intent to sell and deliver.

Attorney General Edmisten, by Assistant Attorney General Donald W. Grimes, for the State.

Bobby G. Deaver for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in admitting photographs found in an apartment of which he was a co-lessee, and in permitting an officer to speculate as to what they depicted. We hold the photographs properly admitted as substantive evidence having some logical tendency to establish defendant's connection with the premises where the marijuana was found, and to establish his *animus* or state of mind with regard to possession and consumption of marijuana. *See* G.S. 8-97; 1 H. Brandis, North Carolina Evidence § 77 (1982). Since the photographs were admissible as substantive evidence, it was not error to deny defendant's request for limiting instructions. While the photographs, as substantive evidence, spoke for themselves as to what they depicted, in light of the record as a whole we hold that any error in allowing the witness to speculate as to what they showed was harmless.

[2] Defendant contends the court erred in denying his motion to dismiss. In considering the motion

> the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. When there is sufficient evidence, direct or circumstantial, by which the jury could find that the defendant had committed the offense charged, then the motion should be denied.

State v. Finney, 290 N.C. 755, 757, 228 S.E. 2d 433, 434 (1976). When the evidence is primarily circumstantial, "the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Spencer*, 281 N.C. 121, 129, 187 S.E. 2d 779, 784 (1972).

There was no evidence here of actual possession. It was nevertheless proper for the court to deny the motion to dismiss if there was evidence sufficient to permit a finding of constructive possession. Our Supreme Court has set forth the standard in this regard as follows:

> Where [illegal drugs] are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss . . . by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'

State v. Harvey, 281 N.C. 1, 12-13, 187 S.E. 2d 706, 714 (1972).

In *Harvey* the Court held the evidence sufficient to overcome a motion to dismiss. The evidence there showed that defendant was in his own home, alone, and within four feet of the marijuana. *Id.* at 13, 187 S.E. 2d at 714.

By contrast, the Court in *State v. Finney,* 290 N.C. 755, 228 S.E. 2d 433 (1976), held that the trial court should have allowed the motion for nonsuit. There, however, the evidence indicated that defendant had not been at the apartment for forty-four days prior to the date the marijuana was seized. Further, there was evidence that defendant had sublet the apartment and gone to Florida a month and a half before the marijuana was found there.

Another case involving controlled substances is *State v. Wells,* 27 N.C. App. 144, 218 S.E. 2d 225 (1975). In *Wells* no one was present when the apartment was searched in August 1974. The evidence, however, showed that defendant had paid the rent in July and August. Further, there was evidence that defendant had been at the apartment at least three days prior to the date of the search. A two week old utility bill in defendant's name was found in the apartment. The Court held that there was sufficient evidence to overcome a motion for nonsuit.

Here, the evidence showed that defendant and one Winters co-leased the apartment where the marijuana was found. Defendant and Winters were together when they picked up the keys.

They indicated that they alone would be residing in the apartment. Both defendant and Winters paid the monthly rent.

A State's witness received complaints regarding two white males selling marijuana out of the apartment. At least three persons told the witness that they purchased controlled substances from defendant and Winters. A month before the marijuana was seized defendant's car was seen parked outside the apartment.

Approximately two hours before the marijuana was seized, a confidential informant went to the apartment and bought marijuana. He informed the officer that the two occupants of the apartment were there, but that one was getting ready to go to a bar. When the officers arrived with a search warrant, only Winters was present. When asked where his roommate was, Winters replied that he had just left to go to a bar. Later that night the officers went to the bar and found defendant there.

During the search the officers found approximately twenty-six bags of marijuana in a closet. Also in the closet were two sets of scales. Throughout the apartment officers found unused portions of marijuana cigarettes. Defendant's automobile title certificate and his photographs discussed above were found on the premises.

Viewing the foregoing evidence in the light most favorable to the State, as required, it shows that defendant had paid rent the month of the search, was present at the apartment on the date of the search, and had several items of personal effects there. Under the foregoing authorities, this established defendant's control over the premises sufficiently to carry the case to the jury. The court thus properly denied the motion to dismiss.

No error.

Judges WEBB and WELLS concur.

Dickson v. Lynch

ALAN T. DICKSON, TRUSTEE v. MARK G. LYNCH, NORTH CAROLINA SECRETARY OF REVENUE

No. 8326SC20

(Filed 17 January 1984)

Taxation § 18— income on trust distributable to nonresident—intangible tax improperly levied

In determining whether a trust held for the benefit of a nonresident is exempt from intangibles tax by G.S. 105-212, it does not matter whether any income was actually distributed from the trust if trust assets were distributable to the nonresident beneficiary. Therefore, where plaintiff trustee was authorized to distribute income to nonresidents, and to no one else, the trusts were clearly exempt from the intangibles tax under the plain language of G.S. 105-212.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 23 November 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 December 1983.

Plaintiff is a resident and domiciliary of North Carolina and is successor trustee of four irrevocable trusts, each in favor of a nonresident beneficiary. The instrument under which each of the trusts was created provides that distribution of income is a matter left to the sole discretion of the trustee. During 1981, plaintiff elected to distribute no income to any of the nonresident beneficiaries.

Plaintiff filed 1981 intangible personal property tax returns and paid a total of $4,753.44 in tax on the intangible assets constituting the corpus of each of the trusts. With the tax returns, plaintiff sent a letter requesting a refund of the $4,753.44 paid in intangible tax. Defendant refused to refund the tax paid, and plaintiff filed suit to recover the $4,753.44.

After a hearing, the trial judge granted plaintiff's motion for judgment on the pleadings, denied defendant's motion for summary judgment, and ordered that defendant refund the $4,753.44, plus interest, to plaintiff. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for defendant-appellant.

Fleming, Robinson, Bradshaw & Hinson, by Russell M. Robinson, II, and Edwin F. Lucas, III, for plaintiff-appellee.

EAGLES, Judge.

A trust held for the benefit of a nonresident by a North Carolina trustee is exempted from intangibles tax to the extent that its net income is "distributed or distributable to such nonresident." G.S. 105-212. Defendant contends that only income actually distributed to the nonresident is exempt from intangibles tax and that plaintiff was subject to intangibles tax for 1981 because there was no distribution of income from the trusts. We do not agree.

In determining whether a trust held for the benefit of a nonresident is exempt from intangibles tax by G.S. 105-212, it does not matter whether any income was actually distributed from the trust if trust assets were distributable to the nonresident beneficiary. We hold that "distributable," as used in G.S. 105-212, means "capable of being distributed." The Secretary of Revenue's regulations requiring that income be actually distributed to a nonresident in order to be considered in determining the ratio of intangible property exempt from taxation are in contravention of the statute. See, 17 N.C.A.C. 8.1505(5). These regulations are also inconsistent with the North Carolina Supreme Court's statement that the purpose of the exemption in G.S. 105-212 is "to dispel any idea that intangibles otherwise exempt would be subject to the intangible personal property tax *because* a fiduciary domiciled in this State held and controlled such intangibles." *Allen v. Currie*, 254 N.C. 636, 643, 119 S.E. 2d 917, 923 (1961).

Because plaintiff here was authorized to distribute income to nonresidents, and to no one else, the trusts are clearly exempt from the intangibles tax under the plain language of G.S. 105-212. The trial judge properly concluded that plaintiff was entitled to a refund of the 1981 intangibles tax paid on the trust assets.

Affirmed.

Judges HEDRICK and BRASWELL concur.

STATE OF NORTH CAROLINA v. ANTHONY JONES

No. 8315SC381

(Filed 17 January 1984)

Larceny § 7.3— ownership of stolen property—insufficient evidence

The State's evidence was insufficient to support defendant's conviction of misdemeanor larceny of money belonging to "Sands Vending Machine Company of Greensboro while in the custody of Brown-Wooten Mills, Inc." as alleged in the indictment where the evidence tended to show only that the money box of a vending machine at the Brown-Wooten mill had been pried open and the money taken therefrom, and that defendant was found lying on the floor of the mill with a sock containing $42.00 in nickels, dimes and quarters and a tire iron in his pocket, but the evidence failed to show that the mill had custody or any property interest in either the machine or money in that there was no evidence as to who owned the vending machine and the money in it or as to what relationship, if any, existed between the mill and the machine owner.

APPEAL by defendant from *Smith, Judge.* Judgment entered 29 November 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 29 November 1983.

Defendant was charged with felonious breaking and entering and larceny. The personal property allegedly stolen was monies belonging to "Sands Vending Machine Company of Greensboro while in the custody of Brown-Wooten Mills, Inc."

The State's evidence tended to show that: A police officer, called to Brown-Wooten Mills in Burlington on July 10, 1982 at approximately 11:37 p.m., found defendant lying on the floor with a sock containing $42 in nickels, dimes and quarters and a tire iron in his pocket; and in a different part of the building, found a vending machine whose money box had been pried open. Defendant admitted breaking into the machine, but signed no statement.

At the close of the State's evidence the court dismissed the breaking and entering and felonious larceny charges, but denied defendant's motion to dismiss the lesser included offense of misdemeanor larceny. Defendant offered no evidence and was convicted of misdemeanor larceny.

Attorney General Edmisten, by Associate Attorney General Charles H. Hobgood, for the State.

Ross and Dodge, by Harold T. Dodge, for defendant appellant.

PHILLIPS, Judge.

The sufficiency of the evidence to support defendant's conviction is the only question presented for our determination. Since *State v. Jenkins*, 78 N.C. 478 (1878), our "law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest." *State v. Greene*, 289 N.C. 578, 584, 223 S.E. 2d 365, 369 (1976). The indictment in this case doubly met the test, since it alleged that two concerns had property interests in the stolen property—Sands Vending Machine Company, as legal owner, and Brown-Wooten Mills, Inc., as custodian. But the proof was deficient.

The only evidence presented about the vending machine and the money in it, other than that the machine was broken into and defendant had the money, was that it was in a certain section of the Brown-Wooten Mills factory building. No evidence was offered as to who owned the machine or the money in it; or as to what relationship, if any, existed between the mill and the machine owner; or as to how the machine came to be at the mill; or who was in charge of it and by what authority. While the State's evidence that the machine was situated in the mill was enough to prove possession, it was not enough to prove that the mill had custody of either the machine or money or had any other property interest in it. Custody of personal property involves more than possession, and, for that matter, can exist without it; ultimately, it is based upon authority from the owner, and means to have charge, or be in control, of property, and also carries with it responsibility for the thing kept. The State's failure to prove its allegations was fatal to the case and defendant's motions to dismiss at the close of the evidence and after the verdict should have been granted. *State v. Wiggs*, 269 N.C. 507, 511, 153 S.E. 2d 84, 87 (1967); *State v. Allen*, 103 N.C. 433, 9 S.E. 626 (1889).

The State contends that since defendant did not claim ownership of the money and the mill had possession of it that it can be safely inferred that the mill was also the owner. But our law permits no such substitutions for proof when liberty or life is in issue; nor should it, since proof is both simpler and more reliable.

The judgment appealed from is reversed and the cause is remanded to the Superior Court for entry of a verdict of acquittal.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. KENNETH RAY LOCKLEAR

No. 8326SC356

(Filed 17 January 1984)

Criminal Law § 9— failure to instruct on aiding and abetting proper

The trial court properly failed to instruct on aiding and abetting where the State's evidence and the theory of the trial was not that defendant aided and abetted in the robbery, but that he acted in concert with the other robbers and where defendant's evidence tended to show that he had no knowledge of the robbery and thus could not have knowingly aided or abetted in it.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 29 September 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 November 1983.

Defendant was tried for and convicted of robbery with a dangerous weapon. The State's evidence tended to show that: Mae Willie Limas was working at the Pineville Fish Market when two armed men identified as Bobby Locklear, defendant's brother, and Max Morris entered and demanded that she give them the cash drawer, which she did; the men drove away in a gray automobile with South Carolina license plates, and when the police stopped the car later that night defendant was in it. Max Morris, who turned State's evidence, testified that: Defendant gave him and Bobby Locklear the guns, suggested they rob the fish market,

agreed they would split the money three ways, drove them to the market, and waited in the car about 100 yards away; after the robbery Morris returned to the car and left with defendant, but Bobby Locklear left by himself and he did not see him anymore that day or get any of the money.

The defendant's evidence, through the testimony of Bobby Locklear, tended to show that: Bobby Locklear and Morris planned and committed the robbery by themselves and defendant knew nothing about it; though defendant drove them to near the market, which was close to the house of a friend that defendant was on his way to visit, he had no knowledge of their plans, because they did not decide to commit the robbery until after they had left defendant.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

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

PHILLIPS, Judge.

Defendant, in writing, timely requested the judge to specially instruct the jury with respect to aiding and abetting, and the refusal to give the instruction is cited as error. This contention is without merit. The State's evidence and the theory of the trial was not that defendant aided and abetted in the robbery, but that he acted in concert with the other participators. According to the evidence favorable to the State the only correct charge was the one given—for acting in concert. *State v. Davis*, 40 N.C. App. 68, 252 S.E. 2d 30 (1979). Nor did the defendant's evidence support the aiding and abetting charge since his evidence tended to show that he had no knowledge of the robbery and thus could not have knowingly aided or abetted in it. Furthermore, the acting in concert charge that was given placed a more onerous burden on the State than would have the aiding and abetting instruction requested by defendant, and thus could not have prejudiced his right to a fair trial.

The defendant's contention that the evidence was insufficient to support his conviction is likewise without merit. The evidence of record, remarkably similar to that in *State v. Davis, supra*,

clearly meets the standard so well elucidated by Justice Exum in *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979), which need not be restated here.

The defendant also cites as error the sustaining of the State's objection to a question asked Bobby Locklear as to whether he *felt* that the defendant was available to help him in any way in robbing the store. But since the record does not show how the witness would have answered the question the contention is not reviewable. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). The question was manifestly improper in any event since it asked for the witness's feeling, which was not an issue in the case.

No error.

Judges WEBB and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 JANUARY 1984

BALDUCCI v. H. B. ZACHRY CO. No. 8310IC516	Industrial Commission (I-0963)	Affirmed
CAMERON v. EPPS No. 8314DC556	Durham (82CVD02022)	Vacated and Remanded
HUBBARDTON FARMS v. SEILLER No. 8320SC623	Moore (82CVS312)	Affirmed
IN RE IGBEKOYI v. ALLIED CHEMICAL No. 8310SC715	Wake (82CVS2742)	Appeal Dismissed
MOSLEY v. MOSLEY No. 8318DC654	Guilford (81CVD6233)	Affirmed
MULLIS v. MULLIS No. 8315DC524	Alamance (82CVD1382)	Appeal Dismissed
ROBINSON v. LEFEVER No. 8320SC240	Moore (80CVS571)	Affirmed
SMITH v. SMITH No. 8321DC569	Forsyth (82CVD2515)	Affirmed
STATE v. HARRIS No. 8329SC216	McDowell (81CRS5758)	No Error
STATE v. HOLDEN No. 834SC588	Duplin (82CRS5963) (82CRS5964)	New Trial
STATE v. IDLEBIRD No. 8310SC722	Wake (82CRS30162)	No Error
STATE v. OXNER No. 8320SC417	Union (82CRS7338)	No Error
STATE v. ROBERTS No. 8328SC830	Buncombe (82CRS33558)	No Error

STATE OF NORTH CAROLINA v. MITCH A. TURNER

No. 836SC561

(Filed 7 February 1984)

1. **Criminal Law § 99.5— admonition to defense counsel—no expression of opinion**

Actions by the trial court, including admonitions to defense counsel to "move on," did not indicate any opinion toward defendant's case or any negative attitude toward defense counsel so as to prejudice defendant, but revealed only the trial court's impatience with defense counsel's attempt to rehash previous testimony.

2. **Criminal Law § 99.4— court's sustaining own objection**

The defendant was not prejudiced when the trial court objected to a line of questioning and sustained his own objection where the line of questioning was irrelevant in this particular case.

3. **Criminal Law § 99.2— correction of witness by court—absence of prejudice**

Although the trial court's correction of an undercover agent's testimony that he had "collected" bags of marijuana in his possession by asking whether the agent meant "bought" was improper, it was not prejudicial where the last question asked by defense counsel before this exchange was how many "buys" the agent had made that day.

4. **Criminal Law § 99.2— improper comment by court—absence of prejudice**

In a prosecution for possession and sale of marijuana in which defendant testified that he did not get into an undercover agent's car when he sold marijuana on a certain date, the trial court's improper comment, "I thought he said he did," was not prejudicial to defendant in light of defendant's testimony admitting that he did in fact sell marijuana to the agent on the occasion in question.

5. **Narcotics § 3.1— references to defendant as drug dealer—absence of prejudice**

In a prosecution for possession and sale of marijuana, three references by prosecution witnesses to defendant as a "drug dealer" and a "large drug dealer" were not prejudicial error where the court on each occasion sustained defendant's objection and instructed the jury to strike such reference from their minds; the first two references of this sort were elicited by defense counsel on cross-examination; and defendant lost the benefit of his objections to such references when substantially the same evidence was thereafter admitted without objection.

6. **Criminal Law § 85.2— State's character evidence—reputation of defendant as drug dealer**

The trial court did not err in permitting the State's three rebuttal character witnesses, who stated that they were familiar with defendant's character and reputation in the community, then to state that defendant had the reputation of dealing in drugs without first requiring the witnesses to state whether defendant's character was good or bad.

7. Criminal Law § 87— witness not on list furnished defendant—allowance of testimony discretionary

Permitting testimony by a witness whose name was omitted from the list of potential witnesses furnished to defendant prior to trial was a matter within the trial court's discretion.

8. Criminal Law § 89.3— prior consistent statement—admissibility for corroboration

An SBI agent's testimony as to what an undercover agent had told him about a purchase of marijuana from defendant was properly admitted to corroborate the undercover agent's testimony even though the undercover agent never testified that he told the SBI agent about the marijuana purchase.

9. Narcotics § 3.3— qualification of witness to testify about marijuana

An expert witness in forensic chemistry was sufficiently qualified to testify as to how many nickel bags could be produced from a quarter pound of marijuana, how many marijuana cigarettes could be rolled from this quantity, and how much this quantity of marijuana would be worth on the street where the witness testified that he had identified marijuana over 10,000 times, that he had testified as an expert in drug analysis more than 500 times, that he had gone out on the street and talked to people about how much marijuana is worth and what it sells for, and that he had dealt with a lot of nickel bags of marijuana.

10. Criminal Law § 7; Narcotics § 3— testimony not relevant to show entrapment

In a prosecution for possession with intent to sell and sale of marijuana, testimony by defendant that, prior to the time an undercover agent came to his home, he had planned to work that day was not relevant on the issue of whether the criminal intent to sell marijuana originated in defendant's mind and was properly excluded.

11. Criminal Law § 138.4— two sentences—failure to place defendant on probation for one sentence

The trial court did not abuse its discretion in failing to suspend the prison term and place defendant on probation for at least one of the two judgments entered against him for possession of marijuana with intent to sell and sale of marijuana. G.S. 15A-1340.4(a).

APPEAL by defendant from *Barefoot, Judge.* Judgments entered 13 January 1983 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 10 January 1984.

Attorney General Edmisten by Special Deputy Attorney General H. A. Cole, Jr., for the State.

Johnson, Johnson & Johnson by Bruce C. Johnson and Steven A. Graham for defendant appellant.

BRASWELL, Judge.

Through an undercover drug investigation conducted by the State Bureau of Investigation (SBI) in Halifax and Northampton Counties, the defendant was arrested and later convicted on Count I for the possession of marijuana with intent to sell and on Count II for the sale of marijuana. The defendant's defense at trial was entrapment. We have carefully reviewed the eight questions presented for our review by the defendant and have found no prejudicial error.

Eugene Bryant is an agent with the SBI who was sent to Northampton County to work undercover with local authorities in a drug investigation in the Spring of 1982. Agent E. H. Cross, Jr., acted as Bryant's supervisor during this operation. The agents were assisted by a man known only as "Raymond" who lived in the Weldon area of Halifax County and who helped set up the first meeting between Bryant and the defendant.

On 22 April 1982, Agent Cross instructed Bryant to pick up Raymond in Weldon. After doing so, Bryant and Raymond drove across the Halifax County line a short distance into Northampton County to the defendant's mobile home. Agent Bryant was dressed in jeans, a regular coat and shirt, was unshaven, and was driving a 1975 Malibu Chevrolet in order to conceal his identity as a policeman. When they arrived at the mobile home, Raymond knocked on the door and the defendant appeared. They did not go inside but conversed at the trailer's door.

Raymond introduced Agent Bryant as "Eugene." Bryant testified that after he had been introduced:

> I told Mitch Turner that I was from Elizabeth City and things are dry down there, and do you know where I can get some marijuana? . . . He [the defendant] stated to me at that time that he could get me a quarter pound, which I stated to him I wanted to purchase, and he stated it would be about an hour before he could get that quarter pound.

The defendant drove to Emporia, Virginia, and met with a man named "Slick" at the Dew Drop Cafe who gave him a quarter-pound of marijuana. Then the defendant drove back to North Carolina and went to Raymond's house to sell the marijuana to Agent

Bryant as previously arranged. Bryant paid the defendant $125 for the marijuana which the defendant took. The next day the defendant went back to Emporia and gave Slick the money for the marijuana. Slick, in turn, paid the defendant twenty-five dollars.

On 30 April 1982, at approximately 11:50 a.m., Agent Bryant again contacted the defendant in order to make a second drug buy. It is this particular transaction for which the defendant was subsequently indicted. Bryant went to Turner's Used Car Lot and told an employee there that he wanted to talk with the defendant. Minutes later, the defendant came over to Agent Bryant who told the defendant that he wanted to purchase a quarter-pound of marijuana. The defendant indicated that it would take him about an hour to get the marijuana and for Bryant to meet him at Turner's Grocery.

Agent Bryant went to the grocery store at approximately one o'clock and waited for several minutes. Thinking that the defendant was not going to show up, Agent Bryant left, traveling south on Highway 301 when he met a vehicle being operated by the defendant who motioned for Bryant to pull over. The defendant turned his car around and pulled up behind Bryant who had stopped. The defendant got out of his car and got into Bryant's. He then pulled out from under his coat a plastic bag containing brown vegetable material. Bryant asked if the correct weight was there and the defendant stated that it was. Taking the marijuana, Bryant paid the defendant $125 which the defendant accepted.

The defendant testified that he had gone back to the Dew Drop Cafe and received the marijuana from Slick. After selling the marijuana to Agent Bryant, he drove back to Emporia to give Slick the $125 for the sale and again was paid twenty-five dollars by Slick.

The defendant does not deny that these two sales occurred, but claims that they occurred only after he had been induced by Agent Bryant to commit these crimes. For instance during the 22 April 1982 transaction, the defendant contends that he repeatedly told Bryant that he did not sell marijuana and did not have any. Also, on 30 April 1982, the defendant told Bryant that he did not sell marijuana, but that Agent Bryant "kept on after [him] to go and get him some [marijuana], because he needed some." On each

occasion, the defendant finally agreed to get Bryant some marijuana, but said that he was only doing it as a favor and would not do it again. Although the trial court charged the jury on the defense of entrapment, the jury returned a verdict finding the defendant guilty of possession of marijuana with intent to sell and guilty of the sale of marijuana.

The defendant's first assignment of error asserts that numerous comments and expressions by the trial judge during the trial and in the presence of the jury prejudiced his right to a fair trial. Because the trial judge occupies an exalted position, " 'he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury.' " *State v. Belk*, 268 N.C. 320, 324, 150 S.E. 2d 481, 484 (1966), *affirmed*, 269 N.C. 725, 153 S.E. 2d 494 (1967), *quoting State v. Carter*, 233 N.C. 581, 583, 65 S.E. 2d 9, 10 (1951). Since impartiality is imperative, it is error for the trial court to express or imply, in the presence of the jury, his opinion in any form whatsoever or to belittle and humiliate counsel which may tend to seriously prejudice the defendant's case in the eyes of the jury. *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971). "It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence or in any other manner." *State v. Freeman*, 280 N.C. 622, 626-27, 187 S.E. 2d 59, 63 (1972).

[1] In the present case, the defendant sets forth several instances in which he feels the trial court by his conduct prejudiced his case. An examination of these instances reveals that the trial court's actions did not indicate any opinion towards the defendant's case or any negative attitude toward defense counsel, but rather revealed the trial court's impatience with defense counsel's attempt to rehash testimony previously asked for and answered. This impatience reflected by trial court's repeated admonishment to defense counsel to "move on" did not constitute prejudicial error because "[i]t is both the right and the duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged and needless examination." *State v. Mansell*, 192 N.C. 20, 24, 133 S.E. 190, 192-93 (1926).

[2] Nevertheless, the trial court must be careful that in the exercise of this duty he does not prevent counsel from effectively examining witnesses on relevant subjects. For example, Agent Bryant had made several marijuana buys on 30 April 1982 when defense counsel attempted to place in the minds of the jurors the possibility that Bryant had commingled the evidence or confused the marijuana from one buy with that of another. The following exchange took place:

> Q. [DEFENSE COUNSEL] And how much marijuana did you have in your own home?
>
> COURT: That's sustained. That doesn't have anything to do with this case. I'll not even sustain that; it doesn't have anything to do with this case.
>
> Q. Did you have several different packages or bags of marijuana in your home?
>
> WITNESS: [Agent Bryant] Do I?
>
> Q. Did you at that time—
>
> MR. BEARD: Objection.
>
> Q. —that you have collected?
>
> A. Yes, sir, I did.
>
> COURT: Bought, you mean; don't you?
>
> EXCEPTION NO. 9.

Although it may appear somewhat inappropriate for the trial court to rule this subject area of cross-examination as irrelevant, we hold that under the defendant's theory of the case his ruling was not error. The defendant admitted that he obtained and sold a quarter-pound of marijuana to Agent Bryant on 30 April 1982. He did not contend that the vegetable material within the plastic bag was not in fact marijuana. Therefore, his line of questioning was irrelevant in this particular drug case and it was appropriate for the trial judge to object and sustain his own objection. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960). In any event, Agent Bryant proceeded to testify to all the safeguards he used in his efforts to keep the evidence separate.

[3] As to the trial court's correction that Bryant "bought" rather than "collected" the bags of marijuana in his possession, the trial court may have overstepped the bounds of cold neutrality. Although any such step constitutes error and should be guarded against with the greatest caution, we hold that in this particular case and context this comment did not amount to prejudicial error, for the last question by defense counsel preceding this exchange asked Agent Bryant how many "buys" had he made that day. Therefore, the trial court was only clarifying that "buys" are "bought."

[4] Also, the defendant asserts that the following comment made by the trial court prejudiced the defendant's credibility in the eyes of the jury. On redirect examination, defense counsel asked:

> Q. Mr. Turner, when you went to the car on April the thirteenth, did you ever get in the car?
>
> A. No.
>
> COURT: I thought he said he did.
>
> EXCEPTION NO. 29.
>
> [Defendant continues] He, Mr. Bryant, was in the car.

It is true that Agent Bryant's and the defendant's testimony differed as to whether the defendant actually got into Bryant's car when he sold the marijuana on 30 April 1982. Although the trial judge must refrain from such unnecessary comments in the course of a trial, we again fail to see how this comment was prejudicial error in light of his testimony admitting that he did in fact sell marijuana to Bryant on this occasion.

Finally, we hold that even though the defendant asserts eleven instances of this nature where the trial court more wisely should have kept silent, we do not feel that they separately or cumulatively warrant a new trial.

[5] In his second assignment of error, the defendant contends that three references by State witnesses to defendant as a "drug dealer" and a "large drug dealer" were prejudicial error not cured by the court's instructions. Contrary to the defendant's brief, the first two references of this sort by Agent Bryant were elicited by defense counsel on cross-examination. From the rec-

ord, the answers given by Bryant referring to the defendant as a drug dealer were responsive to his questions. The third reference to the defendant as a "large drug dealer" was made by Agent Cross during direct examination by the prosecutor. Once each of these references to the defendant were made the trial court immediately sustained defense counsel's objections and instructed the jury to strike the references from their minds as if they had not heard them. We must assume that the jury heeded his instructions. *State v. Robbins*, 287 N.C. 483, 488, 214 S.E. 2d 756, 760 (1975), *modified on other grounds*, 428 U.S. 903, 96 S.Ct. 3208, 49 L.Ed. 2d 1208 (1976). In any event, Agent Bryant further testified without objection during cross-examination that "I was seeking out drug dealers in Northampton County and I sought Mitch Turner out." Defense counsel thus lost the benefit of his objection when substantially the same evidence was theretofore or thereafter admitted without objection. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

[6] The third assignment of error states that the trial court erred by allowing three State rebuttal witnesses to testify to a specific trait of the defendant's character. The defendant placed his character into evidence by calling five witnesses who each testified that his reputation and character were good. In rebuttal, the State called Detective Ellis Squire, Officer H. L. Whittle, and Chief Deputy Sheriff Otis Wheeler. Each witness indicated that they had lived in Northampton County for many years and two of three testified that they knew the defendant for over ten years. When all were asked whether they knew what the defendant's character and reputation was in the community, they all replied, "Yes." Then they were asked:

> Q. What is his character and reputation?
>
> [Squires' reply]: Mr. Turner has the reputation of dealing in drugs.
>
> * * * *
>
> [Whittle's reply]: Mr. Turner has the reputation of dealing in drugs.
>
> * * * *
>
> [Wheeler's reply]: He's a known drug dealer.

During and after each reply, defense counsel objected and moved to strike the answer from the record which was denied. The defendant asserts that error was committed in that each witness should have first stated whether the defendant's character was good or bad before he related on what particular vice his reputation was based. We disagree.

In the present case, the "witnesses were asked the required 'preliminary qualifying question,' that is, whether they knew defendant's character and reputation in the community." *State v. Caudle*, 58 N.C. App. 89, 93, 293 S.E. 2d 205, 208 (1982), *cert. denied*, 308 N.C. 545, 304 S.E. 2d 239 (1983). Once their reply was in the affirmative, they were qualified to speak on the subject of the defendant's reputation and character in the community. The rule is that " 'counsel may then ask him to state what it is. This he may do categorically, *i.e.*, simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices.' " *Id.* at 93, 293 S.E. 2d at 207. By stating that the defendant had a reputation for dealing in drugs, the witnesses were implying that his reputation was bad. Their statements, therefore, were merely a means to qualify their testimony by directly stating the reason they felt his reputation was in fact bad. Although in a technical sense each witness should have first replied that the defendant's reputation in the community was bad, we hold that the foundations laid for each witness to be a sufficient, though minimal, compliance with the requirements for admission of character evidence.

[7] In addition to this ground the defendant also asserts that it was error to allow Officer H. L. Whittle to testify at all in that he was never listed as a State's witness. The accepted rule is that permitting witnesses whose names were omitted from the list of potential witnesses is a matter within the trial court's discretion. *State v. Davis*, 290 N.C. 511, 534, 227 S.E. 2d 97, 111 (1976). Finding no abuse of discretion we hold the trial court committed no error by allowing Whittle to testify.

[8] The defendant's next assignment of error concerns whether the trial court erred in permitting Agent Cross to testify to what Agent Bryant previously told him about the vegetable material

received from the defendant. Over defense counsel's objection, the trial court allowed Agent Cross to relate what Agent Bryant had told him concerning the 30 April 1982 drug sale. Defense counsel objected on the grounds that there was no evidence in the record from Agent Bryant that he ever told Agent Cross what had happened.

The record shows that when Agent Cross was allowed to testify to what Agent Bryant told him he related a story consistent with the testimony given by Agent Bryant earlier. Agent Cross was in effect merely relating a prior consistent statement made to him by Agent Bryant. "The admissibility of a prior consistent statement of a witness to corroborate his testimony is a long established rule of evidence in this jurisdiction." *State v. Medley*, 295 N.C. 75, 78, 243 S.E. 2d 374, 376 (1978). Thus, if the prior statement in fact corroborates the testimony of the witness, it is admissible. *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *modified on other grounds*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1211 (1976). Since this evidence was admitted only to corroborate the manner in which the sale occurred and not as substantive evidence, it is immaterial that Agent Bryant never actually stated during his testimony that he had told Agent Cross that day about the drug buy. Because the account given by Agent Cross is substantially the same as given previously by Agent Bryant, we hold that the court properly allowed the testimony into evidence. Furthermore, besides a slight variation as to whether the defendant actually got in the agent's car to hand over the marijuana, the defendant's testimony corroborated what Agent Bryant and Agent Cross stated as well. *See State v. Medley, supra.* We also hold that the trial court's instruction to the jury to consider the prior statements for the purpose of corroborating Bryant's testimony if they found that the statement did corroborate his trial testimony was proper. *See State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979).

[9] The defendant further contends that the trial court erred in allowing the State's expert witness, Neal Evans, Jr., in forensic chemistry, to testify to how many nickel bags could be produced from a quarter-pound of marijuana, how many marijuana cigarettes could be rolled from this quantity, and how much would this quantity of marijuana be worth on the street. The defendant objected to this testimony in the first place because the expert

testified that his opinions on these matters were "not the result of anything or any analysis" he did in this particular case like actually rolling the quarter-pound of marijuana into cigarettes. However, Mr. Evans did testify that he had been a forensic chemist with the SBI for over thirteen years, that he had identified marijuana over 10,000 times, and that he had testified as an expert in drug analysis more than 500 times. He also testified that he had "gone out on the street and talked to people about how much marijuana is worth and what it sells for" and that he had dealt with a lot of nickel bags. We hold that he was sufficiently qualified to testify to these matters and to relate the opinions he had formed concerning the marijuana. We recognize the rule that an expert may base his opinion on information not otherwise admissible. 1 Brandis on North Carolina Evidence § 136 (1982).

The defendant also objects to this expert's testimony because it is irrelevant. We hold that since the defendant was charged with the sale of marijuana and the possession of marijuana with intent to sell, the jury was at least entitled to know in terms they could understand how much marijuana the defendant did sell as measured in cigarettes and in money.

The seventh assignment of error concerns the trial court's refusal to allow the defendant to answer questions which the defendant felt would show that the criminal intent to commit the crimes charged did not originate in his mind, an element of entrapment. The first question, "did you ever have an idea of selling any marijuana prior to seeing Raymond and Mr. Bryant?" had been previously answered during direct examination. The defendant stated: "I have never sold any marijuana before. My intentions that night, prior to them coming and knocking at my door, was to do nothing but watch TV."

[10] The second question which was objected to and sustained asked: "On April the thirtieth . . . what were your plans and intentions to do that day prior to Mr. Bryant coming up there?" The defendant's answer as shown by the offer of proof in the record would have been that he "[p]lanned on working the rest of the day." We fail to see how this answer is relevant on the issue of whether the criminal intent to sell marijuana originated in the defendant's mind. Simply stating that he planned to work that day does not prove that when the opportunity to make a mari-

juana sale arose that he was not ready and willing to comply with Bryant's request. We hold that this objection was properly sustained.

The third question in which the trial court prevented the defendant from answering was also sustained on the basis that the question had been previously asked and answered on direct examination. In response to the question asking why the defendant had gotten the marijuana for Bryant, he attempted to reply that he had done it only as a favor for Raymond, a statement he had made twice before.

We hold, therefore, that the trial court properly sustained the objection to these questions.

[11] In his final assignment of error, the defendant contends that the trial court abused his discretion in failing to suspend the prison term and place the defendant on probation for at least one of the two judgments entered against him. The defendant in his brief "concedes that the Trial Judge had the legal right to enter Judgment for the presumptive sentence of two years on the conviction of possession with intent to sell, and for the presumptive term of two years for the sale of marijuana, and to run the sentences consecutively" which the trial court in fact did. He also realizes that G.S. 15A-1340.4(a) makes the decision whether to suspend a prison term and impose probationary supervision a discretionary matter for the trial judge. After a careful review of the record, we hold that there has been no abuse of the trial court's discretion.

No error.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. CHARLES ARRINGTON

No. 832SC87

(Filed 7 February 1984)

Searches and Seizures § 26— suppression of evidence proper—affidavits supporting warrant deficient

The trial court properly entered an order suppressing the evidence seized in a search conducted pursuant to a search warrant where the affidavit was deficient. The affidavit contained information from two informants. The first informant asserted that defendant had marijuana for sale in his mobile home; that defendant was growing marijuana in his home; and that the first informant purchased marijuana from the defendant. The affidavit failed to answer the question "When?" as it related to staleness; the affidavit contained no information that the first informant spoke with personal knowledge as to the allegations that the defendant had or was growing marijuana in his home; and the affidavit did not suggest where the first informant purchased marijuana from defendant. The assertions of the second informant were similarly deficient in that, although the second informant asserted that within the last 24 hours and also for the past two months there had been a steady flow of people to the defendant's home who were known by the second informant to use drugs, it was not evident if the informant spoke with personal knowledge.

Judge BRASWELL dissenting.

APPEAL by the State from *Bruce, Judge.* Order entered 14 October 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 30 September 1983.

Attorney General Edmisten, by Associate Attorney General Newton G. Pritchett, Jr., for the appellant State.

Stephen A. Graves for defendant appellee.

BECTON, Judge.

The defendant, Charles Arrington, was indicted for unlawfully, willfully and feloniously possessing more than one ounce of marijuana in violation of N.C. Gen. Stat. § 90-95(a)(3) (1981). Pursuant to defendant's motion to suppress, filed prior to trial, the trial court entered an order suppressing the evidence seized in a search conducted pursuant to a search warrant, specifically finding, among other things, that: "A fair reading of the affidavit in question shows no circumstances from which it could be determined that the information known to Officer Boyd came to him

from the personal knowledge of a reliable confidential source." From the order suppressing the evidence, the State appeals.

By affidavit included in the application for the search warrant, Officer William Boyd swore to the following facts to establish probable cause for the issuance of a search warrant:

> I received from a confidential source within the last forty-eight hours that Charles Arrington had in his possession at his mobile home marijuana for sale. Confidential source advised that they had purchased marijuana from Charles Arrington. Source also advised that Arrington was growing marijuana in his home. A second confidential source advised that within the last 24 hours that there had been a steady flow of traffic to the Arrington home and also a steady flow of traffic for the past 2 months. The traffic is known to source as people that use drugs. The first source and second source has proven to be reliable in the past in that the first source has given information on numerous occasions in the past that has led to arrests. The second source has proven to be reliable in that I have known this source for many years and that they have furnished information not only to me but to other law enforcement officers that has proven to be reliable and arrests have been made.

In its brief, filed in March 1983, the State argued that the affidavit in support of the search warrant was sufficient, even considering the United States Supreme Court's opinion in *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964) and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969). In a Memorandum of Additional Authority, filed 27 July 1983, the State, relying on the 8 June 1983 Supreme Court decision in *Illinois v. Gates*, --- U.S. ---, 76 L.Ed. 2d 527, 103 S.Ct. 2317, argues that the search warrant is clearly sufficient given the totality of the circumstances analysis required by *Gates*.

The United States Supreme Court's decision in *Gates* to "abandon the 'two-pronged test' established by [its] decisions in *Aguilar* and *Spinelli*"[1] in favor of a "totality of the circumstances

1. To establish probable cause based on hearsay information under the "two-pronged test," the affidavit must include the "underlying circumstances" showing

analysis" in determining probable cause does not transform an otherwise deficient affidavit into a sufficient one. *Gates*, --- U.S. at ---, 76 L.Ed. 2d at 548, 103 S.Ct. at ---. Consider this language from *Gates*:

> A deficiency in one [prong of the *Aguilar-Spinelli* test] *may* be compensated for, in determining the overall reliability of a tip, by a *strong* showing as to the other, *or* by some other indicia of reliability. [Citations omitted.]
>
> If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely *should not serve as an absolute bar* to a finding of probable cause based on his tip.

--- U.S. at ---, 76 L.Ed. 2d at 545, 103 S.Ct. at 2329 (emphasis added). If, for example, the affiant's information is stale or is not based on first-hand knowledge and there is no strong showing that the informant is unusually reliable or some other indicia of reliability, *Gates* does not mandate the issuance of a search warrant.

Gates does not require a magistrate to discount "veracity" and "basis of knowledge" in the probable cause equation. The magistrate's "practical, common-sense" determination of probable cause must include a consideration of both "veracity" and "basis of knowledge"; otherwise, the determination becomes impractical and nonsensical. Consistent with this notion, the *Gates* majority specifically noted "that an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report." --- U.S. at ---, 76 L.Ed. 2d at 543, 103 S.Ct. at 2327. Simply put, *Gates* does not decimate all relevant Fourth Amendment case law which preceded it. Or, as the Supreme Judicial Court of Massachusetts recently said:

> It is not clear that the *Gates* opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants. Looking at what the Court did on the facts before it, and rejecting an ex-

that (1) the informant spoke with personal knowledge, and (2) the informant was credible.

> pansive view of certain general statements not essential to the decision, we conclude that the *Gates* opinion deals principally with what corroboration of an informant's tip, not adequate by itself, will be sufficient to meet probable cause standards.

Commonwealth v. Upton, 390 Mass. 562, 568, --- N.E. 2d ---, --- (12 December 1983).

The evil the *Gates* Court sought to guard against was the greatly diminished value of anonymous tips in police work, considering "the strictures that inevitably accompany the 'two-pronged test'." --- U.S. at ---, 76 L.Ed. 2d at 547, 103 S.Ct. at 2331. The *Gates* Court unequivocally stated its concern:

> [A]s the Illinois Supreme Court observed in this case, the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable. As a result, anonymous tips seldom could survive a rigorous application of either of the *Spinelli* prongs. Yet, such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise 'perfect crimes.' While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.

Id. at ---, 76 L.Ed. 2d at 548, 103 S.Ct. at 2331-32.

So, while clearly opting for a totality of the circumstances analysis in determining probable cause, the *Gates* Court bottoms its holding on the value of corroborating details which support an informant's tip. Time after time the *Gates* majority stresses the significance of corroboration.

> Our decision in *Draper v. United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959), however, is the classic case on the value of corroboration efforts of police officials.
>
> . . . .
>
> The showing of probable cause in the present case was fully as compelling as that in *Draper*. Even standing alone, the facts obtained through the independent investigation of

> Mader and the DEA at least suggested that the Gates were involved in drug trafficking.
>
> In addition, the magistrate could rely on the anonymous letter, which had been corroborated in major part by Mader's efforts—just as had occurred in *Draper*. . . . It is enough, for purposes of assessing probable cause, that 'corroboration through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.' [Citations omitted.]
>
> Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letter writer's accurate information as to the travel plans of each of the Gates was of a character likely obtained only from the Gates themselves, or from someone familiar with their not entirely ordinary travel plans. . . . It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a 'substantial basis for . . . conclud[ing]' that probable cause to search the Gates' home and car existed.

Id. at ---, 76 L.Ed. 2d at 551-53, 103 S.Ct. at 2334-36.

In this case, the affidavit contains the first informant's assertions that the defendant had marijuana for sale in his mobile home; that the defendant was growing marijuana in his home; and that the first informant purchased marijuana from the defendant. The affidavit fails to answer the question "when?" as it relates to staleness; the affidavit contains no information that the first informant spoke with personal knowledge as to the allegations that the defendant had or was growing marijuana in his home; and the affidavit does not suggest where the first informant purchased marijuana from defendant. In short, the affidavit contains no underlying circumstances from which the magistrate could reasonably conclude that there was probable cause to believe that marijuana was then present where the first informant declared it was.

The assertions of the second informant are similarly deficient. Although the second informant asserts that within the last 24 hours and also for the past two months, there had been a steady flow of people to the defendant's home, who were known by the second informant to use drugs, we do not know if the informant spoke with personal knowledge. Further, this portion of the affidavit does not detail any of the underlying circumstances from which the magistrate could conclude that marijuana was located at defendant's house.

In this case, we find no circumstances to compensate for the deficient factors "in determining the overall reliability of [the] tip." *Id.* at ---, 76 L.Ed. 2d at 545, 103 S.Ct. at 2329. None of the corroborating factors or other indicia of reliability found in *Gates* are present in this case.

Under *Aguilar* and *Spinelli*, the affidavit in this case is unquestionably deficient. *Gates* does not resurrect it. The affidavit in this case is similar to the "bare bones" affidavit in *Aguilar* and *Nathanson v. United States*, 290 U.S. 41, 78 L.Ed. 2d 159, 54 S.Ct. 11 (1933). *Gates*, while strong medicine in the noble fight to discourage excessively technical dissections of informants' tips, is not a panacea. When, considering the totality of the circumstances, stale, unverified, and uncorroborated allegations give the magistrate no basis for determining the existence of probable cause, we must suppress the search warrant.

The judgment of the trial court is

Affirmed.

Judge JOHNSON concurs.

Judge BRASWELL dissents.

Judge BRASWELL dissenting.

It is not necessary to determine in this case if the affidavit complies with the "two-pronged test" derived from *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), and adopted in North Carolina in *State v. Campbell*, 282

N.C. 125, 191 S.E. 2d 752 (1972). The United States Supreme Court in the recently decided case of *Illinois v. Gates*, --- U.S. ---, 103 S.Ct. 2317, 76 L.Ed. 2d 527, *rehearing denied*, --- U.S. ---, 104 S.Ct. 33, 77 L.Ed. 2d 1453 (1983), has set forth a different standard for determining probable cause for issuance of a search warrant based on information from informants. In *Gates*, the Supreme Court abandoned the two-pronged test established in *Aguilar* and *Spinelli* and in its place reaffirmed "the totality of the circumstances analysis that traditionally has informed probable cause determinations." *Id.* at ---, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548.

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. Finding that the two-pronged test "has encouraged an excessively technical dissection of informants' tips," and has "direct[ed] analysis into two largely independent channels—the informants' 'veracity' or 'reliability' and his 'basis of knowledge,'" the Supreme Court specifically said:

> There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.

Id. at ---, 103 S.Ct. at 2329-30, 76 L.Ed. 2d at 545.

Turning now to the facts of this case, and using the *Gates* analysis, I find the first informant's statement that he had purchased marijuana from the defendant to be highly relevant to the magistrate's common sense determination of probable cause.

Likewise, the second informant's statements that people known to him to be drug users frequented defendant's house within the last 24 hours prior to the issuance of the search warrant, clearly corroborates the first informant's statements and compensates for any deficiency with regard to staleness in determining the overall reliability of the tip.

Significantly, no one questions the reliability of either of the informants. As said in *Gates*, "If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip." *Id.* at ---, 103 S.Ct. at 2329, 76 L.Ed. 2d at 545.

Considering the totality of the circumstances analysis adopted in *Gates*, I would hold that the trial court erred in suppressing the evidence seized in a search conducted pursuant to the search warrant.

IN THE MATTER OF THE ESTATE OF STELLA T. FORREST

No. 8315SC24

(Filed 7 February 1984)

1. Wills § 21.4— undue influence—insufficient evidence

The caveator's evidence was insufficient to be submitted to the jury on the issue of undue influence in the execution of a will where it showed only that testatrix was elderly, weak, unable to comprehend at times, had difficulty communicating and, on occasions, could be "led," and that testatrix had a prior inconsistent testamentary intent, but there was no evidence tending to show that testatrix was subject to the constant association and supervision of the beneficiaries prior to execution of the will, that any beneficiary attempted to control access to the testatrix, that the will is different from and revokes a prior will, that the will was not made in favor of the blood relatives of the testatrix, or that the beneficiaries, either singly or together, procured the execution of the will.

2. Wills § 22— mental incapacity to execute will—insufficient evidence

The caveator's evidence was insufficient to be submitted to the jury on the issue of mental incapacity of the testatrix to execute a will where it tended to show only that the testatrix was elderly, weak, unable to com-

prehend at times, and had difficulty communicating, but there was no evidence that testatrix did not comprehend the natural objects of her bounty, did not understand the nature and extent of her property, did not know the manner in which she desired her act to take effect, and did not realize the effect her act would have upon her estate.

Judge PHILLIPS dissenting.

APPEAL by propounders from *Clark, Judge.* Judgment entered 27 August 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 1 December 1983.

The testatrix, Stella T. Forrest, died on 3 December 1978. A will purportedly executed by testatrix on 18 December 1974 was admitted to probate in common form by the Clerk of Superior Court of Orange County on 3 January 1979. On 3 July 1980, William E. Taylor, who is testatrix's nephew, instituted this caveat proceeding alleging that the 18 December 1974 paper writing was not the last will and testament of the testatrix because it was procured by undue influence and because testatrix lacked testamentary capacity at the time the purported will was made.

At the time of her death, testatrix was survived by the following heirs and next-of-kin: a sister, Helen T. Morton; three nieces, Marie M. Cox, Stella M. Llewellyn, and Louise M. Reese (the daughters of Helen T. Morton); and one nephew, caveator William E. Taylor (son of testatrix's deceased brother, Earl Currie Taylor). The relevant provisions of the will provided that the propounders, Helen Morton, Stella M. Llewellyn, Marie M. Cox and Louise M. Reese shall each receive one-fourth shares of testatrix's interest in three parcels of real property, that Helen Morton shall receive the testatrix's residence, that William Taylor shall receive one parcel of real property, and that the remainder of the estate shall be devised to Helen Morton. Prior to testatrix's death, certain parcels of the property devised to William Taylor and Helen Morton were sold and the proceeds used for testatrix's maintenance and medical care. As a result, no property passed to testatrix's nephew under the will.

At the conclusion of the caveator's evidence, the court allowed the propounders' motion for directed verdict upon the issues of testamentary capacity, but denied their motion for directed verdict upon the issue of undue influence. At the conclu-

sion of all the evidence, the court again denied propounders' motion for directed verdict upon the issue of undue influence.

The case was submitted to the jury upon the issues of testamentary formalities, undue influence, and *devisat vel non.* A verdict in favor of the caveator was returned. The propounders' motion for judgment notwithstanding the verdict was denied, as were propounders' motions to set aside the verdict and for a new trial on the issue of *devisat vel non.* From the rulings of the trial court, the acceptance by the court of the verdict and entry of judgment thereon, propounders appeal.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison, by Josiah S. Murray, III and Joel M. Craig, for propounder appellants.

Maxwell, Freeman, Beason and Morano, P.A., by Robert A. Beason, for caveator appellee.

JOHNSON, Judge.

The question presented by the propounders' appeal is whether the evidence is sufficient to be submitted to the jury on the issue of undue influence. Caveators have also requested, pursuant to Rule 10(d) of the Rules of Appellate Procedure, that the directed verdict in propounders' favor on the issue of mental capacity be reversed if this Court should determine that a retrial is necessary. For the reasons set forth below, we hold that the trial court erred in denying the propounders' motion for a directed verdict on the issue of undue influence, but correctly allowed the propounders' motion for directed verdict on the issue of testamentary capacity.

To constitute undue influence within the meaning of the law, there must be more than mere influence or persuasion. For the influence to be undue,

> "there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exer-

> cising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made."

In re Andrews, 299 N.C. 52, 54, 261 S.E. 2d 198, 199 (1980), *quoting In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935). The burden is on the caveator to show by the greater weight of the evidence that the execution of the will was procured by undue influence. *In re Andrews, supra; In re Womack*, 53 N.C. App. 221, 280 S.E. 2d 494, *cert. denied*, 304 N.C. 391, 285 S.E. 2d 837 (1981). It is often said that no test has emerged by which the sufficiency of the evidence to take the issue of undue influence to the jury may be measured with mathematical certainty. *See In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932). Nevertheless, several factors have been isolated as relevant to the issue of undue influence. They include:

1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

In re Andrews, supra; In re Mueller's Will, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915). The list does not purport to contain all facts and circumstances which might suggest the existence of undue influence, and the caveator need not prove the existence of every factor. However, the caveator must present sufficient evidence to make out a *prima facie* case. *In re Andrews, supra.* The test for determining the sufficiency of the evidence on undue influence is usually stated as follows: "[u]ndue influence is generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence." *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910). In determining whether the evidence is sufficient to

survive a motion for directed verdict, the court must consider the evidence in the light most favorable to the caveator and give him the benefit of all reasonable inferences arising therefrom. *In re Andrews, supra.*

The caveator's evidence showed that testatrix was about 72 years of age at the time the will was executed in 1974. According to her physician, Dr. Aycock, Mrs. Forrest had suffered from hypertension since before 1956, which became "rather marked" by 1972. Mrs. Forrest also suffered from adult onset diabetes and arteriosclerosis. In 1972 she developed a cerebral thrombosis, and suffered a complete stroke resulting in aphasia—a difficulty in speaking. Her doctor had referred Mrs. Forrest in 1972 to Dr. John Pheiffer, a neurologist at Duke University Medical Center, who described her condition as a language dysfunction without any evidence of difficulty in comprehension. Dr. Pheiffer found Mrs. Forrest in 1972 to be lucid, oriented, and not confused, but frustrated with her difficulty in expressing herself.

In 1973 and 1974, according to Dr. Aycock, Mrs. Forrest's aphasia had improved, although she continued to have difficulty at times in enunciating the correct words to express her thoughts. In addition, after 1973 Dr. Aycock testified that Mrs. Forrest had "periods of waxing and waning; on some occasions she could be led and on other occasions she could not be . . ." As of August, 1974 Mrs. Forrest still had aphasia to some extent, would have periods of "fair lucidity," but "there were times when she would be wrong in her conclusions and her facts."

William Taylor, the caveator, testified that he visited frequently with his aunt, Stella Forrest, beginning in January, 1970. In his visits with Mrs. Forrest in 1974, Mr. Taylor felt that Mrs. Forrest recognized him and responded to questions by indicating "yes" or "no" either verbally or by nodding her head, although she was unable to fully communicate. As the caveator understood Mrs. Forrest's condition, "there were periods of time during which she was lucid and there was [sic], periods of time when there was a lack of lucidity." Mr. Taylor testified further that, "You could ask questions, and you know, she might smile and she might agree, but you just felt like what you said did not register."

Margaret Taylor, the caveator's mother, was Mrs. Forrest's sister-in-law. Mrs. Taylor testified that Mrs. Forrest's physical condition deteriorated after 1973, and that by late 1974, in Mrs. Taylor's opinion, at times Mrs. Forrest was unable to interpret a conversation during a visit. "I felt that at times she knew what I was saying perhaps, but that there was a look . . . I could not understand what she said. It was gibberish . . . I just had chit chat and inconsequential things; and she smiled a lot; but at times her facial expression let me know . . . I knew that she did not interpret what I was saying at all."

The 1974 will provided that each of the propounders were to inherit a one-fourth share in certain "Texas property" owned by the testatrix. Mrs. Taylor testified that the Texas property was left by testatrix's parents to their four children: Mrs. Stella Forrest, her two brothers, Dan Taylor and Earl Taylor (caveator's deceased father) and Helen Morton, testatrix's sister. In 1959, Mr. and Mrs. Earl Taylor borrowed money from Stella Forrest, Dan Taylor and Helen Morton and gave in return a deed of sale for Earl Taylor's interest in the Texas property. Mrs. Forrest told Earl and Margaret Taylor that their interest would be returned to them if the debt were repaid. At some point, Earl Taylor asked whether he could buy back the part of his former property Mrs. Forrest owned apart from the others. Later, Mrs. Forrest told the Taylors that "she was to see in her will that he (Earl) got his part" of the property back. Earl Taylor died in January, 1974. William Taylor testified that he also spoke with his aunt about repurchasing the Texas property in about 1970. According to Taylor, the testatrix told him, "Well, you know, you don't have to worry about that, that it will come to you someday."

Stella Llewellyn, a propounder, was also called as a witness by the caveator. She testified that her husband, Mr. Harvey Llewellyn, made a telephone call to Stella Forrest's attorney, Lucius Cheshire, to inform Mr. Cheshire that testatrix wanted Mr. Cheshire to call her to make arrangements for a meeting concerning her will. Mrs. Llewellyn assumed that the call was made in the summer of 1974. Mrs. Llewellyn was named as attorney-in-fact for testatrix in February, 1975. In this capacity she sold all of Mrs. Forrest's real property in Orange County, including the real property devised by Mrs. Forrest to the caveator. At that time, Mrs. Llewellyn did not know the contents of Mrs. Forrest's will,

and did not learn of the contents of the will until Mrs. Forrest's death in 1976. The real property was sold because Mrs. Forrest came to reside with Mrs. Llewellyn in Virginia in 1976 and later went into a nursing home, and the proceeds of the sale were used solely for Mrs. Forrest's maintenance and medical care. According to the testimony of Mrs. Maude Harris, a relative and neighbor of testatrix, Mrs. Forrest resided in her own home in Efland until 1976.

The propounders called Mr. Cheshire as a witness. Mr. Cheshire could not recall when or by whom he was requested to visit Mrs. Forrest about her will. He testified that despite Mrs. Forrest's speech impediment, he received his information from Mrs. Forrest verbally, and drew the December 1974 will from the notes he took of her instructions. At the time of his visit, only Mr. Cheshire, Mrs. Forrest and two of her companions were present—none of the propounders were in the house. Mr. Cheshire received no information or instructions from any of the propounders, nor was he acquainted with any of the propounders at the time the will was drawn.

[1] We conclude that the caveator failed to present sufficient evidence of undue influence to survive the propounders' motion for directed verdict. Of the seven factors ordinarily to be considered in cases of undue influence, caveators have presented evidence sufficient to demonstrate primarily only one of the factors—that testatrix was elderly, weak, unable to comprehend at times, had difficulty communicating, and, on occasions, she could be "led." This evidence at the most establishes that her weakened mental and physical condition left her vulnerable to the exertion of undue influence, but it is insufficient, standing alone, to prove that it was exerted. *In re Will of Ball*, 225 N.C. 91, 33 S.E. 2d 619 (1945).

The testatrix was not shown to be in the home of any of the will beneficiaries and subject to their constant association and supervision, either together or separately. Rather, testatrix went to live with one of the beneficiaries of the will some 20 months *after* the will was executed. Prior to that time she remained in her own home, where persons other than the beneficiary-propounders assisted her. Again, it was two months *after* the will

was executed that Mrs. Llewellyn began acting as Mrs. Forrest's attorney-in-fact.

There was no evidence presented to the effect that others had little opportunity to see the testatrix, and there is nothing in the record to suggest that Mrs. Llewellyn or any of the other beneficiaries attempted to control access to the testatrix.

The record is devoid of any evidence tending to show that the 1974 will is different from and revokes a prior will. There was no evidence of the existence of a prior will. The caveator argues that there was evidence of a prior inconsistent testamentary intent in that testatrix had previously indicated that caveator would receive an interest in the Texas property, but the 1974 will made no provision for such a bequest. Assuming *arguendo* that for purposes of establishing undue influence, evidence of a prior inconsistent testamentary intent is substantially equivalent to the revocation of a prior inconsistent will, the evidence as a whole nonetheless fails to demonstrate that the 1974 will was the product of any one or all of the beneficiaries' exertion of control over the testatrix sufficient to destroy her free agency and render the instrument in question the expression of the will of someone other than Stella Forrest.

The 1974 will was not made in favor of one with whom there are no ties of blood. Rather, the will made provision for all of Mrs. Forrest's near relatives. The caveator was effectively disinherited by the *subsequent sale* by Stella Llewellyn, of certain property devised to him under the will, and Mrs. Llewellyn had no knowledge of the contents of the will at the time of the sale. The 1974 will itself does not disinherit the natural objects of the testatrix's bounty, it provides for all of them through specific devises.

Finally, the evidence does not establish that the beneficiaries of the will, either singly or together, *procured* the execution of the will. None of the propounders were present at the conferences which were held between testatrix and Mr. Cheshire. The instructions as to the plan of testamentary disposition were given directly by the testatrix to the will draftsman. The only relevant contact between a beneficiary and the attorney Cheshire was a phone call made by the husband of one of the beneficiaries to inform Mr. Cheshire that Mrs. Forrest wanted to arrange an ap-

pointment for the preparation of a last will and testament. This does not rise to the level of "procurement" of the execution of the will by the beneficiary.

Thus, the evidence, taken in the light most favorable to the caveator, *at most* establishes only two of the seven indicia of undue influence traditionally cited, and, as such, is insufficient to establish that the December 1974 will was not the product of the free and unconstrained will of the testatrix. *In re Andrews, supra. See also In re Coley,* 53 N.C. App. 318, 280 S.E. 2d 770 (1981). The directed verdict in favor of the propounders was, therefore, erroneously denied.

[2] We turn to caveator's cross-assignment of error on the question of testamentary capacity. At the conclusion of the caveator's evidence, the propounders moved for a directed verdict on the issue of testamentary capacity. The trial judge ruled the evidence to be "insufficient as a matter of law to overcome the presumption of capacity or to establish that the testator did not comprehend the natural objects of her bounty . . . or that she did not understand the kind and nature and extend [sic] of her property or that she did not know the manner in which she desired her act to take effect or that she did not realize the effect that her act would have upon her estate. I think it is, the record is totally void as to any evidence as to those matters."

It is well established that the law presumes that every person has sufficient mental capacity to make a valid will, and that those persons contesting the will have the burden of proving that the testator lacked the required mental capacity. *In re Womack, supra.* We have carefully examined the record and conclude that the trial court correctly entered a directed verdict on the issue of testamentary capacity. The record is absolutely devoid of any evidence tending to show that testatrix did not comprehend the natural objects of her bounty, did not understand her property, did not know the manner in which she desired her act to take effect and did not realize the effect her act would have upon her estate. *See In re Womack, supra.*

Reversed in part, affirmed in part.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

The careful and able trial judge denied the propounders' motions for a directed verdict and judgment notwithstanding the verdict because he was of the opinion that the evidence raised an issue for the jury. Viewing the evidence in the most favorable light to the caveator, as we are required to do, *In re Andrews*, 299 N.C. 52, 261 S.E. 2d 198 (1980), I believe that the trial judge was correct.

The evidence showed that testatrix was elderly, weak, and exceptionally vulnerable to undue influence. She suffered from a complete stroke, adult onset diabetes, hypertension with cerebral complications, and an occasional aphasia, or inability to express herself or to understand language, caused by hardening of the arteries to the brain. At times she was not lucid, spoke "gibberish," and did not comprehend what was being said to her. These problems existed several months before testatrix made her will, as well as afterwards, and were alleviated somewhat by certain medicines prescribed for her; but when her will was made she had stopped taking her medicine for awhile. Her personal physician testified that on occasion she could be led. The husband of one of the propounders, Mrs. Llewellyn, arranged for an attorney to meet with testatrix and make her will. Just a few weeks later Mrs. Llewellyn obtained a power of attorney and thereafter controlled testatrix's business affairs and property, some of which was sold, including the lot that was to have been devised to caveator.

Caveator and testatrix had a close and loving relationship and she had promised to will to him and his mother some land in Texas. Equitable reasons existed for her doing that, since caveator's parents had lost the land some years earlier in a loan transaction that was given the form of a sale, and each of the several times caveator's parents and caveator tried to get testatrix and the other interested relatives to accept repayment of the loan and to convey the property back, testatrix told them not to worry about it, as she was going to will the property back to

them. Yet despite these promises, apparently made in good faith, testatrix's will devised all the Texas property and nearly everything else to propounders. This was evidence that testatrix's will departed from her earlier settled testamentary intent, and along with the other evidence tends to show that her will was unduly influenced. Though each individual fact by itself may have little probative weight, collectively they support the verdict and judgment appealed from in my opinion. That caveator's evidence does not provide direct proof of undue influence is not fatal, since the nature of undue influence is such that direct proof of it rarely exists. *In re Andrews, supra.*

My vote, therefore, is to affirm the judgment.

CLYDE H. NESTLER v. CHAPEL HILL/CARRBORO CITY SCHOOLS BOARD OF EDUCATION

No. 8215SC1138

(Filed 7 February 1984)

1. **Schools § 13.2— dismissal of career teacher for inadequate performance**

A career teacher was properly dismissed by defendant Board of Education for "inadequate performance" on the basis of findings supported by substantial evidence concerning the teacher's poor organization in the classroom and failure to show an acceptable amount of initiative in trying to find more effective means of achieving his objectives.

2. **Schools § 13.2— dismissal of teacher for inadequate performance—constitutionality of statute**

The statute permitting dismissal of a career teacher for "inadequate performance," G.S. 115C-325(e)(1)(a), is not unconstitutionally vague as applied to petitioner where petitioner was advised on several occasions that his performance was inadequate because of his teaching methods.

APPEAL by respondent from *Clark (Giles R.), Judge.* Judgment entered 10 September 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 22 September 1983.

This is an appeal by the respondent Board of Education from a judgment of the superior court reversing a decision of the Board to terminate the employment of the petitioner. In May 1981, Dr. Nestler was notified by the Superintendent of Schools

that she intended to recommend to the Board of Education that petitioner's employment be terminated for inadequate performance. The petitioner was granted a hearing by a professional review panel which by majority vote "did not find that the grounds for recommendation of the Superintendent are true and substantiated." The Superintendent, nevertheless, recommended to the Board that petitioner's employment be terminated.

The Board held a hearing for the petitioner in August 1981. The evidence at the hearing showed that the petitioner was first employed as a teacher by the Board in the fall of 1971. He first taught algebra and chemistry but since 1975 has taught only chemistry. He was placed on conditional status for the 1972-73 school year and was removed from such status the following year, becoming a career teacher. He was observed and evaluated by four different principals from 1971 through 1978 and his performance was satisfactory during that period.

In the fall of 1978 Dr. Robert Monson became principal of Chapel Hill High School. He testified that observations of the petitioner in the 1978-79 school year raised concerns in regard to his competence. He testified that the petitioner's teaching lacked instructional organization. Factors which led him to this conclusion were (1) what he felt was poor anticipatory set which is "giving the kids an opportunity to mentally shift gears from their previous class"; (2) failing to establish an objective by which he tells "the kids what he expects of them in that particular class period, and hopefully, ties that together with what has previously happened in class"; (3) inadequate checking on comprehension including not asking questions of all students in the class to see whether all students were learning; (4) talking in a monotone; (5) too much lecturing and not involving the students in the learning; (6) laboratory experiments that were weak in that students were not required to generate an hypothesis; and (7) inadequate homework assignments so that the students were not expected to complete work at home and begin at that point the next day. Dr. George Fleetwood, Director of Secondary Education for the Chapel Hill-Carrboro City Schools, and Doug Dwyer, Assistant Principal of Chapel Hill High School, participated in observations of the petitioner and they concurred in Dr. Monson's conclusions.

On 15 May 1979 Dr. Monson evaluated petitioner as "fair" on a six-point scale ranging from unsatisfactory to outstanding. Dr. Monson testified that due to a failure to sufficiently improve, Dr. Nestler was placed on conditional status in December 1979. In May 1980, the evaluation of Dr. Nestler was raised "to between satisfactory and fair" and he was continued on conditional status for the 1980-81 school year. In May 1981 Dr. Monson concluded that the petitioner had not sufficiently improved his performance and recommended that he be dismissed. Dr. Monson testified that as a teacher the petitioner was strong in all areas except instructional methodology. No comparison was made between the achievements of petitioner's students and other chemistry students in Chapel Hill or elsewhere.

Diane Bost and Elton G. Smith, two teachers in the Chapel Hill High School, testified for petitioner as to his competency. Dr. Nestler testified as to his technique for making sure his students were learning. He said that after a short period of time he knew which students were having difficulty with the subject matter. He called on those students to involve them in the class. One method he used for helping those students was to work with them when the other students were working on assignments. He had also used volunteer tutors to help these students. He stated that he called on more students after his conference with Dr. Monson. He also used more methods to improve the anticipatory set. He testified that he felt that he did let the students know the objectives for each day. He felt that Dr. Monson could not properly appreciate the experiments conducted in the classroom because he did not know the problems to be solved. He testified that one of the criticisms made by Dr. Monson was that his voice could not be heard in the back of the room but noted that in a recording made from the back of the room during an observation his voice was clear.

The Board of Education made a decision in which it found among other facts that the petitioner was placed on conditional status where he remained for one and one-half years for poor performance in the classroom. He showed some improvement in the spring of 1980 but this improvement did not continue in the 1980-81 school year. The petitioner's weaknesses as a teacher consisted of poor organization in the classroom and a failure to show an acceptable amount of initiative in trying to find more effective

means of achieving his objectives. Based upon these facts the Board concluded that petitioner's performance was inadequate and approved the termination of his contract.

Dr. Nestler petitioned the superior court for review. The superior court held that the findings of fact and conclusions of law made by the Board that the performance of the petitioner was inadequate were not supported by substantial evidence. The superior court also held that G.S. 115C-325(e)(1)(a) as applied to the petitioner violates the due process clause of the fourteenth amendment to the United States Constitution because it is too vague. The superior court ordered the petitioner reinstated as a career teacher in the Chapel Hill-Carrboro City Schools.

The respondent appealed.

Winston, Blue, Larimer and Rooks, by J. William Blue, Jr., for petitioner appellee.

Alexander and McCormick, by John G. McCormick, for respondent appellant.

Tharrington, Smith and Hargrove, by George T. Rogister, Jr. and Ann L. Majestic, for North Carolina School Boards Association, amicus curiae.

WEBB, Judge.

[1] We believe the Board's findings of fact as to the petitioner's weakness as a teacher support the conclusion of his inadequate performance. If these findings of fact were supported by the evidence, the superior court was in error in reversing the Board's decision. The standard of review for the superior court is the "whole record test" which requires that in considering the substantiality of the evidence to support the findings of fact, the court must take into account whatever in the record fairly detracts from the weight of the evidence supporting the findings of fact. *See Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). We believe that the testimony of Dr. Monson which was supported by the testimony of Dr. George Fleetwood and Doug Dwyer establishes the inadequacies of the petitioner as a teacher.

The petitioner argues that a consideration of the evidence that fairly detracts from the evidence in support of the Board's findings of fact shows that the findings were erroneous. The petitioner received a grade between fair and satisfactory in May of 1980. He says that by the Board's own standard this contradicts any finding of fact that there was a weakness or deficiency in his performance. He also contends that Dr. Monson's testimony on direct examination was so weakened by his testimony on cross-examination that it is of no credibility. As to Dr. Monson's testimony that petitioner made inadequate attempts to check on comprehension by students and that some students went the entire year without being called upon, Dr. Monson stated on cross-examination that this was based on the classes he observed and "by comments either formal or informal that we hear from parents, from students." Petitioner argues that this method is not adequate for the support of Dr. Monson's testimony on this point. As to Dr. Monson's testimony that students were assigned problems with no effort made to determine the comprehension level of the students in working the problems and that petitioner failed to relate the problems to classroom work, Dr. Monson testified on cross-examination that he made no effort to work the problems and was not sure he could have done so. Petitioner argues that for this reason Dr. Monson's testimony on this point is not credible.

Dr. Monson stated on direct examination that the laboratory experiences offered by petitioner were inadequate and poorly organized. On cross-examination, he admitted that of the three observations he made in 1978-79, a laboratory experience was observed on one occasion and in 1979-80 laboratory experiences occurred during five of the nine observations he made. One laboratory experience for each ten class sessions generally provides an adequate number of laboratory experiences and the petitioner contends the evidence does not show he was inadequate in the laboratory work assigned. Dr. Monson supported in part his testimony that the petitioner did not adequately challenge his students with the statement that students asked to be in other classes because of a greater challenge. At another point in his testimony he said that he did not use student comments to form his opinions as to the competency of teachers. Petitioner argues this inconsistent approach destroys the credibility of Dr. Mon-

son's testimony. As to Dr. Monson's testimony that petitioner had not made an adequate effort for professional growth and maturity the petitioner testified at length in regard to the efforts he had made to improve his teaching skills.

Other evidence which the petitioner contends detracts from the evidence in support of the findings of fact was the lack of any evidence that as to comparison between standardized tests given to the petitioner's students and other chemistry students and the report of the professional review panel which found the grounds for dismissal were not substantiated.

When all the evidence is considered which detracts from the evidence in support of the findings of fact, we believe the findings of fact are supported by substantial evidence. Dr. Monson, Dr. Fleetwood, and Doug Dwyer testified to the petitioner's deficiencies as a teacher. It is true that this testimony was weakened by cross-examination but we do not believe it was to such an extent to make it incredible. We believe the evidence is that there were certain objective standards which were followed in evaluating the petitioner as a teacher. The persons observing the petitioner were no doubt somewhat subjective, as any human would be, in applying these standards but we believe it could be and the evidence in this case shows the standard was fairly applied.

The evidence that petitioner had an excellent grasp of his subject matter, that there was no test showing his students were not as proficient in chemistry as other students, and that the professional review panel did not find the grounds for dismissal were substantiated, is evidence that detracts from the evidence supporting the findings of fact. When this evidence is considered, however, with all the evidence in the record, we still have the testimony of Monson, Fleetwood and Dwyer which we believe has been not so discredited as to not be substantial evidence supporting the Board's findings of fact. We do not believe that the Board was bound by the grade given to the petitioner by Dr. Monson in May 1980. We hold that the superior court substituted its judgment for the judgment of the Board of Education when it held the Board's findings of fact were not supported by the evidence.

[2] The superior court also held that G.S. 115C-325(e)(1)(a) is unconstitutionally vague as applied to the petitioner. This statute provides in part:

(e) Grounds for Dismissal or Demotion of a Career Teacher:

(1) No career teacher shall be dismissed or demoted or employed on a part-time basis except for one or more of the following:

a. Inadequate performance.

Under the due process clause of the fourteenth amendment to the United States Constitution, a statute is void for vagueness if its terms are so vague, indefinite and uncertain that a person cannot determine its meaning and therefore cannot determine how to order his behavior to meet its dictates. *See Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939) and *State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843, *cert. denied*, 298 N.C. 303, 259 S.E. 2d 304 (1979), *appeal dismissed, sub nom., Poe v. North Carolina*, 445 U.S. 947, 100 S.Ct. 1593, 63 L.Ed. 2d 782 (1980).

We believe that the term "inadequate performance" is one that a person of ordinary understanding can comprehend in regard to how he is required to perform. In this case the evidence is that the petitioner was advised on several occasions that his performance was inadequate because of his teaching methods. We believe that as applied to the petitioner, he was given an objective standard with which a person of ordinary understanding could determine how he must comply. We do not believe the statute is unconstitutional as applied to the petitioner.

We reverse the judgment of the superior court and remand for an order consistent with this opinion.

Reversed and remanded.

Judges HEDRICK and HILL concur.

GREGG DUANE BENDER v. DUKE POWER COMPANY, A NORTH CAROLINA CORPORATION

No. 8326SC175

(Filed 7 February 1984)

1. **Electricity § 5; Negligence § 8.1— placement of poles close to roadway—no causal connection to falling down of wires broken by lightning**

The proximity of defendant company's poles to a highway had no causal relationship to the falling down of wires supported by such poles when the poles or the wires were broken by lightning, and therefore the proximity of the poles to the highway, as a matter of law, could not have been the proximate cause of plaintiff's injury.

2. **Electricity § 9; Negligence § 9— inability to reasonably foresee events leading to falling of wire across highway**

Defendant power company's knowledge that its wires on utility poles at a highway crossing had been previously knocked down by lightning did not lead to the conclusion that the power company could foresee when or where lightning may strike any particular object and that the overhead wires should have been removed and placed under the highway.

Judge PHILLIPS concurring in the result.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 26 October 1982 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 18 January 1984.

This is an action for negligence. In his original complaint, plaintiff alleged, in summary, that on the afternoon of 3 September 1980, he was driving west on Interstate Highway 85, west of Charlotte, approaching the intersection of I-85 with State Road number 1625. A thunderstorm was in progress. As plaintiff passed the underpass of State Road 1625, defendant's overhead electric wires fell across I-85 in front of plaintiff's vehicle, striking plaintiff's vehicle and causing him to lose control, resulting in a collision in which plaintiff was injured. Plaintiff's allegations of negligence were as follows:

. . .

6. That the Plaintiff's injuries were brought about by the negligence of the Defendant, in that:

(a) It erected electrical lines and poles too close to the public roadway and the Defendant, or its agents, servants, or

employees knew or should have known that this closeness to the highway posed a danger to persons or property using said roadway, that said electrical lines were erected in such a manner and without due regard to the safety of persons passing under them;

(b) It erected electrical lines in such a manner and position, without warning this Plaintiff and other users passing under them that they would be likely to fall at the slightest provocation;

(c) That no warning or precautionary measures of any kind were taken by Defendant to put this Plaintiff, and the public on notice of the danger that lurked to users of the highway passing under said electrical lines, which Defendant, its agents, servants and employees, knew, or should have known, would be likely to fall at the slightest provocation upon persons and property, and particularly this Plaintiff.

. . .

In its answer, as a first defense, defendant asserted that plaintiff's complaint failed to state a claim upon which relief could be granted. In its second defense, defendant denied plaintiff's allegations of negligence and asserted as an affirmative defense that during the thunderstorm, lightning struck and splintered one of the poles supporting the line and knocked the line from its supporting insulator, causing the line to fall onto I-85. Defendant further asserted that the lightning strike was a natural phenomenon which defendant could not have guarded against by any known device or equipment and which defendant was powerless to prevent. Defendant prayed that plaintiff's action be dismissed.

Defendant subsequently moved for summary judgment, supporting this motion by the affidavits of a number of persons. Included in these were the affidavits of Paul W. Morgan, a graduate of Georgia Institute of Technology in Electrical Engineering and a Registered Professional Engineer, employed as a District Engineer for defendant; Vance B. Martin, a graduate of Duke University in Electrical Engineering and a Registered Professional Engineer, employed as Manager of Distribution System Design and Standards for defendant; and James M. McCutchen, a graduate of the University of South Carolina in Electrical

Engineering, formerly employed by the Rural Electrification Administration of the United States Department of Agriculture as Chief of the Distribution Standards and Distribution Engineering Division of REA. These affidavits tended to show that defendant's electric line was safely constructed and that there are no known ways to insure that such lines might not be damaged by lightning.

Plaintiff's affidavits filed in opposition to defendant's motion for summary judgment tended to show that defendant knew that its electric line crossing I-85 at State Road 1625 was struck by lightning and fell across I-85 in 1975.

After filing his opposing affidavits, plaintiff amended his complaint, as follows:

> (d) Plaintiff is informed and believes and so alleges that during 1975, that said lines were struck by lightning and fell across the highway in the same manner as occurred on September 3, 1980, as the Plaintiff passed under said lines; that the Defendant knew or should have known at that time that there was inherent danger to allow the line or lines pass over the highway; that said lines should have been put under the highway and thus prevent any danger to the Plaintiff and others using said highway.

Defendant's motion for summary judgment was allowed and from that judgment, plaintiff has appealed.

Plumides, Plumides and Shuster, by John G. Plumides, for plaintiff.

William I. Ward, Jr. and W. Edward Poe, Jr. for defendant.

WELLS, Judge.

In his complaint, plaintiff has asserted two theories of negligence, first that defendant placed its poles too close to highway I-85 for safety of highway users, and second, that because of defendant's knowledge that its wires at this I-85 crossing had been previously knocked down by lightning, the overhead wires should have been removed and placed under the highway.

[1] In his brief, plaintiff has not argued his first theory. It deserves scant consideration. Known laws of physics dictate that

when physical objects supported from the earth's surface lose their support, they will fall to the ground. The proximity of defendant's poles to I-85 would have no causal relationship to the falling down of wires supported by such poles when the poles or the wires are broken by lightning, and therefore the proximity of the poles to the highway, as a matter of law, could not have been a proximate cause of plaintiff's injury.

[2] Plaintiff's second theory must be responded to on principles of foreseeability. As in every negligence case, the threshold questions are duty and proximate cause. At the threshold of duty is foreseeability. If under the circumstances of this case, defendant could have reasonably foreseen that placing its wires over I-85 might result in harm to others, it would be answerable for plaintiff's injury. Plaintiff contends that because lightning had struck these same wires previously and caused them to fall across the highway, defendant could have reasonably foreseen that it would happen again. We cannot agree. While it is clear that defendant could reasonably foresee that lightning could strike its pole lines from time to time, no one can reasonably foresee when or where lightning may strike any particular object. To agree with plaintiff would open a very expensive door. We can take judicial notice that electric lines suspended from poles may be damaged by at least four natural phenomenon over which electric utilities have no control: lightning, wind, ice, and snow. The only way to insure that overhead electric lines crossing public streets or highways might not fall down due to the forces of such natural phenomenon would be to place all such lines underground. The cost of such an undertaking would be so large and hence carry with it such considerations of public policy that it would be entirely inappropriate to establish judicially a precedent for such a requirement.

Because defendant could not have reasonably foreseen the events which led to the falling of its wires across I-85 and plaintiff's injury, defendant was under no duty to place those wires under the highway, and plaintiff was therefore entitled to judgment as a matter of law.

We carefully note that under the circumstances of this case, we do not reach the question of the duty of an electric utility after notice to exercise due care to protect others from the harm

which might occur from wires broken or knocked down by the natural phenomenon we have mentioned.

While we support and adhere to the general rule that summary judgment should rarely be granted in negligence cases, *see Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979) and *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979), each case must be decided on its own merits. In this case, the materials before the trial court showed that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law, conclusively establishing the lack of actionable negligence on the part of defendant.

Affirmed.

Judge BRASWELL concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

Though I agree that plaintiff's case was properly dismissed, I do not agree that defendant could not reasonably have foreseen the events leading to its wires falling across the highway and injuring plaintiff. Every year winds blow, lightning strikes, storms come, and power lines in different parts of the state fall across streets and highways endangering or injuring travelers; and, in my view, it required no special powers of prevision on defendant's part to anticipate that the wires involved here might also be affected by one natural force or another and fall across the highway and injure somebody. But every hazard that is foreseeable is not necessarily avoidable through the exercise of reasonable care, and the first element of actionable negligence is a lack of due care. 65 C.J.S. *Negligence* § 2(3). Plaintiff's case was correctly dismissed, I think, because defendant presented plenary evidence to the effect that it exercised due care in arranging, locating, and maintaining its poles and wires, whereas, plaintiff presented no evidence at all to the contrary. Plaintiff's argument that the wires should have been placed underground is no substitute for evidence to that effect, since we do not know and the record does not indicate either that that was the better course or what it would have involved.

THOMAS E. OATES AND WIFE ANITA R. OATES v. JAG, INC.

No. 8210SC1338

(Filed 7 February 1984)

Negligence § 2; Sales § 6.4— negligent construction of house—defects obvious to third purchasers—Rule 12(b)(6) motion properly granted

In an action in which plaintiffs were third purchasers of a house which they allege was negligently constructed by the defendant, the trial court properly granted the defendant's Rule 12(b)(6) motion since the traditional implied warranty that the dwelling is free from major structural defects and meets a standard of workmanlike quality is available only to the initial vendee-grantee against the vendor-builder. The specific defects alleged in the complaint were obvious or discoverable upon a reasonable inspection by the plaintiffs, and the plaintiffs acted at their own risk and were subject to the traditional doctrine of caveat emptor.

Judge EAGLES concurs in result.

APPEAL by plaintiffs from *Smith, Judge.* Order entered 27 August 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 29 November 1983.

Brown & Johnson by C. K. Brown, Jr., for plaintiff appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog by Sanford W. Thompson, IV; and John W. Liles, Jr., for defendant appellee.

BRASWELL, Judge.

The plaintiffs are the *third* purchasers of a house which they allege was negligently constructed by the defendant. In its answer the defendant asserts that because there has never been a relationship between them, contractual or otherwise, the plaintiffs have failed to state a claim upon which relief can be granted. The trial court granted the defendant's Rule 12(b)(6) motion. The plaintiffs appeal.

The real property in question was originally owned by the defendant who built a dwelling house on the lot in 1978. The defendant sold the house and property to Mr. and Mrs. Edwin Earp Capps who later sold the property to Joos-Poole Realtors and Bob Veasey & Co., Inc.

In February of 1981 the plaintiffs purchased this house and lot where they currently reside, from Joos-Poole Realtors and Bob Veasey & Co., Inc. On 30 April 1982 the plaintiffs filed this action against JAG, Inc., only.

The claim for $25,000 in damages is based upon a theory of negligence in the original construction of the house. In its crucial parts the complaint alleges "[t]hat after the plaintiffs acquired ownership . . . and moved into the residence, they discovered numerous defects, faulty workmanship, and negligent construction." Specifically, the actionable negligence is described as "faulty, defective, and unworkmanlike construction in the building of the home and [that the defendant] was negligent in the construction of the home" by:

(a) installing a cut toilet drain pipe in the upstairs bathroom,

(b) using non grade marked lumber which caused the floor joists on the second floor to sag, settle, and become unlevel,

(c) using an undersized stud underneath a second floor beam in a weight bearing position,

(d) improperly installing a steel flinch plate under the second floor,

(e) creating an excessive span of the floor joists,

(f) using insufficient nails on the ledgers on beams,

(g) improperly nailing the bridging between joists and beams,

(h) using shims between floor joists and second floor flooring in an attempt to raise and level the second floor and to disguise other negligence,

(i) using insufficient vents in the foundation walls,

(j) building the dwelling so that "[a] portion of the hardwood flooring was rotted," and

(k) failing in general "to conform to the customary and acceptable standards and practices" in the trade.

The defendant, on the other hand, asserts that it has no contractual relationship with nor any special duty to the plaintiffs and has no knowledge of what has happened within or without the home since it was sold to the Capps in 1978. The defendant also puts forth that the house passed all building inspections and complied with all applicable building codes when constructed.

The only issue presented for review is whether the trial court properly allowed the motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). This motion tests whether the pleading is legally sufficient.

> A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981). Restated, a motion to dismiss for failure to state a claim is properly granted when it appears that the law does not recognize the plaintiffs' cause of action or provide a remedy for the wrong alleged. *Id.*

The fundamental question presented asks whether a subsequent purchaser of a dwelling house, once removed from the original vendee, may maintain an action against the original builder for negligent construction of the house. We answer no. There are no allegations of fraud. Also, on these same facts no cause of action can be maintained on the basis of a breach of warranty. The traditional implied warranty that the dwelling is free from major structural defects and meets a standard of workmanlike quality is available only to the initial vendee-grantee against the vendor-builder. *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974); *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976); *but compare Strong v. Johnson*, 53 N.C. App. 54, 280 S.E. 2d 37 (1981).

The only claim for damages appears to be for a breached warranty of fitness. North Carolina has not yet extended its protection to cover a remote purchaser. North Carolina statutes have not yet extended the concepts in products liability law to con-

struction of houses or buildings. North Carolina has not yet applied strict liability for torts to the works of building contractors. The liability for tort of JAG, Inc., this defendant, ceased upon its sale and transfer of possession by deed to Mr. and Mrs. Edwin Earp Capps. There was no misleading by defendant of plaintiff Oates to make the purchase. The quality of what the Oateses purchased by deed was at the risk of themselves, as buyers. There are no allegations that the builder knew of any latent defects or failed to disclose the existence of defects. Even so, the builder's disclosure would have been to the first vendee Capps—not the remote vendee Oates. No duty has been alleged for which the breach thereof would give rise to an action in tort for negligence. While some jurisdictions apparently have extended tort liability to real property under the theory of vulnerability espoused by Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), North Carolina has not joined the crowd. *See* Brown, Building Contractor's Liability After Completion and Acceptance, 16 Clev.-Mar. L. Rev. 193 (1967).

A case appearing to allow the present plaintiffs a negligent cause of action against the builder is *Sullivan v. Smith*, 56 N.C. App. 525, 289 S.E. 2d 870, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982). The defendant-general contractor was sued by the plaintiffs who had purchased the house from the original vendees. The negligent original construction of a fireplace and chimney resulted in a fire which damaged the house. The *Sullivan* court, seeking to reach an equitable result, did not discuss Rule 12(b)(6) or the plaintiffs' standing to sue, but limited its major discussion to whether the trial court erred in granting the builder's motion for judgment n.o.v., which was the assignment of error before that court. *Sullivan* highlights how a builder's liability was extended when the defect was hidden, and when even upon a reasonable inspection by the buyer the hazard remained unknown. A hidden defect provides a basis for avoiding the general *caveat emptor* rule. In *Sullivan*, since no fire had previously broken out from the negligent construction, the original vendees were as unaware as the plaintiffs of the hazardous condition. Although the defect was already present no injury or damage had occurred as of the time the plaintiffs moved in.

In the present case, the plaintiffs acted at their own risk and are subject to the traditional doctrine of *caveat emptor. Buckman*

v. Bragaw, 192 N.C. 152, 134 S.E. 422 (1926). This maxim of *caveat emptor*, let the buyer beware, as defined in Black's Law Dictionary 281 (4th ed. 1951), "summarizes the rule that a purchaser must examine, judge, and test for himself . . .; the purchaser takes risk of quality and condition unless he protects himself by a warranty or there has been a false representation." The complaint reveals that the defects as well as the damage had occurred as of the time these plaintiffs moved in. The specific defects were obvious or discoverable upon a reasonable inspection by the plaintiffs, such as the sagging, unlevel second story floor and the rotting hardwood floors. Again, even within the area of products liability North Carolina does not impose liability when the defect and danger are obvious, and this assumption of risk will bar any recovery. *See* G.S. 99B-4(2). Also, in *Hartley v. Ballou, supra*, at 65, 209 S.E. 2d at 785, the Supreme Court relaxed the doctrine of *caveat emptor* in cases concerning the implied warranty of workmanlike quality only with respect to defects of new dwellings when the first purchaser was unaware of them and could not discover the defects by reasonable inspection.

We subscribe to those views expressed in *Levy v. Young Construction Co., Inc.*, 46 N.J. Super. 293, 134 A. 2d 717 (1957), *affirmed*, 26 N.J. 330, 139 A. 2d 738 (1958):

> Anything defendant did occurred while it was the owner of the premises, and not after plaintiffs took title. *Id.* at 296, 134 A. 2d at 718.
>
> Although the doctrine of *caveat emptor*, so far as personal property is concerned, is very nearly abolished, it still remains as a viable doctrine in full force in the law of real estate. Absent any covenant binding defendant to sell a well constructed house, plaintiffs cannot sue on an implied warranty. [Williston, Contracts, § 926 (Rev. ed. 1936).] *Id.* at 296, 134 A. 2d at 719.
>
> [T]he policy reasons underlying the rule that the acceptance of a deed without covenants as to construction is the cut-off point so far as the vendor's liability is concerned, are rather obvious. Were plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had

parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability. The rule which we impose in the circumstances of the present action works no harshness on purchasers of real estate. Plaintiffs had an opportunity to protect themselves by extracting warranties or guaranties from defendant in the contract of sale and by reserving them in the deed. This is not an uncommon practice, and when pursued allows both vendor and purchaser to know the nature and extent of their rights and liabilities and to order their affairs accordingly. *Id.* at 297-98, 134 A. 2d at 719-20.

We, therefore, hold that the trial court correctly dismissed this action by granting the defendant's Rule 12(b)(6) motion.

Affirmed.

Judge HEDRICK concurs.

Judge EAGLES concurs in result.

HENRY M. FISHER, GUARDIAN FOR JESSIE PENNY FARMER, INCOMPETENT v. WILLIS RAY LAMM

No. 8310SC184

(Filed 7 February 1984)

1. Venue § 5.1— action to set aside conveyances—removal to counties where property located

Where plaintiff brought an action to set aside three conveyances of real property which occurred in three separate counties and in different calendar years, the "subject of the action" under G.S. 1-76 was each discrete tract of land conveyed, and the trial court properly ordered each claim transferred and removed to the county wherein the property concerning such claim was located.

2. Fraud § 9— constructive fraud—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim to set aside three deeds from plaintiff's ward to defendant on the ground of constructive fraud where the complaint identified the circumstances surrounding the formation and development of the alleged confidential relationship between plaintiff's ward and the defendant; the complaint identified the specific transactions al-

leged to have been procured by means of constructive fraud and the times at which they occurred; the complaint specifically stated that defendant was trusted by plaintiff's ward "to look after her interests" at the time each of the deeds was executed; and the complaint alleged that each of the deeds was given without monetary consideration and that, with the last deed, plaintiff's ward had conveyed to defendant all of her real estate, reserving only a life estate to herself. G.S. 1A-1, Rules 8 and 9(b).

3. Fraud § 9— constructive fraud—more definite statement

The trial court erred in granting defendant's motion for a more definite statement with respect to plaintiff's claim to set aside on the ground of constructive fraud a power of attorney given by plaintiff's ward to defendant.

APPEAL by plaintiff from *Hobgood, (Robert H.), Judge.* Order entered 14 December 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 19 January 1984.

In his complaint plaintiff seeks to have three deeds and a power of attorney "set aside and declared null and void" for lack of mental capacity, constructive fraud, and undue influence.

The allegations in plaintiff's complaint, except where quoted, are summarized as follows:

On 16 September 1981, in Nash County, Jessie Penny Farmer was declared to be incompetent, and plaintiff, Henry M. Fisher, was appointed her general guardian. Plaintiff and his ward are residents of Nash County, and the defendant, Willis Ray Lamm, is "a resident of Wake County or Nash County." On 13 April 1977 Mrs. Farmer executed and delivered to defendant a deed conveying to him a tract of land located in Wilson County. On 19 September 1979 Mrs. Farmer executed and delivered to defendant a second deed conveying to him a tract of land located in Nash County. On 30 September 1980 Mrs. Farmer executed and delivered to defendant a third deed conveying to him a tract of land located in Wake County. On 6 November 1980 Mrs. Farmer executed in favor of defendant a power of attorney that, among other things, gave defendant authority to sell Mrs. Farmer's real estate.

In his first claim for relief plaintiff alleged that "at the time of the execution of said deeds" "Jessie Penny Farmer's mental faculties were impaired and . . . she did not understand the nature and consequences or the scope and effect of said deeds." In his second claim for relief plaintiff alleged that "the making and

execution of said deeds were obtained by the defendant's constructive fraud and undue influence. . . ." In his third claim for relief plaintiff alleged that the power of attorney designating defendant as an attorney-in-fact "was executed by Jessie Penny Farmer at a time when she was incompetent . . . to manage her own affairs" and was obtained "by the defendant's constructive fraud and undue influence. . . ."

On 26 April 1982 defendant filed the following motions pursuant to Rule 12, North Carolina Rules of Civil Procedure: (1) a motion "to dismiss the Plaintiff's complaint for improper venue;" (2) in the alternative, a motion "to remove this action for improper venue;" (3) a motion to "dismiss Plaintiff's Second and Third Claims For Relief on the ground that fraud and undue influence must be plead with particularity . . .;" and (4) a motion "for a more definite statement of Plaintiff's allegations of mental impairment, undue influence and fraud. . . ."

On 14 December 1982 the trial court granted defendant's motion for a change of venue and entered an order "[t]hat the part of this action that relates to recorded deed and property in Wilson County, North Carolina be transferred to Wilson County Superior Court." The court entered a similar order regarding the property in Nash County. The trial court also held that defendant's motion to dismiss "the constructive fraud claim in Plaintiff's Second Claim For Relief is granted. Said claim is dismissed without prejudice." Finally, defendant's motion for a more definite statement was granted with respect to "the constructive fraud claim in Plaintiff's Third Claim For Relief," and plaintiff was ordered "to plead with particularity the time and specific acts of constructive fraud alleged. . . ." Plaintiff appealed.

Harris, Cheshire, Leager & Southern, by Samuel O. Southern, for plaintiff, appellant.

Kirby, Wallace, Creech, Sarda & Zaytoun, by David F. Kirby, for defendant, appellee.

HEDRICK, Judge.

[1] Plaintiff first assigns error to the court's holding that the defendant is entitled to a change of venue as to the Wilson and Nash County property and its order transferring and removing

the claims relating to the Nash County and Wilson County property to those respective counties. Plaintiff contends that "because some of the real property plaintiff seeks to recover is in fact located in Wake County, then venue is proper in Wake County as to all of the property."

Venue in actions affecting title to land is governed, as both parties concede, by N.C. Gen. Stat. Sec. 1-76, which 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, and for injuries to real property.

(emphasis added). Plaintiff relies on that portion of the statute which refers to "some part thereof" in his argument that venue was proper in Wake County as to all three tracts of land. His reliance is justified only if "the subject of the action" in the instant case is determined to be all of the property, taken as a whole. We must thus first decide whether the record would support such a determination.

We first note that there were three separate conveyances in the instant case, each of a tract of property located entirely within a different county and each in a different calendar year. Indeed, more than two years elapsed between the first and second conveyance. Furthermore, while plaintiff's challenge to each conveyance rests on identical grounds, the evidence necessary to support his contentions will of necessity vary with respect to each deed:

> The incompetency that is offered to show the invalidity of a . . . conveyance must, regardless of its character, exist at the time of the act in question. Thus, the mental capacity of one executing an instrument to pass title to property is to be tested as of the date of the execution and delivery of the instrument. Irrationality before or after the transaction in question is important . . . only to the extent that it bears

> upon the competency of the . . . grantor at the time of the transaction.

41 Am. Jur. 2d *Incompetent Persons* Sec. 69 (1968). Our consideration of all these circumstances persuades us that in the instant case "the subject of the action" under N.C. Gen. Stat. Sec. 1-76 was properly determined by Judge Hobgood to be each discrete tract of land. In effect, there are three "subjects," each located in its entirety in a different county. We hold that plaintiff cannot, by mere joinder of these three distinct claims, bring himself within the purview of that portion of the statute which refers to "some part thereof." Thus, Judge Hobgood properly ordered the cases transferred and removed to the county wherein the property is located.

[2] Plaintiff next assigns error to the trial court's order dismissing "the constructive fraud claim in Plaintiff's Second Claim For Relief." He contends that the allegations set forth within his complaint fall well within the boundaries established by Rules 8 and 9(b), North Carolina Rules of Civil Procedure. Defendant, on the other hand, argues that "Plaintiff's allegations are inadequate under any fraud pleading standard."

The general rule, set out in N.C. Gen. Stat. Sec. 1A-1, Rule 8(a)(1), requires that a complaint contain "[a] short and plain statement of the claim sufficiently particular to give . . . notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. . . ." In pleading certain "special matters," however, of which fraud is one example, Rule 9(b) requires that the circumstances "be stated with particularity." The application of these rules to the pleading of constructive fraud was recently discussed at length by our Supreme Court in *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E. 2d 674, 678-79 (1981):

> A constructive fraud claim requires even less particularity [than a claim for actual fraud] because it is based on a confidential relationship rather than a specific misrepresentation. The very nature of constructive fraud defies specific and concise allegations and the particularity requirement may be met by alleging facts and circumstances (1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which de-

> fendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

(citation omitted).

Our examination of the allegations set forth in plaintiff's second claim for relief reveals that plaintiff has adequately complied with the provisions of Rule 9(b) as construed in *Terry.* Plaintiff has identified the circumstances surrounding the formation and development of the alleged confidential relationship between Mrs. Farmer and the defendant. He has identified the specific transactions alleged to have been procured by means of constructive fraud, and the times at which they occurred. Plaintiff also specifically states that defendant was "trusted by Jessie Penny Farmer to look after her interest" at the time each of the deeds was executed. Finally, he alleges that "[e]ach of said deeds [to defendant] was given without any monetary consideration," and that, with the last deed, Mrs. Farmer "had conveyed to [defendant] all of her real estate, reserving only a life estate to herself." Because we believe these allegations are sufficient under *Terry* to set forth a claim for relief based upon constructive fraud, we hold that the trial court erred in granting defendant's "motion to dismiss" that portion of plaintiff's second claim for relief.

[3] Plaintiff's final assignment of error challenges the court's order granting defendant's motion for a more definite statement "with respect to the constructive fraud claim in Plaintiff's Third Claim For Relief." Here, plaintiff seeks to have set aside the power of attorney executed by Mrs. Farmer in favor of defendant. We note that the trial judge correctly denied defendant's motion to dismiss this claim, thereby implicitly ruling that plaintiff's averments were of sufficient particularity to pass muster under Rule 9(b). The court went on to rule, however, that "Plaintiff's Third Claim For Relief for constructive fraud is so vague that it is unreasonable to require Defendant to respond to such pleadings," and thus ordered plaintiff to "plead with particularity the time and specific acts of constructive fraud alleged. . . ." Our examination of the allegations, performed in light of the holding, previously discussed, in *Terry,* persuades us that the court order requiring a more definite statement of "the time and specific acts of constructive fraud" was unnecessary. A motion for a more definite statement "is the most purely dilatory of all the motions

available under the Rules of Civil Procedure," and should not be granted "[s]o long as the pleading meets the requirements of Rule 8 [here, Rule 9(b)] and fairly notifies the opposing party of the nature of the claim." *Ross v. Ross*, 33 N.C. App. 447, 454, 235 S.E. 2d 405, 410 (1977). Thus we hold that the trial court erred in granting defendant's motion for a more definite statement.

The result is: the order transferring and removing the causes involving the real property in Wilson and Nash Counties to the county in which the land is located is affirmed; the orders dismissing plaintiff's second claim for relief in regard to constructive fraud and requiring a more definite statement as to constructive fraud in plaintiff's third claim for relief are reversed, and the causes are remanded to the Superior Court of Wake County for further proceedings.

Affirmed in part, reversed in part, and remanded.

Judges HILL and EAGLES concur.

CHRYSLER CREDIT CORPORATION, PLAINTIFF v. CHARLES M. REBHAN, CATHERINE REBHAN, DOUGLAS L. REBHAN, AND NINA REBHAN, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. CHRYSLER CREDIT CORPORATION AND CHRYSLER MOTOR CORPORATION, A/K/A CHRYSLER CORPORATION, THIRD PARTY DEFENDANTS

No. 8326SC78

(Filed 7 February 1984)

Rules of Civil Procedure § 13— inability to assert independent cause of action by way of counterclaim

In an action instituted by plaintiff to recover from defendant guarantors overdue financial obligations of a car dealership, the trial court properly dismissed the counterclaim of defendant against third party defendant since the allegations set forth in the counterclaim did not arise under the guaranty contract but arose under the terms of a franchise agreement between Chrysler Motor Corporation and the dealership who is not a party to the lawsuit. The guarantors cannot by way of counterclaim assert an independent cause of action belonging to the debtor and seek affirmative recovery against the creditor.

Chrysler Credit Corp. v. Rebhan

APPEAL by defendants from *Snepp, Judge.* Order entered 14 October 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 December 1983.

Fairley, Hamrick, Monteith & Cobb by Laurence A. Cobb and F. Lane Williamson for plaintiff appellee.

Robert J. Deutsch for defendant appellants.

BRASWELL, Judge.

The plaintiff Chrysler Credit Corporation filed this action on 27 May 1982 against the defendants, Douglas and Charles Rebhan, as guarantors for the overdue financial obligations of Coral Gables Imported Cars, Inc., d/b/a Kalamazoo Chrysler-Plymouth. The defendants answered and added Chrysler Motor Corporation as a third-party defendant. Their counterclaim and third-party claim asserted that Chrysler Credit Corporation and Chrysler Motor Corporation have by their "conduct and actions violated the terms of 15 U.S.C. 1222" and have committed a civil conspiracy under Michigan law, causing the financial ruin of Coral Gables. The plaintiff moved to dismiss the counterclaim pursuant to G.S. 1A-1, Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. From the order entered granting the plaintiff's motion, the defendant appeals.

Coral Gables Imported Cars, Inc., d/b/a Kalamazoo Chrysler-Plymouth, is a Florida corporation qualified to transact business in Michigan. It entered into three Direct Dealer Agreements with Chrysler Motor Corporation in May of 1979 for the sale and service of Chryslers, Plymouths and Chrysler import motor vehicles as well as their accessories and parts. The defendants are the sole directors, officers, and shareholders of the dealership corporation. The corporation's inventory was financed by Chrysler Credit Corporation and the defendants were required to execute a "Continuing Guaranty" agreement, obligating themselves to pay all of the corporation's present and future obligations owed to Chrysler Credit.

The plaintiffs have sued the defendants on this agreement for approximately $300,000 as guarantors of the corporation's debts to Chrysler Credit Corporation. The defendants' counterclaim asserted that in the fall of 1979 Chrysler Motors, acting in

concert with Chrysler Credit, began shipping unordered motor vehicles to dealerships, forcing the dealers to accept them. Chrysler Credit would then, without the dealer's authorization, place these vehicles on the dealer's "floorplan," forcing the dealers to pay for these motor vehicles. Coral Gables, being one of these dealerships affected, soon lost its financial viability and terminated its dealership in November of 1980. Since these additional motor vehicles became a financial obligation of Coral Gables, the defendants became liable for their payment under the "Continuing Guaranty" they executed with Chrysler Credit. The defendants alleged that, by forcing the additional cars on Coral Gables, Chrysler Credit and Chrysler Motor have violated the "Automobile Dealers' Day in Court Act" statute under federal law and have committed civil conspiracy under Michigan common law.

The only issue before this Court is whether the plaintiff's G.S. 1A-1, Rule 12(b)(6) motion to dismiss the defendants' counterclaim for failure to state a claim upon which relief can be granted was properly allowed. A Rule 12(b)(6) motion tests the legal sufficiency of the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The rules regarding the sufficiency of a complaint to withstand a Rule 12(b)(6) motion are equally applicable to a claim for relief presented in a counterclaim by the defendant. *Brewer v. Hatcher*, 52 N.C. App. 601, 604, 279 S.E. 2d 69, 71 (1981). A counterclaim is sufficient to withstand the motion where no insurmountable bar to recovery on the claim appears on its face. *Id.* at 605, 279 S.E. 2d at 71. Thus, the question becomes whether the counterclaim states a claim upon which relief can be granted *on any theory. Benton v. Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975).

In Count I of the counterclaim, the defendants state that they are entitled to relief under 15 U.S.C. § 1221, *et seq.*, casually referred to as the "Automobile Dealers' Day in Court Act." In 15 U.S.C. § 1222, "[a]n automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing

or complying with any terms or provisions of the franchise. . . ." 15 U.S.C. § 1221(c) defines "automobile dealer" as "any person, partnership, corporation, association, or other form of business enterprise . . . operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks or station wagons." As a general rule, federal law has maintained that if the dealer named in a franchise is a corporation, then only the corporation itself, its receiver, or stockholder suing derivatively may maintain an action under this statute. *Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099 (D.C. Minn. 1981), *aff'd*, 685 F. 2d 438 (8th Cir. 1982). Therefore, an individual, operating the automobile dealership in corporate form, had no standing to sue the manufacturer in an individual capacity if the corporation is still viable and could in fact sue the manufacturer. *Rodrique v. Chrysler Corp.*, 421 F. Supp. 903 (E.D. La. 1976). In the present case, the defendants do not allege that the corporation is no longer viable or has been dissolved, but only that the corporation "does not presently transact any business." Therefore, under the general rule, the defendants have no standing to sue Chrysler Credit or Chrysler Motor Corporation under 15 U.S.C. § 1222.

The one exception to this rule preventing individuals from suing the manufacturer is when the individuals are inextricably woven into the franchise agreement by provisions which require them to maintain beneficial ownership and control of the stock. These individuals who are essential to the operation of the franchise, who have extensive control over the corporation's activities, and who have a dominant financial interest in the corporation, may maintain an action against the manufacturer. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F. 2d 786 (5th Cir. 1971). *See also Rea v. Ford Motor Co.*, 406 F. Supp. 271 (W.D. Pa. 1975), *vacated and remanded on other grounds*, 560 F. 2d 554 (3d Cir. 1977); *Moorehead v. General Motors Corp.*, 442 F. Supp. 873 (E.D. Pa. 1977). The exception is allowed because these individuals are technically the "dealers" although their business is being conducted through a corporate form. From the record before this Court, the counterclaim states that the defendants are the sole stockholders, directors, and officers of Coral Gables, and that they were essential to its operation and in control of the cor-

poration. The defendants argue therefore that because of this exception they have standing to assert this counterclaim.

We do not agree. The defendants are not suing in their capacity as "dealers," but are suing in order to avoid their obligations as "guarantors" under the "Continuing Guaranty" agreement with Chrysler Credit. The "Director Dealer" franchise agreements entered into by Coral Gables with Chrysler Motor is a separate contract from the "Continuing Guaranty" agreement executed by the defendants to Chrysler Credit. The allegations set forth in the counterclaim have not arisen under the guaranty contract but under the terms of the franchise agreement between Chrysler Motor Corporation and Coral Gables who is not a party to this lawsuit. The guarantors cannot by way of counterclaim assert an independent cause of action belonging to the debtor and seek affirmative recovery against the creditor, Chrysler Motor Corporation. *See Service Co. v. Sales Co.*, 259 N.C. 400, 418, 131 S.E. 2d 9, 23 (1963), *affirmed*, 264 N.C. 79, 140 S.E. 2d 763 (1965). If the principal debtor, Coral Gables, had been sued jointly with the defendants, a claim in favor of Coral Gables may have been set off by the defendants against the demand of Chrysler Credit. *Id.* Since Coral Gables has not been named as a party, no setoff is possible.

The second count in the defendants' counterclaim states that the conduct of Chrysler Motors and Chrysler Credit constitutes actionable civil conspiracy under Michigan law. As discussed above, this claim is also not assertable by the defendant-guarantors. In any event, the defendants acknowledged in their counterclaim and third-party claim that "Chrysler Credit is a wholly-owned subsidiary and agent of Chrysler Motors." Because the present conspiracy claim is based on an alleged unlawful agreement between a corporation and its agent, this claim cannot stand. "In legal contemplation, a corporation and its agents comprise but a single person, one less than the requisite number for a conspiracy." *Schroder v. Dayton-Hudson Corp.*, 448 F. Supp. 910, 915 (E.D. Mich. 1977), *modified on other grounds*, 456 F. Supp. 650 (E.D. Mich. 1978). Thus, there can be no conspiracy. With regard to Count II, we hold the plaintiff's Rule 12(b)(6) motion was properly granted. Counts III and IV have not been addressed by the defendants in their brief. We deem that they have abandoned their assignments of error as they relate to these counts. Rule

28(a), N.C. Rules App. Proc.; *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E. 2d 644 (1978).

Affirmed.

Judges HEDRICK and EAGLES concur.

ROCHELLE L. EASON, CLAIMANT-APPELLANT v. GOULD, INCORPORATED AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES

No. 8310SC115

(Filed 7 February 1984)

Master and Servant § 108— unemployment compensation—leaving job before announced lay-off

Where claimant left work on 4 March two weeks before her announced lay-off on 19 March and filed for unemployment benefits on 10 March, claimant was voluntarily unemployed without good cause attributable to her employer between the time of her application on 10 March and her lay-off date of 19 March, but claimant was unemployed with good cause attributable to her employer after the lay-off date of 19 March and thus would be eligible for unemployment benefits after that date. G.S. 96-14(1).

APPEAL by claimant from *Bailey, Judge.* Judgment entered 22 September 1982 in WAKE County Superior Court. Heard in the Court of Appeals 11 January 1984.

Claimant, Rochelle Lynn Eason, a former assembly-line worker at Gould, Inc. of Wilmington, was denied unemployment benefits when she left work in March 1982, two weeks before an announced lay-off.

The facts, which are essentially undisputed by the parties, are as follows. Ms. Eason learned from fellow employees on 4 March 1982 that she would be laid off on 19 March 1982 due to a "slow down" at the plant where she worked. Claimant did not return to work after she learned of the impending layoff, and filed for unemployment benefits on 10 March 1982. Claimant indicated she decided not to return to work because she was unable to sup-

port herself without a steady income and therefore she was forced to live with her parents, who were moving to Raleigh.

Claimant's request for unemployment benefits was denied by Appeals Referee W. R. Perry, Jr., on the ground that ". . . claimant left the job voluntarily and . . . while claimant may have had a good personal reason for leaving, the leaving was without good cause attributable to the employer." Claimant's later appeals to Deputy Commissioner V. Henry Gransee, Jr., and to Wake County Superior Court were also unsuccessful. From the denial of benefits, claimant appealed.

East Central Community Legal Services, by Victor J. Boone, for claimant.

Donald R. Teeter for Employment Security Commission of North Carolina.

WELLS, Judge.

Claimant contends that the trial judge erred in concluding that claimant left her job voluntarily without good cause attributable to her employer, and was therefore ineligible for unemployment benefits under N.C. Gen. Stat. § 96-14(1) (1981).

Findings of fact made by the Employment Security Commission are binding on appeal where there is any competent evidence to support the findings. *In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980). Conclusions of law, however, may be fully reviewed on appeal.

An analysis of N.C. Gen. Stat. § 96-14(1) (1981) shows that an applicant will be disqualified from receiving unemployment benefits if two things are shown: (1) claimant left work voluntarily (2) without good cause attributable to the employer. If a claimant *either* left work involuntarily *or* with good cause attributable to the employer, then the claimant may collect benefits, provided of course, the other requirements of the Employment Security Act are met. Our courts have examined the meaning of the term "voluntary" job termination in several recent cases. *See, e.g., Milliken and Co. v. Griffin*, 65 N.C. App. 492, 309 S.E. 2d 733 (1983) (not voluntary termination where employee leaves job for health reasons); *Sellers v. National Spinning Co., Inc.*, 64 N.C. App. 567,

307 S.E. 2d 774 (1983); *In re Werner*, 44 N.C. App. 723, 263 S.E. 2d 4 (1980) (not voluntary termination where employer told employees they could resign or be fired); and *In re Scaringelli*, 39 N.C. App. 648, 251 S.E. 2d 728 (1979) (termination of research grant not a voluntary quit). These cases teach that an employee has not left his job voluntarily when events beyond the employee's control or the wishes of the employer cause the termination.

Our courts have also construed the meaning of the term "good cause attributable to the employer" for purposes of the Employment Security Act. *See, e.g., Tastee Freez Cafeteria v. Watson*, 64 N.C. App. 562, 307 S.E. 2d 800 (1983) and *In re Bolden*, 47 N.C. App. 468, 267 S.E. 2d 397 (1980) (good cause where employees left due to racial discrimination against them by employer); *In re Clark*, 47 N.C. App. 163, 266 S.E. 2d 854 (1980) (good cause where employee resigned rather than carry out unethical order of employer). It is clear from these cases that a good cause within the meaning of N.C. Gen. Stat. § 96-14(1) (1981) includes a reaction to requests or policies of the employer which would be considered valid by "reasonable minds." *Compare* "good cause" definition under N.C. Gen. Stat. § 96-14(2) (1981) (discharge for misconduct); *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982), and "good cause" under N.C. Gen. Stat. § 96-14(3) (1981) (disqualification for failure to seek or accept suitable work); *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968).

Turning now to an analysis of the case before us, we first consider whether claimant left her job voluntarily within the meaning of N.C. Gen. Stat. § 96-14(1) (1981). It is undisputed that claimant was told by her employer that she would be laid off beginning 19 March 1982, and that as of that date at least, claimant would be forced out of work due to an action by the employer. There is no indication that claimant was terminated for misconduct. The courts of a number of other states have held that an employee who leaves work before the effective date of an impending layoff or termination has not quit voluntarily and is not disqualified from receiving unemployment benefits. *See, e.g., Elizabeth V. Caldwell*, 160 Ga. App. 549, 287 S.E. 2d 590 (1981) (employee told on Monday she would be terminated as of Friday, left on Tuesday); *McCammon v. Yellowstone Co., Inc.*, 100 Idaho 926, 607 P. 2d 434 (1980) (notified of termination on 18 March, ef-

fective date 1 April, left 18 March); *Johnston v. Florida Department of Commerce*, 340 So. 2d 1229 (Fla. Dist. Ct. App. 1976) (employee left two weeks before firing, on same day as notified); *Department of Labor & Industry v. Unemployment Comp. Board of Review*, 133 Pa. Super. 518, 3 A. 2d 211 (1938) (job layoff effective 24 December, employee left on 20 December). *But see Ferguson v. Arizona Dept. of Economic Security*, 122 Ariz. 290, 594 P. 2d 544 (1979) (claimant told she would be terminated on 11 May, left on 6 May. Court held employee who leaves before effective date of termination must show she would suffer substantial detriment by staying, in order to collect); and *Berkowitz v. Levine*, 41 A.D. 2d 791, 341 N.Y.S. 2d 239 (1973) (employee left two weeks before effective date, no benefits awarded).

Appellees contend, however, that under our statute the crucial time for considering whether a claimant left his job voluntarily is the date of application for unemployment benefits, rather than the last day worked or the effective date of the termination. Appellees point to N.C. Gen. Stat. § 96-14(1) (1981) which disqualifies claimants who are ". . . *at the time such claim is filed*, unemployed because [they] . . . left work voluntarily without good cause attributable to the employer." Because claimant filed for benefits on 10 March 1982, nine days before the effective date of her layoff, appellees contend that she was voluntarily unemployed at the time of her application and was thus ineligible to receive any benefits. Appellees' argument rests upon an overly strict interpretation of the statute which we are unwilling to adopt.

While the statutory language does focus upon the time of the application for benefits, there is no provision preventing consideration of a claimant's application after the effective date of a termination. Appellees' interpretation is supported neither by common sense, nor the spirit of the Employment Security Act. The act was designed to provide protection against "economic insecurity due to unemployment," N.C. Gen. Stat. § 96-2 (1981), and should be liberally construed in favor of applicants. *In re Scaringelli*, *In re Watson*, *supra*.

Appellees cite *In re Cianfarra*, 56 N.C. App. 380, 289 S.E. 2d 100 (1982), *vacated*, 306 N.C. 737, 295 S.E. 2d 457 (1983) in support of their argument that claimant is ineligible to receive benefits. The dispositive issue addressed by our Supreme Court in *Cian-*

farra was defendant's misconduct. Because the opinion of this court in *Cianfarra* was vacated by our Supreme Court, it may not be relied upon in this case.

Applying the two-pronged test of N.C. Gen. Stat. § 96-14(1) (1981) to the case before us, we hold that while claimant was voluntarily unemployed without good cause attributable to the employer between 10 March 1982, the date of her application, and 19 March 1982, her lay-off date, nevertheless, upon her application disputed in this case, claimant may be considered for benefits accruing after 19 March 1982.

This cause is remanded to the Superior Court of Wake County for remand to the Employment Security Commission for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges WEBB and WHICHARD concur.

RHETA M. ROGERS v. RICHARD KELLY AND WIFE, MRS. RICHARD KELLY

No. 8330DC103

(Filed 7 February 1984)

Tenants in Common § 3— action for rent—summary judgment for defendant improper

Where, upon divorce, plaintiff, as a tenant in common, owned a one-half undivided interest in drugstore property, the trial court erred in granting defendant-lessee's motion for summary judgment since on the basis of the record, there was no genuine issue of fact on the issue that defendant owed the plaintiff one-half the fair rental value of the premises, and thus plaintiff, rather than defendant, was entitled to summary judgment on the issue of liability. The case must be remanded to decide the factual issue of the fair rental value of plaintiff's one-half undivided interest in the property.

APPEAL by plaintiff from *Leatherwood, Judge.* Judgment entered 30 August 1982 in District Court, CLAY County. Heard in the Court of Appeals 10 January 1984.

Jones, Key, Melvin & Patton by R. S. Jones, Jr., for plaintiff appellant.

McKeever, Edwards, Davis & Hays by George P. Davis, Jr., for defendant appellee.

BRASWELL, Judge.

A tenant in common sues for rents and for possession of the common premises, a drugstore, leased by only one of the two tenants in common to a third party, the defendants. The plaintiff, as non-lease signing cotenant, appeals from the trial court's granting of defendant-lessee's motion for summary judgment and from the denial of her own motion for summary judgment. The standard for our review is to determine from the record, the pleadings, affidavits and evidence presented at the hearing, whether the facts show that there is a genuine issue as to any material fact that would show a party was entitled to a judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

Rheta Rogers, the plaintiff, and William R. Rogers, her former husband, purchased the subject drugstore property in the Town of Hayesville in 1966 as tenants by the entirety. In 1980 Mr. and Mrs. Rogers were divorced. According to the terms of a "Custody, Support, and Property Settlement" agreement of 26 August 1980 which was incorporated into a consent judgment of the same date, Mr. and Mrs. Rogers agreed to a division of their property. Mrs. Rogers received, among other things, the dwelling house and approximately twelve acres. Mr. Rogers' part is described thusly:

> All remaining assets accumulated by the parties during their marriage shall be appraised, and equally divided by value between the parties. . . . Husband shall receive all the remainder of the assets and shall pay Wife in cash *or by conveyance of an accumulated asset of his choice* for the balance of her share, at their appraised value, in lieu of cash. (Emphasis added.)

From the date of divorce to the date of trial there has been no completed appraisal or actual division of the accumulated and remaining assets of the marriage. For purposes of the summary

judgment hearing Mr. Rogers gave an affidavit for the defendants which shows that he intended at all times for the drugstore property to be his alone after the divorce. Mr. Rogers has not implemented the *possibility* of divestment of this property from Mrs. Rogers.

The deed recorded at the courthouse shows ownership as tenants by the entirety in Mr. and Mrs. Rogers. Upon absolute divorce in 1980 this legal title was converted to a tenancy in common. *Smith v. Smith*, 249 N.C. 669, 107 S.E. 2d 530 (1959). When this action was filed on 5 May 1981 we hold that the plaintiff Rheta Rogers and her former husband each owned a one-half undivided interest in the property. Nothing in the property settlement agreement has yet changed this legal conclusion. As between this plaintiff and these third-person defendants, the property settlement between Mr. and Mrs. Rogers is of no effect. Title and ownership has never been changed at the courthouse. Mr. Rogers is not a party to this lawsuit.

After the final divorce Mr. Rogers alone leased the drugstore to the defendants. About December 1st or 2nd, 1980, the defendants took possession under a verbal agreement, which was converted to a written agreement in June of 1981. According to defendant Richard Kelly, "Mr. Rogers let us move in without paying rent until we could afford it. Mr. Rogers helped us, because I guess it's to his best interest that it be rented, because he's getting rent money." Mr. Kelly's deposition also stated that he and his wife, the defendant Linda Kelly, agreed to pay to Mr. Rogers only the sum of $840 monthly rent. Only two rent payments were made in 1981 "due to the fact that William Ray Rogers is helping us in the business as a friend," and from 1982 rent was paid for January through June. Kelly's Pharmacy is operated by defendants in the leased property. Mr. Kelly admits that no rent has been paid to Mrs. Rogers. Mrs. Kelly, by her deposition, substantially adopted the deposition of her husband, and there are no facts different from the above.

In her complaint the plaintiff sues for "possession of the subject premises" and for "[h]er proportionate share of the rental value of the premises from January 1, 1981 until possession is returned to Plaintiff, in the amount of $500 per month." She alleges "the fair rental value" to be $1,000 per month.

On 29 December 1980 plaintiff's attorney wrote a letter to the defendants, now of record as Exhibit C. After indicating some information had come to Mrs. Rogers' attention about an arrangement for defendants to occupy the building, the letter informs the defendants that Mrs. Rogers is owner of a one-half undivided interest, and that

> Mrs. Rogers *does not wish to interfere with your taking possession* of and entering into a lease in connection with the building. She is simply desirous of being sure that she is fully aware of the business transaction involved, and that she is going to receive her just portion of all rental payments due.

Upon this background we now inquire into the rights of one tenant in common against the third-person lessee of the other cotenant. In essence, we interpret the complaint as an action in ejectment with a claim for money damages of one-half fair rental value of the premises during the time of occupancy. *See Baldwin v. Hinton*, 243 N.C. 113, 117, 90 S.E. 2d 316, 319 (1955). The *Baldwin* case also states that "[i]n an action for trespass, a tenant in common may recover judgment only for his proportionate part of the damages; but in an action in ejectment, one tenant in common may recover the entire tract against a third party." *Id.* at 118, 90 S.E. 2d at 319. In *Baldwin*, unlike here, the third parties (the defendants) were not lessees of a cotenant but claimed the property "under deed pursuant to foreclosure of [a certain] deed of trust." *Id.*

Discovering no North Carolina case directly on point, we now look to the general rule, and interpret it to be:

> [A] lease by one tenant in common . . . is valid and effectual to the extent of the lessor's interest, and entitles the lessee to occupy, use, and enjoy the premises as fully as the lessor himself might do but for the lease.
>
> The lease does not bind the *interests* of nonjoining owners, absent ratification or authorization by them, and in so far as it purports to bind those interests it is invalid; but, at least in most jurisdictions, it is an inaccuracy to state broadly that the lease is "invalid" as to, or is "voidable" by, the nonjoining owners, since under the doctrine of most jurisdictions they clearly are required to respect the rights

vested in the lessee, and cannot exclude him from the premises during the term of the lease.

Annot., 49 A.L.R. 2d 797, 798 (1956).

In this case because of the actual exclusion of the plaintiff-cotenant from the premises of the drugstore building, the lessee has a liability to the nonjoining plaintiff-owner for use and occupation which here can be satisfied by the paying of a proportional fair rental value. As stated in 49 A.L.R. 2d at 805, "It is very plain in all jurisdictions that one tenant in common . . . is not by reason of his character as such able or authorized to bind by lease the interests of any other owner." Here, in effect, for the term of the lease the defendants become substantially a cotenant of the nonjoining plaintiff-owner, and the plaintiff "can claim no other or greater rights against the lessee than he could assert against the lessor himself." 49 A.L.R. 2d at 810.

The forecast of the evidence shows that the plaintiff, as a cotenant, does have some rights against the defendants. On this record we hold that there is no genuine issue of fact on the issue that defendants owe the plaintiff one-half the fair rental value of the premises, and thus plaintiff was entitled to summary judgment on the issue of liability. However, because the question of what is fair rental value does not lend itself to be decided as a matter of law it was error for the trial court to grant summary judgment for the defendants. The case must be remanded to decide the factual issue: What is the fair rental value for Rheta M. Rogers' one-half undivided interest in the leased drugstore premises from 1 January 1981 through the end of the lease [or such period as she owns a one-half undivided interest]?

We hold that plaintiff is not entitled to "possession" of the premises as alleged in her complaint. Just as one cotenant cannot eject another cotenant from rightful occupancy, and with Mr. Rogers' lessee standing in his shoes as that of a cotenant in possession, the defendants may remain in possession for the duration of the lease, subject to the duty to pay plaintiff as owner her proportional fair rental value.

While the letter of 29 December 1980 from plaintiff's counsel to defendants shows that plaintiff does not object to the premises being leased, and asks for rents, other evidence shows no lease

existed on that date. The plaintiff has not been shown to have ratified the subsequent oral or written lease as to rental terms. Also, a nonjoining cotenant cannot be bound by one tenant's leasing of more than his own interest for free rent. While the monthly rental of $840 used in Mr. Rogers' lease to the defendants would furnish some evidence of fair rental value, the plaintiff, not having ratified any of the terms of the lease, is not to be bound from offering evidence to the contrary, if there be any.

The results are: summary judgment for defendants is reversed. The trial court erred in not entering summary judgment for the plaintiff on the issue of liability. The cause is remanded to the trial court to determine the one issue of damages as to fair rental value.

Reversed in part and remanded.

Judges HEDRICK and EAGLES concur.

VANCE TRUCKING COMPANY, INC. AND MYRTLE N. WALKER, ADMINISTRATRIX OF THE ESTATE OF HORACE HOBART WALKER v. ALLEN ROSS PHILLIPS, ED KEMP ASSOCIATES, INC. AND CHARLES JENNINGS GEORGE, JR.

ALLEN ROSS PHILLIPS AND ED KEMP ASSOCIATES, INC. v. VANCE TRUCKING COMPANY, INC. AND MYRTLE N. WALKER, ADMINISTRATRIX OF THE ESTATE OF HORACE HOBART WALKER

No. 8314SC93

(Filed 7 February 1984)

1. **Appeal and Error § 68— admissibility of evidence—law of the case**

Testimony by a breathalyzer operator and a medical pharmacologist concerning defendant's blood alcohol level some time after and at the time of an accident was admissible under the doctrine of the law of the case where such testimony had been ruled admissible by the Court of Appeals on a prior appeal of this case.

2. **Automobiles and Other Vehicles § 90.1— instructions on driving with blood alcohol content of .10%**

The trial court's instructions concerning negligence by the operation of a motor vehicle upon the highways with a blood alcohol level of .10% or more by

weight did not set forth a rebuttable presumption that a person with a .10% or greater blood alcohol level is intoxicated.

3. **Trial § 46— impeachment of verdict**

No evidence may be received that shows the effect of any statement, conduct, event or condition upon the mind of a juror or the mental processes by which the verdict was determined.

4. **Appeal and Error § 68— admissibility of evidence—law of the case**

The trial court erred in excluding testimony which another panel of the Court of Appeals had specifically held to be admissible in this case.

5. **Rules of Civil Procedure § 42— severance of issues of liability and damages**

While the trial court has the discretion to bifurcate the trial as to the issues of liability and damages, the court should enter findings and conclusions establishing the appropriateness of the severance of the issues for trial. G.S. 1A-1, Rule 42(b).

APPEAL by plaintiffs and defendants, Phillips and Ed Kemp Associates from *Preston, Judge.* Judgment entered 22 September 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 January 1984.

These are consolidated cases arising from claims by plaintiff, Walker, for wrongful death and plaintiff, Vance Trucking Company, for property damage to a tractor trailer and its contents, and counterclaims by defendants, Phillips and Ed Kemp Associates, for property damage and personal injury. All claims arose from a collision in 1975 involving plaintiff's intestate and defendant.

These claims were initially heard in 1980, at which time the trial court directed a verdict in defendants' favor. Plaintiffs appealed and another panel of this court reversed in *Trucking Co. v. Phillips,* 51 N.C. App. 85, 275 S.E. 2d 497, *review denied,* 303 N.C. 320, 281 S.E. 2d 659, *pet. for reconsideration denied,* 303 N.C. 550, 281 S.E. 2d 661 (1981). On remand, the case resulted in a hung jury and a mistrial. After a subsequent trial, which forms the subject of this appeal, the jury rendered a verdict finding no liability as to any of the parties. We see no reason to repeat the underlying facts, set out in *Trucking Co. v. Phillips, supra.*

M. Alexander Biggs for plaintiffs/defendants appellants, Vance Trucking Company, Inc. and Myrtle N. Walker.

M. Alexander Biggs, by D. Royce Powell, for plaintiffs/defendants cross-appellees, Vance Trucking Company, Inc. and Myrtle N. Walker.

Haywood, Denny & Miller, by George W. Miller, Jr., for appellee, Charles Jennings George, Jr.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Alan W. Duncan, for defendant appellees and cross-appellants, Alan Ross Phillips and Ed Kemp Associates, Inc.

VAUGHN, Chief Judge.

On appeal, plaintiffs and defendants, Phillips and Ed Kemp Associates, set forth several assignments of error with respect to errors allegedly made by the trial court. Since none of plaintiffs' assignments of error relate to the liability of defendant, George, we affirm that part of the jury verdict finding no liability as to defendant, George.

Defendants' Contentions

[1] At trial, a licensed breathalyzer operator testified that three hours and fifty-five minutes after the accident, defendant, Phillips, had a blood alcohol level of .07% by weight. A medical pharmacologist testified that in his opinion, defendant's blood alcohol level at the time of the accident would have been .13% by weight. Defendants now contend that this testimony should have been excluded since the results of a breathalyzer test and expert testimony relating thereto are inadmissible and compromise the rule against cross examination regarding a criminal conviction or acquittal in a civil action. Another panel of this court has already settled this question to the contrary. *See Trucking Co. v. Phillips, supra.* We feel, as did the trial judge, that under the doctrine of the law of the case, the testimony in question was admissible at this trial. *See Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673 (1956).

[2] Defendants also contend that the judge's charge to the jury was improper in that it set forth a rebuttable statutory presumption that a person with a .10% or greater blood alcohol level is intoxicated. While we agree with defendants that the presumption of intoxication created in G.S. 20-139.1 relates only to criminal ac-

tions, we, nevertheless, find no merit in defendants' contention. *See Wood v. Brown*, 20 N.C. App. 307, 201 S.E. 2d 225 (1973), *later appeal*, 25 N.C. App. 241, 212 S.E. 2d 690, *cert. denied*, 287 N.C. 469, 215 S.E. 2d 626 (1975). The trial judge charged, in pertinent part:

> The motor vehicle law provides that it is unlawful for any person to operate a vehicle upon any highway when the amount of alcohol in his blood is 0.10 percent or more by weight.
>
> Driving with an amount of alcohol in the blood of 0.10 percent or more by weight is negligence within itself.
>
> However, a finding of such negligence does not establish a causal connection between it and the collision. The driver's condition, operating a vehicle with an amount of alcohol in his blood of 0.10 percent or more by weight, must have caused him to violate some other rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision.
>
> If you find, by the greater weight of the evidence, that Alan Ross Phillips was negligent in that he operated a vehicle while the amount of alcohol in his blood was 0.10 percent or more by weight, then you would consider this negligence in determining whether he was capable of maintaining proper control of this vehicle in the same manner as a reasonably careful and prudent person would have done under all of the circumstances then existing.

The above instruction created no presumption of intoxication and was in accordance with recognized law. A violation of a statute like the one herein that imposes a duty for the protection of others constitutes negligence *per se*. *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955).

After trial, plaintiffs moved for a new trial and submitted affidavits of two jurors to support their motion and show the materiality and prejudicial effect of the trial court error in excluding the testimony of Mr. William Wallace regarding the asphalt he found in the Pinto's bumper.

[3] No evidence may be received that shows the effect of any statement, conduct, event or condition upon the mind of a juror or the mental processes by which the verdict was determined. *See State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980). Although the trial court erred by receiving the affidavits of these jurors, such error was harmless. The trial court denied plaintiffs' motion for a new trial. We have not considered such affidavits on appeal.

Defendants lastly contend that the trial court erred in not granting their motions for a directed verdict at the close of plaintiffs' evidence or at the conclusion of all the evidence. In *Trucking Co., supra*, another panel of this court held that, with substantially similar testimony, the trial court erred in directing a verdict for defendants at the close of plaintiffs' evidence. We are bound by this decision under the doctrine of the law of the case. *See Hayes v. Wilmington, supra.*

Plaintiffs' Contentions

[4] Plaintiffs first contend that the trial court erred by excluding the testimony of William Wallace pertaining to asphalt found in the bumper of defendant's vehicle. Realizing the consequences of our holding, we, nevertheless, agree with plaintiffs' contention. The doctrine of the law of the case overrides our hesitation to subject the parties to a fourth trial. In *Trucking Co., supra*, plaintiffs had excepted to several of the trial court's rulings excluding the testimony of Mr. William Wallace. The panel deciding the case found merit in the exception. Specifically, it held the following trial court ruling to be in error:

> COURT: Now, ladies and gentlemen, the Court allows the defendant Phillips' motion to strike all of the testimony of the witness with respect to his observation of a tear shaped gouge in the pavement. You may not consider any of his testimony in that respect. You must disabuse your minds of his description of the so-called "gouge" that he saw. You must disregard and disabuse your minds of his testimony concerning the location of that gouge or mark in the pavement. You must disregard and disabuse your minds of his testimony concerning his visual comparison of the material that he has heretofore described as asphalt and rock on or about a

bumper guard that he was in Greensboro or near the Ford automobile that he has described with the composition of the surface of Interstate 85 at the place that he has testified that he saw a "gouge" mark. None of that evidence, none of that testimony may be given any consideration by you. It is ordered stricken by the Court as being legally incompetent for your consideration. Pass to the next matter.

The trial court committed reversible error by excluding testimony another panel of this court specifically held to be admissible. *Trucking Co. v. Phillips, supra.*

[5] Plaintiffs also contend that the trial court erred in bifurcating the trial as to the issues of liability and damages. The trial judge has discretion, under G.S. 1A-1, Rule 42(b) to sever issues for trial in order to further convenience or avoid prejudice. On remand, if the trial judge exercises such discretion, we recommend that he enter findings and conclusions that will establish the appropriateness of severance. *See Wallace v. Evans,* 60 N.C. App. 145, 298 S.E. 2d 193 (1982). It seems to us that to try all issues in the next trial would not present a suit of unmanageable size and would tend to lessen the already protracted delay in the resolution of this controversy.

Reversed and remanded for proceedings not inconsistent with this opinion.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. VERIL JONES

No. 8216SC1295

(Filed 7 February 1984)

1. Criminal Law §§ 23, 138— plea arrangement for a consolidation of cases—not as to sentence

Where defendant's plea arrangement was simply to consolidate all three cases into one judgment for sentencing purposes and did not contain a bargain for the prosecutor's recommendation of a particular sentence, the arrangement did not limit the trial judge's opportunity to exercise his discretion in deter-

mining an appropriate sentence, and the trial judge was required to make proper findings in aggravation and mitigation to support the sentence.

2. **Criminal Law § 138— aggravating factor of deterrent to others improperly considered**

The trial court erred in considering as an aggravating factor that defendant's sentence would serve as a "deterrent to others," since it does not relate to the character or conduct of the offender.

3. **Criminal Law § 138— consideration of defendant's mental defects as mitigating and aggravating factor—proper**

The trial court could consider defendant's mental defects as supporting an aggravating factor as well as a mitigating factor.

4. **Criminal Law § 138— consideration of mental defects for more than one aggravating factor—error**

The trial court erred in using defendant's mental problems to support four aggravating factors since the same item of evidence may not be used to prove more than one factor in aggravation. G.S. 15A-1340.4(a)(1).

5. **Criminal Law § 138— consideration of aggravating factor supported by evidence of pre-Act crime—improper**

Where, pursuant to a plea arrangement, three charges against defendant were consolidated for sentencing purposes, and where only one of the crimes occurred after the date the Fair Sentencing Act became applicable, and where there was no evidence that a deadly weapon was used in the commission of that crime, the trial court erred in finding as a statutory aggravating factor that "The defendant was armed with or used a deadly weapon at the time of the crime."

6. **Criminal Law § 138— consideration of possible concurrent sentences error**

Where the trial judge accepted a plea bargain arrangement in which it was agreed to consolidate three cases for sentencing under one judgment and not treat the offenses separately, the trial court could not find as a factor in aggravation that defendant "could be given consecutive sentences, but is being given a concurrent sentence."

APPEAL by defendant from *Bailey, Judge.* Judgment entered 9 June 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 21 September 1983.

Pursuant to a plea arrangement to consolidate three charges under one judgment for sentencing, defendant entered a plea of guilty to charges of felonious breaking or entering, assault on a female with intent to commit rape and first degree burglary. The court consolidated the charges for judgment and imposed a sentence of forty (40) years. The presumptive sentence for first degree burglary is fifteen (15) years. Defendant appeals pursuant

to G.S. 15A-1444(a1) contending that the trial judge erroneously considered factors in aggravation.

Attorney General Edmisten, by Assistant Attorney General Barry S. McNeill, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen and Assistant Appellate Defender James R. Glover, for defendant appellant.

JOHNSON, Judge.

[1] The State opposes defendant's appeal on the grounds that defendant cannot now complain of the sentence imposed simply because he entered into a plea arrangement. We disagree. G.S. 15A-1340.4(a) provides that if a prison term in excess of the presumptive is to be imposed, the trial judge must consider factors in aggravation and mitigation unless he imposes a prison term pursuant to a plea arrangement as to *sentence.* Although defendant had the opportunity to bargain for the prosecutor's recommendation of a particular *sentence,* the record shows that no such agreement was made. The plea arrangement was simply to consolidate all three cases into one judgment for sentencing purposes. This plea bargain did not limit the trial judge's opportunity to exercise his discretion in determining an appropriate sentence for the defendant. Inasmuch as the plea arrangement did not constitute a plea bargain as to *sentence,* and the sentence of 40 years varied from the presumptive sentence of 15 years, the trial judge was required to make proper findings in aggravation and mitigation to support the sentence.

The record shows that on 8 June 1982, defendant entered pleas of guilty to the offenses of felonious breaking or entering and assault on a female with intent to commit rape in case Nos. 81CRS14957 and 81CRS14906 respectively. Each offense was committed against the same victim on 17 June 1981. In case No. 82CRS7606 defendant entered a plea of guilty to the offense of first degree burglary. This offense was committed on 11 May 1982. After conducting a sentencing hearing and making findings of factors in aggravation and mitigation, the trial judge consolidated the charges for judgment and imposed a term of imprisonment of forty (40) years.

As statutory aggravating factors, the court found:

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

11. The defendant committed the offense [of burglary while on pretrial release on a charge of breaking or entering].[1]

As additional aggravating factors, the court found:

16. (a) That defendant is being sentenced on three offenses not arising out of the same crime episode and could be given consecutive sentence, but is being given concurrent sentence;

(b) that the sentence is necessary to deter others from committing like crimes;

(c) that defendant's history makes it necessary to segregate him for the safety of the public;

(d) that defendant is a dangerous and mentally abnormal person whose commitment for an extended term is necessary for the protection of the public;

(e) that defendant has engaged in a pattern of violent conduct which indicates a serious danger to society;

(f) defendant lacks normal judgment and ability to act logically.

As statutory mitigating factors the court found:

(1) The defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days imprisonment.

(4) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.

As an additional mitigating factor the court found that there is a guarded prospect for the rehabilitation of the defendant.

[2] Defendant contends that the trial court erred by imposing a sentence based upon: (a) factors which the legislature had consid-

1. The bracketed portion of Finding No. 11 was added by the court to the statutory factor.

ered in setting the presumptive term, (b) evidence used to support more than one factor in aggravation and (c) factors not supported by a preponderance of the evidence. Defendant first argues that the additional aggravating factor 16(d) regarding "deterrence to others" was erroneously considered by the court since the legislature considered this factor in setting the presumptive term.

We find *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983) to be dispositive of this contention. In *Chatman* the trial judge entered a finding that the sentence was necessary to deter others and that a lesser sentence would unduly depreciate the seriousness of the crime. The Supreme Court held this to be error, stating:

> These two factors fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to *the character or conduct of the offender.* (Emphasis original.)

Id. at 180, 301 S.E. 2d at 78. Therefore, the trial court erred in making the identical finding in aggravation of defendant's sentence.

[3] Next, defendant argues that since the legislature has determined that evidence of a defendant's mental defects which significantly reduce his culpability, although insufficient to constitute a defense, is a mitigating factor, the trial judge was thereby precluded from considering the same evidence to support a finding in aggravation. We disagree. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) is dispositive of this contention. In *Ahearn* the Supreme Court held that the trial judge properly found as an aggravating factor that defendant was dangerous to others as a result of his social and emotional problems, even though evidence of his social and emotional problems was also considered in mitigation.

[4] On this point, defendant further urges that it was error for the trial court to consider the same evidence of defendant's mental problems to support more than one aggravating factor. We

agree. A careful review of the record reveals that aggravating factors 16(c), (d), (e) and (f) all relate to the same evidence of defendant's history of mental problems upon which the trial judge determined that the defendant represented a danger to society and should, therefore, be committed for a term beyond the presumptive sentence. G.S. 15A-1340.4(a)(1) provides that "the same item of evidence may not be used to prove more than one factor in aggravation."

[5] Defendant next contends that the trial judge erroneously found as a statutory aggravating factor, "The defendant was armed with or used a deadly weapon at the time of the crime." Defendant argues that this factor was not supported by the evidence. We agree. The charge of first degree burglary is the only offense of the three offenses before us to which the Fair Sentencing Act is applicable against this defendant. All of the evidence at the sentencing hearing showed that the crimes of felonious breaking or entering and assault on a female with intent to commit rape occurred on 17 June 1981, and that it was during the commission of the June 1981 crimes that defendant possessed and used a deadly weapon. The State concedes that there is no evidence that defendant possessed or used a weapon in the commission of the May 1982 crime. The Fair Sentencing Act clearly mandates that the Act is applicable only to felonies that occur on or after 1 July 1981. G.S. 15A-1340.1. Therefore, the trial judge erred in aggravating defendant's burglary charge on the basis of evidence relating to a pre-Act crime.

[6] By his final assignment of error defendant contends the trial judge erroneously found additional aggravating factor 16(a) which states that defendant "could be given consecutive sentences, but is being given a concurrent sentence." Defendant argues that there is no evidence to support this finding because the trial judge's acceptance of the plea arrangement and of defendant's plea precluded the court from imposing consecutive or concurrent sentences. The cases were therefore to be consolidated under *one* judgment for sentencing, leaving the trial judge with no further ability to deal with the 1981 offenses separately. We agree.

Fundamental fairness requires that once the trial judge accepted the plea bargain negotiation and accepted defendant's plea, the court was required to consolidate the cases for sentenc-

ing under one judgment and not treat the offenses separately. Contrary to the trial court's findings, the court could not, in violation of the terms of the accepted negotiated plea, have imposed a separate sentence in each case to run concurrently or consecutively. Therefore, the trial court erroneously considered additional aggravating factor 16(a).

In conclusion, we hold that the trial judge made numerous errors in his findings of factors in aggravation, and the defendant's sentence must be vacated and the case remanded for resentencing. *State v. Ahearn, supra.*

Vacated and remanded.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. RONALD LEROY WINNEX

No. 8318SC599

(Filed 7 February 1984)

1. Appeal and Error § 2— jurisdiction of Court of Appeals—certiorari previously denied by another panel

A panel of the Court of Appeals had no jurisdiction to consider defendant's argument as to whether the trial court improperly used facts tending to prove attempted first degree rape of the victim to establish the elements of first degree kidnapping of the victim where defendant entered guilty pleas to the crimes, defendant could thus present his argument only upon a writ of certiorari, and defendant's petition for certiorari was rejected by another panel of the Court of Appeals. G.S. 15A-1444(a1).

2. Criminal Law § 138— use of joinable offenses as aggravating factor

Where five charges against defendant for rape and kidnapping were joinable, the trial court could not properly consider defendant's conviction of one of the offenses as an aggravating factor in any of the other four cases, and the court thus erred in finding as an aggravating factor upon the basis of the other offenses that defendant had "engaged in a pattern of violent conduct which indicates a serious danger to society." G.S. 15A-1340.4(a)(1)(o).

3. Criminal Law § 138— voluntary acknowledgement of wrongdoing as mitigating factor

The trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing to a law officer at an early stage in the criminal process.

4. Criminal Law § 138— good character or reputation as mitigating factor—insufficient evidence

Defendant produced insufficient, inherently credible evidence of good character or reputation in the community in which he lives to require the trial court to find this factor in mitigation where the record did not disclose whether the character witnesses were friends or relatives of defendant or whether they had sufficient knowledge to be acquainted with his character or reputation, and where the testimony of the character witnesses revealed simply that defendant is a regular churchgoer, has a family, and has never been in trouble before. G.S. 15A-1340.4(a)(2)(n).

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 4 January 1983 in GUILFORD County Superior Court. Heard in the Court of Appeals 11 January 1984.

Defendant was charged in separate indictments with attempted first degree rape of Myra Ann Pagett on or about 4 August 1982; second degree rape of Bonnie Cheeks on or about 4 August 1982; first degree kidnapping of Myra Ann Pagett on or about 4 August 1982; first degree kidnapping of Bonnie Cheeks on or about 4 August 1982; and second degree rape of Juanna Denise Massey on 31 August 1982. At trial, pursuant to a plea arrangement, defendant entered pleas of guilty to all of the above charges.

The rape and kidnapping charges involving Ms. Pagett (82CRS50090 and 82CRS50128) were consolidated and defendant was sentenced to twelve years in prison, the presumptive term. The remaining charges (82CRS50089, second degree rape; 82CRS50091, second degree rape; and 82CRS50127, first degree kidnapping) were also consolidated and defendant was sentenced to sentences which exceed the presumptive term; from those sentences defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General John C. Daniel, Jr., for the State.

Lee, Johnson & Williams, P.A., by Joseph A. Williams, for defendant.

WELLS, Judge.

In his first assignment of error, defendant contends that the trial court erred in its "determination" as to the necessary

evidence to sustain the charges of first degree kidnapping, first degree attempted rape, and first degree rape.

[1] Defendant argues, *inter alia*, that the trial judge violated the constitutional prohibition against double jeopardy by using facts which tend to prove the attempted first degree rape of Ms. Pagett to establish the elements of the first degree kidnapping of Ms. Pagett. A similar argument was rejected by our Supreme Court in *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), based upon construction of N.C. Gen. Stat. § 14-39(b) (1979 Cum. Supp.) as it then appeared. Defendant contends, however, that the 1981 amendment of N.C. Gen. Stat. § 14-39(b) (1979 Cum. Supp.), coupled with the reasoning of *Williams*, supports his double jeopardy argument. Whatever the merits of defendant's claim, however, we are powerless to consider it. Defendant may present his argument only upon a writ of certiorari, as there is no appeal of right from cases in which a criminal defendant enters a guilty plea. N.C. Gen. Stat. § 15A-1444(a1) (1981). Defendant's petition for a writ of certiorari was rejected by another panel of this court on 9 August 1983, and we are bound by that decision. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983). We are, therefore, without jurisdiction to consider defendant's first assignment of error.

In his second and third assignments of error, defendant contends that the trial judge made several errors during the sentencing hearing on the three consolidated rape and kidnapping charges (82CRS50089, 82CRS50091 and 82CRS50127). We will therefore consider these assignments of error together.

[2] Defendant first contends that the trial judge erred by finding as an aggravating factor that defendant had been "engaged in a pattern of violent conduct which indicates a serious danger to society." Because defendant has no prior criminal record, it is clear that the trial judge relied upon evidence of events leading to the five kidnapping and rape convictions to prove that defendant had engaged in a "pattern of violent conduct." A defendant's prior convictions may be considered in aggravation except where the crimes are joinable with the offense for which the defendant is currently being sentenced. N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1981 Cum. Supp.). Since the five charges against defendant were joinable, the trial judge could not have properly considered de-

fendant's conviction of one of the offenses as an aggravating factor in any of the other four cases. It would frustrate the intent of the statute to permit a trial judge to consider the fact that a defendant "committed" a joinable offense, when he could not consider that defendant had been convicted of that same joinable offense.

[3] Next, defendant argues that the trial court should have found as mitigating factors that (1) defendant had a good character or good reputation in the community in which he lives, N.C. Gen. Stat. § 15A-1340.4(a)(2)(m) (1981 Cum. Supp.) and (2) defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or early in the criminal process. N.C. Gen. Stat. § 15A-1340.4(a)(2)(l) (1981 Cum. Supp.). The State's own evidence at the sentencing hearing indicates that defendant confessed "early on" after his arrest. Therefore, it was error for the trial judge to fail to find this factor. *State v. Graham*, 61 N.C. App. 271, 300 S.E. 2d 716 (1983).

[4] Defendant's argument concerning the judge's failure to find defendant's good character or reputation in mitigation requires more detailed discussion, and we turn first to an analysis of recent decisions of our Supreme Court. These cases teach that a trial judge's failure to find a mitigating factor will be error where the evidence is (1) substantial or uncontradicted and (2) inherently credible. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Under the first prong of the test, evidence of good character or reputation must be at least "substantial." Unfortunately, definitions of good character are nebulous at best. In *State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983), the court defined good character as "something more than the absence of bad character . . . It means that he must have conducted himself as a man of upright character ordinarily would, should or does. . . . Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it." (Cites omitted.) Nor do the facts in *Benbow* itself provide much further guidance. The court noted that defendant's witnesses ". . . paint[ed] a picture of a young man who, apart from one incident with the law for which he appeared to have been making satisfactory amends, was generally well-behaved, considerate, and respectful to family and friends. . . . This evidence does not rise to the level which would entitle defendant to a finding in mitigation

that he was a person of 'good character' or that he had a 'good reputation.' " *Id.* Although the *Benbow* decision seems to indicate that possession of the quiet virtue of good manners and a law-abiding life do not necessarily constitute a good character, the court did not specify what level of benevolence is required. A similar result was reached in *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983), in which the court held that evidence that defendant was nonviolent and well-behaved was insufficient to demonstrate a good character or reputation.

The second prong of the test requires inherently credible evidence of good character. Even where favorable character evidence is uncontradicted, the trial judge may determine that the witnesses are unreliable and hold that defendant has failed to meet his burden of proof. *State v. Benbow, supra.* The few cases decided on this point indicate several permissible indicia of unreliability.

In *State v. Benbow, supra*, for instance, the court noted that defendant's character witnesses were "for the most part, family members." In *State v. Taylor, supra*, at least four men testified to defendant's good character. "[T]hree witnesses admitted that their knowledge of defendant's character and reputation was limited," and had been gained primarily from occasional contacts with defendant in a pool hall. The fourth witness "conceded that he and defendant 'are good friends and were good friends.' " Language such as this leaves a criminal defendant in the difficult position of trying to find character witnesses who are not relatives or good friends and yet know him well and are willing to testify on his behalf.

Applying the foregoing rules to these cases, we are forced to hold that defendant produced insufficient, inherently credible evidence of good character or reputation in the community in which he lives to *require* the trial court to find this factor in mitigation. The record does not disclose, for instance, whether the character witnesses were friends or relatives of defendant, or whether they had sufficient knowledge to be acquainted with his character or reputation. Furthermore, the testimony of the character witnesses reveals simply that defendant is a regular churchgoer, has a family, and has never been in trouble before. Although we are reluctant to interpret the "good character" re-

quirement so narrowly, it appears in the light of *State v. Benbow, supra*, that we have no other choice.

Because the trial judge erred in failing to find that defendant confessed at an early stage of the criminal process and in finding that defendant had participated in a pattern of violent conduct which constitutes a danger to society, cases numbered 82CRS-50089, 82CRS50091 and 82CRS50127 must be remanded for resentencing.

The results are:

As to 82CRS50090 and 82CRS50128

No error.

As to 82CRS50089, 82CRS50091 and 82CRS50127

Remanded for resentencing.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. RONALD TYLER AND KENNETH C. HUNT

No. 8316DC511

(Filed 7 February 1984)

1. **Criminal Law § 138— aggravating factor that sentence is a deterrent and necessary to protect society—improper**

The trial judge erred in finding as an aggravating factor that the sentences imposed were necessary as a deterrent to others and in one defendant's case that the sentence was necessary to protect society.

2. **Criminal Law § 138— failure to list mitigating factor that was considered in mitigation**

The trial court erred when it considered a defendant's lesser role in a crime but failed to specifically list this consideration as a factor in mitigation. G.S. 15A-1340.4(b).

3. **Criminal Law § 138— more mitigating factors not necessarily outweighing aggravating factors**

The discretion and balance struck by the trial judge imposing a sentence does not depend on the precise number of aggravating and mitigating factors;

two factors in mitigation do not automatically outweigh one factor in aggravation.

APPEAL by defendants from *Herring, Jr., Judge.* Judgment entered 28 January 1983, in Superior Court, ROBESON County. Heard in the Court of Appeals 7 December 1983.

Defendants, who pled guilty to several felonies, appeal from sentences imposed that exceed the presumptive terms under G.S. 15A-1340.4.

Defendant Tyler pled guilty to conspiracy to commit armed robbery, armed robbery, assault with a deadly weapon with intent to kill inflicting serious injury, and assault by pointing a gun. Defendant Hunt pled guilty to conspiracy to commit armed robbery and armed robbery.

In sentencing defendant Tyler, the judge found the following aggravating factors:

(1) The offense was committed for hire or pecuniary gain.

(2) The offense was especially heinous, atrocious, or cruel.

(3) The defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement.

(4) The defendant was on escape from the North Carolina Department of Correction at the time these offenses were committed.

(5) The defendant attempted to escape from the Robeson County Jail pending disposition of this matter.

(6) The sentence imposed is necessary as a deterrent to others.

(7) The sentence imposed is necessary to protect society.

The judge found as a mitigating factor that defendant had pled guilty, thereby avoiding the necessity of a jury trial. Defendant received a total sentence of fifty years, a sentence exceeding the combined presumptive sentences for the crimes committed.

In sentencing defendant Hunt, the judge found as aggravating factors that the offense was committed for hire or

pecuniary gain and that the sentence imposed was necessary as a deterrent to others. The judge found as mitigating factors that defendant had no record of criminal convictions or misdemeanors punishable by not more than sixty days imprisonment and that defendant had pled guilty, thereby avoiding the necessity of a jury trial. Defendant was sentenced to twenty years, a sentence exceeding the presumptive term.

Attorney General Edmisten, by Richard H. Carlton, Assistant Attorney General, for the State.

Robert D. Jacobson, for defendant-appellant Ronald Tyler.

Smith and Jobe, P.A., by Bruce F. Jobe, for defendant-appellant Kenneth C. Hunt.

VAUGHN, Chief Judge.

Defendants contend that the trial judge committed several errors during sentencing. We agree. First, the trial judge erred in finding as an aggravating factor to armed robbery that the offense was committed for hire or pecuniary gain. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983).

[1] Second, the trial judge erred in finding as an aggravating factor that the sentences imposed were necessary as a deterrent to others and in defendant Tyler's case that the sentence was necessary to protect society. These factors—deterrence and protection—fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentences. *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Moreover, it is improper to consider factors like these, which relate neither to the conduct nor the character of defendants, during sentencing. *Id.; State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[2] Defendant Hunt also contends that the trial judge erred when he considered defendant Hunt's lesser role but failed to specifically list this consideration as a factor in mitigation. Pursuant to G.S. 15A-1340.4(b), a judge who imposes a sentence that differs from the presumptive term must specifically list each factor in aggravation or mitigation that he finds proven by a preponderance of the evidence. He is not required to list in the

judgment statutory factors considered and rejected as being unsupported by a preponderance of the evidence. *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 sentencing defendant Hunt, the trial judge found "that the aggravating factors, by a preponderance of the evidence, outweigh the mitigating factors, and *taking into consideration a lesser role*, it is the judgment of this Court that the defendant be imprisoned . . . for a term of twenty years." (Emphasis added.) It appears from the Record that the judge considered defendant Hunt's lesser role during sentencing. It was, therefore, error, under G.S. 15A-1340.4(b), not to record such consideration.

[3] Defendants also contend that the trial judge erred by imposing sentences exceeding the presumptive terms since the mitigating factors outweigh the aggravating factors. With this contention, we find no merit. The discretion and balance struck by the judge imposing sentence does not depend on the precise number of aggravating and mitigating factors. The judge's task is not a simple matter of mathematics; two factors in mitigation do not automatically outweigh one factor in aggravation. *State v. Davis, supra.*

Finally, although not raised on appeal, we note on remand that the defendants' pleas of guilty should not be considered as mitigating factors during sentencing. *State v. Ahearn, supra.*

Remanded for resentencing.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. JERRY BEASLEY

No. 8319SC548

(Filed 7 February 1984)

1. Automobiles and Other Vehicles § 3.4— driving while license permanently revoked—sufficiency of evidence

Defendant could properly be convicted of driving while his license was permanently revoked rather than merely driving without a proper license

where defendant's license was permanently revoked in 1973; defendant was notified that he could request a hearing for restoration of his license three years from the date of revocation; defendant was arrested for driving while his license was permanently revoked on 24 September 1982; defendant received a letter from the Division of Motor Vehicles dated 4 October 1982 which informed him that his license would be restored on 5 October 1982; and defendant failed to show that he was entitled to a restoration of his license as of the date of the offense.

2. Criminal Law § 168.5— harmless error in instructions

The trial court's instructions that defendant's evidence had shown that his license was in a permanent state of revocation on the date in question was harmless error when the charge is construed as a whole.

3. Criminal Law § 75.7— statements not result of custodial interrogation

Statements volunteered by defendant which were not responses to questions were not subject to the limitations of *Miranda v. Arizona.*

4. Criminal Law § 163— instruction not "plain error"

In a prosecution of defendant for driving while his license was permanently revoked, an instruction by the trial court that Old Thomasville Highway and Bethel Road in Randolph County were highways did not constitute "plain error" such as to require a new trial even though defendant failed to object thereto at the trial.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 25 January 1983 in Superior Court of RANDOLPH County. Heard in the Court of Appeals 9 January 1984.

Defendant's driving license had been revoked because of a third conviction for Driving While Under the Influence of Intoxicating Liquor or Drugs. On 25 June 1973 defendant received notice advising him that "after three (3) years from the effective date of the revocation you may request a hearing. If you can prove good behavior for the three years prior to the hearing, you may be eligible to apply for a new Driver's License."

On 24 September 1982 defendant was charged with driving a motor vehicle while his license was permanently revoked, approximately nine years and three months after the revocation of his driver's license. He offered into evidence a letter from the Division of Motor Vehicles dated 4 October 1982, which provided his license would be restored on 5 October 1982. There were no express conditions to the restoration of his license other than (a) payment of a restoration fee of $25.00, and (b) furnishing a birth certificate or two other forms of identification.

Defendant was convicted of driving a motor vehicle while his operator's license was permanently revoked. An active sentence of twelve months was imposed, and defendant appeals.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Lester V. Chalmers, Jr. for the State.

Richard M. Warren for defendant appellant.

HILL, Judge.

[1] Defendant contends that he should have been convicted of driving without a proper driver's license instead of driving while his license was permanently revoked, relying on *Ennis v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 612, 184 S.E. 2d 246 (1971). We do not agree and affirm the decision of the trial court.

Defendant's reliance on *Ennis* is misplaced. In that case defendant was convicted for driving under the influence for a period of one year effective 2 January 1970. He would have been eligible for reinstatement of his driving privilege on 2 January 1971. On 6 March 1971 he was charged with driving while his license was revoked and driving while under the influence of intoxicating liquor. He was found guilty on 19 March 1971 of careless and reckless driving and of driving without a valid operator's license. He had not applied for reinstatement of his driving privilege or paid the restoration fee of $10.00 as of 6 March 1971. Justice Lake, in affirming the lower court ruling that the order revoking the driving privilege of the petitioner was in excess of the Commissioner's authority, stated the following:

> When the period of revocation stated in the order of revocation terminates, the license is no longer "in a state of suspension or revocation" within the meaning of G.S. 20-28.1 (a). This does not mean that the former holder of the license may immediately resume driving. Before he may do so the fee required by G.S. 20-7(i1) must be paid. In the interim, he is simply a person without a valid operator's or chauffeur's license.

279 N.C. at 615-16, 184 S.E. 2d at 248.

In the case under review, defendant's license was permanently revoked, and there was no termination of the revocation as of

24 September 1982 when the defendant was arrested. Before entitlement to his license, defendant must have shown that prior to 24 September 1982 he had exhibited satisfactory proof that he had not been convicted within the past three years of a violation of the motor vehicle laws, liquor laws or drug laws of this or any other state and that he was not an excessive user of alcohol or drugs. This he has failed to do. Defendant has shown nothing entitling him to a restoration as of the date of his offense. This assignment of error is overruled.

[2] Defendant next argues the court erred in charging the jury that the defendant himself had shown personally that his license was revoked on the date in question and upon request by defendant's counsel to correct the error, did not properly do so. The three instances referred to are as follows:

> The Court will instruct you that the parties by their evidence have indicated that the license were (sic), in fact, on that date permanently revoked.
>
> * * *
>
> As to this point, again I'll instruct you and originally instruct you that the Defendant has indicated by evidence solicited in this trial that his license were (sic) revoked on that date.
>
> * * *
>
> Some of the evidence for the defendant tends to show that on September the 24th, 1982, Jerry Beasley and his now wife, Dora Beasley, had purchased an automobile; that at this time Jerry Beasley's license were (sic) in a state of revocation and they had been revoked since 1973.

The Court made an attempt to correct the impression that the defendant's evidence admitted that his license was in a permanent state of revocation by recalling the jury and issuing the following additional instruction:

> Ladies and gentlemen of the jury, as an additional instruction to you, prior to the recess and during my instructions to you, I informed you concerning the defendant's revocation or I made some statements concerning the defend-

ant's status of his license. The Court was not intending to indicate to you that the defendant had admitted knowledge of permanent revocation of his license.

Based on our reasoning under the first assignment of error, it is only logical that the sum of the evidence offered by the parties substantiated that defendant's license was permanently revoked.

As to the second and third portions to which defendant objects, reference to *defendant's* evidence is a *lapsus lingui*, which when taken in connection with the entire charge becomes harmless. The abortive effort by the trial judge to correct his prior mistakes partially clears the matter by showing the Court did not intend to indicate to the jury that the defendant admitted knowledge of permanent revocation of his license. A trial judge's instructions must be read contextually as a whole, and isolated erroneous portions will not be considered prejudicial error on appeal when the instruction read as a whole is correct. *See State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. McCall*, 31 N.C. App. 543, 230 S.E. 2d 195 (1976). When construed as a whole, the charge is adequate, and this assignment of error is overruled.

[3] We find no error in allowing the arresting officer in this case to testify to a statement made by the defendant after his arrest and before having been given his *Miranda* rights. Nothing in the record indicates the officer asked anything more than defendant's name, address and date of birth for the purpose of running a check to see if he had a driver's license. The defendant on his own, as substantiated by the *voir dire* and later at trial, asked questions which the police officer answered. Statements volunteered by the defendant which are not responses to questions are not subject to limitations placed thereon by *Miranda*. *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). This assignment of error is overruled.

[4] Lastly, defendant argues the judge erred in instructing the jury that the Old Thomasville Highway and Bethel Road in Randolph County were highways. Operation of a motor vehicle on a public highway is one of the elements of the crime covered by G.S. 20-28(b). By failing to object to the charge prior to the retiring of the jury and before the verdict, defendant failed to adhere to the dictates of Appellate Rule 10(b)(2). Nevertheless, having reviewed this instruction, we hold that the challenged jury charge

in the instant case was not "plain error" such as to require a new trial.

Defendant received a fair trial free from prejudicial error.

No error.

Chief Judge VAUGHN and Judge BECTON concur.

STATE OF NORTH CAROLINA v. PHILLIP D. PARKER

No. 8314SC647

(Filed 7 February 1984)

1. **Constitutional Law § 51— delay between offense and arrest—no denial of speedy trial rights**

Defendant was not entitled to have a robbery charge against him dismissed because of a delay of 207 days from the date of the offense to the date of his arrest. Art. I, § 23 of the N.C. Constitution; G.S. 15A-954(a)(3) and (4).

2. **Criminal Law § 66.9— photographic identification not unnecessarily suggestive**

A robbery victim's pretrial photographic identification of defendant was not unnecessarily suggestive where the victim was in defendant's presence for over 10 minutes; the victim was able positively to identify defendant when a detective showed her a group of photographs; the victim recognized defendant at the probable cause hearing; and there was no question in the victim's mind that defendant was the person who had robbed her.

3. **Criminal Law § 99.1— remarks by trial court—no expression of opinion**

The trial judge did not express an opinion as to defendant's guilt when, during his opening remarks to the jury, he stated that defendant is presumed to be innocent "at this stage of the proceedings" and that "I think that the State will show that it occurred at the Maplewood Cemetery."

4. **Criminal Law § 43— photographs of robbery victim**

Photographs of a robbery victim were properly admitted to illustrate to the jury the injuries the victim received when defendant hit her in the face.

5. **Criminal Law § 102— last jury argument—requiring defendant to introduce exhibit—absence of prejudice**

There is no merit in defendant's contention that the trial court erred in requiring defendant to offer a supplemental police report into evidence in order to use the report in cross-examining an officer, thereby depriving defendant of his right to the final jury argument, since (1) defendant voluntarily introduced the exhibit, and (2) defendant was not prejudiced by such admission

since the trial judge decides the order of final jury arguments and his decision is final. Rule 10, General Rules of Practice for the Superior and District Courts.

APPEAL by defendant from *Clark, Giles R., Judge.* Judgment entered 14 February 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 January 1984.

Defendant appeals from a jury verdict finding him guilty of common law robbery.

Attorney General Edmisten, by John R. B. Matthis, Special Deputy Attorney General, for the State.

C. Douglas Fisher, for the defendant-appellant.

VAUGHN, Chief Judge.

[1] Defendant first contends that the trial judge erred by denying his pre-trial motion to dismiss in violation of Article I, § 23 of the North Carolina Constitution and G.S. 15A-954(a)(3) and (4). We find no merit in this contention.

Article I, § 23 of our Constitution provides:

> In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

G.S. 15A-954(a)(3) and (4) provide:

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> (3) The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.
>
> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

The robbery with which defendant was charged occurred on 20 March 1982. The police had no leads or information as to possible suspects until two months later, in May 1982. Defendant was arrested on 12 September 1982. Defendant contends that the delay of over 207 days from the date of the offense to the date of arrest denied him of his rights under Article I, § 23 and that, therefore, his motion to dismiss should have been granted.

Defendant has been denied neither a speedy trial nor any other constitutional right. To grant a motion to dismiss for pre-indictment delay, defendant must show both intentional delay on the part of the State in order to impair defendant's ability to defend himself and actual and substantial prejudice from the pre-indictment delay. *State v. Davis*, 46 N.C. App. 778, 266 S.E. 2d 20, *review denied*, 301 N.C. 97 (1980).

[2] Defendant next contends that the trial court erred in denying defendant's pre-trial motion to suppress identification of defendant, based on an impermissibly suggestive and unreliable pre-trial identification of defendant. This contention is without merit.

It is well established that an in-court identification based on an impermissibly suggestive out-of-court identification will be inadmissible as well. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). The legality of a pre-trial identification is determined by the totality of the circumstances in the particular case. Factors to consider in evaluating the suggestiveness and likelihood of mistaken identification include:

(1) the opportunity of the witness to view the criminal at the time of the crime,

(2) the witness' degree of attention,

(3) the accuracy of the witness' prior description of the criminal,

(4) the level of certainty demonstrated by the witness at the confrontation,

(5) the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974).

Mrs. Streib testified that she was at a cemetery, putting some flowers at her mother's gravesite when she first saw defendant. She watched defendant walk over to her car and try the door. He then started walking toward her and she began running. Defendant caught up to her, grabbed her, pinned her down and beat her. He grabbed her keys, returned to her car and attempted to open the door. Unsuccessful, he left. Mrs. Streib testified that "a good ten minutes" transpired from the time she saw defendant to the time he left. In mid-May, when the detective showed her a group of photographs, she was able to positively identify defendant. Mrs. Streib recognized defendant at the probable cause hearing. There was no question in her mind that defendant was the same person who attacked her and took her keys. The evidence leaves no question but that applying the *Biggers* standards, Mrs. Streib's pre-trial identification of defendant was reliable and admissible.

[3] Defendant next cites prejudicial error in the trial judge's opening remarks to the jury. Defendant contends that the trial judge inserted his opinion as to the guilt of defendant and the place where the alleged robbery occurred.

Specifically, defendant objects to parts of the following statements to the jury:

> [T]his is a criminal action. The defendant has entered a plea of not guilty to the charge against him. I wish to inform you at this time that upon his plea of not guilty there arises in his behalf a presumption of innocence. He is presumed to be innocent at *this stage* of the proceedings and the burden is cast upon the state to satisfy you of his guilty [sic] beyond a reasonable doubt. In a criminal action such as this there is no duty, or burden on behalf of the defendant to prove anything to you. . . .
>
> Members of the jury, by way of background, and, of course, you will base your verdict on the evidence given during the trial by the witnesses sworn and called to testify before you, and by the exhibits that are introduced into evidence, by way of background in order that you may re-

spond to the questions that will be asked of you, I have told you that this offense is alleged to have occurred back on the twentieth day of March of 1982, and *I think that the state will show that it occurred at the Maplewood Cemetery.* It is alleged to have occurred at the Maplewood Cemetery here in the city of Durham.

Defendant finds prejudice in the italicized portions of the judge's remarks. We find no such prejudice. The judge's remarks, viewed as a whole, were fair and impartial.

[4] Defendant next contends that the trial court erred by admitting into evidence photographs of the victim, Mrs. Streib, after the robbery. Defendant's contention is without merit. Mrs. Streib used photographs to illustrate to the jury the injuries she received when defendant hit her in the face. She testified that the photographs fairly and accurately portrayed the way she had looked. Generally, if a photograph is relevant and material, the fact that it is gory or gruesome and, thus, may tend to arouse prejudice, does not, alone, render it inadmissible. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969); 1 Brandis on North Carolina Evidence, § 34 (1982). The photographs in this case were properly admitted into evidence.

[5] During trial, defense counsel attempted to impeach State's witness, Officer Robert Franklin, using a supplementary police report made by the officer. The prosecutor objected and the following exchange occurred:

MR. NIFONG: Your Honor, I am going to object to his reading it, unless he introduces it into evidence. If he wishes to do that, I have no objection to it being read. If he wants him to read a document that is not in evidence, I object to that as long as it is not in evidence.

COURT: I think he would be right, sir.

MR. FISHER: If your Honor please, then, I believe the appropriate foundation has been laid, and I would move the defendant's exhibit one into evidence.

MR. NIFONG: No objection.

Defendant contends that the trial court committed reversible error by requiring him to offer the police report into evidence and, thereby, depriving him of his right to final jury argument. Defendant's contention is without merit. We note, first, that defendant voluntarily introduced the exhibit. Second, defendant was not prejudiced by such admission. The trial judge decides the order of final jury arguments and his decision is final. Rule 10, General Rules of Practice for the Superior and District Courts; *Pinner v. Southern Bell*, 60 N.C. App. 257, 298 S.E. 2d 749, *review denied*, 308 N.C. 387, 302 S.E. 2d 253 (1983).

Defendant lastly contends that the trial court erred in denying his motion to dismiss at the close of the State's evidence. The State produced plenary evidence that the crime was committed and that defendant was the perpetrator. The case was properly submitted to the jury.

No error.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. DONALD EUGENE BAUCOM

No. 8326SC618

(Filed 7 February 1984)

1. **Criminal Law § 138— aggravating factor that evidence supported initial, more severe, charge—no need to set out specific facts**

There was no error in the trial judge finding that defendant was allowed to plead guilty to taking indecent liberties with a child "after having been charged with First Degree Sexual Offense which was fully supported by the evidence," without setting forth the specific evidence upon which he relied. The record need only contain sufficient evidence to support the aggravating factor. G.S. 15A-1340.4(b).

2. **Criminal Law § 138— aggravating factor that offense committed against defendant's brother—no reasonable relationship to purpose of sentencing**

Although an aggravating factor that defendant committed the sexual offense against his brother indicates that the trial judge was relying upon the aggravating factors set forth in G.S. 15A-1340.4(a)(1)(n), that defendant took advantage of a position of trust or confidence when he victimized his brother, the matter must, nevertheless, be remanded for resentencing since the sole fact

that the defendant and the victim were brothers was not a factor "reasonably related to the purposes of sentencing." G.S. 15A-1340.4(a).

APPEAL by defendant from *Snepp, Judge.* Judgment entered 12 January 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 January 1984.

Defendant was indicted for committing a first degree sexual offense against his younger brother. The indictment was subsequently waived, and defendant agreed to be tried on an information charging him with taking indecent liberties with a child. Pursuant to a plea bargain agreement, defendant pleaded guilty to this latter charge in return for dismissal of the first degree sexual offense charge. He was sentenced to ten years.

Defendant appeals from the judgment and assigns error to two aggravating factors found by the sentencing judge.

Attorney General Edmisten, by Associate Attorney General David R. Minges, for the State.

Assistant Public Defender Grant Smithson, for defendant-appellant.

ARNOLD, Judge.

During the guilt adjudication phase of the proceedings, the State presented evidence that on 17 June 1982 the defendant, age 21, was living at home with his parents and younger brother, age 10. His mother discovered that defendant and his brother, the victim, were in the bathroom with the door locked, and she informed her husband. Defendant's father later asked the victim if anything had happened between him and defendant. The victim told his father that for the past three months defendant had victimized him. He indicated that on one occasion defendant had forced him to perform oral sex; and that defendant had attempted to sodomize him in the bathroom.

During the sentencing hearing, both the State and defendant presented evidence. At the conclusion of the hearing, the judge found the following non-statutory factors:

1. That as a result of plea agreement, defendant was allowed to plea to this offense after having been charged with First

Degree Sexual Offense which was fully supported by the evidence.

2. That factors indicated by the pre-sentence diagnostic study as to the threat to the community and defendant's immediate family.

3. That this offense was committed against the brother of the defendant.

The sole mitigating factor found by the judge was that defendant had no criminal record.

After finding the factors in aggravation outweighed the factor in mitigation, the judge sentenced defendant to 10 years and recommended that he be given an immediate psychiatric evaluation and treatment.

[1] Defendant now argues that the sentencing judge committed prejudicial error in finding aggravating factors Nos. 1 and 3. He assigns error to aggravating factor No. 1 for the reason that the judge failed to set out the specific facts which supported the initial charge of first degree sexual offense. The judge found that defendant was allowed to plead guilty to taking indecent liberties with a child "after having been charged with First Degree Sexual Offense which was fully supported by the evidence." Defendant argues that this finding does not meet the requirements of the Fair Sentencing Act.

G.S. 15A-1340.4(b) of this Act provides: "If the judge imposes a prison term for a felony that differs from the presumptive term . . ., the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence." The State argues, and we agree, that this statutory language does not require the sentencing judge to include in his finding of an aggravating factor the specific evidence on which he relies. The record need only contain sufficient evidence to support the aggravating factor. We find support for this position in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). There the Supreme Court emphasized:

> The sentencing judge's discretion to impose a sentence within the statutory limits, but greater or lesser than the presumptive term, is carefully guarded by the requirement

> that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence.

Id. at 596, 300 S.E. 2d at 696-697.

In the case now before us, *all* the evidence showed that the 21-year-old defendant had forced his 10-year-old brother to perform oral sex upon him. This evidence supports the charge of first degree sexual offense as defined in G.S. 14-27.4(a), and therefore supports aggravating factor No. 1.

[2] Defendant next assigns error to the finding of factor in aggravation that the offense was committed against defendant's brother. During the sentencing hearing the State argued that the judge should consider that defendant took advantage of a position of trust or confidence when he victimized his brother. The judge did not cite this statutory aggravating factor set out in G.S. 15A-1340.4(a)(1)(n), but instead, found that defendant committed the sexual offense against his "brother."

Defendant argues that a "brother relationship is not one of trust and confidence envisioned in the Fair Sentencing Act, because it lacks legal duties and obligations which characterize legally ordained relationships such as parent-child and husband-wife." Under the circumstances here, we may find this argument to be flawed. There was sufficient evidence for the sentencing judge to find that the 21-year-old defendant took advantage of a position of trust or confidence by sodomizing his 10-year-old brother during the time the two were residing in their parents' home. While the record strongly suggests that the judge was referring to this statutory aggravating factor when he found that defendant committed the sexual offense against his brother, the matter must, nevertheless, be remanded for resentencing.

The sole fact that the defendant and the victim were brothers is not a factor "reasonably related to the purposes of sentencing." G.S. 15A-1340.4(a). This relationship, without more, does not constitute a factor that may diminish or increase defendant's culpability. *See* G.S. 15A-1340.3.

In light of the increasing number of cases that have been remanded because of erroneous findings of non-statutory factors

in aggravation, this Court deems it appropriate to remind trial judges that only one factor in aggravation is necessary to support a sentence greater than the presumptive term. The trial judge must determine that this factor is proved by a preponderance of the evidence and outweighs any mitigating factors. G.S. 15A-1340.4(b). "The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. [Citations omitted.]" *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). With these rules in mind the trial judge may wish to exercise restraint when considering non-statutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing.

Because we find error in the non-statutory aggravating factor listed by the trial judge, the case is

Remanded for resentencing.

Judges JOHNSON and PHILLIPS concur.

RONALD TAYLOR, EXECUTOR OF THE WILL OF H. E. GILLESPIE (DECEASED) v. H. L. GILLESPIE

No. 8317SC209

(Filed 7 February 1984)

1. Rules of Civil Procedure § 15.2— amendment of pleadings to conform to evidence

In plaintiff executor's action to recover a car from defendant, the trial court did not err in permitting plaintiff to amend his complaint at the end of the trial to allege that title to the car was held by defendant on a resulting trust for plaintiff's testator where defendant did not object to evidence tending to establish the resulting trust and where defendant failed to show that he was denied a fair opportunity to assert his defense to plaintiff's claim, since the pleadings were deemed to have been amended by implied consent even if no formal amendment had been made. G.S. 1A-1, Rule 15(b).

2. Trusts § 13.3— resulting trust in automobile—sufficiency of evidence

The evidence was sufficient to create a presumption that title to an automobile was held by defendant on a resulting trust for plaintiff's testator where

it showed that testator provided the money which paid for the automobile and that he did so before legal title to the automobile passed to defendant.

APPEAL by defendant from *Hairston, Judge.* Judgment entered 1 October 1982 in SURRY County Superior Court. Heard in the Court of Appeals 20 January 1984.

Plaintiff, executor of the estate of H. E. Gillespie, filed claim to a 1979 Lincoln car held by defendant H. L. Gillespie, brother of the deceased testator. Plaintiff's request for a writ of delivery pursuant to N.C. Gen. Stat. § 1-472 (1983) was denied on 21 January 1982, following a hearing before the clerk of the Surry County Superior Court. Plaintiff appealed to the Surry County Superior Court and a jury trial was held on 28 September 1982.

Plaintiff's evidence tended to show the following events. Testator and his son, Michael Gillespie, traveled to Bristol, Virginia on 14 September 1978, where testator ordered the Lincoln from Bristol Lincoln Mercury Sales, Inc. Testator thereafter paid for the car with his own money, kept the bill of sale and drove the car regularly. Defendant was not present when testator ordered the car, nor did he give testator money on 14 September 1978. Testator later paid for various improvements to the car, including a burglar alarm system, new tires, and routine maintenance work. In August 1981, after testator's death, when plaintiff asked defendant to deliver the car to him for the benefit of the estate, defendant replied that he was interested in purchasing the car.

Evidence for the defendant tended to show the following facts and events. The car title and bill of sale were in the name of Gillespie's Used Cars, an automobile dealership in Mount Airy owned by defendant. The car was always operated using dealer tags issued to Gillespie's Used Cars, and defendant had access to the car and paid for some maintenance work. Defendant denied offering to purchase the car from plaintiff in August 1981.

At the close of all the evidence, plaintiff and defendant made motions for entry of directed verdicts, which were denied. The trial judge concluded that defendant held legal title to the car but permitted plaintiff to amend his complaint to allege that the car was held on resulting trust for the benefit of testator.

The case was then submitted to the jury which found that the car was held by defendant on resulting trust for testator. From entry of judgment upon the verdict, defendant appealed.

Folger and Folger, by Fred Folger, Jr. and H. Lee Merritt, Jr., for plaintiff.

Franklin Smith for defendant.

WELLS, Judge.

In his first assignment of error, defendant contends that the trial judge erred in failing to allow his motion for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. A defendant waives his right to appeal the denial of a motion for a directed verdict at the close of plaintiff's evidence by offering evidence of his own thereafter. *Gibbs v. Duke*, 32 N.C. App. 439, 232 S.E. 2d 484, *disc. rev. denied*, 292 N.C. 640, 235 S.E. 2d 61 (1977). Although defendant also assigns as error that the trial judge failed to grant a directed verdict in his favor at the close of all the evidence, defendant does not support this assignment of error by arguments in the body of his brief. Instead, he states only that the trial judge was correct in determining that legal title to the Lincoln was in defendant's name. Assignments of error not supported by legal argument are deemed abandoned, Rule 28(a) of the Rules of Appellate Procedure. Defendant's first assignment of error is overruled.

[1] In his second assignment of error, defendant contends that the trial judge erred by permitting plaintiff to amend his complaint to allege a resulting trust. Defendant argues that he was unfairly surprised by the change in theory of the case at the end of the trial, since the trust theory was not raised in the parties' pleadings. N.C. Gen. Stat. § 1A-1, Rule 15(b) of the Rules of Civil Procedure, provides:

. . .

> 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 plead-

> ings, 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 . . .

A formal amendment to the pleadings "is needed only when evidence is objected to at trial as not within the scope of the pleadings." *Securities & Exchange Commission v. Rapp*, 304 F. 2d 786 (2d Cir. 1962), *cited with approval in Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). In the case at bar, defendant did not object to the introduction of *evidence* tending to establish the existence of a resulting trust. Because no objection was made to the introduction of the evidence, the pleadings were amended by implication. Formal permission of the court was not required, although the better practice is that the party benefited should move to amend the pleadings to reflect the theory of recovery. *Roberts v. Memorial Park, supra.* By failing to make timely objection to the introduction of the evidence at variance with the pleadings, defendant has waived his right to assert this ground on appeal.

In addition to the question of amendment to the complaint, defendant raises the question of when a party to a lawsuit may seek to alter his legal theory of recovery. Defendant cites *Goldston Bros. Inc. v. Newkirk*, 234 N.C. 279, 67 S.E. 2d 69 (1951) for the proposition that while a lower court may permit amendments to the pleadings within its sound discretion ". . . the cause of action as previously charted may not be substantially changed." Cases decided after *Goldston* and the adoption of the current rules of civil procedure permit a more liberal use of amendments to a party's theory of recovery. N.C. Gen. Stat. § 1A-1, Rule 15(b) of the Rules of Civil Procedure allows *issues* to be raised by liberal amendments to pleadings, and, in some cases, by the evidence, the effect of the rule being to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case. *Roberts v. Memorial Park, supra.* While defendant may not have anticipated plaintiff's use of the trust theory, defendant has failed to show that he was denied a fair opportunity to assert his defense to plaintiff's claim.

[2] It is clear, however, that an amendment to the theory of a case is improper unless there is some evidence supporting the new theory. In the case before us, there was ample evidence that testator provided the money that paid for the Lincoln, and that he did so before legal title to the Lincoln passed to defendant. On these facts, a sufficient presumption of resulting trust arises. A resulting trust is one which arises by operation of law, based upon some action or conduct, rather than a direct expression of intent by the parties. *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954). A resulting trust may arise ". . . in the absence of circumstances indicating a contrary intent, where the purchase price is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide . . ." *Strange v. Sink*, 27 N.C. App. 113, 218 S.E. 2d 196 (1975), and where it is also shown that the payor gave the consideration before legal title in the subject of the trust passed to the other party. *Byerly v. Byerly*, 38 N.C. App. 551, 248 S.E. 2d 433 (1978). Defendant's second assignment of error is overruled.

For the reasons stated, we find

No error.

Judges BRASWELL and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RICHARD FRANKLIN WATSON

No. 8321SC709

(Filed 7 February 1984)

1. Weapons and Firearms § 3— discharging a firearm into occupied dwelling— sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the charge of feloniously discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1 where the evidence tended to show that defendant discharged a firearm towards a residence in which five people were located; a bullet hit a window, the window glass broke, and other bullets hit the side of the house. The repeated discharge of the firearm toward the house and the resultant striking of the house by the bullets so discharged was evidence of something more than the firing of a stray bullet which accidentally struck the dwelling.

2. Weapons and Firearms § 3— discharging a firearm into occupied dwelling— error in instructions

A specific intent is a necessary element in proof of discharging a firearm into an occupied dwelling; therefore, where a portion of the jury instructions permitted the jury to find the requisite intent solely from the proof of defendant's commission of the unlawful act of malicious damage to property in that he intentionally fired his weapon at an automobile, the erroneous instruction was prejudicial.

3. Weapons and Firearms § 3— discharging weapon offenses—no double jeopardy

A guilty plea to discharging a firearm in the city did not bar, on grounds of double jeopardy, subsequent prosecution of the charges of malicious damage to property and discharging a firearm into an occupied building. G.S. 14-160 and G.S. 14-34.1.

APPEAL by defendant from *Walker, Judge.* Judgment entered 12 April 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 January 1984.

Defendant Richard Franklin Watson pled guilty to the violation of the Winston-Salem city ordinance of discharging a firearm in the city and judgment was entered on 17 February 1983. Defendant was also charged in proper bills of indictment with the misdemeanor of malicious damage to personal property in violation of G.S. 14-160 and with feloniously discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1. These two charges were consolidated for trial.

The State offered evidence tending to show that on 14 December 1982 defendant from the front porch of his house discharged a firearm numerous times in the general direction of a dwelling occupied by Sheila Vaughn. An automobile belonging to Donna Morrison, parked in a driveway adjacent to the Vaughn residence, sustained a broken windshield, broken windows, flat tires, and a total of twenty-two bullet holes. While in the living room of the Vaughn house, a police officer observed defendant fire eight to ten shots, at least one of which hit a bedroom window and others hit the side of the house. The defendant presented no evidence.

The jury returned a guilty verdict on both charges, and the trial court sentenced the defendant to a jail term of six months for the misdemeanor and seven years for the felony. Defendant appealed.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General H. A. Cole, Jr., for the State.

Booe, Mitchell, Goodson and Shugart by Jeanne S. Wine for defendant appellant.

HILL, Judge.

Defendant appeals his convictions of the misdemeanor of malicious damage to personal property and feloniously discharging a firearm into an occupied dwelling. We have examined the record concerning the misdemeanor conviction under G.S. 14-160 and find no basis for reversal. We do find error, however, in the jury charge concerning the offense of feloniously discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1, necessitating a new trial for the felony only.

[1] We first consider defendant's assignment of error to the trial court's denial of his motion to dismiss made at the close of the State's evidence. G.S. 14-34.1 provides in pertinent part: "Any person who willfully or wantonly discharges or attempts to discharge . . . [a] firearm into any building, structure . . . or enclosure while it is occupied is guilty of a Class H felony." A person is guilty of the felony created by this section if he "intentionally, without legal justification or excuse, discharges a firearm into an occupied building . . . when he has reasonable grounds to believe that the building might be occupied by one or more persons." *State v. Williams*, 284 N.C. 67, 73, 199 S.E. 2d 409, 412 (1973).

With regard to this offense, Sheila Vaughn, Donna Morrison, and three police officers were in the Vaughn residence at various times during the shootings. Police officer Lloyd and Sheila Vaughn testified that as the defendant was discharging the firearm toward the Vaughn residence in which they were located, they heard a bullet hit a window, heard window glass break, and heard bullets hit the side of the house. The repeated discharge of the firearm toward the house and the resultant striking of the house by the bullets so discharged is evidence of something more than the firing of a stray bullet which accidently strikes the dwelling. Such conduct manifests an intentional disregard of and indifference to the rights and safety of others, and supports

elements of the offense of discharging a firearm into an occupied dwelling to require its submission to the jury.

[2] Defendant next contends that the trial court erred in answering the jury's questions concerning sufficiency of the evidence to justify a conviction for intentionally discharging a firearm into an occupied dwelling. The question and instruction with which we find error are as follows:

> [JURY:] First if the weapon as (sic) willfully fired at the car and the stray bullet hit the house, can this be considered discharging a firearm into an occupied building?
>
> [THE COURT:] You remember that I told you the defendant must willfully or wantonly and intentionally discharge a firearm into the building in order to be guilty of that charge. Now, if he intentionally fired a—or discharged a firearm and intended to fire at one thing and if it did hit another, if you find he intentionally discharged the firearm and it hit the building, that is intentionally fired it and it hit the building, that would be sufficient.

In the case under review, a specific intent was a necessary element in proof of discharging a firearm into an occupied dwelling. See G.S. 14-34.1; *State v. Williams, supra.* The above-quoted portion of the charge permitted the jury to find the requisite intent solely from the proof of defendant's commission of the unlawful act of malicious damage to property, i.e., firing into the automobile. This is prejudicial error and requires that defendant be given a new trial for failure of the trial court to adequately declare and explain the law relative to the requisite specific intent.

[3] Defendant finally contends that the trial court erred by denying defendant's motion to dismiss on the grounds that defendant had previously been placed in jeopardy of the same offense. Defendant asserts that the guilty plea to discharging a firearm in the city barred subsequent prosecution of the charges of malicious damage to property and discharging a firearm into an occupied building on grounds of double jeopardy. We disagree.

> If each of two criminal offenses, as a matter of law, requires proof of some fact, proof of which fact is not required

for conviction of the other offense, the two offenses are not the same and a former jeopardy with reference to the one does not bar a subsequent prosecution for the other.

State v. Overman, 269 N.C. 453, 465, 153 S.E. 2d 44, 54 (1967).

Conviction of discharging a firearm in the city requires proof that the gun was fired within city limits, while conviction of malicious damage to property and discharging a firearm into an occupied dwelling does not. Conviction of malicious damage to property requires proof of injury to personal property, G.S. 14-160, and conviction of discharging a firearm into an occupied dwelling requires proof of discharge into a building, structure, or enclosure, G.S. 14-34.1, while conviction of discharging a firearm in the city does not require such proof. Therefore, "each offense for which defendant was tried required proof of a fact not required for conviction of the other." *State v. Malloy*, 53 N.C. App. 369, 370, 280 S.E. 2d 640, 640 (1981). A guilty plea on the charge of discharging a firearm in the city did not bar prosecution for the charges of malicious damage to property and discharging a firearm into an occupied dwelling.

No error in Case No. 82CR53826; new trial for Case No. 82CR53828.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. RAYMOND ALLEN PAUL NUGENT

No. 8321SC508

(Filed 7 February 1984)

1. Automobiles and Other Vehicles § 113.1— involuntary manslaughter in driving vehicle—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant was culpably negligent and thus guilty of involuntary manslaughter in passing four cars at one time (some in a no passing zone) and in causing an on-coming driver to lose control, crash into the fourth car defendant was passing, and cause the death of an occupant of the fourth car.

2. Criminal Law § 70— authentication of tape recording

A tape recording of a conversation between defendant and the investigating officer was sufficiently authenticated by the State for its admission into evidence.

APPEAL by defendant from *Lane, Judge.* Judgment entered 16 December 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 December 1983.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

White & Crumpler, by Randolph M. James, for defendant appellant.

BECTON, Judge.

Concluding that defendant, Raymond Nugent, drove a pickup truck in a culpably negligent manner and thereby proximately caused the death of Elisha Sessums, a Forsyth County jury found defendant guilty of involuntary manslaughter. From a judgment imposing an active sentence of "not less than three and not more than three years," defendant appeals.

Defendant makes four arguments on appeal: (1) that the evidence failed to show that defendant was culpably negligent or that his actions proximately caused the accident; (2) that the State improperly authenticated a tape recorded conversation between defendant and the investigating officer; (3) that neither of the two State's witnesses called to give lay opinions as to speed had a sufficient opportunity to observe the speed of defendant's truck; and (4) that the State improperly cross-examined a defense witness with regard to his prior criminal convictions. We are not persuaded by defendant's arguments, and we find no error in the trial of this case.

I

[1] Defendant's motion to dismiss for insufficiency of the evidence was properly denied. The evidence, including all inferences of fact which may be reasonably deduced therefrom, considered in the light most favorable to the State, is sufficient to support the submission of the case to the jury. *See State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). Consider the

following testimony as it relates to the State's theory that defendant was culpably negligent in passing four cars at one time (some in a no passing zone) and in causing an on-coming driver to lose control and crash into the fourth car defendant was passing:

Mrs. George Heath testified:

> Well, I was driving along there and he passed me and then he went on and passed three more cars and then he pulled in to the right side and just as he was leaving the left lane into the right lane, I saw this car coming toward me—I mean coming out this way and it was kind of wavering in the road and then just as I noticed it wavering, it just swerved over into the lane that I was going but it was the third car in front of me.

Renee Hill testified:

> I saw the truck coming toward us in our lane and when the truck—it seemed like it was speeding toward us and my mama went off, swerved off to stop the truck from hitting us head on and she lost control of the car and went back across the other side of the lane.

Ann Cashwell testified:

> It was at the yellow line—the yellow line, it was a no-passing zone. . . . She swerved to the side to keep from heading on and went straight across and lost control of the car. . . . I know the truck was passing at the yellow line.

Robert Murphy testified:

> I turned, I seen this brown and white pick up truck coming around me. Habit, you know, kind of follow something around you looking and as it passed, when I turned back to the highway, I seen the station wagon veering off to the road and the truck cut back in front of me. . . . I hit my brakes where he'd have room to cut in.

Bearing in mind that each case must be decided upon its own particular facts, consider now the law: "culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of

others," as set forth in *State v. Becker*, 241 N.C. 321, 328, 85 S.E. 2d 327, 332 (1955).

Based on the peculiar facts of this case and the applicable law, we uphold the trial court's decision to submit the case to the jury. And we are aware that defendant, himself, escaped the head-on crash with the on-coming east-bound car because the fourth car that defendant passed braked, allowing defendant to dart safely into the right-hand west-bound lane. Defendant is not absolved of culpability because his actions proximately caused Mrs. Geraldine Hughes, the on-coming driver, to lose control of her car and swerve into the west-bound lane, killing Elisha Sessums. Foreseeability is not difficult in this case. As pointed out by the State in its brief, the danger created by defendant's acts presented a risk of death and injury not only to on-coming cars, but also to cars which were being passed. It was, therefore, irrelevant whether defendant's car struck Mr. Sessums' car or caused Mrs. Hughes' car to strike Mr. Sessums' car.

II

[2] Citing *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979) and *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971), the defendant contends that the tape-recorded conversation was not properly admitted into evidence because there was insufficient evidence of the recording capability and proper operation of the recorder and of the operator's competency. Defendant further contends that one portion of the tape in which the defendant talked too low, and two portions in which both the defendant and Officer Canipe talked simultaneously, vitiated the validity of the recording.

To lay a proper foundation for the admission of tape recorded evidence, *Lynch* requires the State to prove:

> (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions or dele-

tions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made.

279 N.C. at 17, 181 S.E. 2d at 571.

We are convinced from a reading of the record that the tape recorded evidence was a "fair and accurate representation of the conversation." *Detter*, 298 N.C. at 628, 260 S.E. 2d at 584 (quoting *State v. Godwin*, 267 N.C. 216, 218, 147 S.E. 2d 890, 891 (1966)). Defendant has made no showing that the tape recording, as a whole, was untrustworthy. In short, the following conclusion of the trial court, in its order denying the motion to suppress the tape recording, persuasively disposes of this argument:

> The Court, after hearing the evidence, concludes that the recording satisfies the requirements of State versus Decker [sic], even though in three cases a question was asked and in the place for an answer, there was written the word indistinguishable, and particularly since the question was repeated and the answer clearly recorded, and that at the conference involving Officer Canipe, the defendant, and his attorney, Mr. Armentrout, no objections were made to the question "have you been involved in an automobile accident before," and that the three places marked indistinguishable do not constitute wilful deletion and thus have not vitiated the recorded conversation and that the Court can suppress the question and answer as it relates to any prior automobile accident without damage to the statement.

III

We summarily reject defendant's other two arguments, finding that (1) the testimony concerning the speed of defendant's truck was properly admitted, and (2) that defendant failed to show that the trial court abused its discretion in controlling the manner and extent to which the district attorney cross-examined defendant's witness.

IV

In this case we find

No error.

Chief Judge VAUGHN and Judge HILL concur.

MASUKI MISHIO WILLIAMSON v. RONNIE E. WILLIAMSON

No. 8321DC95

(Filed 7 February 1984)

Divorce and Alimony § 13.5— separation for statutory period—sufficiency of evidence

Defendant-husband's motion to set aside a judgment by confession and a separation agreement and property settlement concerning monthly alimony payments was properly denied where defendant failed to meet his burden of proof that the parties intended to resume the marital relation where there was no evidence that either party intended to resume the marital relation and there was contradictory evidence as to whether an isolated incident of sexual intercourse did take place.

APPEAL by defendant from *Tanis, Judge*. Order entered 30 March 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 9 January 1984.

On 21 July 1981, plaintiff wife and defendant husband entered into a separation agreement and property settlement in which defendant agreed to pay monthly alimony payments to plaintiff. On the same day, defendant signed a statement authorizing entry of judgment, and a judgment by confession was entered in Forsyth County which ordered defendant to pay monthly alimony to plaintiff pursuant to the separation agreement.

On 30 July 1982, defendant filed a motion to set aside the judgment by confession and the separation agreement and property settlement. Defendant alleged that the parties had engaged in sexual relations on two occasions during the separation period. Plaintiff denied the allegation of sexual relations between the parties.

After hearing the parties' evidence, the trial court made the following pertinent findings of fact:

4. The defendant testified: (a) that he spent the nights of May 27 and 28, 1982, with the plaintiff and had sex with her . . . .

* * *

(d) That on July 11, 1982, he called plaintiff and said he was not going to reconcile but that he had discussed reconciliation with the plaintiff.

* * *

8. Plaintiff testified that on May 27, 1982, defendant came back to the home and was tired and went to sleep before the television without even taking his clothes off and even slept in his shoes and that the parties did not have intercourse or any affectionate encounter and did not discuss reconciliation.

* * *

11. Plaintiff testified that on July 11, 1982, defendant called her and said he was not interested in reconciliation and did not talk about resumption of the marriage.

Based upon these relevant findings of fact, the trial court concluded:

1. There is no evidence that either party intended to resume the marital relation and no evidence that the parties held themselves out as husband and wife to the community.

2. There is conflicting and contradictory evidence as to whether an isolated incidence of sexual intercourse did take place between the parties.

3. The burden of proof is on the defendant in this action to set aside a written Separation Agreement and Property Settlement and a Confession of Judgment.

It is the Opinion of this Court that clear, cogent and convincing evidence is required to meet this burden of proof . . . .

4. . . . [T]he defendant has failed to meet his burden of proof.

The trial judge denied defendant's motion to set aside the separation agreement and property settlement and the judgment by confession. Defendant appeals.

Meyressa H. Schoonmaker for plaintiff appellee.

B. Jeffrey Wood for defendant appellant.

HILL, Judge.

Defendant first argues that the trial court erred in its findings of fact and conclusions of law by disregarding uncontroverted evidence that the parties stayed overnight together on two consecutive nights thereby entitling defendant to the presumption that the parties engaged in sexual intercourse. We hold that defendant is entitled to no such presumption.

The "inclination and opportunity" concept allows a presumption of adulterous sexual intercourse if adulterous inclination and opportunity are shown. 1 Lee, North Carolina Family Law, sec. 65, p. 321-22. The rule applies only to cases of alleged adultery, because adultery is an illegal act which by its very nature is difficult to prove. The problem of proof is compounded by evidentiary prohibitions of spouses testifying in their divorce actions about the adultery of the other, or from admitting their own adultery. See G.S. 55-10; see also G.S. 8-56. Such justification of the rule for adultery cases is nonexistent for proof of resumption of marital relations between separated spouses, an act which is not against the law but which merely breaks a contract between the spouses. The resumption of the marital relation is not inherently secretive and spouses are competent to testify about it. Accordingly, defendant's request to extend the "inclination and opportunity" presumption to proof of resumption of the marital relation is denied.

Defendant's appeal, therefore, rests upon the determination of whether the parties had reconciled and resumed their marital cohabitation. "Where such a reconciliation and resumption of cohabitation has taken place, an order or separation agreement with provisions for future support and an agreement to live apart is necessarily abrogated." *Hand v. Hand*, 46 N.C. App. 82, 85, 264 S.E. 2d 597, 598, *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 107 (1980); *Hester v. Hester*, 239 N.C. 97, 79 S.E. 2d 248 (1953). When

the evidence is conflicting, "[t]he issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation." *Newton v. Williams*, 25 N.C. App. 527, 532, 214 S.E. 2d 285, 288 (1975).

The trial court's fact finding reveals that defendant has failed to carry his burden of proof under any standard, as the findings disclose no evidence that either party intended to resume the marital relation and contradictory evidence as to whether an isolated incidence of sexual intercourse did take place. Where the trial judge sits as judge and juror, his findings of fact have the effect of a jury verdict and are conclusive on appeal if there is evidence to support them. *Laughter v. Lambert*, 11 N.C. App. 133, 136, 180 S.E. 2d 450, 452 (1971). Contradictions and discrepancies are matters to be resolved by the trier of the facts. *Hand v. Hand, supra.* In the case under review, there is competent evidence to support the trial court's findings of fact which in turn support the conclusions of law. The order entered thereupon is

Affirmed.

Chief Judge VAUGHN and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. THEODORE NICHOLS

No. 836SC598

(Filed 7 February 1984)

1. Criminal Law § 138— aggravating factor—infliction of serious bodily injury—sufficiency of evidence

The trial court's finding as a factor in aggravation that defendant inflicted serious bodily injury upon a robbery victim was supported by a preponderance of the evidence where the evidence showed that defendant participated with two other persons in a brutal assault upon the victim, and that as a result thereof, the victim had several stitches in his face, developed pneumonia, and suffered injuries to his arm and back.

2. Criminal Law § 138— inflicting serious bodily injury—propriety as aggravating factor for robbery

In imposing a sentence for common law robbery, the trial court could properly find as an aggravating factor that defendant inflicted serious bodily

injury upon the victim since serious injury is not an element of common law robbery, and such factor is reasonably related to the purposes of sentencing.

3. **Criminal Law § 138— lack of prior convictions as mitigating factor—insufficient evidence**

An unsworn statement by defendant's attorney in his final argument on sentencing that defendant did not have a criminal record was insufficient to require the court to find defendant's lack of a prior criminal conviction as a mitigating factor.

APPEAL by defendant from *Brown, Judge.* Judgment entered 23 March 1983 in Superior Court, BERTIE County. Heard in the Court of Appeals 11 January 1984.

The defendant appeals from the imposition of more than the presumptive sentence. The defendant pled guilty to common law robbery. The evidence at the sentencing hearing showed that on 9 February 1983, Charlie Lyons, a resident of Bertie County, was accosted by the defendant and two other persons while he was walking along a highway. The defendant and his two companions gave Mr. Lyons a severe beating. The defendant hit him with brass knuckles beside his left eye. Mr. Lyons was knocked to the ground and dragged to the side of the road where his assailants kicked him, beat him with their fists, and removed all his clothes. One of them took Mr. Lyon's watch and $75.00. He was left lying in the ditch.

Mr. Lyons was taken to the hospital where several stitches were put in his face. At the time of the hearing, he was having trouble moving his arm, his back still hurt, and he had blurred vision. He developed pneumonia as a result of the experience and was hospitalized for seven days. The defendant during the incident said, "Let's drag him out of the road" which was done. As they were beating Mr. Lyons one of them said, "let's kill him." The defendant said "don't kill him."

The court found as an aggravating factor that "the defendant inflicted serious bodily injury upon the victim." It found as a mitigating factor that "at an early stage of the criminal process the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer." It concluded that the factor in aggravation outweighed the factor in mitigation and imposed an active sentence in excess of the presumptive sentence.

The defendant appealed.

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

W. Rob Lewis, II for defendant appellant.

WEBB, Judge.

[1] The defendant first argues that there is not a preponderance of evidence to support the finding of the aggravating factor. He says this is so because the defendant told the others to drag Mr. Lyons from the road, that the record shows defendant hit Mr. Lyons only once and that he told the other two not to kill Mr. Lyons. The record is not clear that defendant hit Mr. Lyons only once. It is clear that he struck the first blow. Mr. Lyons testified that "they beat me." We believe the inference from this is that all three did so. We do not believe the fact that the defendant told the others to drag Mr. Lyons from the road is helpful to him. They removed him from the road and continued the assault. The evidence that defendant told the others not to kill Mr. Lyons, while favorable to defendant, does not weaken other evidence against him. This evidence shows that the defendant participated with two other persons in a brutal assault against Mr. Lyons. As a result, Mr. Lyons had several stitches put in his face, developed pneumonia, and suffered injuries to his arm and back. We believe the evidence supported the finding of the aggravating factor.

[2] The aggravating factor found by the judge is not one of those set forth in G.S. 15A-1340.4(a)(1). The court can use such a factor if it reasonably relates to the purposes of sentencing. The defendant, relying on *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983) and *State v. Eure*, 61 N.C. App. 430, 301 S.E. 2d 452 (1983), argues that the aggravating factor is not reasonably related to the purposes of sentencing. In *Medlin* this Court held that when the defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury, the sentencing judge could not use as an aggravating factor "that the victim suffered very severe physical disability." 62 N.C. App. at 255-256, 302 S.E. 2d at 486. This Court said the General Assembly, in classifying the offense of assault with a deadly weapon inflicting serious injury, did

not require consideration of the injury inflicted beyond the requirement that it be serious. Since the seriousness of the injury was taken into account by the General Assembly when it prescribed the punishment, it should not be used as an aggravating factor. In a common law robbery case, there is not an element of serious injury. If there is serious injury in a common law robbery, we do not believe *Medlin* is authority that it cannot be used as an aggravating factor.

In *State v. Eure, supra*, the court found as an aggravating factor that the victim in a common law robbery case suffered a severe personal injury when the defendant brutally and unmercifully and without cause beat him with his fist and that the defendant had threatened the victim during the robbery. This Court held it was error to find as aggravating factors that the defendant threatened the victim or that he brutally, unmercifully and without cause beat him with his fists. This court held that it was error to find these aggravating factors because the evidence to support them was necessary to prove an element of the offense. This Court did not hold that the serious injury aggravating factor in a common law robbery case was improperly found.

Serious injury is not an element of common law robbery. We believe the fact that the victim suffered serious injury in this case makes it a worse crime than it would otherwise have been, and it is reasonably related to the purposes of sentencing. We hold that Judge Brown properly found this aggravating factor.

[3] In his second assignment of error the defendant argues that it was error for the court not to find as a mitigating factor his lack of a criminal conviction. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983) holds that if there is uncontradicted credible evidence as to a mitigating factor listed under G.S. 15A-1340.4 (a)(2), the court must make a finding as to that factor. No record of criminal convictions is a mitigating factor listed under that section. In this case there was not a stipulation as to no criminal record nor was there any testimony to that effect. The defendant's attorney in his final argument on sentencing stated the defendant did not have a criminal record. We do not believe an unsworn statement by an attorney is such uncontradicted credible evidence as to require the court to find a mitigating factor. *See State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

Affirmed.

Judges WELLS and WHICHARD concur.

BOBBY G. STEVENS v. STEVEN DORENDA, JR.

No. 8229DC1296

(Filed 7 February 1984)

Compromise and Settlement § 6; Contracts § 26.1— finding settlement agreement ambiguous error—admission of parol evidence error

In an action instituted by plaintiff to recover on two promissory notes where defendant raised the defense of settlement, the trial court erred in finding a settlement agreement ambiguous which discussed four other lawsuits between the parties but failed to include a reference to the present action. The lack of ambiguity in the settlement agreement precluded the admission of parol evidence, and the trial court committed reversible error by allowing the settlement agreement into evidence, by allowing parol evidence concerning the settlement agreement and by allowing into evidence a complaint from one of the three actions which was settled in the agreement.

APPEAL by plaintiff from *Guice, Judge.* Judgment entered 24 June 1982 in District Court, HENDERSON County. Heard in the Court of Appeals 27 October 1983.

McGuire, Wood, Worley & Bissette, P.A., by Joseph P. McGuire, for plaintiff appellant.

Long, Parker, Payne & Matney, P.A., by William A. Parker and Steve Warren, for defendant appellee.

BECTON, Judge.

I

On 15 January 1980, plaintiff, Bobby G. Stevens, instituted this action, No. 80CVD23, in Henderson County District Court, to recover on two promissory notes for $2,500 and $1,500 respectively, after the defendant, Steven Dorenda, Jr., defaulted on payment. At the time the notes were executed, Stevens and Dorenda were principals in two closely related corporations, Eastern Carolina Lime Company, Inc., and Fletcher Limestone Company.

In a supplemental answer filed 23 December 1981, Dorenda raised the defense of settlement. Dorenda asserted that the parties, pursuant to a settlement agreement dated 22 August 1980, had settled all the matters in controversy since the original complaint and answer. After finding the settlement agreement ambiguous, the trial court admitted parol evidence concerning the agreement and instructed the jury on settlement. From a jury verdict for Dorenda, Stevens appeals.

II

Stevens argues that the trial court erred in finding the settlement agreement ambiguous and, therefore, erred in admitting parol evidence. We agree.

The introductory clauses of the agreement contain the following provisions concerning the settlement of certain lawsuits:

> WHEREAS, Joyce R. Lance ('J. Lance'), William Newton Lance, II ('W. Lance'), Stephen Dorenda, Jr., ('S. Dorenda'), and Mary A. Dorenda ('M. Dorenda') have been involved in *certain disputes and lawsuits* with Fletcher Limestone Company, Inc. ('Fletcher Limestone'), Virgil Mack Henson ('Henson'), and Bobby G. Stevens ('Stevens'), *including the following:*
>
> a. Joyce R. Lance, Stephen Dorenda, Jr. and wife, Mary A. Dorenda, and William Newton Lance, II, v. Fletcher Limestone Company, Inc., Virgil Mack Henson, and Bobby G. Stevens, 79CVS674, Superior Court of Henderson County;
>
> b. Joyce R. Lance v. Fletcher Limestone Company, Inc., 80CVS0100, Superior Court of Buncombe County; and
>
> c. William N. Lance, II v. Fletcher Limestone Company, Inc., 80CVS0101, Superior Court of Buncombe County; and
>
> WHEREAS, J. Lance, W. Lance, S. Dorenda, M. Dorenda, Fletcher Limestone, Henson and Stevens agree to amicably resolve *the aforesaid disputes and lawsuits,* and all claims, counterclaims and purported liabilities asserted therein, by settlement and compromise;
>
> NOW, THEREFORE, the undersigned J. Lance, W. Lance, S. Dorenda, M. Dorenda, Fletcher Limestone, Henson and Stevens for good and valuable consideration, including the

> premises and mutual covenants made herein, do hereby stipulate, covenant and agree as follows. . . .

The agreement, in paragraphs 1-11, discusses the settlement terms, but at no point refers to this action, No. 80CVD23. Further, in paragraph 12, the agreement sets out:

> 12. The undersigned parties agree and stipulate that the following shall occur within ten days of the date hereof:
>
> (a) J. Lance, W. Lance, S. Dorenda and M. Dorenda, shall dismiss with prejudice civil action number 79CVS674, Superior Court of Henderson County.
>
> (b) Fletcher Limestone, Henson and Stevens shall dismiss with prejudice any and all counterclaims asserted in civil action number 79CVS674, Superior Court of Henderson County;
>
> (c) J. Lance shall dismiss with prejudice civil action number 80CVS0100, Superior Court of Buncombe County; and
>
> (d) W. Lance shall dismiss with prejudice civil action number 80CVS0101, Superior Court of Buncombe County.

Significantly, the agreement, on its face, omits this action. Since the inclusion of this action in the agreement would "vary, add to, or contradict" the written agreement, parol evidence would only be admissible to explain or construe any ambiguous terms. *Vestal v. Vestal*, 49 N.C. App. 263, 266-67, 271 S.E. 2d 306, 309 (1980); *see generally* Annot., 40 A.L.R. 3d 1384 (1971). "A statement is ambiguous if it is susceptible of more than one meaning." *Lineberry v. Lineberry*, 59 N.C. App. 204, 206, 296 S.E. 2d 332, 333 (1982). Dorenda perceives ambiguity in the language of the introductory clauses: "certain disputes and lawsuits . . . including the following," and "the aforesaid disputes and lawsuits. . . ." Dorenda asserts that the above language fails to *exclude* this action from the terms of the agreement. We disagree.

We apply a long-recognized rule of construction in concluding that the agreement unambiguously excluded this action.

> If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former.

3 A. Corbin, *Corbin on Contracts* § 547, at 176-78 & n. 19 (1960); *see also Wood-Hopkins Contracting Co. v. N. C. State Ports Auth.*, 284 N.C. 732, 202 S.E. 2d 473 (1974). Here, the broad language of "certain disputes . . . including the following" is modified by the list of named lawsuits. The listed lawsuits become the only subject matter of the agreement. Under our view, the phrase "the aforesaid disputes and lawsuits . . ." refers directly to the listed lawsuits. Further, the terms of paragraphs 1-11 and the final matching list of dismissed lawsuits in paragraph 12, by omitting any reference to this action, support our interpretation.

The unambiguous language of the settlement agreement precluded the admission of parol evidence. We hold that the trial court's admission of parol evidence constituted reversible error. Moreover, "when a contract is plain and unambiguous the construction of the agreement is a matter of law for the court." *East Coast Dev. Co. v. Alderman-250 Corp.*, 30 N.C. App. 598, 605, 228 S.E. 2d 72, 78 (1976). In construing the settlement agreement, the trial court should have found it irrelevant to this action, No. 80CVD23, and excluded it from evidence, since the agreement would be likely to mislead the jury or prejudice Stevens. *See* 1 H. Brandis, *North Carolina Evidence* § 77, at 285-86 (2d rev. ed. 1982). Therefore, the trial court's failure to exclude the settlement agreement is also reversible error. In light of the above holding, we need address only one of Stevens' remaining contentions.

III

Presumably because it had found the settlement agreement ambiguous, the trial court, over objection, allowed Dorenda to introduce into evidence a complaint from one of the three actions settled in the agreement, No. 79CVS674, alleging trespass and the fraudulent removal of stone from plaintiff's land against Stevens. We hold that the trial court committed reversible error by admitting the complaint. The subject matter of the complaint was irrelevant to this action and extremely prejudicial to Stevens. *Id.*

IV

We remand for a

New trial.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. JEFFREY CLAY SMITH

No. 8322SC616

(Filed 7 February 1984)

1. **Criminal Law § 168.2— instructions—reference to statement as "confession"—harmless error**

Any error in the court's instruction referring to defendant's statement as a "confession" was harmless beyond a reasonable doubt in light of the overwhelming evidence that defendant intentionally and without provocation shot the deceased.

2. **Criminal Law § 138.7— judge not influenced by personal feelings in sentencing**

The trial court's comments to the effect that defendant was guilty of second degree murder did not show that the court was improperly influenced by "personal feelings" in imposing the presumptive sentence for voluntary manslaughter.

3. **Criminal Law § 138— presumptive sentence—findings as to aggravating and mitigating factors unnecessary**

The trial court was not required to make any findings concerning aggravating and mitigating factors where he imposed the presumptive sentence. G.S. 15A-1340.4(b).

APPEAL by defendant from *Davis, Judge.* Judgment entered 7 January 1983 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 12 January 1984.

Defendant was charged in a proper bill of indictment with second degree murder. At trial, the State offered evidence tending to show the following:

On 5 June 1982 an officer of the Davidson County Sheriff's Department discovered the body of Lawrence Rudolph Lanier in a heavily wooded area. The deceased had been shot twice in the head at close range. Officers investigating the death interviewed

the defendant on 6 June 1982 at which time the defendant signed a waiver of his constitutional rights and made a formal statement. This statement was admitted into evidence without objection and is as follows:

> Around 8:00 a m I got up from bed. I had spent the night at Rudolph Lanier's house. He wanted me to do some work on a white Cadillac in the basement. We went riding around and I told him I didn't want to work on the car. We got in a argument over that and argued for three or four hours. We were going to Salisbury but he didn't stop anywhere there. He then went back towards . . . the Lake. Prior to this Rudolph had hit me in the chin and said, "I'll blow your [expletive deleted] head off." When he turned off Hwy. 8 . . . I got worried. Then he turned right . . . onto a dirt road. . . . He started arguing again and I told him to let me out of that damn car. He was sitting in the driver's seat and when he started squirming and looked like he was trying to turn, I shot him twice with a .32 revolver. . . .
>
> I, then, slid him out of the truck and removed all identification from the body and his money in the billfold. . . .
>
> I was under the influence when the shooting happened. I had had a little to drink. But I knew he was going to kill me so I shot him.

Search of the deceased's residence revealed a stolen white Cadillac and parts taken from the car. Ballistics testing revealed that one of the pellets removed from the body at the autopsy was fired from the gun found in defendant's possession at the time of his arrest. Testing on the other pellet taken from the body was inconclusive.

Defendant offered no evidence. The jury returned a verdict of guilty of voluntary manslaughter, and the court sentenced the defendant to the presumptive term of six years. From this judgment, defendant appealed.

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

Jerry B. Grimes and Kimberly T. Harbinson for the defendant, appellant.

HEDRICK, Judge.

Defendant's Assignment of Error Nos. 1-5 relate to the exclusion of testimony. Our examination of the exceptions on which these assignments of error are based reveals several instances in which defendant failed to offer any proof of the evidence excluded. In these instances, of course, we are unable to determine whether exclusion of the evidence in question was error. In other instances we note defendant's exceptions are to rulings made prior to a voir dire, following which the evidence in question was admitted without objection. Despite such difficulties in identifying the precise judicial action now complained of, we have examined each exception upon which each assignment of error is based and find each to be without merit.

In Assignment of Error No. 6 the defendant challenges the exclusion of evidence "relative to the character for violence of the deceased, Rudolph Lanier." It is true that in this State "[e]vidence of the deceased's violent character . . . is admissible in a homicide case where self-defense is in issue and the State's evidence is wholly circumstantial or the nature of the transaction is in doubt in order to shed light on the question of which party was the first aggressor." *State v. Barbour*, 295 N.C. 66, 73, 243 S.E. 2d 380, 384 (1978). In the instant case, however, the evidence was uncontroverted as to which party was the aggressor, and this evidence was derived entirely from defendant's own statement. The rule set forth in *Barbour* has no application in such circumstances, and the assignment of error is thus overruled.

By Assignment of Error Nos. 7 and 15 defendant raises the question of the sufficiency of the evidence to support his conviction of voluntary manslaughter. He contends evidence offered by the State established as a matter of law that he acted in self-defense and that the victim was the aggressor. This argument, when considered in light of defendant's own statement about the killing, borders on the frivolous. The assignments of error are meritless.

In Assignment of Error Nos. 9-12 and 14 defendant assigns error to various aspects of the court's charge to the jury. We have carefully reviewed each exception upon which these assignments of error are based and feel that little would be gained by

discussing in detail the arguments presented. We conclude that the challenged instructions are free from prejudicial error.

[1] In Assignment of Error No. 13, defendant argues that the court erred in refusing to correct an instruction in which the court referred to defendant's statement as a "confession." While the instruction complained of is inartfully stated, we are unwilling to say that, considered in context of the entire charge, it is error. Assuming *arguendo* that the instruction is erroneous, we find that under these circumstances, where the evidence is overwhelming that the defendant intentionally and without provocation shot the deceased, any error was harmless beyond a reasonable doubt. "In addition to showing that an instruction was erroneously given, the defendant must show that the instructions as given materially prejudiced him." *State v. Tillman*, 36 N.C. App. 141, 143, 242 S.E. 2d 898, 899 (1978).

[2] Finally, defendant assigns error to the court's imposition of the presumptive six year term, contending first that the judge was improperly influenced by "personal feelings" in imposing sentence. In this regard, he directs our attention to the following comments made by the trial judge at the sentencing hearing:

> At this particular time, that time has passed and the body is cold, and it is not as bad as it appeared at the time; but this man executed that man. I don't care how mean he was, he executed him. He shot him once in the jaw, and then he put that pistol to his head and pulled the trigger into his brain. If he had shot once, that would have been one thing; but an execution—that is exactly what it was. You know it—I know it—and these officers know it. We may not want to admit it.
>
> . . .
>
> You are dealing mighty close to murder one, for which they take your life; and the Jury was very kind to the Defendant in finding him guilty of voluntary manslaughter rather than second-degree; because, from all the evidence presented, he was certainly guilty of second-degree murder.

While the quoted statements could be characterized as inappropriate, we hardly think the judge can be said, under the cir-

cumstances, to have acted out of his "personal feelings" in imposing the presumptive sentence.

[3] Defendant also assigns as error the court's failure, in sentencing defendant, to find three of the mitigating factors set out in N.C. Gen. Stat. Sec. 15A-1340.4(a)(2). We hold that, based on the clear language of N.C. Gen. Stat. Sec. 15A-1340.4(b), the judge was not required to "make any findings regarding aggravating and mitigating factors . . . [since] he impose[d] the presumptive term."

Defendant has brought forward and argued other assignments of error that are meritless beyond peradventure. We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. JOHNNY WAYNE CARTER

No. 8319SC65

(Filed 7 February 1984)

1. Larceny § 7— felonious larceny of a tractor—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the charge of felonious larceny of a tractor where the evidence tended to show eyewitness testimony placing a truck similar to defendant's at the crime scene; evidence that defendant attempted to sell a tractor shortly after the crime; evidence that the tractor was found on his property; and evidence that the owner positively identified as part of the tractor a hinge later found in defendant's truck.

2. Searches and Seizures § 6— tractor properly discovered and seized

Officers did not discover and seize a tractor in violation of defendant's Fourth Amendment rights where the evidence established that the officers entered the property for the purposes of general inquiry; when the headlights on the officers' car struck the tractor, it was in "plain view"; the tractor and trailer matched the general description given by the owner; and the confirmation of the tip that had led them to the property made it "immediately apparent" that the items were probably evidence of a crime.

3. Searches and Seizures § 6— hinge found in back of impounded pickup truck— properly admitted into evidence

In a prosecution for larceny of a tractor where the police received information from the owner that a hinge was missing from the tractor the day after the officers had arrested defendant and impounded his truck, it was not error for the trial court to admit evidence that the hinge was found in the back of defendant's truck after an officer went to the impoundment garage, looked in the back of the truck, and immediately found the hinge. The police had arrested defendant when he was "located in" the truck, and the incriminating evidence lay uncovered in the back of a pickup truck. The officers' action in looking into the back of the pickup did not constitute an unreasonable search.

APPEAL by defendant from *Watts, Judge.* Judgment entered 31 August 1982 in Superior Court, CABARRUS County. Heard in the Court of Appeals 28 September 1983.

Defendant was indicted and tried for felonious larceny. The State's evidence tended to show the following: At about 9:45 p.m. Gerald Stallings observed a white pickup truck driving along his driveway with a tractor mower and trailer in the back. The tractor appeared to be one he had had stored in a shed behind his house. Stallings then notified the police. He verified the theft of his tractor and trailer and gave investigating officers a description and the serial numbers. Shortly thereafter, officers received a call from an "anonymous tipster" that defendant had tried to sell a "hot" tractor and planned to store the tractor at a house he was renting. They proceeded to the house, located some 100 yards off U.S. 601, arriving there around 12:30 a.m. As they drove up the driveway, their headlights illuminated a tractor and trailer sitting uncovered about 15 feet from the house. Closer examination and comparison of serial numbers revealed that it was Stallings' property.

Sometime thereafter, the officers received another call, that defendant's truck was stuck in a ditch. When the officers arrived, they found defendant in his white pickup, near the home of an acquaintance who testified that defendant had offered to sell him a tractor. The officers arrested defendant and impounded his truck. The next day, the police received information from Stallings that a hinge was missing from the tractor; an officer went to the impoundment garage, looked in the back of the truck, and immediately found the hinge.

Defendant testified and presented alibi evidence that he was at a card game during the time of the commission of the crime. He testified that he loaned his truck to an acquaintance, and denied any conversation concerning the sale of a tractor.

The jury returned a verdict of guilty and defendant received a sentence of three years. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Nancy C. Northcott, for defendant appellant.

JOHNSON, Judge.

[1] Defendant first assigns error to the court's failure to grant his motion to dismiss. He argues that the jury had to infer his actual possession of the tractor from its presence on his property and then infer his guilt from this recent possession. Defendant maintains that under the rule of *State v. Voncannon*, 302 N.C. 619, 276 S.E. 2d 370 (1981) and *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981), such "stacking of inferences" is impermissible.

In deciding whether a motion to dismiss was properly denied, we must consider all the evidence actually admitted, whether competent or incompetent, in the light most favorable to the State. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). Here, there was eyewitness testimony placing a truck similar to defendant's at the crime scene; evidence that defendant attempted to sell a tractor shortly after the crime; and evidence that the owner positively identified as part of the tractor a hinge later found in defendant's truck. Thus, the State did not rely entirely on inferences to make its case and consequently the rule in *Maines* does not apply. The jury could draw a reasonable inference of defendant's guilt from the totality of the evidence presented, and the court properly denied the defendant's motion.

[2] Defendant next contends that officers discovered and seized the tractor in violation of the Fourth Amendment. On *voir dire*, the court found that the officers did not know who lived at the house and went there looking for defendant or the tractor. The findings of the trial court are supported by competent evidence and, therefore, are conclusive on appeal. *State v. Jackson*, 308

N.C. 549, 304 S.E. 2d 134 (1983). They establish that the officers entered the property for the purpose of general inquiry. Officers are not trespassers when they go to a door to inquire about a matter. *See State v. Prevette*, 43 N.C. App. 450, 259 S.E. 2d 595 (1979), *appeal dismissed*, 299 N.C. 124, 261 S.E. 2d 925 (1980). *A fortiori*, in driving up the driveway to the house the officers were where they had a right to be. When their headlights struck the tractor, it was in "plain view" and its discovery did not violate the Fourth Amendment. *Texas v. Brown*, 460 U.S. 730, 75 L.Ed. 2d 502, 103 S.Ct. 1535 (1983) (use of artificial illumination "simply does not constitute a search"); *see also* 1 W. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 2.2(b) (1978) (collecting "flashlight" cases). The tractor and trailer matched the general description given by Stallings; this and the confirmation of the tip made it "immediately apparent" that the items were probably evidence of a crime, *Texas v. Brown*, *supra*, which closer examination quickly confirmed. The court thus properly admitted evidence of the discovery and seizure of the tractor and trailer.

[3] Defendant's final assignment of error challenges the admission of the hinge into evidence, again on Fourth Amendment grounds. Whether searches or seizures are unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. *Cooper v. California*, 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788 (1967). An officer found the hinge uncovered in the back of defendant's pickup truck. The court found that police had arrested defendant when he was "located in" the truck. Again this finding, supported by competent evidence, is conclusive. *State v. Jackson*, *supra*. Assuming *arguendo* that defendant had some legitimate expectation of privacy in the back of his pickup truck, officers could have searched the back of his truck without a warrant for contraband and/or evidence at the scene of his arrest. *United States v. Ross*, 456 U.S. 798, 72 L.Ed. 2d 572, 102 S.Ct. 2157 (1982); *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978). Therefore, the warrantless search the next day was not unreasonable under the Fourth Amendment. *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *State v. Cobb*, *supra*.

In addition, the incriminating evidence lay uncovered in the back of a pickup truck. This fact raises a question as to whether

defendant had any Fourth Amendment interest at stake. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 352, 19 L.Ed. 2d 576, 582, 88 S.Ct. 507, 511 (1967). Although no court has yet held that there is *no* expectation of privacy in the open bed of a pickup, they had hesitated to accord much protection. *See United States v. McHugh*, 575 F. Supp. 111 (1983) ("it would stretch credibility to the limit" to hold defendant had an expectation of privacy); *State v. Kramer*, 231 N.W. 2d 874 (Iowa, 1975) (items "on exterior" of pickup not protected); *State v. Yaeger*, 277 N.W. 2d 405 (Minn. 1979) (upholding seizure of items in plain view in back of parked pickup).

Under the circumstances of this case then, we hold that the officers' action in looking into the back of the pickup did not constitute an unreasonable search. The hinge was therefore properly seized and admitted into evidence.

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

No error.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. ALVIN LYNN DAVIS

No. 8212SC1188

(Filed 7 February 1984)

1. Homicide § 28.8— defense of accident—insufficient evidence to require instruction

Defendant's testimony that he did not stab deceased but that deceased sustained four stab wounds as the result of the two of them bumping into cabinets as they struggled with a knife did not require the trial court to instruct the jury on the defense of homicide by accident where all of the evidence tended to show that defendant was not engaged in lawful conduct at the time of the killing in that the stab wounds proximately resulted from an altercation brought on by defendant and that defendant was the one who introduced the knife into the affray.

2. Homicide § 30.3— second degree murder—failure to submit involuntary manslaughter

The evidence in a second degree murder case did not require the trial court to instruct on involuntary manslaughter since defendant's conduct in intentionally grabbing a knife and moving it toward the deceased during the course of a fight initiated and aggressively pursued by defendant constituted an act naturally dangerous to human life in that the fatal consequences were probable under all the facts existing at the time.

APPEAL by defendant from *Hobgood, Jr. (Robert), Judge.* Judgment entered 23 June 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 31 August 1983.

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

James R. Parish, for defendant appellant.

JOHNSON, Judge.

Defendant was indicted and tried upon the charge of second degree murder. The state presented evidence which tended to show that on 4 March 1982 defendant was living with his girlfriend, Martha Wingate, in Apartment 3-C, Hyde Place Apartments, Fayetteville, North Carolina. Martha Wingate testified that on 4 March 1982, defendant left for work at about 6:00 a.m. Between 7:45 and 8:00 a.m. Robert Lowery arrived at the apartment to do some work on Martha's motor vehicle. Martha and Lowery had been "seeing" each other for about two months. She admitted Lowery into the apartment and told him to be seated while she finished dressing. Defendant returned home at about 8:45 a.m. and discovered Lowery in the apartment. Defendant and Lowery began to argue. Martha told defendant that she had asked Lowery over to work on her car. Defendant reminded Lowery that he had previously told him not to return to the apartment. After ordering Lowery to leave, defendant struck him, at which time the two of them began to struggle. As they struggled, defendant grabbed a knife with a seven or eight inch blade from a counter. Defendant stabbed Lowery four times. A stab wound in the lower left abdomen resulted in Lowery's death.

Defendant presented evidence which tended to show that defendant has a good character and reputation. Defendant testi-

fied that he returned to the apartment at about 8:45 a.m. When he discovered Lowery in the apartment, he ordered him to leave, but became angry when Lowery "just stood there and didn't want to leave." Defendant then punched and jumped on Lowery. According to defendant, the two of them then began to fight with each other. As they struggled with each other, defendant picked up the knife, and as he came around with it, Lowery grabbed the hand which defendant held the knife in. Lowery tried to force the knife into defendant, who was trying to force the knife away. They bumped against cabinets as they struggled with the knife. Defendant testified further that he did not try to cut Lowery, he was only trying to protect himself and he does not know how Lowery was stabbed.

The court denied defendant's request for an instruction on the defense of homicide by accident and on involuntary manslaughter as permissible verdicts. Defendant was convicted of voluntary manslaughter and from judgment imposing a five year active sentence, defendant appeals.

[1] By his first assignment of error, defendant contends the trial court erred in denial of his request for an instruction on the defense of homicide by accident. Defendant argues that from his testimony a permissible inference may be drawn that deceased came to his death by accident.

The court is required to charge the jury as to the law upon all substantial features of the case arising upon the evidence, including all defenses presented by defendant's evidence. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961). If the killing was in fact accidental, defendant would not be guilty of any crime, even though his acts were responsible for the victim's death. *State v. Faust, supra.* A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. *State v. Faust, supra.* Culpable negligence as defined in the criminal law is more than actionable negligence in the law of torts, and is such recklessness or carelessness proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety or rights of others. *State v. Early*, 232 N.C. 717, 62 S.E. 2d 84 (1950).

A defense that the death of Lowery was the result of an accident must be predicated upon the absence of an unlawful act on the part of the defendant and the absence of culpable negligence. *State v. Faust, supra.* An examination of defendant's testimony reveals that defendant was not entitled to an instruction on the defense of homicide by accident. At the time of the killing, defendant was not engaged in lawful conduct. It appears from defendant's testimony that defendant willingly and aggressively initiated the fight. Defendant, upon discovering Lowery at his apartment, became angry and punched Lowery, at which time the two began to fight. As they struggled, defendant grabbed a knife and "came around with it" toward Lowery. Assuming *arguendo* that, as defendant testified, he did not stab Lowery, but that Lowery apparently sustained the four stab wounds as a result of the two of them bumping into cabinets as they struggled with the knife, the conclusion is inescapable that the stab wounds nonetheless proximately resulted from the altercation brought on by the defendant, who was also the one who introduced the knife into the affray. Therefore, the trial court was correct in its denial of defendant's request for an instruction on defense of homicide by accident.

[2] Defendant next contends the trial court erred in failing to submit involuntary manslaughter as a possible verdict. Defendant was tried on a charge of second degree murder. The trial judge submitted three possible verdicts: guilty of second degree murder, guilty of voluntary manslaughter or not guilty.

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the performance of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existing at the time, or resulting from a culpably negligent omission to perform a legal duty. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); *State v. Poole*, 44 N.C. App. 242, 261 S.E. 2d 10 (1979), *disc. rev. denied*, 299 N.C. 739, 267 S.E. 2d 667 (1980). The trial judge must submit and instruct the jury on any lesser included offense of the crime when there is evidence from which the jury can find that a defendant committed the lesser included offense. *State v. Redfern, supra.*

It is clear, from defendant's own testimony, that defendant was not entitled to have involuntary manslaughter submitted as a possible verdict. Defendant's conduct in *intentionally* grabbing the knife and moving it toward the deceased during the course of a fight initiated and aggressively pursued by defendant, constituted an act naturally dangerous to human life in that the fatal consequences were probable under all the facts existing at the time. There was no evidence to support a verdict of involuntary manslaughter and the trial court was correct in not submitting it as a possible verdict.

In the trial of defendant's case we find

No error.

Judges BECTON and BRASWELL concur.

C. E. SAMPLE, T/A SAMPLE CONSTRUCTION COMPANY v. PATRICK H. MORGAN AND WIFE, IRENE S. MORGAN

No. 831SC120

(Filed 7 February 1984)

Contracts § 6.1— general contractor with a limited license—ability to collect only amount of limited license

Plaintiff, who held a limited license as a general contractor for a single project "of a value [not to exceed] one hundred twenty-five thousand dollars ($125,000)" under G.S. 87-10, could not collect more than $125,000.00 on his contract with defendant even though plaintiff calculated the total cost of the house as $139,998.90 under a formula orally agreed to by the parties.

Judge EAGLES dissenting.

APPEAL by plaintiff from *Allsbrook, Judge*. Judgment entered 24 September 1982 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 12 January 1984.

This is a civil action wherein plaintiff seeks to recover from defendants $19,667.08 plus interest pursuant to a contract to build a house on defendants' property. The evidence introduced at trial shows the following: plaintiff and defendants entered into an oral

contract whereby plaintiff agreed to build a house on defendants' lot at a price of "cost of materials and labor plus 10%." Plaintiff held a limited license as a general contractor for single projects "of a value [not to exceed] one hundred twenty-five thousand dollars ($125,000) . . ." under N.C. Gen. Stat. Sec. 87-10. At the time plaintiff was first approached by defendants about building the house, plaintiff estimated the cost at $130,000.00. Defendants felt that this was "too much" and the plans were substantially revised, yielding a new estimate of $115,000.00. When the house was completed, the plaintiff calculated the total cost of the house as $139,998.90 under the formula orally agreed to by the parties.

At the close of the plaintiff's evidence and again at the close of all the evidence defendants made motions "for a dismissal" "pursuant to Rule 50 of the North Carolina Rules of Civil Procedure." The court "reserved" ruling on the motions and submitted the case to the jury, which returned a verdict in favor of plaintiff in the amount of $11,000.00. The defendants then made a motion "for judgment notwithstanding the verdict, renewing . . . previous motions filed pursuant to Rule 50," which motion was granted. From a judgment notwithstanding the verdict for defendants, plaintiff appealed.

O. C. Abbott for plaintiff, appellant.

Trimpi, Thompson & Nash, by C. Everett Thompson, for defendants, appellees.

HEDRICK, Judge.

Plaintiff first contends "the trial court committed reversible error in granting defendants' motion to amend their answer." Plaintiff recognizes the well-established rule that a motion to amend "is addressed to the sound discretion of the trial judge," *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E. 2d 444, 448 (1982) (citation omitted), but contends that the court's action in the instant case constitutes an abuse of discretion. We disagree, noting that plaintiff has failed to identify any prejudice resulting from the court's ruling in this regard. This assignment of error is overruled.

Plaintiff next contends that "the trial court committed reversible error in setting aside the verdict and granting defend-

ants' motion for judgment notwithstanding the verdict." The uncontroverted evidence discloses that plaintiff, a contractor, seeks to recover on a contract for construction of defendants' house an amount in excess of the statutory limitations of his contractor's license. The rule is clear that a contractor who violates statutory licensing requirements may not enforce a construction contract against an owner. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). Plaintiff seeks to escape imposition of this rule, however, by invoking the doctrine of "substantial compliance" most recently recognized in *Barrett, Robert & Woods v. Armi*, 59 N.C. App. 134, 296 S.E. 2d 10, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). The theory of "substantial compliance" relied on by plaintiff has been specifically and emphatically rejected by our Supreme Court in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983). On this record plaintiff cannot collect more than $125,000.00 on his contract with defendants.

Affirmed.

Judge BRASWELL concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. I would reverse the judgment notwithstanding the verdict allowed by the trial court and would permit the jury verdict to stand. I am cognizant of the recent decision of our Supreme Court in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983), rejecting the doctrine of substantial compliance as a vehicle for salvaging claims of unlicensed contractors. Though relied upon by the majority, that case is not dispositive of the question here.

In the case *sub judice*, the general contractor was licensed *at all times* in dispute, without interruption. His license authorized him to enter and perform construction contracts having a value of up to $125,000. Before entering the contract with plaintiff, defendants altered their originally submitted plans and specifications by eliminating certain features from the original plans to reduce the estimated cost from the initial estimated cost of $130,000 to an

estimated cost for the house of $115,000, a figure well within the authorized license limits of plaintiff. The contract entered into called for the work to be performed on a cost plus ten percent basis which was estimated to be $115,000. The evidence shows clearly and in detail that the increase in cost from the $115,000 estimated cost was not due to any action of the plaintiff, save his acquiescence to defendants' subsequently requested additions, extras, add on, and changes in the items specified to be included in the house. The house is conceded by all to be a well built and beautiful home. The fact that plaintiff acquiesced in defendants' choices to have installed finer plumbing fixtures than originally called for, marble counter tops in lieu of those originally called for, a finer and more expensive type of carpeting than the original carpet allowance would permit and other changes while construction was in progress does not violate the language or spirit of Chapter 87 and its strictures. I would hold that a licensed general contractor has complied with Chapter 87 when the contractor is licensed throughout the negotiation, contracting and construction process, the estimated construction cost under the original contract is within the dollar limits of his license, and any subsequent variations from the plans and specifications of the original contract are at the initiation of the other party and are merely acquiesced in by the contractor.

THELMA FREEMAN v. SCM CORPORATION

No. 8320SC85

(Filed 7 February 1984)

Master and Servant § 87— receipt of workers' compensation benefits—court action based on gross negligence and intentional acts precluded

A plaintiff who has received workers' compensation benefits for an injury is precluded by G.S. 97-10.1 from maintaining a separate tort action against the employer based upon allegations that her injury was the result of gross negligence and intentional acts on the part of the employer.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Seay, Judge*. Judgment entered 10 January 1983 in Superior Court, MOORE County. Heard in the Court of Appeals 8 December 1983.

Plaintiff, an employee of defendant SCM Corporation, was working on a molding machine on 14 October 1980 when she noticed that it was not functioning properly. She reported the problem to her supervisor and requested permission to turn off the machine. The supervisor ordered plaintiff to continue operating the machine despite this and subsequent repeated warnings. Plaintiff was later struck in the face by a pressure bolt which blew out of the machine.

Plaintiff sought and recovered workmen's compensation benefits for injury to her nose, back, neck and shoulder. A lump sum payment was approved by the Commission on 19 November 1980.

On 26 October 1982, plaintiff filed this action, alleging that her injuries were caused by the gross, willful and wanton negligence and by the intentional acts of defendant. Plaintiff further alleged that her injuries did not result from an "accident" within the meaning of the Workers' Compensation Act and, therefore, her claim was not barred by the exclusivity provisions of G.S. 97-10.1. Defendant alleged lack of subject matter jurisdiction and moved to dismiss pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. From the granting of defendant's motion, plaintiff appeals.

Pollock, Fullenwider, Cunningham & Patterson, by Bruce T. Cunningham, Jr., for plaintiff-appellant.

William D. Sabiston, Jr., for defendant-appellee.

ARNOLD, Judge.

The crux of plaintiff's appeal is her contention that the trial court erred in granting defendant's motion to dismiss for lack of subject matter jurisdiction. She claims that since her injuries were not caused by "accident," her claim was not barred by G.S. 97-10.1.

G.S. 97-10.1 provides as follows:

> 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 employee at common law or otherwise on account of such injury or death.

It is plaintiff's contention that her injuries were the result of gross negligence and intentional acts on the part of defendant. Since the Workers' Compensation Act contemplates recoverable injuries as being those which result from "accident" under G.S. 97-2, she claims that she is now entitled to recover damages from defendant employer in addition to any workmen's compensation benefits she may have received. Plaintiff indeed may have been injured by defendant's gross negligence, rather than by accident. However, she is still precluded from maintaining an action against defendant.

Plaintiff relies heavily on the case of *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), to support her claim for relief. In *Andrews*, this Court held that the Workers' Compensation Act was not the exclusive remedy for an employee intentionally injured by a fellow employee. In the case at bar, however, any liability on the part of defendant employer appears to be more the result of gross negligence than any intentional act, despite plaintiff's catch-all assertion to the contrary. Moreover, plaintiff was not injured by the intentional tort of a fellow employee, as occurred in *Andrews*.

In fact, the court in *Andrews* distinguished a claim against a fellow employee from a claim against an employer, stating that "[o]ur courts . . . have barred injured employees covered by the act from bringing negligence actions against their employers" (citations omitted), but adding that "[j]urisdictions differ as to whether such immunity should extend to co-employees." *Id.* at 126, 284 S.E. 2d at 749.

Plaintiff has been compensated by the payment of workmen's compensation benefits. She cannot now maintain a separate action against her employer for additional compensation. Having already selected one avenue of recovery, plaintiff is precluded from main-

taining a tort action. The trial court's order granting defendant's motion to dismiss for lack of subject matter jurisdiction is

Affirmed.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

That a worker otherwise subject to the Workers' Compensation Act cannot recover from his employer for injuries accidentally sustained or negligently inflicted cannot and perhaps should not be gainsaid. But in my opinion the Workers' Compensation Act does not and should not immunize employers against liability for injuries wantonly, wilfully or intentionally inflicted. Though it obviously will be very difficult, indeed, for the plaintiff to prove her case, the allegation that she was injured because of defendant's wilful, wanton and intentional acts gives her the right to try, in my opinion.

ROBERT FRANDER AND WIFE, VIRGIE FRANDER v. BOARD OF TRANSPORTATION

No. 8212SC1150

(Filed 7 February 1984)

Eminent Domain § 2.3— elimination of direct access to highway—compensation for a taking

Where the evidence supported a finding that the expansion of a highway replaced plaintiffs' former direct access to the main highway with a gravel drive to what is now a dead-end street, there was a taking of plaintiffs' property which required compensation. It is established in this State by statute and case law, when all direct access has been eliminated, there has been *pro tanto* a taking. G.S. 136-108; G.S. 136-112.

APPEAL by defendant from *Herring, Judge*. Judgment entered 1 June 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 September 1983.

This is an inverse condemnation proceeding instituted by plaintiffs to recover just compensation for an alleged taking of a compensable interest in their real property. Pursuant to G.S. 136-108 the trial court, without a jury, heard all issues raised by the pleadings except for the issue of damages. From the trial court's preliminary judgment holding that defendant Board of Transportation has taken a compensable interest in the plaintiff's property, Board of Transportation (hereafter BOT) appeals.

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond, for defendant appellant.

Nance, Collier, Herndon and Ciccone, by James R. Nance, Sr. and James R. Nance, Jr., for plaintiff appellees.

JOHNSON, Judge.

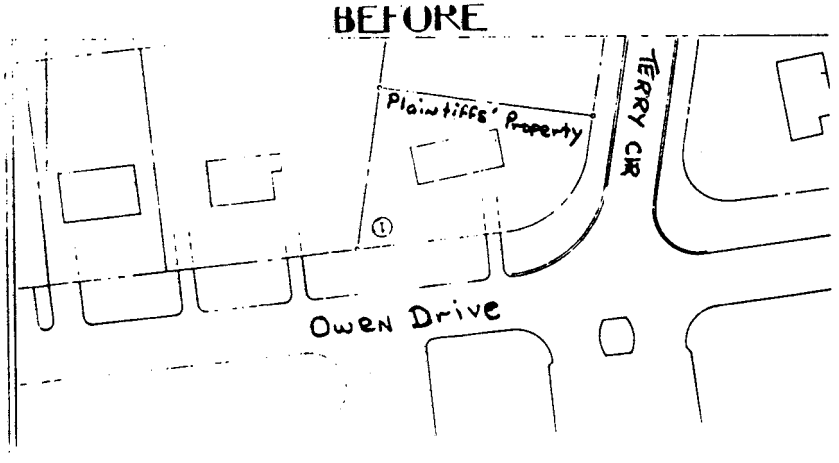
We note initially that defendant has failed to comply with Rule 12(a) of Rules of Appellate Procedure, which requires filing of the record on appeal no later than 150 days after giving notice of appeal. The trial judge announced his decision in open court on 1 June 1982, and BOT immediately gave oral notice of appeal. (The formal written judgment was signed 7 June 1982.) BOT did not file the record in this Court until 3 November 1982, some 155 days after judgment. Ordinarily the violation of the 150 day requirement would deprive the aggrieved party of his right to appeal and we would dismiss the appeal. *See State v. Ward*, 61 N.C. App. 747, 301 S.E. 2d 507 (1983). Nevertheless, we exercise our discretion and consider the merits.

The undisputed facts are as follows: The plaintiffs are owners of a house and lot in Fayetteville. Their property is situated in the northeastern corner of the intersection of, and abuts upon, Owen Drive and Terry Circle. Owen Drive runs north and south, and prior to the construction in question, it was a main-traveled thoroughfare. Terry Circle runs east and west. Plaintiffs' house and attached carport face Owen Drive on its east side. The driveway runs westerly from the carport to Owen Drive. Without using or acquiring any of plaintiffs' property, BOT constructed a controlled access Owen Drive Expressway (hereafter Expressway) opposite the front of plaintiffs' property. The Expressway runs northwesterly of and obliquely to Owen Drive where Owen Drive

abuts plaintiffs' property. In constructing the Expressway, BOT abandoned much of Owen Drive. Beginning at a point 30 feet north of plaintiffs' property and continuing south some 99.6 feet along the frontage of plaintiffs' property to Terry Circle, Owen Drive was plowed up and the pavement totally removed. An open ditch was constructed at the north and south ends of this abandoned section of Owen Drive. BOT also constructed a chain link fence between plaintiffs' property and the Expressway. The fence is constructed on the right-of-way of the east side of Owen Drive and runs for the distance of the frontage of plaintiffs' property onto and along a portion of the north side of Terry Circle. The effect of this construction totally prevents direct access from plaintiffs' property onto the main travel lanes of Owen Drive and the main travel lanes of the Expressway. After construction of the Expressway, Terry Circle continues to intersect on grade with the Expressway. By way of the gravel drive the plaintiffs are required to take a more inconvenient and circuitous route between their driveway and the main travel lanes of the Expressway. In its preliminary judgment, after making findings of fact, the trial judge concluded as a matter of law "that there has been substantial and unreasonable interference with plaintiffs' right of access onto Old Owen Drive and onto the limited access Owen Drive Expressway and that such constitutes the taking of a property right for which compensation must be paid."

The recent decision of the Supreme Court in *Department of Transportation v. Harkey*, 308 N.C. 148, 301 S.E. 2d 64 (1983) is dispositive of this appeal. There the Court stated: "[I]t is established in this state by statute and case law, when all direct access has been eliminated, there has been *pro tanto* a taking . . ." 308 N.C. at 155, 301 S.E. 2d at 69. Here the court found, and the evidence supports its findings, that the expansion replaced plaintiffs' former direct access to the main highway with a gravel drive to what is now a dead-end street. These findings are conclusive on appeal, *Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521 (1970), and they establish that a taking occurred. *Harkey, supra.*

We note that under the rule established in *Harkey,* an exception is recognized, and that is, where a service road is provided as a substitute for the former direct access no taking occurs. 308 N.C. at 156-58, 301 S.E. 2d at 69-71. Defendant does not contend, nor does the record justify a conclusion, that the narrow gravel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Plaintiffs' Property
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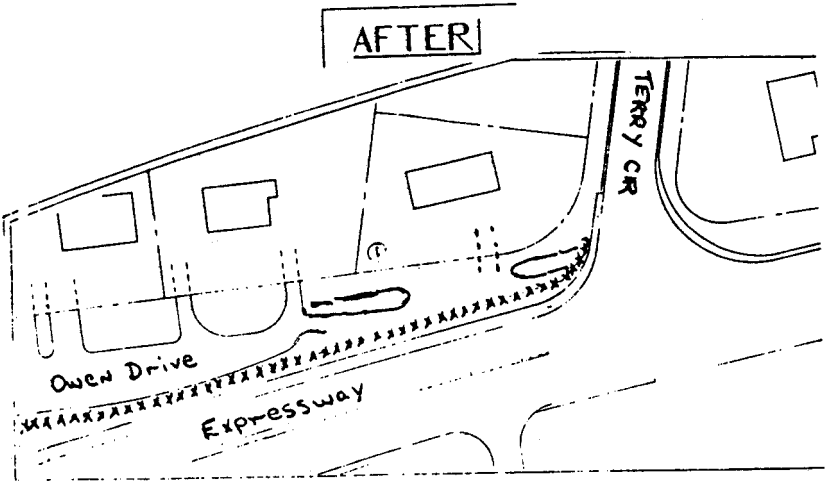
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driveway provided is a "local traffic lane" equivalent to a service road. *Id; see also Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967).

Defendant attempts to show that the availability of a less convenient route precludes a taking. However, "the availability and reasonableness of any other access goes to the question of damages and not to the question of liability for the denial of access." *Harkey, supra*, 308 N.C. at 155, 301 S.E. 2d at 69. "[W]hen all direct access is taken no inquiry into the reasonableness of alternative access is required to determine liability." *Id.* at 155-56, 301 S.E. 2d at 69. Therefore, the only question which remains is that of the amount of damages, which a jury will determine in accordance with the statute. G.S. §§ 136-108; 136-112. Defendant's contention will be appropriate at that time.

The evidence supports the findings of fact, the findings support the conclusions of law, and the judgment must therefore be

Affirmed.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. ROYSTON D. BLANDFORD, III

No. 834SC108

(Filed 7 February 1984)

1. Conspiracy § 3— sentencing for conspiracy—co-defendants not then under indictment

The trial court was not precluded from sentencing defendant on his plea of guilty to a charge of conspiracy to sell and deliver cocaine because his two co-defendants were not charged with and had not been convicted of conspiracy at the time of sentencing, particularly where the State was proceeding as quickly as possible against the co-defendants and ultimately obtained convictions against them.

2. Criminal Law § 23.1— factual basis for guilty plea—silence of record

It will be presumed that the trial court determined that there was a factual basis for defendant's plea of guilty where the record on appeal does not contain a transcript of the proceedings at which the plea was accepted, and the

prosecutor's statement at the sentencing hearing indicates that the State did have sufficient evidence to support its case.

3. **Criminal Law § 23.4— denial of motion to withdraw guilty plea—necessity for findings**

The trial court is required to make findings of fact in denying a motion to withdraw a guilty plea only where an evidentiary hearing is necessary or where constitutional violations are asserted. G.S. 15A-1420(c).

4. **Criminal Law § 138— denial of continuance of sentencing hearing**

The trial court did not abuse its discretion in denying defendant's motion to continue his sentencing hearing. G.S. 15A-1334(a).

APPEAL by defendant from *Small, Judge*. Judgment entered 27 September 1982, in Superior Court, ONSLOW County. Heard in the Court of Appeals 17 October 1983.

Defendant was indicted for conspiracy to traffic in cocaine and felonious possession of more than one gram of cocaine. The record discloses that a police informant had arranged to buy cocaine from defendant at a location in Onslow County, but defendant refused to turn the drugs over until paid. He told the informant they were in another vehicle. Defendant drove off; the informant alerted waiting officers as to the location of the drugs. After a high speed chase of the vehicle purportedly containing the drugs, officers apprehended the two occupants in Jones County and found cocaine in their vehicle. All three men were indicted in Jones County. Later, the Jones County indictments were dismissed and the three were indicted for the subject offenses in Onslow County. Defendant entered a plea of guilty to a charge of felonious conspiracy to sell and deliver cocaine on 25 August 1982. On 15 September 1982, before defendant's sentencing, the Onslow County indictments against the co-defendants were dismissed on the grounds that Jones County had exclusive jurisdiction over the matter. At the scheduled sentencing hearing on 27 September 1982, defendant filed a motion for appropriate relief to withdraw his plea and dismiss the charges. The court denied his motion and sentenced defendant to the presumptive term of three years.

The co-defendants were reindicted at the next criminal session of Superior Court, Jones County, in November 1982, and thereupon entered pleas of guilty to lesser offenses. Defendant appeals from the denial of his motion for appropriate relief.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Norman B. Kellum, Jr. and Robert S. Pierce, for defendant appellant.

JOHNSON, Judge.

[1] Defendant's primary contention is that since at the time of his sentencing his co-defendants were neither charged with nor convicted of conspiracy, the court could not lawfully sentence him on his plea of guilty to the conspiracy charge. Therefore, he argues, it erred in refusing to allow him to withdraw his plea. He relies on *State v. Littlejohn*, 264 N.C. 571, 142 S.E. 2d 132 (1965) for the proposition that at least two persons must be convicted of conspiracy, otherwise all must be acquitted. However, *Littlejohn* requires only that where co-defendants are tried together and all but one are acquitted, then that one cannot be convicted of conspiracy solely on his own admission. The Supreme Court took care to make clear that circumstances could arise under which a single defendant may be convicted of conspiracy. *Id.* at 574, 142 S.E. 2d at 135. We believe this is such a circumstance; under the unusual procedural facts of the case, the State was proceeding as quickly as possible against the co-defendants and ultimately obtained convictions. No finding of fact tantamount to a jury's acquittal ever was made with respect to them. Therefore, withdrawal of the plea was not required. We also note that the great weight of authority supports our holding. *See* Annot., 19 A.L.R. 4th 192, 211-24 (1983). Furthermore, withdrawal of a plea of guilty after its acceptance by the court is not a matter of right, but is addressed to the sound discretion of the trial court. *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); *State v. Elledge*, 13 N.C. App. 462, 186 S.E. 2d 192 (1972). Under the circumstances of the case, it is clear that the court did not abuse its discretion.

[2] Defendant alleges various evidentiary failings. G.S. § 15A-1022(c) does require the court to determine that there is a factual basis for the plea. The record on appeal does not contain a transcript of the proceedings at which the court accepted the plea on 25 August 1982. However, the hearing on the judgment conducted 27 September 1982 indirectly indicates that the court found a factual basis for the entry of the plea. To raise the issue of the suffi-

ciency of the evidence to support that finding on appeal, defendant must preserve the record for appeal. Where the record is silent we will presume the trial court acted correctly. *State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982). The prosecutor's statement at the sentencing hearing indicates that the State did have sufficient evidence to support its case. We find no error.

[3] Defendant next contends the court erred in not making findings of fact in denying his motion to withdraw the plea. G.S. § 15A-1420(c) clearly requires such findings only where an evidentiary hearing is necessary or where constitutional violations are asserted. Such is not the case here.

[4] Defendant also contends that the court erred by denying his motion to continue the sentencing hearing. Such a motion is addressed to the discretion of the trial judge who may grant it on good cause. G.S. § 15A-1334(a); *State v. McLaurin*, 41 N.C. App. 552, 255 S.E. 2d 299 (1979), *cert. denied*, 300 N.C. 560, 270 S.E. 2d 113 (1980). We agree with the trial court that defendant had ample notice of the scheduled sentencing hearing, but tried instead to turn it into a hearing on his motion to withdraw the plea filed at the beginning of the hearing. The court did not abuse its discretion in denying a continuance.

Defendant has brought forward several other assignments of error, but we find them also to be without merit. We conclude that the proceedings below were free from prejudicial error, and that the court's order must therefore be

Affirmed.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. CHRISTINE E. WARD

No. 833SC747

(Filed 7 February 1984)

Constitutional Law § 20.3; Social Security and Public Welfare § 2— selected prosecution for welfare fraud—insufficient evidence

Defendant failed to establish a prima facie case of selective enforcement or prosecution for welfare fraud where she failed to show (1) "that others similarly situated have not been proceeded against," and (2) that "the government's discrimination against [her] has been in bad faith." Equal Protection Clause of Fourteenth Amendment.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 14 January 1983 in Superior Court, PITT County. Heard in the Court of Appeals 20 January 1984.

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

Assistant Public Defender Robert E. Dillow, Jr., for defendant appellant.

BRASWELL, Judge.

The defendant was indicted for welfare fraud. She sought to have this charge dismissed on the grounds that she had been denied her Sixth Amendment right to a speedy trial and that she and other black females similarly situated were selectively prosecuted for welfare fraud in violation of the Equal Protection Clause of the Fourteenth Amendment. Her motion to dismiss was denied, and she was subsequently convicted of felonious food stamp fraud. The defendant has appealed the denial of her motion to dismiss on the basis of selective prosecution.

Mr. Edward L. Garrison, Director of the Pitt County Department of Social Services (DSS) was called by the defendant to testify in the hearing on the defendant's motion to dismiss. A summary of his testimony in chart form follows:

YEAR	WELFARE FRAUD CASES PROSECUTED	RACE OF THOSE PROSECUTED
1978	5	all 5—black females
1979	5	all 5—black females
1980	6	2 white females—4 black females
1981	9	all 9—black females
1982	14	1 white female—13 black females

He also testified to the ratio of blacks to whites receiving food stamps for those years:

YEAR	TOTAL NO. OF PEOPLE	BLACKS (%)	WHITES (%)
1977	8,594	7,254 (84%)	1,340 (16%)
1978	8,149	6,954 (85%)	1,195 (15%)
1979	10,624	9,143 (86%)	1,481 (14%)
1980	13,533	11,429 (84%)	2,140 (16%)

(In 1981, the Department began reflecting the number of households receiving aid instead of the number of people.)

YEAR	TOTAL NO. OF HOUSEHOLDS	BLACKS (%)	WHITES (%)
1981	4,551	3,619 (80%)	932 (20%)
1982	4,209	3,429 (81%)	780 (19%)

Furthermore, Mr. Garrison testified that for the month of December in 1982 there were 1,596 families receiving Aid to Families With Dependent Children in Pitt County and of that number, 118 were white families (7%) and 1,477 were black families (93%).

Mary S. Leaphart, an investigator for the Pitt County DSS, was also called by the defendant and testified that the Department was notified of some possible wrongdoing by the defendant in April of 1982 through an anonymous telephone call. An investigation was begun and revealed that an adult male, Robert Earl Williams, who worked for Pepsi-Cola, might be living with the defendant; that the defendant had won some money in a Winn-Dixie contest; and that two of the defendant's daughters

were working at the Sonic Restaurant. A further investigation indicated that the defendant had only won eleven dollars in prize money from Winn-Dixie.

At the conclusion of this hearing, the trial court denied the defendant's motion to dismiss. Because the defendant had misrepresented to the Department of Social Services that Robert Earl Williams was living with her and the amount of his income, and by doing so had received food stamps to which she was not entitled, the jury concluded that she was guilty of felonious food stamp fraud.

The defendant has presented only one question for review: whether the trial court committed reversible error by denying the defendant's motion to dismiss on the basis of selective prosecution. The defendant contends that at the hearing on her motion she presented sufficient evidence to establish a prima facie case of selective prosecution. Once established, the burden of proof then shifted to the State to come forward with contrary evidence. *See State v. Brown*, 271 N.C. 250, 156 S.E. 2d 272 (1967). Because the State presented no evidence at the hearing, the defendant asserts that the trial court erred by denying her motion to dismiss. We disagree. A review of the defendant's evidence reveals that the defendant failed to make a prima facie showing.

As seen in the record, the defendant failed to take exception to any of the findings of fact in the trial court's order denying her motion. Therefore, the facts found are presumed correct and are binding on appeal. *State v. Tate*, 300 N.C. 180, 184, 265 S.E. 2d 223, 226 (1980). Our review is "limited to whether the findings of fact support the conclusions of law." *State v. Capps*, 61 N.C. App. 225, 229, 300 S.E. 2d 819, 821, *disc. rev. denied*, 308 N.C. 545, 304 S.E. 2d 239 (1983).

To establish a prima facie case of selective enforcement or prosecution for welfare fraud the defendant was required at least to show "that others similarly situated have not been proceeded against." *Creech v. Sparkman*, 523 F. Supp. 1157, 1161 (E.D.N.C. 1981). The trial court made findings of fact in accordance with the statistics related to the court by Mr. Garrison. As the trial court correctly concluded in his order denying the defendant's motion, "the defendant has shown no pattern of undertaking and abandon-

ing prosecutions of suspected violations involving white people by the Pitt County Department of Social Services." Without proof of this factor, the defendant cannot show that she, as a black female, was a victim of selective prosecution or enforcement.

Furthermore, the defendant must have shown that "the government's discrimination against [her] has been in bad faith." *Id.* Again, based on findings made from the defendant's statistical evidence, the trial court concluded that the defendant offered no evidence which tended to show "that this defendant or any female has been prosecuted simply on account of the fact that they were black or female." Her statistical information only showed that out of thirty-nine cases prosecuted between 1978 and 1982, thirty-six of the defendants were black (93%) and three were white (7%). This fact does not indicate that the State's prosecution was in bad faith, especially in light of the fact that the approximate number of people during this time receiving food stamp assistance were 83% black and 17% white. Because this conclusion of law as well as the others were supported by appropriate findings of fact, we hold that the motion to dismiss was properly denied.

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ANDRE LEVI PARKER

No. 835SC386

(Filed 7 February 1984)

Robbery § 4.7— attempted armed robbery—insufficient evidence

In a prosecution for attempted armed robbery, the trial court erred in failing to allow defendant's motion to dismiss where the evidence failed to show that defendant actually attempted to take property from a market. Evidence tended to show that defendant put a pistol in his toboggan and then into his jacket; that he took his bicycle up the street and parked it; that he observed the market from the bushes across the street; and that he ultimately was seen just outside the entrance to the store. For this evidence to amount to an attempt, it must show more than mere preparation. G.S. 14-87.

State v. Parker

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 14 December 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 29 November 1983.

Defendant was tried on an indictment charging him with attempted armed robbery. On 25 August 1982, defendant was seen lying beside a hedge near Pearsall's Lawn and Garden Center, which is located across the street from the S & R Market in downtown Wilmington. Defendant was wearing a white toboggan, a black shirt and cut-off khaki pants, and he had a gun in his possession. Defendant left the hedge, crossed the street, and got on a bicycle, which he rode a short distance before returning to the vicinity of the S & R Market. He got off the bicycle and then walked back to the hedge, where he resumed his position.

A short time later, defendant was seen sitting on a rail beside the S & R Market, in which Lana Clayman was working as a store clerk. At that time, a police officer, responding to a call from a Pearsall's employee who had become suspicious after observing defendant, arrived at the scene. Defendant quickly walked away, crossing the street and heading towards his bicycle, when he was arrested. After being released that same day without being charged, a warrant was issued for defendant the following day, and he was subsequently arrested at his home.

Defendant was charged with attempted armed robbery. The first trial ended with the Honorable Napoleon B. Barefoot declaring a mistrial. Judge Barefoot again presided over the second trial, during which defendant was found guilty and sentenced to the presumptive term of 14 years in prison.

Attorney General Rufus L. Edmisten, by Associate Attorney David E. Broome, Jr., for the State.

J. H. Corpening, II for defendant-appellant.

ARNOLD, Judge.

Defendant's foremost contention is that the trial court erred in denying his motion to dismiss. He argues that there was no evidence introduced at trial showing that he ever entered the S & R Market, that he ever threatened any person, that he ever

pointed a gun at any person, or that he ever took or demanded money from any person.

Upon a defendant's motion to dismiss, the court must determine whether there is substantial evidence to establish (1) each element of the offense charged and (2) that the defendant is the person who committed the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Furthermore, this evidence must be considered in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980).

Defendant does not deny having committed the acts set forth in the State's case, but instead contends that there lacks "substantial evidence" to establish each element of the offense of attempted armed robbery. "Substantial evidence" has been defined as meaning "more than a scintilla." *State v. Smith*, 40 N.C. App. 72, 77, 252 S.E. 2d 535, 539 (1979).

The elements of attempted armed robbery, as embodied in G.S. 14-87, are as follows: 1) possession of a firearm or other dangerous weapon; 2) use or threatened use of the firearm or other dangerous weapon whereby the life of a person is endangered or threatened; and 3) unlawfully taking or attempting to take personal property from another person or from any place of business.

We find insufficient evidence to establish the third element and therefore hold that defendant's motion to dismiss should have been allowed. The element in question requires a showing that defendant actually attempted to take the property of the S & R Market. Evidence was introduced at trial showing that defendant put a pistol in his toboggan and then into his jacket; that he took his bicycle up the street and parked it; that he observed the S & R Market from the bushes across the street; and that he ultimately was seen just outside the entrance to the store. For this evidence to amount to an attempt, it must show more than mere preparation. It must, in fact, constitute an overt act towards the commission of the crime. *State v. Powell*, 6 N.C. App. 8, 169 S.E. 2d 210 (1969). This act, however, "need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in the direct movement

towards the commission of the offense after the preparations are made." *State v. Addor*, 183 N.C. 687, 689, 110 S.E. 650, 651 (1922).

We find that defendant's acts amounted to no more than mere preparation. Although lurking outside a place of business with a loaded pistol may be unlawful conduct, it does not constitute the sort of overt act which would clearly show that defendant attempted to rob that business. Moreover, without elaborating, we also find insufficient evidence to support the second element, use or threatened use, of any weapon endangering or threatening the life of anyone.

Substantial evidence is lacking to establish two elements of the offense of attempted armed robbery. Defendant's motion to dismiss was improperly denied.

Reversed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. LANCE ALBERT SNYDER

No. 8321SC674

(Filed 7 February 1984)

Homicide § 21.7— second degree murder—insufficient evidence of malice

The conviction of defendant for second degree murder constituted "plain error" as there was no evidence of malice on the part of defendant where the evidence tended to show that defendant, after heavily drinking before going to a bar and then trying to buy a drink at a bar, was hit in the head in a fight, walked to his car, drove onto the highway at an excessive speed, and ultimately struck a car killing three passengers. There was no evidence that the deaths were the result of any malice, and without this essential element there can be no crime of second degree murder.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 3 December 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 January 1984.

Defendant was tried on indictments charging him with three counts of second degree murder. On 4 September 1982, defendant and his brother went to Smokey's Lounge in Forsyth County af-

ter having had several mixed drinks during the course of the afternoon. Worth Shelton, the owner of Smokey's Lounge, refused to serve them and told them to leave. As they were leaving, an altercation ensued, during which Shelton struck defendant on the chin with his fist. He then hit defendant above the eye, causing him to fall into the door. As he was falling, defendant's head hit the base of the door.

Defendant then walked to his car and drove out of the parking lot and onto Highway 311 at excessive speed. While leaving the parking lot he struck the rear of a motorcycle on which two people were riding, forcing it off the road. Defendant then increased his speed and, after running through a red light, entered an intersection where he struck a car, killing three passengers. After the accident defendant was taken to Forsyth Memorial Hospital. Records of the hospital emergency room indicated that defendant had a .32 alcohol blood content when admitted.

Defendant testified at trial that he had no memory of any events that occurred after he was hit and knocked into the door at Smokey's Lounge. Defendant's attempt to offer medical testimony showing that he was unconscious at the time of the accident was denied by the court, as was his attempt to argue the defense of unconsciousness to the jury. Moreover, the court refused to instruct the jury on the issue of unconsciousness. The jury was allowed to return one of four verdicts: Guilty of second degree murder, guilty of involuntary manslaughter, guilty of death by vehicle, or not guilty; and found defendant guilty of second degree murder in all three cases.

After finding as an aggravating factor that defendant was engaged in a pattern of violent conduct, and finding no mitigating factors, the court sentenced defendant to 20 years on each of the three counts to be served concurrently, such sentence being in excess of the presumptive term of 15 years. From these proceedings defendant appeals.

Attorney General Edmisten, by Associate Attorney David E. Broome, Jr., for the State.

James J. Booker and W. Eugene Metcalf for defendant-appellant.

ARNOLD, Judge.

Defendant was convicted of three counts of second degree murder. Second degree murder is defined as the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Although the issue has not been raised by the parties, we find that the conviction of defendant for second degree murder constituted "plain error" as there is no evidence of malice on the part of defendant.

Malice as an element of the crime of second degree murder may be either express or implied. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). Furthermore, malice is not only hatred, ill-will, or spite, as it is ordinarily defined, but it also includes the "condition of the mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *Id.* at 458, 128 S.E. 2d at 893.

In the case at bar, there is no question that defendant's act of running a red light and striking the car of the decedents resulted in their deaths. There is no evidence, however, express or implied, that these deaths were the result of any malice. Without this essential element there can be no crime of second degree murder.

The disposition of this case in no way prevents the State from prosecuting defendant for the offenses of involuntary manslaughter or death by vehicle (*see* C. Whitebread, Constitutional Criminal Procedure, § 23.6 *Appeal, Retrial, and Implied Acquittal* (1978), but the conviction on the three counts of second degree murder is

Reversed.

Judges WHICHARD and BECTON concur.

ROBERT G. PRYSE, SR. v. STRICKLAND LUMBER AND BUILDING SUPPLY, INC. AND JOHNS-MANVILLE SALES CORPORATION

No. 8311DC1

(Filed 7 February 1984)

1. **Rules of Civil Procedure § 55— entry of default—no abuse of discretion—no excusable neglect**

In an action against two defendants, there was no abuse of discretion in the trial court's finding that defendant Strickland's neglect in "failing to employ counsel or to follow-up the alleged mailing of the Summons and Complaint to [defendant] Johns-Manville Sales Corporation constitute[d] inexcusable neglect."

2. **Rules of Civil Procedure § 41.2— dismissal against one defendant not dismissal against other as well**

When plaintiff filed a voluntary dismissal against one defendant, he did not in effect dismiss the other defendant as well since plaintiff's basis for recovery had been his allegation that the two defendants were jointly and severally liable.

APPEAL by defendant Strickland Lumber and Building Supply, Inc. from *Lyon, Judge*. Judgment entered 26 October 1982 in District Court, JOHNSTON County. Heard in the Court of Appeals 29 November 1983.

Plaintiff filed this action 10 February 1982 against co-defendants Strickland Lumber and Building Supply, Inc. and Johns-Manville Sales Corporation alleging joint and several liability for breach of an express warranty and breach of a warranty of quality and fitness regarding roofing shingles manufactured by Johns-Manville and sold by Strickland. Service was accomplished against Johns-Manville on 12 February 1982 and against Strickland on 19 February 1982.

When no answer was filed by either defendant, plaintiff obtained entry of default on 23 March 1982 and default judgment on 19 April 1982. Strickland filed a motion and affidavit to set aside the default judgment on 9 June 1982. Johns-Manville filed like motions and affidavits on 17 June 1982. At a hearing on 23 August 1982, Johns-Manville's neglect in misplacing the summons and complaint at its home office in Denver, Colorado was found to be excusable and the entry of default and default judgment were set aside. On the other hand, Strickland's neglect in relying on Johns-

Manville to defend the action was found to be inexcusable, and, in that instance, the court left the entry of default and default judgment intact.

On 27 August 1982, Strickland filed a motion to amend the order of 23 August 1982, contending that, since plaintiff's causes of action involved joint and several liability, and since the entry of default and default judgment against Johns-Manville had been set aside, allowing Johns-Manville to now defend these claims on the merits, the default judgment entered against Strickland should also be set aside pending plaintiff's trial against Johns-Manville. Strickland further contended that entry of default could be left intact and, if liability were found against Johns-Manville, judgment could be reinstated. In addition, Strickland contended that if Johns-Manville successfully defended the suit, its defense would inure to Strickland's benefit.

On 7 October 1982, plaintiff filed a voluntary dismissal against Johns-Manville. On 28 October 1982, Strickland's motion to amend was heard, and the court ruled that plaintiff's voluntary dismissal did not affect the default judgment entered against Strickland and that plaintiff could, therefore, proceed against Strickland pursuant to the default judgment. From the court's ruling, Strickland appeals.

Mast, Tew, Armstrong & Morris, by L. Lamar Armstrong, Jr. and George B. Mast, for defendant-appellant.

L. Austin Stevens for plaintiff-appellee.

ARNOLD, Judge.

[1] Defendant Strickland first contends that the trial court erred in ordering entry of default and default judgment against Strickland, in that its negligence in failing to file an answer to plaintiff's complaint was excusable. Strickland argues that it was justified in taking no action, since it reasonably relied on defendant Johns-Manville to defend the suit.

A determination of the existence of good cause for setting aside an entry of default under Rule 55(d) rests in the sound discretion of the trial judge, and his ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. *Miller v.*

Miller, 24 N.C. App. 319, 210 S.E. 2d 438 (1974). After being served with a summons and complaint, Strickland, on the advice of a Johns-Manville representative, mailed the papers to that company's Atlanta office. There is no evidence that he did anything further. We are not persuaded that the trial court abused its discretion in finding that Strickland's neglect in "failing to employ counsel or to follow up the alleged mailing of the Summons and Complaint to Johns-Manville Sales Corporation constitutes inexcusable neglect."

[2] Strickland next urges that when plaintiff filed a voluntary dismissal against Johns-Manville he in effect dismissed against Strickland as well, since plaintiff's basis for recovery had been his allegation that the two defendants were jointly and severally liable. Rule 41 of the Rules of Civil Procedure allows a plaintiff to dismiss a claim without order of the court, subject only to certain situations not applicable to the case at bar. Moreover, it is well established that where negligence is joint and several, an injured party may choose to sue either of the joint tortfeasors separately. *Bell v. Lacey*, 248 N.C. 703, 104 S.E. 2d 833 (1958).

In the case at bar, plaintiff was initially able to proceed against either defendant. When his default judgment against Johns-Manville was set aside because of excusable neglect, he simply elected to act against Strickland. This decision in no way prevents Strickland from exercising his right to sue Johns-Manville for reimbursement if, in fact, it is ordered to compensate plaintiff. We, therefore, reject plaintiff's contention and the order of the trial court is

Affirmed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIAM ROBERT GROSS

No. 8325SC580

(Filed 7 February 1984)

Criminal Law § 91— speedy trial—date of indictment rather than date of arrest time from which tolling of period began

The date of defendant's indictment rather than the date that defendant was originally arrested was the correct date to begin tolling the 120-day period for speedy trial purposes where the original charges against defendant were dismissed pursuant to G.S. 15A-931 for lack of a report from the investigating officer, rather than G.S. 15A-703 for lack of a speedy trial or under a finding of no probable cause pursuant to G.S. 15A-612. After the charges were dismissed against defendant, he was indicted for the same offense less than a month later, and the indictment returned was the only indictment issued against defendant for the charges, and of the relevant events issued by the statute, the indictment was the last to occur.

STATE appeals from *Sitton, Judge*. Judgment entered 23 March 1983 in Superior Court, CATAWBA County. Heard in the Court of Appeals 10 January 1984.

On 20 October 1982, defendant was arrested on charges of felonious breaking and entering and felonious larceny (82CRS14922). These charges were dismissed by the State on 9 February 1983 pursuant to G.S. 15A-931, with the stated reason being "no report from investigating officer—three Grand Juries have passed."

On 7 March 1983, the grand jury indicted defendant for the felonious breaking and entering of Rays Cafe and Grocery and for the felonious larceny of $43.83 in personal property from the premises (83CRS4065). The charges in 82CRS14922 are the same charges as those contained in 83CRS4065. On 21 March 1983, defendant filed a motion to dismiss for lack of a speedy trial pursuant to G.S. 15A-703. The trial court dismissed the case with prejudice on 23 March 1983. The order dismissing the case occurred some 156 days after the date of defendant's arrest and some 16 days after the date of indictment. From that order the State gave notice of appeal.

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

J. David Abernethy for defendant-appellee.

ARNOLD, Judge.

The State contends that the trial court erred in concluding that the correct date by which to begin calculating the Speedy Trial Act time limitations was 20 October 1982, the date of defendant's arrest, rather than 7 March 1983, the date of indictment. This contention is based on the language of G.S. 15A-701(a1), which provides in part:

> . . . the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted . . . shall begin within the time limits specified below:
>
> . . . .
>
> (3) When a charge is dismissed, other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction . . ., then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge.

The disposition of this case depends upon whether the 120-day period during which defendant must have been brought to trial is deemed to run from the last event relative to the original charges, namely the arrest of defendant, or the last event relative to the new charge, that being his subsequent indictment, when charges are dismissed for reasons other than a finding of no probable cause pursuant to G.S. 15A-612 or G.S. 15A-703. We agree with the State that the date of defendant's indictment, not the date of arrest, is the correct date to begin tolling the 120-day period.

The original charges against defendant were dismissed pursuant to G.S. 15A-931, rather than G.S. 15A-703 or under a finding of no probable cause pursuant to G.S. 15A-612. After the charges

were dismissed against defendant on 9 February, he was indicted for the same offense less than a month later. The indictment returned by the grand jury on 7 March was the only indictment issued against defendant for these charges, and of the relevant event issued by the statute, to wit: arrest, service of criminal process, waiver of indictment, or indictment, it was the last to occur. *See State v. Simpson*, 60 N.C. App. 436, 299 S.E. 2d 257 (1983).

Defendant, however, places great significance in the words "for the original charge," maintaining that the voluntary dismissal taken by the State and the subsequent indictment creates, in effect, an entirely new charge, separate and distinct from the "original," which requires the 120 days to be measured from the date of arrest. This issue was recently decided by the North Carolina Supreme Court in *State v. Koberlein*, 309 N.C. 601, --- S.E. 2d --- (filed 3 November 1983).

In *Koberlein*, the court found no distinction between a dismissal based on the failure of the State to proceed with a probable cause hearing because of the unavailability of a prosecuting witness and a dismissal based on a finding of no probable cause. *Id.* In addition, the court held that when a charge is dismissed on a finding of no probable cause, "the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the listed items ('arrested, served with criminal process, waived an indictment, or was indicted') relating to the *new* charge rather than the original charge." *Id.* at 603, --- S.E. 2d at --- (citing *State v. Boltinhouse*, 49 N.C. App. 665 at 667, 272 S.E. 2d 148 at 150 (1980)) (emphasis added).

In the case at hand, the dismissal taken by the State pursuant to G.S. 15A-931 for lack of a report from the investigating officer is, in substance, no different than a dismissal based on the State's failure to proceed with a probable cause hearing because of the unavailability of a prosecuting witness. It should, therefore, be given the same effect as a dismissal based on a finding of no probable cause in considering the tolling of the Speedy Trial Act time period.

We find that the 120-day period began to run from 7 March 1983, since the indictment was the last of the relevant events to occur in relation to the "new" charge. It was error to dismiss the

case on 23 March 1983, only 16 days after the return of the indictment. The order of the trial court is

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JAMES MATTHEW WALKER

No. 835SC777

(Filed 7 February 1984)

Narcotics § 4.2— failure to instruct on defense of entrapment error

In a prosecution for possession with intent to sell cocaine, sale of cocaine, and conspiracy to sell and deliver cocaine, the trial court erred in failing to instruct on the defense of entrapment where the defendant's evidence tended to show that a confidential informant and defendant were lifelong friends; the informant introduced defendant to an SBI agent at a bar; the informant then asked defendant to obtain cocaine, but defendant refused; the next day the informant and the agent visited defendant's home and while the agent was in another room, the informant told defendant that he had a quarter ounce of cocaine, that he owed the agent money, and asked defendant to pretend that the cocaine was his so that the informant would not have to give the cocaine to the agent in repayment of the debt; that defendant at first refused but finally agreed to pretend that the cocaine was his; that several days later the informant returned to defendant's house and again asked defendant to obtain cocaine for him; that defendant refused; that the informant returned the next day and finally persuaded defendant to allow him to leave some cocaine at defendant's house while he went to pick up the agent; that the drugs were placed in a brown paper bag on defendant's bed; that the informant returned with the agent, who laid $2,000.00 on the bed, picked up the bag and left; that the informant stuck the money in his back pocket and followed the agent out the door; and that about 30 minutes later, the informant returned to defendant's home and thanked defendant for his help.

APPEAL by defendant from *Brown, Judge*. Judgment entered 16 February 1983 in NEW HANOVER County Superior Court. Heard in the Court of Appeals 20 January 1984.

Defendant was charged with and convicted of two charges of possession with intent to sell cocaine, two charges of sale of cocaine, and one charge of conspiracy to sell and deliver cocaine.

From judgments entered on the verdicts, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

William Norton Mason for defendant.

WELLS, Judge.

In one of his assignments of error, defendant contends that the trial court erred in refusing defendant's requested jury instruction on the defense of entrapment. We agree and order a new trial.

In *State v. Jamerson*, 64 N.C. App. 301, 307 S.E. 2d 436 (1983), we set out the rules under which a defendant is entitled to an entrapment instruction:

> In order to establish the defense of entrapment, the defendant must prove '(1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) . . . the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.' *State v. Walker*, 295 N.C. 510, 246 S.E. 2d 748 (1978).
>
> A defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant. *State v. Walker, supra, State v. Burnette*, 242 N.C. 164, 87 S.E. 2d 191 (1955). The instruction should be given even where the state's evidence conflicts with defendant's. *Id.*

While defendant's evidence on this issue clearly conflicted with the state's evidence, defendant's evidence, when viewed in the light most favorable to defendant, tended to show the following events and circumstances. Ricky Watson, a confidential informant, and defendant were lifelong friends. Watson introduced defendant to SBI Agent Burch at a bar on 12 May 1982, identifying her as an acquaintance named Debbie York. Watson then asked defendant to obtain cocaine, but defendant refused. The

next day Watson and Burch visited defendant's home and while Burch was in another room, Watson told defendant that he had a quarter ounce of cocaine. Watson said he owed Burch money, and asked defendant to pretend that the cocaine was his, so that Watson would not have to give the cocaine to Burch in repayment of his debt. Defendant refused, explaining that he was on probation and did not want any drugs in his house. Finally, however, as a result of Watson's urgings, defendant agreed to pretend that the cocaine was his.

On 18 May 1982, Watson returned to defendant's house and again asked defendant to obtain cocaine for him, explaining that he could make enough money from the sale to enable him to repay Burch. Defendant refused, saying he couldn't get any cocaine and was afraid to have drugs in his house. Watson returned the next day and finally persuaded defendant to allow him to leave some cocaine at defendant's house while he went to pick up Burch. Watson told defendant that he would return soon and pick up the drugs, which were placed in a brown paper bag on defendant's bed. Watson returned on 19 May with Burch, who laid $2,000.00 on the bed, picked up the bag and left. Watson stuffed the money in his back pocket and followed Burch out the door. About thirty minutes later, Watson returned to defendant's home and thanked defendant for his help.

We hold that this evidence was sufficient to entitle defendant to his requested jury instruction.

New trial.

Judges BRASWELL and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RODNEY MICHAEL McGEE

No. 8327SC437

(Filed 7 February 1984)

1. Criminal Law § 80— magistrate's order properly admitted into evidence

The trial court properly admitted into evidence a magistrate's order finding defendant in contempt of court even though the order was not identified

by a witness and no foundation was laid to establish its authenticity since G.S. 8-34 provides that "[c]opies of . . . documents, recorded or filed as records in any court" can be considered as competent evidence.

2. **Contempt of Court § 6.2— insufficiency of evidence**

The superior court erred in failing to grant defendant's motion to dismiss a contempt charge at the close of all the evidence where the magistrate's order of contempt was the only evidence offered at the de novo trial, and standing alone, it did not constitute sufficient evidence to find him in contempt.

APPEAL by defendant from *Lane, Judge*. Judgment entered 13 January 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 1 December 1983.

On 5 January 1983, defendant was arrested on charges of obstructing and delaying a Bessemer City police officer by refusing to get out of his van when ordered to do so. Defendant was found to be in contempt and was sentenced to 30 days in jail by the magistrate, L. D. Adams, for making a disrespectful statement to Adams and for calling the magistrate's office on 4 January and 5 January to repeatedly harass him. Defendant's appeal of the contempt charge was heard in Superior Court on 13 January 1983. After the court found defendant in contempt and ordered him into custody, defendant gave notice of appeal.

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

Frederick R. Stann for plaintiff appellant.

ARNOLD, Judge.

[1] Defendant first contends that the court erred in admitting into evidence the magistrate's order finding him in contempt of court because the document was not identified by a witness and no foundation was laid to establish its authenticity. We reject this contention. It is generally accepted that "[a] court will notice earlier proceedings in the same cause . . ." 1 Brandis on North Carolina Evidence, § 13 (2d Rev. Ed. 1982). In addition, certain documentary evidence is admissible without authentication if it is inherently reliable. *See In re Arthur*, 27 N.C. App. 227, 218 S.E. 2d 869 (1975), *reversed on other grounds*, 291 N.C. 640, 231 S.E.

2d 614 (1977). Furthermore, G.S. 8-34 provides that "[c]opies of . . . documents, recorded or filed as records in any court" can be considered as competent evidence. The order of the magistrate was properly admitted to determine whether he had the authority to hold defendant in contempt.

[2] Defendant next contends that the court erred in failing to grant his motion to dismiss at the close of all the evidence. He argues that even if the magistrate's order of contempt was properly admitted into evidence that document, standing alone, did not constitute sufficient evidence to find him in contempt. We agree, and find that defendant's motion to dismiss was improperly denied.

In ruling on a motion to dismiss in a criminal action, "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. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980). The only evidence offered at the de novo trial (G.S. 5A-17), however, was the magistrate's order, which was received in accordance with the court's finding that "the matter in issue is the judgment itself . . . the validity of that judgment." This evidence alone does not provide a sufficient basis to uphold the magistrate's finding of contempt. The document merely indicates that defendant told the magistrate, "Shut up fellow, I don't have to hear this" and that he called the magistrate's office on 4 January and 5 January. There is no independent evidence to show contempt by defendant. The order of the trial court holding defendant in contempt must be

Reversed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JOE DEAN GILLILAND

No. 8325SC639

(Filed 7 February 1984)

1. **Assault and Battery § 14.5— assault with a deadly weapon inflicting serious injury—sufficiency of evidence**

The evidence was sufficient in a prosecution for assault with a deadly weapon inflicting serious injury to withstand defendant's motion to dismiss where the evidence tended to show that after defendant struck the victim's wife or girlfriend, the victim and defendant started scuffling and the victim felt defendant sticking him with a knife; after the fight was over, the victim had four cuts on his body; the victim was carried to the hospital by ambulance and was treated in the emergency room; and where 46 stitches were put in his body as the result of his wounds.

2. **Assault and Battery § 15.6— instructions—victim's right of self-defense**

There was no error in the trial court's denial of defendant's motion for appropriate relief after his conviction of assault with a deadly weapon inflicting serious injury where the record indicated the court charged the jury as to the victim's right of self-defense when his wife was assaulted; and where after the verdict had been entered, the victim's "wife" testified that she had gone to a marriage ceremony with the victim but she was not divorced from her first husband at the time.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 27 January 1983 in Superior Court, BURKE County. Heard in the Court of Appeals 13 January 1984.

The defendant was tried for assault with a deadly weapon inflicting serious injury. The evidence for the State showed that defendant engaged in a fight with Ronnie Mull after the defendant had struck Ronnie Mull's wife or girl friend, Wanda Mull. Ronnie Mull testified that as they were "scuffling . . . I felt him sticking me with a knife. It was just like you was stung by a bee." After the fight was over, Ronnie Mull had four cuts on his body. He was carried to the hospital by ambulance and was treated in the emergency room. Forty-six stitches were put in his body as a result of his wounds. No one testified he or she saw a knife or other weapon.

The defendant was convicted as charged. He received the presumptive sentence of three years and appealed.

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

McMurray and McMurray, by John H. McMurray and Martha McMurray, for defendant appellant.

WEBB, Judge.

[1] The defendant assigns error to the denial of his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. He contends it should have been dismissed because there was no evidence that the defendant used a deadly weapon. No witness testified that he saw a weapon. We believe, however, there was sufficient circumstantial evidence that the defendant used a deadly weapon for the jury to so find. The State introduced evidence that the victim was severely cut. We believe the jury could infer from this that the defendant used a knife which could be found to be a deadly weapon. *See* 6 Strong's N.C. Index 3d, *Evidence* § 21 (1978) for a definition of circumstantial evidence.

We do not believe *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947); *State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931); and *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924), relied on by the defendant, are helpful to him. *Randolph* held that the weapon need not be offered in evidence. *Watkins* deals with the charge of the court as to how the jury determines whether a weapon is a deadly weapon. It does not deal with the question in this case, which is, whether the evidence is sufficient to be submitted to the jury. *Smith* deals with the question of whether a baseball bat used to kill a person is a deadly weapon as a matter of law.

The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant argues that his motion for appropriate relief should have been granted. The court charged the jury as to Ronnie Mull's right of self-defense when his wife was assaulted. After the verdict had been entered, Wanda Mull testified that she had gone through a marriage ceremony with Ronnie Mull but she was not divorced from her first husband at the time. The defendant argues that he did not receive as favorable a charge as he should have received on the right of Ronnie Mull to go to the aid of Wanda Mull. The judge

charged the jury that Ronnie Mull was entitled "to stand his ground on behalf of his wife and to use such force as his wife would have been allowed to use." The defendant, relying on *State v. Fields*, 268 N.C. 456, 150 S.E. 2d 852 (1966), argues that if the case had been tried according to the correct facts as to the relationship between Ronnie and Wanda Mull the court would not have charged that Ronnie had a right to act in self-defense of Wanda unless he reasonably believed she was being feloniously assaulted. Assuming the defendant is right as to the difference in the right of self-defense in the protection of others, we do not believe there was error in the charge in this case. Wanda Mull might not have been married to Ronnie Mull but she was not a stranger to him. He was on his own premises and saw one he loved assaulted. We believe he was justified in going to her defense.

No error.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. SAMUEL LAWRENCE WILLIAMS

No. 8310SC642

(Filed 7 February 1984)

Criminal Law § 62— results of polygraph test improperly admitted

In a prosecution for robbery with a firearm, the trial court erred in allowing into evidence the results from two polygraph tests administered to defendant.

Judge JOHNSON dissenting.

APPEAL by defendant from *Bowen, Judge*. Judgment entered 19 January 1983 in Superior Court, WAKE County. Heard in the Court of Appeals 16 January 1984.

Defendant was convicted of robbery with a firearm.

Attorney General Edmisten, by Dennis P. Myers, Assistant Attorney General, for the State.

Kimzey, Smith, McMillan and Roten, by Duncan A. McMillan, for defendant-appellant.

VAUGHN, Chief Judge.

Defendant raises several arguments on appeal, one of which we find to be of merit. Prior to trial, defendant, defense counsel, and the prosecutor stipulated to the admissibility at trial of polygraph evidence. On the day of trial, however, defendant moved to exclude this evidence. The trial judge denied defendant's motion and allowed into evidence the results from two polygraph tests administered to defendant. Defendant argues that the admission of these polygraph results and the accompanying testimony of the SBI polygraphist constituted prejudicial error. We agree.

In *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), our Supreme Court held that polygraph evidence is inadmissible even if the parties have stipulated to admissibility. The questionable reliability of and the undue weight a jury may give polygraph evidence are factors that remain even when parties have waived objections regarding admissibility. *See Id.*

The Court in *Grier* held that polygraph evidence would not be admissible in the retrial of that case or in the trial of any case commencing after the certification of the opinion.

The *Grier* opinion was filed 8 March 1983. The trial of the case before us was concluded on 19 January 1983. In *Grier*, the Court held that polygraph evidence was inherently unreliable. In the light of that decision, it is obvious that defendant in the present case was convicted, in part, on evidence the Supreme Court has held to be inherently unreliable.

The defendant here has properly raised the question and presented it on direct appeal. We, therefore, see no reason why we should not correct the error and allow a new trial in which the inherently unreliable evidence must be excluded.

The same conclusion was reached on similar facts by another panel of this Court in *State v. Knight*, 65 N.C. App. 595, --- S.E.

2d --- (filed 20 December 1983) with Wells, J., writing for the panel, Webb and Whichard, JJ., concurring. We are in accord with the reasoning and result in that case.

We will apply the rule in *Grier* to all cases coming to us on *direct appeal*, whether the case was tried before or after *Grier*, if, and only if, the question is properly raised and briefed.

New trial.

Judge WEBB concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent. It is clear that the majority has overruled the mandate of the Supreme Court in *Grier* which states unequivocally that the rule announced in *Grier* shall be applied prospectively. The trial of the case at bar occurred before the certification of the *Grier* opinion.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 FEBRUARY 1984

BOYKIN v. BOYKIN No. 837DC760	Wilson (81CVD588)	Affirmed
CRAVEN v. JONES No. 8319SC764	Randolph (82CVS507)	Dismissed
ELLER v. ELLER No. 8325DC194	Catawba (82CVD1755)	Affirmed
GILLESPIE v. GILLESPIE No. 838DC163	Wayne (81CVD1174)	Affirmed
IN RE HAMER No. 8311DC203	Lee (77J86)	Affirmed
IN THE MATTER OF CARPENTER No. 8327DC661	Gaston (82J123)	Reversed
JULIAN BAPTIST CHURCH, INC. v. BROWN No. 8318SC161	Guilford (80CVS3288) (80CVS4392) (80CVS5262) (81CVS3497)	Affirmed
LEONARD v. STULL No. 831DC182	Dare (82CVD285)	Affirmed
STATE v. BOONE No. 8325SC796	Catawba (82CRS14893)	No Error
STATE v. BOSTON No. 8321SC379	Forsyth (83CRS37836)	No Error
STATE v. BREAKFIELD No. 8327SC688	Gaston (82CRS27885)	No Error in Trial; Remanded for New Sentencing Hearing
STATE v. CHILDRESS No. 8317SC829	Surry (82CRS6913) (82CRS6914)	No Error
STATE v. EDMONDS No. 836SC641	Halifax (83CRS323)	No Error
STATE v. FIGGERS No. 834SC780	Duplin (82CRS7149)	No Error
STATE v. FREEMAN No. 836SC876	Bertie (82CRS3111)	No Error

STATE v. HARRIS No. 8320SC731	Moore (83CRS213) (83CRS214) (83CRS215)	Affirmed
STATE v. HOLMES No. 834SC793	Duplin (82CRS7148)	No Error
STATE v. SCOTT No. 831SC188	Pasquotank (77CRS1412)	No Error
STATE v. SMITH No. 8316SC540	Scotland (82CRS1074) (82CRS5046) (82CRS5047) (82CRS5048)	No Error in Trial; Remanded for New Sentencing Hearing
STATE v. TAYLOR No. 8327SC689	Lincoln (82CRS3502)	Remanded for Resentencing
STATE v. THOMAS & BATTLE No. 838SC730	Lenoir (82CRS7174) (82CRS7176)	Remanded for Resentencing
STATE v. WINGO No. 8326SC288	Mecklenburg (82CRS34602)	No Error
WISE v. LAUGHRIDGE No. 8329SC51	McDowell (76CVS268)	Affirmed

DOUGLAS BISHOP, AND WIFE PEGGY BISHOP v. MARIE C. REINHOLD, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF ERNEST M. REINHOLD

No. 8228SC1353

(Filed 7 February 1984)

1. **Appeal and Error § 6.2; Limitation of Actions § 4.1; Trespass §§ 3, 8— statute of limitations concerning trespass to property—continuing trespass—no interlocutory appeal—award of damages improper**

In an action for trespass in which plaintiffs sought removal of a home partially built on their land, G.S. 1-52(3) operated to bar the recovery of money damages for any acts committed in the initial trespass of 1973 or acts which continued to cause the plaintiffs money damages up to the three years prior to the institution of the action. Even though defendant's trespass is considered a continuing trespass, the appeal was not interlocutory since damages were awarded for only past acts of trespass. However, the award of monetary damages by the jury here was improper since according to G.S. 1A-1, Rule 9(g), each item of special damages must be averred, and the plaintiffs pled only "removal" of the house, and have, therefore, limited their choice of relief.

2. **Trespass § 8— damages for trespass on real property**

A plaintiff in an appropriate case of trespass to real property may prove the value of his monetary loss through the use of the measure of the difference between the fair market value before and after the trespass or the rental value of the land actually occupied, plus the decrease in the rental value of the remainder of the land caused by the presence of the encroaching structure. In addition the injured plaintiff can compel the removal of obstructions placed on his property by a defendant.

3. **Trespass § 6— duty of trial judge and jury when boundary is in dispute**

There was no merit to defendants' assignment of error that the trial court erred by refusing to determine as a matter of law the sufficiency of the beginning point in the plaintiffs' deed since it is the duty of the trial judge as a matter of law to determine what the boundary is and it is the jury's duty to establish where the line is located on the ground. In this case, the judge was not called upon to proclaim any boundaries, and the real controversy arose over where the boundary was on the ground.

4. **Trespass § 7— sufficiency of evidence**

There was no abuse of discretion by the trial judge on his denial of a new trial on either the first issue in which the jury found that the defendants had wrongfully trespassed upon the plaintiffs' land or on the second issue in which the jury found that the land in controversy was not conveyed by defendants to plaintiffs by reason of a mutual mistake of defendants and plaintiffs or by reason of mistake or inadvertence of the draftsman.

APPEAL by defendants from *Friday, Judge.* Judgment entered 7 July 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 November 1983.

Redmond, Stevens, Loftin & Currie by Gwynn C. Radeker for plaintiff appellees.

Adams, Hendon, Carson & Crow by George Ward Hendon for defendant appellants.

BRASWELL, Judge.

In the construction of their new dwelling house the defendants Reinhold partially erected the house on the adjoining, unimproved, lot of the plaintiffs, the Bishops. In this action for trespass the Bishops sue for removal of the building. The jury by its verdict found that the defendants had committed a wrongful trespass, that the deed from the Reinholds to the Bishops did not contain a mutual mistake of the parties or a mistake or inadvertence of the draftsman as to the description of the lot, and did award the Bishops $3,250 in damages. The judgment decreed that the encroachment constituted a continuing trespass, that the $3,250 represented "damages for such wrongful trespass to the date of trial," and that jurisdiction was retained in the trial court for a future trial which would assess "rental value (or its equivalent)" from the date of the first trial to the date of the future, or second, trial, and that the future jury should "ascertain the reasonable cost of removing the structure" from the Bishops' premises. Defendants appeal.

Of the seven questions presented by the Reinholds in their brief, we find that two have merit. First, it was error for the trial court to fail to apply the three-year statute of limitations for a continuing trespass, G.S. 1-52(3), to the undisputed evidence, at the close of all the evidence. Second, it was error for the trial court to allow into evidence any testimony about the Bishop's travel expenses to attend court (or deposition hearing), and error to allow any evidence of the amount of the survey fees. No special damages were pled, nor was there any motion to amend the pleadings at the close of the evidence to conform to the evidence presented. For these errors which were prejudicial to a part of

the defendants' case, we grant a partial new trial, as further reflected.

To understand these assignments of error it is essential to review the factual history of the parties' dealings. Douglas Bishop was a Colonel in the U. S. Air Force and during the years in question was stationed in widely-scattered places. In early spring of 1972 the Bishops, then living in Texas, became interested in buying real property in western North Carolina. E. M. Reinhold, husband of codefendant Marie C. Reinhold, who had several lots for sale in their "Town Mountain Estates," made contact with the Bishops. [Mr. Reinhold died between the date of trial and before judgment was filed. His wife, the other defendant, became his executor, and by court order was made a party in the representative capacity for him.]

After viewing various lots the Bishops agreed to purchase a particular lot and signed a sales contract prepared by Mr. Reinhold. Later, Mr. Reinhold informed the Bishops that he and his wife had promised that particular lot to a relative, and stated that if the Bishops would agree to tear up the sales contract the Reinholds would instead sell to them a lot east of the Reinholds' residence, which lot the Bishops had seen during their trip to Buncombe County. The Bishops did agree, and a new sales contract was signed on 7 July 1972. The defendants Reinhold caused a deed to be prepared dated 7 July 1972 and recorded in Book 1065 at Page 85.

In September of 1973 Colonel Bishop returned to the Town Mountain Estates. He noticed many changes in the area surrounding his lot. A swimming pool had been constructed to the left side of his lot upon the Reinholds' old residence lot. Adjoining the right side of his lot Colonel Bishop saw that a new dwelling house had been built, which by conversation he discovered to be the new residence of the defendants Reinhold. [They had built and moved from the left to the right of the plaintiffs.]

In 1978 the Bishops decided to sell their lot in Town Mountain Estates. Through a local realtor a potential buyer was located. To satisfy the requirements of the new buyer the Bishops had the lot surveyed. In May 1980 the surveyor completed his work, tendered the plat, and billed the Bishops $400 which was paid. The sale fell through upon the discovery by survey that the

Reinholds' new home had been partially built on the Bishops' lot. Damages resulting from the Bishops' present inability to sell the lot as well as their travel expenses for two trips from Hawaii, the place where plaintiffs were living when the lawsuit was filed on 11 September 1980, were allowed into evidence.

While testifying Colonel Bishop stated that during his 1978 visit to the lot that "[i]t had not changed any from what I remembered it when I was there in '73, so it was still basically the same." George Keller, a neighbor who owned a lot on the south of plaintiffs' lot and across the street, testified that he realized in 1973 when construction began that the Reinholds were building on the plaintiffs' lot. Keller stated, "just by eye or even by tape it was easy to ascertain that Mr. Reinhold was building" on the plaintiffs' land, but the Reinholds continued to build. As to why he did not do something about it earlier, Colonel Bishop replied, "I first did something about it when I first realized that there was an encroachment on my property when the Anders survey [May 1980] revealed the encroachment." Colonel Bishop did not object in 1972-73 because: "[W]hy should I object? At that time when [Mr. Reinhold] told me that's where [the line] was located, I had no reason not to believe it."

A continuing trespass is a peculiar animal in the law. The difficulty arises as to whether a plaintiff may maintain successive actions, as the physical trespass continues, which will subject a defendant to multiple suits, or whether he must recover all damages, past, present, and future, in a single action. This determination naturally controls the running of the statute of limitations. W. Prosser, Handbook of the Law of Torts § 13 (4th ed. 1971). Ordinarily, each day the trespass continues a new wrong is committed, which in turn bears a new statute of limitations.

[1] At the outset the question has been raised as to whether this appeal is interlocutory. We answer no, because any appeal in a continuing trespass case that has awarded damages for only past acts of trespass is final as to the subject covered, while damages awarded at any subsequent trial, although stemming from the same continuing trespass, are based on further or continuing wrong as the encroachment remains. However, "in order to avoid a multiplicity of actions at law for damages," it lies within the province of the trial judge in a continuing trespass case to grant

"equitable relief in the form of a permanent injunction" as a proper remedy. *Conrad v. Jones*, 31 N.C. App. 75, 78, 228 S.E. 2d 618, 619 (1976).

In the case of an actual encroachment, such as a building on another's land, North Carolina, in accord with the majority view, holds that a plaintiff is limited to a single recovery of all damages. *Prosser, supra. See also Cherry v. Canal Co.*, 140 N.C. 422, 53 S.E. 138 (1906). *But compare Phillips v. Chesson*, 231 N.C. 566, 58 S.E. 2d 343 (1950). The complaint here is in accord with this view as factually it seeks only the removal of the building itself from the lot. While the prayer for relief does mention damages—"such damages as Plaintiffs may be entitled"—"[t]he nature of plaintiff's action and the relief to which plaintiff is entitled are to be determined by the facts alleged in the complaint and established by the evidence, and not the prayer for relief." 10 Strong, N.C. Index 3d, *Pleadings*, § 7 (1977). In *Lightner v. Raleigh*, 206 N.C. 496, 174 S.E. 272 (1934), the Supreme Court stated that whether a trespass was continuing or recurring depended on whether the damages could be ascertained and recovered in a single action. If the damages cannot be ascertained all at once, then successive actions may be brought to recover damages as they accrue. Here, the defendants' house has been located on the Bishops' lot for seven years and we can see no reason why all relief cannot be granted in this one action, and in one trial, as the rule indicates.

In a factually similar continuing trespass case, *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 175 S.E. 2d 354 (1970), a house was wrongfully constructed on the plaintiffs' land by the defendant. Although the defendant's appeal was based on the measure of damages used in the judge's instructions to the jury, the court added that "since the defendant is not a public authority or clothed with any right of eminent domain, the plaintiffs, as the landowners, could elect either to keep the house on their lot or demand that the defendant remove it and seek damages for the wrongful trespass." *Id.* at 642, 175 S.E. 2d at 357. The *Terry* court also seems to suggest that all damages must be recovered in one action. We hold, therefore, that the Bishops having chosen to sue for the removal of the house should not be allowed to maintain successive actions.

We now turn to a closer look at the statute of limitations (G.S. 1-52(3)). It provides that an action must be brought within three years.

> For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

In construing this statute our Supreme Court said in *Sample v. Lumber Co.*, 150 N.C. 161, 165-66, 63 S.E. 731, 732 (1909):

> True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such actions shall be commenced within three years from the original trespass and not thereafter; but this term, "continuing trespass," was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some *quasi*-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of the wrong.

See Teeter v. Telegraph Co., 172 N.C. 784, 90 S.E. 941 (1916). The wrongful maintenance of a portion of the defendants' dwelling house on the plaintiffs' lot is a separate and independent trespass each day it so remains and the three-year statute for removal begins to run each day the encroaching structure remains upon the plaintiffs' land. Any action to remove the encroachment, as in an action for compensation for the easement, or for the fee by adverse possession would not be barred until defendants had been in continuous use thereof for a period of twenty years so as to acquire the right by prescription. *See Love v. Telegraph Co.*, 221 N.C. 469, 20 S.E. 2d 337 (1942). To deny plaintiffs a right of action on 11 September 1980, when the complaint was filed, would be to allow the defendants a right of eminent domain as private persons (and without the payment of just compensation) or grant defendants a permanent prescriptive easement to use the plaintiffs' land. This the law will not do, as the defendants have not been in possession for 20 years from 1973, the date the house was constructed. Similar rationales have been applied to nuisances

and to renewing trespasses.[1] *Anderson v. Waynesville,* 203 N.C. 37, 164 S.E. 583 (1932).

We hold, therefore, that G.S. 1-52(3) operates in the present case to bar the recovery of money damages for any acts committed in the initial trespass of 1973, or which acts continued to cause the plaintiffs money damages up to three years prior to the institution of this action. Thus, the cut-off date is 11 September 1977. There are no allegations in the complaint for increased damages since 1977 from the continuing trespass. No special damages, such as survey fees, since 1977 are alleged. According to G.S. 1A-1, Rule 9(g) of the Rules of Civil Procedure, each item of special damages must be averred. Also, the underlying facts must be alleged so as to inform the defendant of the nature of the damages sought. *Stanford v. Owens,* 46 N.C. App. 388, 265 S.E. 2d 617, *disc. rev. denied,* 301 N.C. 95 (1980). The only claim for relief not barred here is for the actual removal of that part of the house which remains constructed upon the plaintiffs' lot. The award of monetary damages by the jury here was improper. While the evidence shows that the plaintiffs lost a sale of the lot in 1980, and although evidence of the difference in market value of the lot before and after the lost sale would be admissible in some proper case where it arose on the pleadings, for lack of a proper pleading of this item as damages, the plaintiffs here may not use it as their measure of damages. These plaintiffs chose only "removal" and have, therefore, limited their choice of relief. The trial court improperly admitted evidence of travel expenses and survey fees and wrongly allowed them to be recovered.

The defendants also assigned as error the evidence which was admitted concerning the rental value of plaintiffs' lot. While in a proper case rental value as one of the measures of damages may be used, it is out of place in this case with "removal" of the

1. *Galloway v. Pace Oil Co.,* 62 N.C. App. 213, 302 S.E. 2d 472 (1983), is a comprehensive opinion analyzing G.S. 1-52(3) and continuing trespasses in the nature of the ponding of water. Because there is a distinction between the defendant's wrong such as building a structure which impedes natural water drainage, and the actual trespass, such as the rainfall that has ponded, it is possible to avoid G.S. 1-52(3) by terming the trespass intermittent rather than continuing. In the present case, the defendant's wrong is the trespass which is clearly continuing. Therefore, *Galloway* is not cited as authority in this opinion nor the cases cited therein where the trespasses have been renewing, recurring, or intermittent in nature.

encroachment being the remedy chosen by the plaintiffs' complaint.

[2] What is the measure of damages for trespass on real property? In *Sanderlin v. Shaw*, 51 N.C. (6 Jones) 225, 229 (1858), the court held that "the plaintiff 'was entitled to recover damages for the loss he had sustained, if that loss was connected immediately with the act of the defendant.' " In *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E. 2d 524, 528 (1973), it was said that a trespasser "would be liable for all damage proximately resulting from his wrongful entry and, at least, for nominal damages." In *Academy of Dance Arts v. Bates*, 1 N.C. App. 333, 336, 161 S.E. 2d 762, 764-65 (1968), our Court reviewed the principles of law in trespass cases. It cited *Lee v. Stewart*, 218 N.C. 287, 10 S.E. 2d 804 (1940), which said,

> "An invasion of the close of another . . . constitutes a trespass. * * * Where a trespass is shown the party aggrieved is entitled at least to nominal damages. * * *" In an action in trespass, "the defendant is liable for all damages which proximately resulted from his illegal act. In law he is required to contemplate all damages which proximately resulted from his wrongful act whether or not produced intentionally or through negligence. 'It is wholly immaterial whether the defendant in committing the trespass actually contemplated this, or any other species of damages, to the plaintiff.' *Johnson v. R.R.*, 140 N.C. 574."

Under these principles of damages, a plaintiff in an appropriate case of trespass may prove the value of his monetary loss through the use of the measure of the difference between the fair market value before and after the trespass (*see Hill v. Town of Hillsborough*, 48 N.C. App. 553, 559, 269 S.E. 2d 303, 306 (1980)), or the rental value of the land actually occupied, plus the decrease in the rental value of the remainder of the land caused by the presence of the encroaching structure (*see Leigh v. Mfg. Co.*, 132 N.C. 167, 43 S.E. 632 (1903)). In certain cases fair rental value may be received into evidence regardless of operating losses shown by the defendant. *See Development Corp. v. James*, 58 N.C. App. 506, 294 S.E. 2d 23, *disc. rev. denied*, 306 N.C. 740, 295 S.E. 2d 763 (1982). In addition the injured plaintiff can compel the removal of obstructions placed on his property by a defend-

ant. *See Academy of Dance Arts v. Bates, supra*, at 339, 161 S.E. 2d at 766: "all dirt, stones, concrete slabs, tree trunks."

[3] The defendants' assignment of error that the trial court erred by refusing to determine as a matter of law the sufficiency of the beginning point in the plaintiffs' deed is without merit. When a boundary is in dispute, it is the duty of the trial judge as a matter of law to determine what the boundary is and it is the jury's duty to establish where the line is located on the ground. *Combs v. Woodie*, 53 N.C. App. 789, 281 S.E. 2d 705 (1981).

In the present case neither party disputes the validity of the plaintiffs' deed (furnished by defendants) as describing a certain piece of land by metes and bounds. Even the counterclaim asked only for reformation, alleging a mutual mistake of the parties or inadvertence or mistake in the draftsman, and states: "[T]he Defendants conveyed real property to the Plaintiffs in error and which lay farther east of the property intended to be conveyed." Thus, the judge was not called upon in this case to proclaim any boundaries.

The real controversy arises over where this boundary is on the ground, what method the jury should use in locating the boundary, and if the plaintiffs' property has been encroached upon by the defendants' house. The plaintiffs' witness, Ray Anders, a registered land surveyor, stated that because the deed's beginning point was indeterminable he had to use other calls in the description to establish a beginning point in order to survey the property. E. M. Reinhold, on the other hand, testified that the beginning call could be ascertained and stated where he said it was located on the property.

The beginning point in the description in the plaintiffs' deed reads:

> BEGINNING on a stake in the center of Sunrise Summit Drive (also known as "B" Drive), at the Southeast corner of the property where E. M. Reinhold now resides . . . .

When he was cross-examined about the beginning point, Mr. Anders, the surveyor, explained:

> I saw that there in the deed before I even started doing any surveying. It's true that I testified earlier that "I tried to

> place the beginning point. It would have been in an entirely different place, because I didn't know where he now resides." . . . So then I went on to look for the other monument, the CATV corner and the Keller corner.

Also, Mr. Anders continued to testify without objection and explained that when he first went to the area of the property he "didn't know where Sunrise Summit Drive was," and found out by making inquiries, that he had a conversation with Mr. Reinhold to help him determine where Mr. Reinhold lived as of the date of the deed, and that he looked at a map brought out by Mr. Reinhold. When counsel next sought to pinpoint the southeast corner of the Reinhold residence lot as of 1972 in accordance with the defendants' theory of location, the surveyor replied, "I didn't rightfully know that that was the southeast corner."

Mr. Anders further pointed out that "there was really no stake here," referring to defendant's contention of "a stake in the center of Sunrise Summit Drive." However, he did find an offset iron and a concrete monument as otherwise indicated on the plat being shown to him. Finally, Mr. Anders testified:

> I ignored that as the beginning corner of the Bishop property because I felt in my mind that that was not certain enough to be a corner; so I went and used the CATV corner and the Keller corner and backed into a beginning point.
>
> . . . If I had this description in the sales agreement to go by and I didn't have the deed from Reinhold to Bishop to go by, I could not locate that property. . . .

We would also point out that from a survey made by defendants the new house was not located upon the Bishop lot. On Mr. Anders' survey, a portion of the new house was upon the Bishop lot. There is a 50-foot difference in the two surveys. The 50-foot strip lies to the western side of the Bishop lot. Since the Reinholds owned all of the land at an earlier time, and since the 50-foot section adjoins the 1972 residence of the Reinholds, it would appear from this record that the 50-foot section still is owned by the defendants Reinhold. As indicated in *Cutts v. Casey*, 271 N.C. 165, 168, 155 S.E. 2d 519, 521 (1967), *remanded on other grounds*, 278 N.C. 390, 180 S.E. 2d 297 (1971), *quoting Batson v. Bell*, 249 N.C. 718, 719, 107 S.E. 2d 562, 563 (1959):

"If a particular corner is unknown and cannot be determined by adhering to the directions in the sequence specified, it is permissible to go to a subsequent known or established corner and by reversing the direction fix the location of the unknown corner. This backtracking is permissible only because it permits the location of an otherwise unknown corner."

[4] In addition, we see no error in the trial court's denial of the defendants' motion for a judgment notwithstanding the verdict or denial of the motion for a new trial as to the first and second issues. By its answer to the first issue the jury found that the defendants had wrongfully trespassed upon the plaintiffs' land. By its answer to the second issue the jury found that the land in controversy was not conveyed by defendants to plaintiffs by reason of a mutual mistake of defendants and plaintiffs or by reason of mistake or inadvertence of the draftsman.

The standard of review for determining the appropriateness for granting a judgment notwithstanding the verdict is the same standard applicable to a motion for a directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). We hold from the evidence that the plaintiffs did present a prima facie case of trespass on which the jury was properly allowed to pass and which would support a verdict for plaintiffs on the first issue. The second issue, on mistake or inadvertence, arose from the counterclaim. The evidence presented a question for the jury, and the jury, within its sole province, decided the facts against the defendants. The evidence was sufficient to support the result.

The decision on whether to grant a new trial on the issues rested in the sound discretion of the trial judge. *Sizemore v. Raxter*, 58 N.C. App. 236, 293 S.E. 2d 294, *disc. rev. denied*, 306 N.C. 744, 295 S.E. 2d 480 (1982). We hold that the record discloses no abuse of discretion by the trial judge on his denial of a new trial on either the first or second issue, and his ruling is upheld.

We have examined all the other assignments of error and find no error in any of them.

The third, and last, issue submitted was the damage issue. As shown above, in this case it was error to allow monetary damages. Ordinarily, any error in the damage issue would warrant a new trial on damages. However, since the plaintiffs are not en-

titled in law on these facts to money damages, and are entitled to a removal of the structure that encroaches upon their lot, the jury having found there was a trespass, the plaintiffs are entitled to a mandatory injunction requiring a removal of the encroachment (*see O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937)), which injunction will be enforced under the contempt powers of the court. No new trial, as that term is usually used, is required. Based upon the jury's verdict to the first issue of trespass the case is now remanded to the Superior Court of Buncombe County to issue a new judgment which shall strike the award of monetary damages, and which shall grant a mandatory injunction of removal of all that part of the defendants' dwelling house that sits upon the plaintiffs' land as shown in the evidence by the plat of the Anders' survey. The removal shall be at the sole expense of the defendants.

Modified in part, affirmed in part, and remanded for new judgment in accordance with this opinion.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. JOSEPH HEDGEPETH

No. 8310SC154

(Filed 7 February 1984)

1. **Jury § 6.3— voir dire examination—error to exclude question concerning ability of jurors to limit consideration of defendant's prior criminal record**

The trial court erred in refusing to allow defendant's attorney to question prospective jurors regarding their willingness and ability to follow the judge's instructions that they were to consider defendant's prior criminal record only for purposes of determining his credibility as a witness since, because of the similarity of the prior crimes to the one with which defendant was charged, rape, there was a real danger that a juror might consider those convictions as substantive evidence of defendant's guilt of the present rape charge. It was, therefore, crucial for defense counsel to know if a juror could follow the law and consider defendant's prior convictions only as they bore on credibility. G.S. 15A-1214(c).

2. Criminal Law § 86— credibility of defendant—direct examination concerning prior criminal record—proper

The trial court erred in refusing to allow defendant's counsel to ask defendant on direct examination about his prior criminal convictions since defendant was virtually assured of being cross-examined about his prior record, and defense counsel should have been allowed to question defendant on direct examination regarding his criminal record in order to enhance his credibility.

3. Criminal Law § 86.2— error to allow State to ask defendant about plea of nolo contendere

The State could not ask the defendant about a plea of *nolo contendere* for purposes of impeachment by prior convictions since a plea of *nolo contendere* is not a conviction; it is an implied admission of guilt only for the purposes of the case in which it is entered.

Judge HEDRICK concurs in the result.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 11 October 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 20 October 1983.

Attorney General Rufus Edmisten, by Assistant Attorney General Richard H. Carlton, for the State.

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

BECTON, Judge.

Defendant was indicted for first degree rape. His first trial on this charge ended in a hung jury. He was convicted of second degree rape at a second trial and was sentenced to 18 years in prison.

I

The dispositive issues on appeal relate to (a) the trial court's refusal to allow defendant's attorney to question prospective jurors regarding their willingness and ability to follow the judge's instructions regarding their consideration of defendant's criminal record; (b) the trial court's refusal to allow the defendant to disclose his criminal record on direct examination; and (c) the trial court's allowing the State to impeach defendant by questioning him about a plea of *nolo contendere*. For the reasons that follow, we order a new trial.

II

The prosecuting witness testified that, after she and a girlfriend drank beer at a few taverns in Raleigh on the evening of 10 October 1981, the two of them walked to the Fayetteville Street Mall in downtown Raleigh, where they parted. Later, as the prosecuting witness walked down the street, she was met by defendant, who began talking to her. According to her testimony, defendant suddenly grabbed her and pushed her to the ground in a grassy area. Defendant then beat, choked, and forcibly had sexual intercourse with her. After they had intercourse, defendant offered to call a cab for her at his house. She walked with him to a house where, instead of calling a cab, defendant told her to remove her clothes and to get in bed. She had sexual intercourse with defendant seven or eight times that night, submitting because defendant threatened to "put [her] in the freezer box," and because one time she saw defendant with a knife. Further, every time she tried to run, defendant hit her.

The next morning, defendant walked her to a bus stop near a coffee shop, It was daylight, and there were other people near the bus stop. When the prosecuting witness declined defendant's offer to buy her coffee, defendant left her alone for approximately ten minutes while he was in the coffee shop. When defendant returned from the coffee shop, he gave her a few dollars and some change to get a bus. She then went inside the coffee shop and telephoned her girlfriend, who agreed to meet her at the court house. When she came back out, defendant was gone.

The prosecuting witness was examined later that morning at Wake Medical Center. The examining physician testified that she had prominent contusions about the face, neck and left leg, which had been sustained within the past twelve to twenty-four hours. He performed routine sexual assault examinations and did not notice anything particularly remarkable. There was no evidence of trauma on the pelvic examination.

Ms. Boykin, the girlfriend, testified that the prosecuting witness did not have any marks or bruises on her person when she last saw her on the night in question. When they met the next morning, the prosecuting witness' hair was messed up, and she had bruises all over her neck. Three other people who had

seen the prosecuting witness the night before also testified that they observed no bruises or marks on her that night.

The prosecuting witness at some point identified the house where the alleged rape occurred, although it was a different house than the one she had identified initially. However, she was unable at any time to locate for police the grassy area where she was first allegedly raped.

Defendant's testimony was altogether different. He testified that he was driving down the street when he saw the prosecuting witness standing on the corner. He pulled over and asked her what she was doing. She told him "she was out having fun." He replied that he "would like to have some fun with her." She got into his car, and he drove to his house, where he lived with his mother and two children. After they went into the house, the prosecuting witness asked for twenty dollars. After he gave her fifteen dollars, she got in bed and had intercourse with him. The next morning, he walked her to the bus stop because his car would not start. After he gave her twenty cents to make a phone call, she disappeared.

III

[1] Defendant's first contention is that the trial court erred in refusing to allow his attorney to question prospective jurors regarding their willingness and ability to follow the judge's instructions that they were to consider defendant's prior criminal record only for purposes of determining his credibility as a witness.

Pursuant to N.C. Gen. Stat. § 15A-1214(c) (1978), a defendant's counsel is allowed to question prospective jurors individually regarding their competence and fitness to serve as jurors to determine whether there is a basis to challenge for cause or to exercise a peremptory challenge. "Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him." *State v. Thomas*, 294 N.C. 105, 115, 240 S.E. 2d 426, 434 (1978). Indeed, our jury selection system "permit[s] parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors." *State v. Woods*, 286 N.C. 612, 619, 213 S.E. 2d 214, 220 (1975), *death*

sentence vacated, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3207 (1976).

It is true that G.S. § 15A-1214(c) does not permit counsel to ask jurors the "kind of verdict they would return under certain named circumstances" or to "fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided"; however, counsel is permitted to ask jurors if they would follow the trial judge's instructions. *State v. Phillips*, 300 N.C. 678, 682, 268 S.E. 2d 452, 455 (1980). In *Phillips*, the defense counsel asked a prospective juror if the defendant would have to prove anything to her before defendant would be entitled to a verdict of not guilty. At that point, the trial court intervened, but permitted counsel to ask all twelve jurors if they would follow the judge's instructions that the burden is on the State to prove the defendant guilty beyond a reasonable doubt.

In the present case, defendant's counsel was not "fishing" or "staking the jurors out," by questioning them as to the kind of verdict they would render or how they would be inclined to vote under a particular set of facts. *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3204 (1976). Defendant's counsel merely wanted to ask the jurors the same type of question the trial court allowed and which the Supreme Court approved in *Phillips*, that is, whether the juror would be able to follow the judge's instructions, in this case, regarding their consideration of defendant's prior convictions.

The request was squarely put to the trial judge. The following occurred just prior to jury *voir dire*:

> MR. CRUMPLER: Will I be prohibited from asking the juror whether—well, first of all, will I be prohibited from informing the jury that my client is going to testify and it will come out in evidence that he has a criminal record *and if the Court instructs the jurors* that may be considered only for the purpose of determining his credibility would it—*would they follow the Court's instructions*. [Emphasis added.]
>
> May I ask such a question?

THE COURT: Flatly you are prohibited from doing so.

Further, the trial court was fully aware of defendant's contentions as they had already been asserted in pre-trial motions and an affidavit from defense counsel. By way of example, defense counsel stated the following, among other things, in his affidavit:

> 2. I have discussed the case at length with my client and have read a partial transcript of the last trial. My client's criminal record was put in issue at that trial, obviously for the purposes of impeachment although the district attorney, Mike Payne, asked about other offenses that my client denied being convicted for. Apparently my client has no record of convictions except in Wake County, North Carolina. In looking through the records in the Office of the Clerk of Superior Court of Wake County and in talking with my client, it appears that his criminal record of convictions is confined to the following:
>
> a. 1962—assault with intent to commit rape and assault on a female, and a subsequent escape;
>
> . . .
>
> c. 1971—assault and battery;
>
> . . .
>
> e. 1978—assault with intent to commit rape (upon a plea of no contest);
>
> f. 1981—assault on a female (his sister).
>
> 3. My client believes that the only attorneys he has ever had representing him were me (for the 1978 plea of no contest to assault with intent to commit rape and presently) and Howard Manning, Jr. in this case. Particularly, he does not recall having an attorney in 1962. . . . To the best of his recollection he does not believe that he ever signed a waiver of his right to appointed counsel, and he does not believe that he was in a position to employ an attorney in those other instances.
>
> . . .

6. I am very much concerned, based upon my experience as a trial attorney, that numerous questions concerning Mr. Hedgepeth's record could be inflammatory and create bias in the jury against him. Moreover, I did review the court files for the two assault offenses in 1962. There is no reference in the files indicating that Mr. Hedgepeth had an attorney. Further, from the files it appears that he was 15 years old at the time of those offenses; he was processed through the domestic relations court and bound over to Superior Court. Considering the nature of this case, a rape case, I am particularly concerned that those assault offenses could inflame the jury even though they are nearly 20 years old. It seems to me that the probative value with respect to credibility of those offenses in particular is outweighed by their inflammatory nature.

Based on the district attorney's questions at the first trial which ended in a hung jury, defense counsel had every reason to believe that the State would proceed in similar fashion. And the State did. Relevant portions of the transcript follow:

Q. Is it correct that in 1981 you were convicted of an assault on a female charge against your sister?

A. Yes, I were.

Q. And is it correct that in 1978 you plead no contest and received an active sentence in the penitentiary for a charge of assault with intent to commit rape?

A. Yes, I did.

Q. The victim in that case was a relatively young white female, is that correct?

MR. CRUMPLER: Objection.

THE COURT: Overruled.

A. Yes.

THE COURT: You may answer.

A. Yes, it were.

. . .

Q. Mr. Hedgepeth, is it correct to say that in the year 1962 that you on two separate occasions committed acts of violence against female persons?

A. Yes.

MR. CRUMPLER: Objection.

THE COURT: Overruled.

Q. Do you now recall the names of the victims involved in those two incidents?

A. No.

Q. And at least one of those incidents was a physical assault of a sexual nature, was it not?

MR. CRUMPLER: Objection.

THE COURT: Overruled. You may answer.

A. Yes, it were.

Q. Is it accurate, Mr. Hedgepeth, to say that in the year 1969 you committed two separate assaults, one against a female and one against another person?

A. I do not think—I do not—

. . .

A. I do not recall in '69, no, sir, I don't.

Q. Mr. Hedgepeth, isn't it correct that you were convicted of two separate assaults in 1969, one being an assault on a female for which you got a ten-day sentence and the other being an assault against some other person for which you got a thirty-day sentence?

A. No, sir, it's not.

. . .

Because of the similarity of these prior crimes to the one with which defendant was charged, rape, there was a real danger that a juror might consider these convictions as substantive evidence of defendant's guilt of the present rape charge. It was, therefore, crucial for defense counsel to know if a juror could fol-

low the law and consider defendant's prior convictions only as they bore on credibility. *See State v. Wallace*, 54 N.C. App. 278, 283 S.E. 2d 404 (1981). As Chief Justice Warren Burger noted while a judge on the Federal Court of Appeals:

> Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time."

Gordon v. United States, 383 F. 2d 936, 940 (D.C. Cir. 1967).

The reference to "inevitable pressure on lay jurors" in *Gordon* and in *Wallace* is a candid recognition, no different than Alfred Lord Tennyson's recognition in *Ulysses*, that jurors—like all of us—are "a part of all that [they] have met." Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. We, therefore, conclude that prohibiting defense counsel from questioning potential jurors as to their willingness and ability to follow the judge's instructions limiting their consideration of the defendant's prior record to the issue of his credibility was error, and a misapplication of the law set forth in *State v. Phillips*.

Other courts have reached similar conclusions. In *State v. Ziebert*, 34 Or. App. 497, 579 P. 2d 275 (1978), defense counsel sought to question prospective jurors concerning their possible bias against the defendant, who was charged with burglary, because of his prior forgery conviction. The *Ziebert* Court said:

> Further, defendant's prior conviction of forgery involved, as did the burglary with which he was charged here, an element of theft. It is true that the trial court did instruct the jury to treat defendant's prior convictions as affecting only the defendant's credibility as a witness; however, that is not a substitute for counsel's right to inquire into the individual juror's attitude toward convicted felons in an attempt to determine the ability of the jurors to be guided by the

court's instructions. Under these circumstances, we conclude that the trial court's limitation of defendant's voir dire questioning constituted prejudicial error.

Id. at 502, 579 P. 2d at 277; *see also United States v. Baldwin*, 607 F. 2d 1295 (9th Cir. 1979).

IV

[2] Defendant next assigns error to the trial court's refusal to allow defendant's counsel to ask defendant on direct examination about his prior criminal convictions.

In refusing to allow defendant's counsel to question defendant about his criminal record, the trial court cited the rule that a party cannot impeach its own witness. This rule is largely based upon the premise that the calling party vouches for the credibility of its witnesses, and presents the witness' testimony as being worthy of belief. *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954). This rule, however, has been criticized for a long time by the commentators on the law of evidence.[1] *Id.; see* 3 A. Wigmore, Evidence §§ 896-99 (Chadbourn rev. 1970); *McCormick's Handbook of the Law of Evidence* § 38 (E. Cleary 2d ed. 1972). Moreover, this rule seems to have been modified by our Supreme Court.

In *State v. Dellinger*, 308 N.C. 288, 302 S.E. 2d 194 (1983), our Supreme Court held that it is permissible for a party to enhance the credibility of its witnesses by showing, on direct examination, that the witness has no criminal record, or that his record is relatively insignificant. The Court quoted the following from an 1879 decision: "In whatever way the credit of the witness may be impaired, it may be restored or strengthened by . . . evidence tending to insure confidence in his veracity and in the truthfulness of his testimony." *Dellinger*, 308 N.C. at 299, 302 S.E. 2d at 200 (quoting *Jones v. Jones*, 80 N.C. 246, 250 (1879)); *see generally* 1 Brandis, *Brandis on North Carolina Evidence* § 50, at 186-89 (2d rev. ed. 1982). Since a witness could be impeached by cross-examination about prior criminal convictions, the calling

1. The new Code of Evidence in North Carolina, which becomes effective 1 July 1984, has abolished the rule. Rule 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him." 1983 N.C. Adv. Legis. Serv., ch. 701.

party is entitled to enhance the witness' credibility by examining him on the absence of such convictions.

Ordinarily, when a defendant is not permitted to testify on direct examination regarding his prior criminal record and the prior record is elicited during cross-examination, the defendant sustains a double blow to his credibility—aside from the obvious effect of the prior conviction, defendant's credibility is hurt because the jury is left with the impression that the defendant tried to hide his criminal record and was not being entirely truthful. Allowing the defendant to testify on direct examination, rather than detracting from his credibility, may actually bolster his credibility because the jury may believe that the defendant is being completely open and straightforward and worthy of belief. Defendant's counsel surely was not attempting in the present case to attack defendant's veracity as a witness. Consequently, he should not be accused technically of impeaching his own witness.

The outcome in a rape case in which the defense of consent is raised often turns upon whom the jurors choose to believe—the defendant or the prosecuting witness. The credibility of each is therefore crucial. Since defendant was virtually assured of being cross-examined about his prior record, defendant's counsel should have been allowed to question defendant on direct examination regarding his criminal record in order to enhance his credibility. Defendant had everything to gain and nothing to lose.

V

[3] Defendant's next assignment of error relates to the following cross-examination of defendant by the State:

> Q. And is it correct that in 1978 you plead no contest and received an active sentence in the penitentiary for a charge of assault with intent to commit rape?
>
> A. Yes, I did.
>
> Q. The victim in that case was a relatively young white female, is that correct?
>
> MR. CRUMPLER: Objection.
>
> THE COURT: Overruled.
>
> A. Yes.

Defendant argues that the State could not ask defendant about his plea of *nolo contendere* or about the details of the underlying crime.

In North Carolina, a plea of *nolo contendere* is not a conviction; it is an implied admission of guilt only for the purposes of the case in which it is entered. *State v. Thomas*, 236 N.C. 196, 72 S.E. 2d 525 (1952); *see also State v. Stone*, 245 N.C. 42, 95 S.E. 2d 77 (1956); *North Carolina State Bar v. Hall*, 293 N.C. 539, 238 S.E. 2d 521 (1977). The State, therefore, may not ask the defendant about the plea of *nolo contendere* for purposes of impeachment by prior convictions. The State may, however, for purposes of impeachment by prior misconduct, ask the witness whether he committed the crime, as long as the question is not phrased in terms of arrests, indictments, convictions, sentences, or pleas. *See State v. Suits*, 296 N.C. 553, 251 S.E. 2d 607 (1979).

Indeed, in the present case, the trial court, in ruling upon a motion *in limine* by defendant to prevent the State from inquiring into the plea, instructed the State that it could cross-examine about prior acts of misconduct, as long as the question *was not phrased*, "Have you been convicted of Y and Z conduct or misconduct?" The State's question, therefore, was in violation of the trial court's directive, and the trial court should have interrupted *ex mero motu*.

The error was compounded by the second question. Because the first question was improper, the second question had no foundation. It had not been established that defendant had committed the 1978 assault with intent to commit rape. The error was prejudicial because it led the jury to believe that defendant, a black, had a propensity to rape white girls. The victim in the present case was a seventeen year old white girl.

VI

These errors, when considered together, mandate the award of a new trial. The evidence of defendant's guilt is not overwhelming. Indeed, a first trial ended in a hung jury. The prosecuting witness' own testimony presents a scenario arguably inconsistent with rape. The morning after the alleged rape, the defendant walked her to a bus stop, offered to buy her some coffee, and

gave her some money and some change for bus fare. She did not flee when the defendant went into the coffee shop for ten minutes.

VII

Since we are ordering a new trial, defendant's remaining assignments of error have been rendered moot, or are not likely to recur at retrial. We will, however, summarily discuss one evidentiary point which is likely to recur at retrial. Simply put, for purposes of impeachment by prior misconduct, the State may ask the defendant whether he committed acts similar in nature to the one charged, and the question must be framed in sufficient detail to identify the act. *See State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982).

New trial.

Chief Judge VAUGHN concurs.

Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. STEVE THOMAS SIMMONS

No. 8317SC574

(Filed 7 February 1984)

1. **Searches and Seizures § 3— "open field doctrine"—no Fourth Amendment protection**

In a prosecution for trafficking in marijuana, the trial court correctly denied defendant's motion to suppress evidence of marijuana found in the warrantless search of leased farmland since the protections of the Fourth Amendment are not applicable to open fields.

2. **Searches and Seizures § 14— voluntariness of signature on consent to search form**

There was no error in the denial of defendant's motion to suppress marijuana uncovered as the result of the search of his home where, although conflicting, there was competent evidence supporting the court's conclusion that "the defendant freely and voluntarily consented to the search."

3. **Narcotics § 4— sufficiency of evidence of total weight of marijuana**

In a prosecution for trafficking in marijuana by possession of marijuana in excess of 10,000 pounds and with trafficking in marijuana by manufacturing

marijuana in excess of 10,000 pounds, the State introduced sufficient evidence on the essential element of weight to permit the case to go to the jury where the evidence revealed that officials harvested eight truckloads of the material alleged to be marijuana and "plowed under" another "pickup load or so"; the eight loads weighed by officials of the License, Theft, and Weight Section of the North Carolina Division of Motor Vehicles were found to weigh 16,620 pounds; one load contained plants that had been pulled up by the roots, while the remaining loads contained plants that had been mown or hand picked; some of the plants were damp because of rain that interrupted the harvesting process; photographs and random samples were taken of the materials seized prior to its destruction; and the State's evidence showed that the destruction was performed in good faith and for a practical reason.

4. Narcotics § 3.3— opinion testimony concerning weight of marijuana—properly admitted

The trial court properly admitted testimony by a police officer that marijuana he observed in an upstairs room of defendant's residence weighed "approximately 200 pounds," where the testimony was based on personal observation and defendant had ample opportunity to challenge the witness's testimony on cross-examination, and defendant was free to argue the question of its proper weight to the jury.

5. Narcotics § 3.3— opinion testimony concerning maturity of marijuana plants—failure to strike—no error

There was no error in the court's denial of a motion to strike testimony of a witness who was properly qualified as an expert in the identification of controlled substances where the witness was permitted to testify that marijuana stalks he examined were not, in his opinion, mature and where the witness stated on cross-examination that his expertise did not extend to "the growing of marijuana." Because the State had offered substantial evidence on the point, the motion to strike was overbroad, and the court's action proper.

Judge EAGLES dissenting.

APPEAL by defendant from *Washington, Judge.* Judgment entered 13 January 1983 in Superior Court, STOKES County. Heard in the Court of Appeals 10 January 1984.

Defendant was charged in proper bills of indictment with trafficking in marijuana by possession of marijuana in excess of 10,000 pounds and with trafficking in marijuana by manufacturing marijuana in excess of 10,000 pounds. He was found guilty as charged and from a judgment on the verdict imposing a prison sentence of thirty-five years he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Francis W. Crawley, for the State.

White and Crumpler, by Fred G. Crumpler, Jr. and Randolph M. James, for defendant, appellant.

HEDRICK, Judge.

Defendant assigns as error the trial court's denial of his motion to suppress evidence of marijuana seized from a cornfield and from his home. After a hearing on defendant's motion, the court made findings and conclusions which are summarized as follows:

On 14 July 1982 employees of Duke Power Company were inspecting power lines and power line poles along a power line right of way located on land leased by defendant. While performing his duties one of the employees observed what appeared to be marijuana growing in a cornfield on the land. He broke off part of one plant and took the material to the Pilot Mountain Police Department, where he told an officer what he had seen and where he had seen it. The Stokes County Sheriff's Department was informed of the discovery, and officers from that Department examined the material and believed it to be marijuana. The officers then went to the scene, where they met the defendant as they approached the cornfield. The officers told defendant that they had received a report of marijuana and were going to look for it, whereupon the defendant agreed and led the officers through the cornfield. The officers examined the area along the power line right of way, and discovered what appeared to be marijuana growing in the cornfield. Defendant was then advised of his constitutional rights, and he and the officers returned to the house in which defendant lived alone.

Upon arriving at the house defendant and the officers first sat in an unmarked patrol car, at which time defendant was again advised of his constitutional rights. At this time defendant signed a written waiver of his constitutional rights and consented to a search of his home. Although defendant contends that this consent was coerced, the evidence showed that the "threats" complained of were statements by the officers that they would obtain a search warrant if defendant withheld consent to a search of the house.

Based on the foregoing findings, the court concluded that the searches of the farm property and defendant's residence were reasonable and proper. The court found that defendant "did not have a legitimate or reasonable expectation of privacy in so far as the marijuana patch located in the cornfield is concerned; and the defendant's consent to the search of the residence occupied by him was freely and voluntarily given by him, understanding his position and his status at that time."

[1] Defendant first contends that the court erred in denying his motion to suppress "the fruits of a warrantless search of the leased farmland." Defendant argues that the warrantless search of the cornfield violated his Fourth Amendment right to be free from unreasonable search and seizure.

In *Hester v. United States*, 265 U.S. 57 (1924), the United States Supreme Court held that "the special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.* at 59. That *Hester* has continued vitality is demonstrated by its application in a recent Sixth Circuit opinion to facts similar to those of the instant case: "[W]e conclude that under *Hester* and *Katz* any expectation of privacy that an owner might have with respect to his open field is not, *as a matter of law*, an expectation that society is prepared to recognize as reasonable. . . . We believe that no privacy rights inhere and the Fourth Amendment does not protect an open field of marijuana." *United States v. Oliver*, 686 F. 2d 356, 360 (1982). Our Supreme Court followed the "open fields doctrine" established in *Hester* in *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972), and in *State v. Boone*, 293 N.C. 702, 709, 239 S.E. 2d 459, 463 (1977): "Generally, an open field is not an area entitled to Fourth Amendment protection."

The evidence in the instant case shows that the marijuana was found in a cornfield more than one quarter mile from defendant's house, near a power line right-of-way. We find ample evidence to support the court's finding and conclusion that defendant had no reasonable expectation of privacy in this field and therefore agree with the court's determination that the protections of

the Fourth Amendment were not applicable to the area. Accordingly, we find no error in the court's ruling on this point.

[2] Defendant next argues that the court erred in denying his motion to suppress "the fruits of a warrantless search of the defendant's residence." Defendant acknowledges that he signed a "consent to search" form, agreeing to a search of his house by police officers, but contends that this consent was not voluntarily given.

Examination of the evidence adduced at the suppression hearing reveals some conflict in testimony regarding the circumstances surrounding defendant's consent to the search of his home. Defendant testified that he consented only after one of the officers threatened to "make it tough on" the defendant if he refused to sign the consent form. This officer and other officers present at the scene contradicted defendant's testimony, stating that no such statements were made. "When the trial judge's findings of fact are supported by competent evidence they will not be disturbed on appeal, even though the evidence is conflicting." *State v. Prevette,* 43 N.C. App. 450, 452, 259 S.E. 2d 595, 598 (1979). Because there was competent evidence supporting the court's conclusion that "the defendant freely and voluntarily consented to the search of the home," we find no error in the court's denial of defendant's motion to suppress the marijuana uncovered as a result of the search.

[3] Defendant next assigns error to the court's refusal to dismiss the charges against him at the close of the State's evidence "where the State failed to establish the total weight of the alleged marijuana." Defendant contends that the State's own evidence showed that the marijuana loaded onto trucks and weighed was accompanied by roots and dirt, that the material was wet, and that mature stalks, which are to be excluded from the total weight under N.C. Gen. Stat. Sec. 90-87(16), were included in the material loaded and weighed. Although the total weight of the material came to 16,620 pounds, well in excess of the 10,000 pound statutory threshold, and despite the fact that the State terminated the weighing process before weighing one truckload of the material, defendant contends that the evidence was insufficient as a matter of law to establish the essential element of weight of 10,000 pounds or more. He further contends

that subsequent destruction of the bulk of the material constituted a denial of his due process rights. A similar claim was discussed by this Court in *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982):

> Whether the destruction [of physical evidence] infringes upon the rights of an accused depends upon the circumstances in each case. In this case we consider particularly significant the destruction of the bulk of the marijuana in good faith and for a practical reason, the preservation of random samples, the photographs of the physical evidence, and the failure on the part of the defendants to show that the weight of the marijuana, though a necessary element, was a critical issue.

Id. at 610-11, 292 S.E. 2d at 168. The *Anderson* court also noted that "[t]he weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged." *Id.* at 608, 292 S.E. 2d at 167.

In the instant case, the evidence reveals that officials harvested eight truckloads of the material alleged to be marijuana and "plowed under" another "pickup load or so." The eight loads weighed by officials of the License, Theft, and Weight Section of the North Carolina Division of Motor Vehicles were found to weigh 16,620 pounds. One load contained plants that had been pulled up by the roots, while the remaining loads contained plants that had been mown or handpicked. Some of the plants were damp because of rain that interrupted the harvesting process. Photographs and random samples were taken of the material seized prior to its destruction. The State's evidence shows that the destruction was performed in good faith and for a practical reason. Our examination of this evidence persuades us that the State introduced sufficient evidence on the essential element of weight to permit the case to go to the jury, and we hold that the court did not err in denying defendant's motion to dismiss the charges against him. Furthermore, we think it clear that destruction of the seized marijuana did not deny defendant's right to due process under the circumstances of this case.

[4] Defendant also contends that the court erred in admitting testimony by a police officer that marijuana he observed in an

upstairs room of defendant's residence weighed "approximately 200 pounds." The officer testified that marijuana leaves were spread "just about all over the room" "3 to 4 inches deep" in a room "about 9 by 10." Defendant argues that the opinion testimony of this officer was inadmissible because he had not been qualified as an expert witness.

"The weight of objects is a matter on which opinion testimony of a non-expert witness is frequently admitted, provided the witness has those qualifications which show him to be capable of forming opinions upon the issue of weight that are reliable and trustworthy." 31 Am. Jur. 2d, *Expert and Opinion Evidence*, Sec. 159 (1967). "It is generally held that evidence as to size, weight, quantity and value from experienced witnesses who base their opinions upon personal observation is admissible." *State v. Weinstein*, 224 N.C. 645, 650, 31 S.E. 2d 920, 924 (1944). The testimony of the officer in the instant case was based on personal observation. Defendant had ample opportunity to challenge the witness's testimony on cross-examination, and he was free to argue the question of its proper weight to the jury. We believe the testimony was properly admitted under these circumstances. We note that even if its admission were erroneous, the abundant evidence of weight which was properly admitted would render any error harmless.

Defendant's next assignment of error asserts that "the trial court committed reversible error at the suppression hearing in allowing evidence as to whether the defendant grew marijuana in that evidence of innocence or guilt of the defendant should not have been considered during the suppression hearing." The exceptions forming the basis of this assignment of error refer to questions put to defendant by the State about what crops he grew on the land he leased, whether he grew marijuana on the land, and the length of his residence in the leased house. In his answer defendant denied growing marijuana on the land. Defendant does not assert that his answers to these questions were improperly admitted against him at trial, nor does he identify any way in which he was prejudiced by the questions. He merely contends that "[e]vidence of guilt . . . could cause a Trial Judge to fail to protect the constitutional rights of the accused." We first note that defendant's denial that he grew marijuana on the land can hardly be considered "evidence of guilt." We second note our

earlier holding that the court's denial of defendant's motion to suppress finds ample support in the record. This assignment of error borders on the frivolous.

[5] Defendant next assigns error to the court's denial of his motion to strike testimony by an expert witness. The record reveals that the witness was properly qualified as an expert in the identification of controlled substances. The witness was permitted to testify over objection that marijuana stalks he examined were not, in his opinion, mature. When the witness stated on cross-examination that his expertise did not extend to "the growing of marijuana" the defendant moved to strike "any evidence that the State has offered concerning maturity of the plants." Because the State had offered substantial evidence on this point, the motion to strike was clearly overbroad, and the court's action proper. Furthermore, we do not think admission of this testimony, if error, was prejudicial. The evidence relating to maturity of the plants was relevant only because mature stalks are not to be included in calculating the weight of the contraband. As we have already noted, we believe there was ample evidence from which the jury could infer that defendant possessed and manufactured more than 10,000 pounds of marijuana. This assignment of error is without merit.

We have examined the remaining assignments of error brought forward and argued by defendant and conclude that they do not require discussion. We hold that defendant had a fair trial, free from prejudicial error.

No error.

Judge BRASWELL concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent and would vote to reverse based on the failure of the State's evidence to establish that the weight of the marijuana excluding mature stalks, roots and the muddy clods of dirt clinging to the roots amounted to more than 10,000 pounds as alleged. As noted in *State v. Anderson*, 57 N.C. App. 602, 608, 292

S.E. 2d 163, 167 (1982), "weight is one of the essential elements of the crimes charged." In *Anderson* the weight of the marijuana alleged was "in excess of 2000 pounds" and the evidence showed 2700 pounds including some arguably mature stalks which should have been excluded. The court there considered that the potential for error by including some arguably mature stalks was less significant where the weight differential was not close. Too, the court in *Anderson* noted that there was no evidence as to the maturity of the stalks and that "the burden was upon the defendant to show that the stalks were mature or that any other part of the matter or material seized did not qualify as 'marijuana' as defined by G.S. 90-87(16)."

In the case *sub judice* as distinguished from the facts in *Anderson*, there was evidence that there were mature stalks included, that entire plants were pulled up and loaded into trucks including mature plants with mature stalks, roots and dirt clinging to the pulled up roots. In addition, there is evidence that the material loaded on the trucks including roots, dirt, stalks and plants had been rained on and that they were wet when weighed.

This case is distinguishable from *Anderson* in that defendants here did offer credible, largely undisputed evidence as to the diversity of foreign (non-marijuana) materials (dirt, mud, wet stalks, etc.) included in the truckloads weighed and that the material weighed was wet, a factor which would have enhanced the weight.

I do not suggest that marijuana must be processed by law enforcement authorities before being destroyed in order for large volume drug trafficking charges to be sustained. However, I do suggest that fundamental fairness requires, at the least, that where entire plants are uprooted, an effort be made to exclude from the gross weight the roots and dirt or mud attached thereto and that some evidence be presented by the State as to approximately what portion of the material weighed is excludable as mature stalks or otherwise. The burden of proof as to all elements of a crime is properly on the State. The weight charged here is an essential element of the offense. Because the State failed to prove that there were 10,000 pounds of marijuana *excluding extraneous material*, I would reverse the conviction of trafficking in marijuana by manufacturing in excess of 10,000 pounds.

IN THE MATTER OF THE WILL OF MADELINE S. COOLEY, DECEASED

No. 837SC140

(Filed 7 February 1984)

1. **Wills § 19— caveat proceeding—sufficiency of evidence to support jury verdict finding proper will**

The evidence presented by the propounder of a will was sufficient to support the jury's verdict finding a paper writing to be the valid last will and testament of Madeline S. Cooley, and although some of the caveator's evidence may have been sufficient to raise some doubt as to the validity of Mrs. Cooley's will, the jury resolved these doubts. G.S. 31-3.3.

2. **Wills § 23— caveat proceeding—instructions proper**

In a caveat proceeding, the trial court was not required to charge on the application of the following evidence to the issues submitted to the jury: that the appearance of the will manuscript cover and the two pages of the will showed that the staple holes in the three pieces of paper did not match; that there were more staple holes in page one of the will where all devises and bequests were made, than in the manuscript cover or page two of the will; that devises and bequests were made on page one to "several" heirs and on page two the will contained an express desire that "neither" of her heirs mentioned in the will contest the will. Such evidence was totally lacking in probative value and would not support a reasonable inference as to any finding as to whether the will had been "changed" after its execution.

APPEAL by caveator from *Winberry, Judge.* Judgment entered 21 September 1982 in NASH County Superior Court. Heard in the Court of Appeals 13 January 1984.

Madeline S. Cooley died on 13 November 1981, at the age of 79. Her last will, dated 1 March 1979, was duly presented for probate. Mrs. Cooley's son, Roger A. Cooley, duly filed a caveat to the will. The matter was tried before a jury. The following issues submitted and the answers of the jury were as follows:

Issue Number One: Was the paper writing dated March 1, 1979, executed by Madeline S. Cooley according to the requirements of the law for a valid last will and testament?

Answer: Yes.

Issue Number Two: Is the paper writing referred to in issue number one, and every part thereof, the last will and testament of Madeline S. Cooley, deceased?

Answer: Yes.

Following the return of the verdict, the caveator moved for judgment notwithstanding the verdict on the grounds that the verdict was against the weight of the evidence and that the evidence did not support the verdict; and moved for a new trial on the grounds of errors committed in the course of the trial, particularly in the charge of the court to the jury. These motions were denied.

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

> IT IS THEREFORE ORDERED AND ADJUDGED:
>
> 1. That the paper writing dated March 1, 1979, was executed by Madeline S. Cooley according to the requirements of the law for a valid last will and testament, and said paper writing, and every part thereof, is the last will and testament of Madeline S. Cooley, deceased; and the same is hereby admitted to probate in solemn form;
>
> . . .

From the judgment, caveator has appealed.

Nelson W. Taylor, III for caveator.

Valentine, Adams, Lamar & Etheridge, by Franklin L. Adams, Jr. and Spruill, Lane, Carlton, McCotter & Jolly, by Frank P. Spruill, Jr. and Ernie K. Murray, for propounder.

WELLS, Judge.

Caveator has presented assignments of error relating to the exclusion of certain evidence at trial, the failure of the trial court to give requested jury instructions, the denial of caveator's motion to set the verdict aside, for judgment N.O.V. and for a new trial, and to the entry of judgment. We find no error in the trial below.

Caveator's principal assignments of error challenge the trial court's ruling on caveator's motions relating to the sufficiency of the evidence and to the trial court's denial of caveator's requested jury instructions on the question of whether Mrs. Cooley's will was changed after she executed it.

I. Sufficiency of the Evidence.

[1] In a caveat proceeding, proof of the formal execution of an attested will in conformity with the statutory requirements establishes *prima facie* that the offered document is the will of the testator and is sufficient to allow the jury to find that the document is the will of the testator. *See In re Will of Isley*, 263 N.C. 239, 139 S.E. 2d 243 (1964); *In re Will of Roberts*, 251 N.C. 708, 112 S.E. 2d 505 (1960); *see also* 1 Wiggins, *Wills and Administration of Estates in North Carolina*, § 126 (2d ed. 1983). The controlling statute, N.C. Gen. Stat. § 31-3.3 (1976) provides:

> § 31-3.3. *Attested written will.*—
>
> (a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.
>
> (b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.
>
> (c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.
>
> (d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

In support of her burden, propounder offered the will and the testimony of four persons: Belva Johnson Williamson, George A. Harrison, Mary A. Harrison, and Verla Vick. The testimony of these witnesses tended to show that Ms. Williamson and Mr. and Mrs. Harrison were employed by Mrs. Cooley at her residence. The Harrisons were household employees who had worked for Mrs. Cooley for many years before 1 March 1979, the date on Mrs. Cooley's will. Ms. Williamson was employed by Mrs. Cooley as a companion from January 1979 until Mrs. Cooley's death. For a number of years prior to 1 March 1979, Ms. Vick had provided

record keeping services for Mrs. Cooley and Mrs. Cooley's deceased husband, Congressman Harold Cooley.

On the afternoon of 1 March 1979, Ms. Williamson informed Mrs. Harrison that Mrs. Cooley desired the Harrisons and Ms. Williamson to witness her will. At Mrs. Cooley's request, Ms. Vick went to the Cooley home on that same afternoon. Before Ms. Vick's arrival, Mrs. Cooley was in the downstairs dining room of the Cooley residence. Upon Ms. Vick's arrival, at Mrs. Cooley's request, Ms. Vick told Mrs. Cooley how to date and sign her will. Mrs. Cooley then called Ms. Williamson to come to the dining room; Ms. Vick called Mrs. Harrison, who then called Mr. Harrison. They all then observed Mrs. Cooley date and sign an instrument which Mrs. Cooley stated was her will. Mrs. Cooley requested Ms. Williamson and the Harrisons to witness her execution of her will and to attest to their witnessing. Ms. Williamson and the Harrisons then all signed the will in the presence of Mrs. Cooley and in the presence of each other. Mrs. Cooley then placed the will in an envelope, sealed the envelope and turned it over to Ms. Vick, who placed it in a bank safety deposit box, where it remained undisturbed until it was removed for probate following Mrs. Cooley's death.

It is clear to us that the evidence presented by the propounder was sufficient to support the jury's verdict. In his effort to persuade the jury to reject the offered will of Mrs. Cooley, caveator presented the testimony of a number of witnesses. Caveator's relevant evidence tended to show the following. For about two years prior to 1 March 1979, Mrs. Cooley had been in a state of declining health, was usually bedridden and seldom ventured to the downstairs areas of her home. It was Mrs. Cooley's habit to summon her family and associates to her bedside to accommodate her needs, rather than to go about the house herself. Mrs. Cooley suffered from severe arthritis, which caused her hands to swell and become stiff. In February of 1979, Mrs. Cooley, who was right-handed, fell in her bedroom and broke her right wrist, an injury requiring the application of a cast extending from her hand to her elbow. She was still wearing the cast on 1 March 1979. During the time the cast was in place and for at least a month thereafter, all of Mrs. Cooley's personal checks were signed for her by Ms. Vick. At the time her offered will was dated, purportedly signed and witnessed, it would have been dif-

ficult for Mrs. Cooley to go from her upstairs bedroom to the downstairs dining room and it would have been difficult for her to use her right hand to sign her will. Following Mrs. Cooley's death, Ms. Vick and George Harrison had stated that the will was signed in Mrs. Cooley's bedroom and that George Harrison was not present when it was signed and was not requested by Mrs. Cooley to attest to her signature or execution of her will. These statements conflicted with later trial testimony of Ms. Vick and Mr. Harrison.

Caveator also presented certain other evidence which we will discuss in more detail in the next section of our opinion, tending to show that the staple holes in the manuscript cover and the second page of the will matched, but the staple holes on the first page did not match the other staple holes.

Caveator's motion for judgment notwithstanding the verdict addresses the sufficiency of the evidence to support the jury's verdict. Although some of caveator's evidence may have been sufficient to raise some doubt as to the validity of Mrs. Cooley's will, the jury resolved these doubts. Our review of the evidence convinces us that the trial judge was clearly correct in denying caveator's motion for judgment N.O.V.

Caveator's motion to set the verdict aside and for a new trial on insufficiency of evidence grounds were addressed to the sound discretion of the trial court, and the trial court's ruling thereon will not be disturbed absent a manifest showing of abuse of that discretion. *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977) and cases and authorities cited therein. We find no basis in the evidence of this case for doubting the trial court's rulings on these motions, and hold that caveator has failed to show any abuse of the trial court's discretion in ruling on these motions.

II. Caveator Jury Instruction Requests.

[2] In other assignments of error, caveator contends that the trial court erred in denying his requested jury instructions on "changes" in Mrs. Cooley's will. Although the caveat in this case stated no specific grounds, it is clear from the record that one of the grounds caveator hoped to establish at trial was that Mrs. Cooley's will had been tampered with or changed after its execution and therefore could not qualify as her last will. Caveator's requested instructions, in pertinent part, were as follows:

This issue reads:

"Is the paper writing referred to in Issue #1, and every part thereof, the last will and testament of Madeline S. Cooley, deceased?

. . .

I instruct you, members of the jury, that on this issue the propounder, Verla M. Vick, has the burden of proof to satisfy you by the greater weight of the evidence that the paper writing is in all respects the will of the testator, Madeline S. Cooley.

The paper writing submitted to you by the propounder, Verla M. Vick must be the same paper writing executed by the testator, Madeline S. Cooley, as her last will and testament.

If there has been any change in the paper writing since Madeline S. Cooley signed it, that change must have been made by Madeline S. Cooley or someone at her direction, and the paper writing must have been executed again after such change.

(Here relate the above law to the evidence.)

Therefore, members of the jury, I instruct you that if you find, by the greater weight of the evidence, that the paper writing was executed according to the requirements of the law, that it is in all respects as it was when signed by her, or if changed, was again executed by Madeline S. Cooley after the change, then I instruct you that you will answer this issue, "Yes."

On the other hand, if you don't find from the greater weight of the evidence that the paper writing was executed according to the requirements of the law or if you find that there was a change in the will after the testator, Madeline S. Cooley, executed it and that she did not again execute it after the change, or if you are not able to determine where the truth lies, then you would answer this issue, "No."

While it is the general rule that in a civil case the trial judge must declare and explain the law arising in the evidence, even in

the absence of a special request, *see* N.C. Gen. Stat. § 1A-1, Rule 51 of the Rules of Civil Procedure, *Board of Transportation v. Rand*, 299 N.C. 476, 263 S.E. 2d 565 (1980), *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972), the rule has certain accepted limits. *E.g.*, the duty is to explain the law and apply it on "all substantial features of the case," *Investment Properties v. Norburn, supra*, and the instruction must be based on evidence "which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted, *Cockrell v. Transport Co.*, 295 N.C. 444, 245 S.E. 2d 497 (1978).

The evidence caveator contends required his requested instruction is: One, that the appearance of the will manuscript cover and the two pages of the will show that the staple holes in these three pieces of paper do not match; that there are more staple holes in page one of the will where all devises and bequests are made, than in the manuscript cover or page two of the will; and two, that while devises and bequests were made on page one to several heirs of Mrs. Cooley, on page two, the will contains an expressed desire that "neither" of her heirs mentioned in the will contest the will. Such evidence is totally lacking in probative value and would not support a reasonable inference as to any finding as to whether Mrs. Cooley's will had been "changed" after its execution. Hence, the trial court was not required to charge on the application of this evidence to the issues submitted to the jury. Indeed, to have done so would have led the jury into areas of pure speculation and conjecture.

We have carefully examined caveator's other assignments of error and find them to be without merit, therefore, we deem it unnecessary to discuss them.

In the trial below, we find

No error.

Judges WEBB and WHICHARD concur.

DORIS ANN BURROW, EMPLOYEE-PLAINTIFF v. HANES HOSIERY, INC., EMPLOYER, AETNA LIFE AND CASUALTY INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 8310IC136

(Filed 7 February 1984)

Master and Servant § 77.1— workers' compensation—insufficient evidence of change of condition

Plaintiff failed to show a change of condition after an award for permanent partial disability so as to entitle her to additional compensation where undisputed evidence showed that plaintiff's pain has not worsened since the final award of permanent partial disability; the three physicians who believed that plaintiff was unable to work at the initial hearing and still unable to work at the second hearing attributed her incapacity to earn to her pain; at the second hearing the only evidence of a change in plaintiff's condition was an increase in her depression and fear of surgery; and neither fear nor depression were given as causes of plaintiff's disability.

Judge PHILLIPS dissenting.

APPEAL by defendants from order of North Carolina Industrial Commission entered 1 September 1982. Heard in the Court of Appeals 12 January 1984.

On 9 March 1979 plaintiff sustained an injury to her right little finger arising out of and in the course of her employment with defendant Hanes Hosiery, Inc. Hanes and its insurance carrier, defendant Aetna Life and Casualty Insurance Company, admitted liability and agreed to pay temporary total disability compensation for a period of two weeks. At a hearing to consider additional compensation, Chief Deputy Commissioner Shuford heard the testimony of five physicians who were treating plaintiff. Based upon the testimony of Dr. Kenneth G. Tomberlin, an orthopedic surgeon, Chief Deputy Commissioner Shuford found that plaintiff suffered a 75 percent permanent partial disability of the right fifth finger and a 15 percent permanent partial disability of the upper right extremity. This latter rating included pain which plaintiff had in her chest wall. The chest pain began after plaintiff underwent a cervical-dorsal sympathectomy in August 1979 as part of her treatment.

Chief Deputy Commissioner Shuford further found that a second operation would most likely relieve plaintiff's chest and arm

pain, but that this surgery had not been performed because of plaintiff's "fear, nervousness and apprehension of another surgical procedure." He ordered that plaintiff be awarded compensation of $115.38 per week for a period of 51 weeks commencing 5 September 1980 and all medical expenses incurred as a result of her injury. Defendants were ordered to pay expert witness fees.

The Full Commission adopted the opinion and award of Chief Deputy Commissioner Shuford and added:

> Nothing herein shall be construed to determine the rights of the parties after February 17, 1981. This matter is hereby RESET in Winston-Salem to be heard in due course to determine the rights of the parties after February 17, 1981.

On 14 December 1981 this rehearing was held before Deputy Commissioner Sellers. In her opinion and award filed 1 February 1982 she found that plaintiff's pain was decreased to some extent by surgery in April 1981. She further found:

> 3. Plaintiff continues to complain of constant pain, yet has refused additional surgery due to a fear that surgical complications might arise during such surgery.
>
> 4. At the hearing, no witness, including the plaintiff, testified that plaintiff's condition or pain had in any way worsened since the February 17, 1981 hearing.

Deputy Commissioner Sellers concluded that plaintiff had not shown any change in her condition since Chief Deputy Commissioner Shuford rated her disability; and that this former rating is binding and prevents plaintiff from any additional rating of disability.

On appeal the Full Commission vacated and set aside Deputy Commissioner Sellers' ruling, and concluded that plaintiff had sustained a change of condition. They awarded her temporary total disability compensation of $115.38 beginning 28 August 1981 and continuing until there was a change of condition. The Commission based their opinion and award on the following findings of fact:

> 1. Following plaintiff's accident, she was treated by Dr. Kenneth Tomberlin, orthopedic surgeon, Dr. Jack Billings, family practitioner, Dr. Albert Glod, general and thoracic

surgeon, Dr. Ernesto de la Torre, neurosurgeon, and Dr. Henry E. Branham, Jr., psychiatrist.

2. Plaintiff underwent a cervical-dorsal sympathectomy in August 1979. Since that time, she has experienced pain in the right side of the thorax, four or five inches wide upper portion, including the lower half of the breast extending from about the fourth thoracic vertebra and horizontally around the front of the chest.

3. Dr. de la Torre performed an operation in 1981 called a rhizotomy. He cut three or four nerve routes going to the right side of the area where the pain was. After the operation, plaintiff's back was in so much pain, and she felt that the pain in the arm and chest had improved at first, but later realized the pain was not relieved. In addition to the pain, she had a band of numbness below the band of pain. Dr. de la Torre suggested further surgery, but after two bad experiences plaintiff has had with surgery, she does not want to take the chance of further surgery.

4. Plaintiff was treated by Dr. Jack Billings prior to February 17, 1981, and he has continued to treat her since that date, on August 4, September 1, September 30, October 28, November 25, and December 9, 1981. Dr. Billings has been unable to control the pain with medication. The pain is of moderate to severe intensity. Dr. Billings feels that plaintiff is now totally disabled.

5. Plaintiff has been treated by Dr. Henry Branhan, Jr., a psychiatrist. His opinion is that previous surgery has had a rather deleterious effect on plaintiff's emotional status. She now feels helpless and hopeless. Plaintiff's depression is worse than it was in February 1981. She lost all hope after the right rhizotomy did not work. Dr. Branhan does not recommend any further surgery.

6. Plaintiff has sustained a change of condition since February 17, 1981 and is now totally disabled as a result of her injury by accident on March 9, 1979 with defendant employer.

The defendants appeal.

Harper, Wood and Brown, by William Z. Wood, Jr., for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for defendant-appellants.

ARNOLD, Judge.

Defendants assign error to the award of additional compensation to plaintiff for a change of condition. We agree that neither the evidence presented at the 17 February and 14 December 1981 hearings nor the findings of fact in the 1 September 1982 opinion and award of the Full Commission show a change of condition occurring after the final award of permanent partial disability compensation. The award of temporary total disability beginning 28 August 1981 and continuing until there is a change of condition is reversed.

A change of condition for purposes of G.S. § 97-47 has been defined by the North Carolina Supreme Court in *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27 (1960):

> Change of condition "refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition." 101 C.J.S., Workman's Compensation, sec. 854(c), pp. 211-2 . . . . Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings.

Id. at 722, 115 S.E. 2d at 33-34. An examination of the testimony presented at the hearing before Chief Deputy Commissioner Shuford and at the subsequent hearing before Deputy Commissioner Sellers reveals no evidence which would support a finding of a substantial change of physical capacity to earn.

At the initial hearing Drs. Billings, de la Torre and Branham all testified that in their opinion plaintiff was unable to return to work because of the intensity of her pain. Dr. Tomberlin testified that in his opinion plaintiff was able to return to work on 12 March 1980; and that she had a permanent partial disability of

her right little finger and upper extremity. Chief Deputy Commissioner Shuford chose to adopt Dr. Tomberlin's opinion, and awarded plaintiff permanent partial disability compensation.

At the later hearing before Deputy Commissioner Sellers, Drs. Billings, de la Torre and Branham again testified. Dr. Billings indicated that plaintiff had obtained some relief from her pain after having surgery in April 1981, but that in his opinion she was totally disabled because of the remaining pain. Dr. de la Torre testified that he performed the April 1981 surgery; that this surgery did not make plaintiff's pain any worse and that her pain was disabling. Dr. Branham, a psychiatrist, testified that since February 1981 he had been treating plaintiff for pain, depression and anxiety; and that her fear of surgery and her depression were worse. He testified that in his opinion plaintiff was 100 percent disabled because "[t]he pain is of such a nature that the least movement or the least pressure or performance of any kind of duties that Mrs. Burrow does, creates an intensification of the pain." He noted that the nature and severity of plaintiff's present pain was the same as before the April surgery. Dr. Tomberlin did not testify at this second hearing.

Plaintiff argues that the Full Commission's finding that her depression is worse than it was in February 1981, is sufficient to support the conclusion that there has been a change of condition. She cites this Court's decision in *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E. 2d 539 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982), affirming the award to an employee who injured her back at work and subsequently became depressed. This case is clearly distinguishable from the matter on appeal, because there was competent evidence that Fayne's inability to work was caused by her depression. One psychiatrist testified that Fayne had "been suffering from a severe neurotic depressive reaction which has caused her to have significant impairment from a psychological and emotional point of view, which in my opinion has made her unable to work." *Id.* at 145, 282 S.E. 2d at 539. Another psychiatrist indicated that "he classified her depression as a compensation neurosis and that she is unable to work because of her depression." *Id.* at 145, 282 S.E. 2d at 539.

The record on appeal contains undisputed evidence that plaintiff's pain has not worsened since the final award of perma-

nent partial disability compensation; and that the three physicians who believed that plaintiff was unable to work at the initial hearing and still unable to work at the second hearing attributed her incapacity to earn to her pain. At the second hearing the only evidence of a change in plaintiff's condition was an increase in her depression and fear of surgery. Neither fear nor depression were given as causes of plaintiff's disability and are therefore insufficient to show a substantial change of physical capacity to earn.

In light of our decision, we need not discuss defendants' alternative assignments of error. The opinion and award of the Full Commission is reversed and the case is remanded to the Full Commission with orders for it to enter an opinion consistent with this Court's opinion.

Reversed and remanded.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the record supports the opinion and award of the Full Commission, and my vote is to affirm it.

IN THE MATTER OF THE ASSESSMENT OF ADDITIONAL NORTH CAROLINA AND ORANGE COUNTY USE TAXES AGAINST VILLAGE PUBLISHING CORPORATION FOR THE PERIOD FROM APRIL 1, 1972 THROUGH MARCH 31, 1978

No. 8210SC1163

(Filed 7 February 1984)

Taxation § 31— "newspaper" not exempt from State and county use taxes

The trial court properly found that *The Village Advocate* was not a newspaper exempt under G.S. 105-164.13(28) from the use tax imposed by G.S. 105-164.6 and G.S. 105-468 where the advocate was devoted almost entirely to advertising with some announcements of special events.

In re Assessment of Taxes Against Village Publishing Corp.

APPEAL by petitioner Village Publishing Corporation from *Farmer, Judge.* Judgment entered 19 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 27 September 1983.

Petitioner Village Publishing Corporation appeals from a judgment of the superior court affirming the decision of the Tax Review Board and the Secretary of Revenue sustaining the proposed assessment of additional state and county use taxes against it. Petitioner is the publisher and distributor of a publication known as *The Village Advocate* (hereinafter "the Advocate").

During the period in question, the Advocate was printed by Womack Press in Virginia. Petitioner did not pay any North Carolina use tax with respect to the sums charged it by Womack Press for printing the Advocate. In June 1978 the North Carolina Department of Revenue issued notices of proposed assessment of additional state and county use taxes against petitioner together with penalties and interest based upon the sums paid by petitioner to Womack Press.

Petitioner protested the proposed assessment and requested a hearing before the Secretary of Revenue. At the hearing, petitioner contended that (1) the Advocate is a newspaper, and (2) since the purchases of newsprint, ink, and printing services by paid circulation newspapers are exempt from sales and use taxation by G.S. 105-164.13(28) and Sales and Use Tax Regulation 38, the denial of this exemption to the Advocate, a free circulation newspaper, is in violation of the principle of equitable taxation set forth in article V, section 2 of the North Carolina Constitution; the guarantees of freedom of speech and of the press in the first amendment to the United States Constitution; and the guarantees of equal protection of the laws in the fourteenth amendment to the United States Constitution.

Twenty copies of the Advocate were introduced into evidence. These showed that the Advocate consists almost entirely of commercial and classified advertising but contains a limited number of news and sports articles and announcements of local interest such as movie schedules, school lunch menus, schedules of sporting events, community events calendars, and a question and answer section on antiques. The evidence showed that the Advocate is distributed free of charge. The Secretary made findings

of fact consistent with the evidence and concluded as a matter of law that the Advocate is not a newspaper but is an advertising circular; that even if the Advocate were classified as a newspaper it would still be subject to use taxation because G.S. 105-164.13 (28) exempts only paid circulation newspapers and not free circulation newspapers; and that as Secretary of Revenue, he had no authority to rule on the constitutional questions presented.

Petitioner then filed a petition with the Tax Review Board requesting an administrative review of the decision of the Secretary of Revenue. Following a hearing, the Tax Review Board affirmed the decision of the Secretary of Revenue and specifically approved and adopted by reference in its decision the findings of fact and conclusions of law made by the Secretary. In August 1981, petitioner paid the taxes and interest asserted to be due and filed a petition for judicial review in superior court seeking reversal of the Tax Review Board's decision on the grounds that (1) the Board's finding that the Advocate is not a "newspaper" for purposes of the N.C. Sales and Use Tax Act is not supported by substantial evidence in view of the entire record as submitted, and (2) the Board's decision is in violation of the constitutional provisions noted previously herein.

The superior court affirmed the decision of the Tax Review Board in all respects. From the judgment entered, petitioner appealed.

Thigpen and Hines, by James C. Smith, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for respondent appellee North Carolina Department of Revenue.

WEBB, Judge.

The question posed by this appeal is whether the Advocate is a newspaper and thus exempt under G.S. 105-164.13(28) from the use tax imposed by G.S. 105-164.6 and G.S. 105-468. The evidence is not in dispute. The Advocate is devoted almost entirely to advertising with some announcements of special events. We hold it was not error for the Secretary of Revenue and the Tax Review Board to conclude that the Advocate is not a newspaper.

We have found no case in this State dealing with the point at issue in this case. We believe a newspaper is a publication appearing at short intervals of time containing news which may be of various types, and intended for the general reader. *See* 58 Am. Jur. 2d *Newspapers, Periodicals, etc.* § 1 (1971); 66 C.J.S. *Newspapers* § 1 (1950). We believe news is ordinarily understood as being "reports of recent occurrence and of a varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, and intended for the information of the general reader." 58 Am. Jur. 2d, *supra* at p. 130. We believe that news reports are distinguishable from paid advertisements. The Tax Review Board found that the Advocate is devoted almost entirely to advertising. We believe this finding is supported by the evidence. Since the Advocate does not disseminate news except in very small amounts, we do not believe it qualifies as a newspaper but is instead an advertising circular.

Most of the cases from other jurisdictions which deal with the issue in this case decide the matter as we do. *See Green v. Home News Publishing Co.*, 90 So. 2d 295 (Fla. 1956); *Department of Revenue v. Skop*, 383 So. 2d 678 (Fla. App. 1980); *Shoppers Guide Publishing Co. v. Woods*, 547 S.W. 2d 561 (Tenn. 1977); *G & B Publishing Co., Inc. v. Department of Taxation and Finance*, 57 A.D. 2d 18, 392 N.Y.S. 2d 938 (1977). A different result was reached in at least one state. *See Hadwen, Inc. v. Department of Taxes*, 139 Vt. 37, 422 A. 2d 255 (1980), *appeal dismissed, sub nom. Hadwen, Inc. v. Vermont Department of Taxes*, 451 U.S. 977, 101 S.Ct. 2300, 68 L.Ed. 2d 834 (1981). We believe we are in accord with the majority.

Our determination that the Tax Review Board was correct in holding the Advocate is not a newspaper renders moot much of petitioner's constitutional arguments. We address its contention that the imposition of a use tax on the Advocate is an attempt to impose a tax on the transmission of an advertising message in violation of the first amendment to the United States Constitution. We do not believe this contention has merit. The tax imposed is not upon the dissemination of information to the public. It is a general tax which is applicable to all persons who use, consume, distribute or store for use or consumption tangible personal property in this state.

Affirmed.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. PRINCE PARTRIDGE

No. 834SC520

(Filed 7 February 1984)

1. Criminal Law § 34.4— admissibility of evidence of another offense

In a prosecution for kidnapping, testimony by the prosecutrix that defendant told her that if she left she would end up like his "last white girl" who was found dead in the woods at Camp Lejeune was competent to prove that defendant maintained dominion over the prosecutrix by putting her in fear for her life, notwithstanding the testimony tended to show that defendant had committed another crime.

2. Indictment and Warrant § 17.2— instructions—time not of essence

The trial court in a kidnapping prosecution did not err in charging the jury that time was not of the essence in the case where an alibi, the statute of limitations, or some other defense predicated on time was not involved.

3. Kidnapping § 1.3— instructions on actions of defendant in disjunctive

The trial court in a kidnapping case did not err in instructing the jury in the disjunctive concerning defendant's actions toward the victim over a three-day period rather than instructing that in order to convict defendant the jury would have to find that he did all the intimidating acts and made all the threatening remarks referred to. G.S. 14-39.

4. Criminal Law § 138— improper aggravating factors in sentencing

The trial court erred in finding as aggravating factors in sentencing that defendant had "knowingly devoted himself to criminal activity" and that the sentence imposed was "necessary to deter others from committing the same crime."

APPEAL by defendant from *Brown, Judge*. Judgment entered 16 December 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 8 December 1983.

Defendant was convicted of kidnapping. The State's evidence tended to show that: In late January of 1982, Donna Lippard traveled to Jacksonville, North Carolina to be with her boy friend, but decided to leave town by bus when she learned that he was married. While at the bus station, defendant initiated a con-

versation with her, displayed a large roll of money, asked if she would be interested in making some, and she went with him to his apartment, where they spent the night talking, drinking and taking drugs. During that time defendant introduced her to his two female companions—Cleo and Diamond—and suggested that she work for him as a prostitute, as they did. For the next two days she was forcibly injected with drugs, which kept her "high all the time." Thereafter she went on the streets as a prostitute, turned the money collected over to defendant, and several times when the amount of money given to defendant was less than he claimed she had received, he beat and kicked her. On several occasions she expressed a desire to leave, but each time defendant told her that if she left she would "end up" like his "last white girl," who was found dead in the woods at Camp Lejeune. On January 29, 1982, trying to escape, she slipped away, went to the bus station, bought a ticket, and was waiting for her bus when defendant, armed with a pistol, forced her to return to the apartment. A week or so later, trying again to escape, she went to Farmington, North Carolina, but defendant found her there and forced her to return with him to Jacksonville.

Defendant, in testifying, admitted the three women were prostitutes and he received money from them, but claimed the money was given voluntarily. He denied forcing the prosecuting witness to stay with him initially or to return from either the bus station or Farmington. He also denied beating or otherwise mistreating her.

Attorney General Edmisten, by Associate Attorney General Sueanna P. Peeler, for the State.

Popkin and Coxe, by Samuel S. Popkin, for defendant appellant.

PHILLIPS, Judge.

None of the defendant's many assignments of error relating to his conviction have merit or requires more than passing discussion, and some require no discussion.

[1] The defendant's most earnest contention is that the victim's testimony that defendant told her that if she tried to escape from his control she would end up like "the last white girl" did was in-

admissible because it tended to show only that he had committed murder and thus was a bad man. The defendant misperceives the impact and effect of the testimony objected to. Not only was the testimony relevant to some essential fact that was in issue, it tended to prove the very heart of the State's case—that defendant maintained dominion over the witness by putting her in fear for her life—and was thus properly received into evidence, notwithstanding its devastating impact. 1 Brandis N.C. Evidence § 92 (2d ed. 1982).

[2] Another contention is that the court erred in charging the jury that time was not of the essence in this case, the prosecuting witness having contradicted herself as to whether the Jacksonville bus station incident occurred on January 29th, 1982, the date given in the indictment, or on January 22nd, 1982 or January 30th, 1982. The instruction was correct, however, since the rule generally in criminal cases is that time is not of the essence except where an alibi, the statute of limitations, or some other defense predicated on time is involved. *State v. Bailey*, 49 N.C. App. 377, 271 S.E. 2d 752 (1980), *rev. denied*, 301 N.C. 723, 276 S.E. 2d 288 (1981).

[3] Defendant also cites the following part of the charge as error:

> And, so, I charge that if you find from the evidence, and beyond a reasonable doubt, that on or about January 29, 1982, the defendant unlawfully held Donna Lippard at Circle Drive apartments and not allowing her to leave for three days; or that he beat her all over the body and threatened her and had her watched so as to prevent her from leaving Circle Drive apartments; or that he carried Donna Lippard from the bus station to the Circle Drive apartments and that Donna Lippard did not consent, and that this was for the purpose of terrorizing Donna Lippard by beating her and not allowing her to leave, then it would be your duty to return a verdict of guilty as charged.

The contention is that his activities over the three-day period were not separable, and that instead of instructing the jury in the disjunctive, the court should have told the jury that to convict him it would be necessary to find that he did all the intimidating acts and made all the threatening remarks referred to. But the

court was just following the statute that defendant was being tried under, G.S. 14-39, which provides, in part, as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

Thus, in order to convict, the jury did not have to find that defendant unlawfully confined, restrained, *and* removed the witness, but only that he unlawfully did any of those things *either* for the purpose of terrorizing or doing serious bodily harm to her.

[4] But the defendant's contention that error was committed in the sentencing process is well taken. The presumptive sentence for the Class E felony that defendant was convicted of is nine years. G.S. 15A-1340.4(f)(3). The thirty year maximum sentence that was imposed was based on three aggravating factors, only one of which was properly found and authorized by the Fair Sentencing Act. The evidence showed and it was properly found that defendant had prior convictions punishable by confinement of sixty days or more. That the State failed to prove that defendant was not indigent or was represented by or waived counsel when those convictions occurred is immaterial, since under *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), it was up to the defendant to show that the proven or admitted convictions were improperly obtained within contemplation of the Act, and defendant attempted no such showing.

The first factor in aggravation that the court improperly found was that defendant had "knowingly devoted himself to criminal activity." This finding is patently ambiguous, and what the court meant by it, we do not know. If it was meant that defendant knowingly committed the crime he was convicted of, the finding is banned by G.S. 15A-1340.4, since "[e]vidence necessary to prove an element of the offense may not be used to prove any

factor in aggravation." If it was meant that defendant knowingly committed the other crimes that are the basis for the first finding, it is banned by the same statute, which also provides "and the same item of evidence may not be used to prove more than one factor in aggravation." If, however, it was meant that defendant had *habitually* devoted himself to criminal activity over a long period of time—which was shown by evidence that for several years he had not been lawfully employed and had lived off of money received from gambling and prostitutes—that is not what the finding states, and it cannot be so construed. Whether in addition to a prior conviction factor, G.S. 15A-1340.4 also authorizes under appropriate circumstances finding a factor in aggravation that a defendant regularly and habitually led a life of crime, it is not necessary to say, since such a finding is not before us.

The other finding in aggravation improperly found was that the sentence imposed was "necessary to deter others from committing the same crime." As has been ruled in several cases, since deterrence, a basic purpose of all sentencing, was necessarily considered by the Legislature in establishing presumptive sentences for the various crimes, it cannot also be the basis for trial judges exceeding the presumptive terms. *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983) and cases therein cited.

Because of the aggravating factors erroneously found, the resentencing process must be repeated as required by *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Thus, in the defendant's trial there is no error and this matter is remanded to the Superior Court for resentencing.

No error in trial; remanded for resentencing.

Judges ARNOLD and JOHNSON concur.

ELOISE BEST DARDEN v. WALTER ROSWELL DARDEN

No. 838DC118

(Filed 7 February 1984)

1. **Divorce and Alimony § 24.6— child support—sufficiency of evidence**

There was ample evidence to support a trial court's decision to order defendant to pay child support of $100.00 per month for each child where the evidence tended to show that, although defendant was unemployed, defendant had engaged in and is engaged in "running numbers" and gambling which produces an income as high as $1,000.00 to $2,000.00 per week; that defendant continues to make a living by illegal means; and that defendant, an able-bodied 38-year-old man, provided extremely well for his family prior to the parties' separation.

2. **Divorce and Alimony § 24.9— findings regarding defendant's living expenses—properly admitted**

In a proceeding for child support, the trial court properly omitted a finding regarding the amount of defendant's living expenses since defendant failed to present any evidence of such expenses.

3. **Divorce and Alimony § 27— child support—award of attorney's fees proper**

In light of the evidence regarding the legal services provided to plaintiff, the skill of counsel and defendant's income, there was no abuse of discretion in the trial court awarding attorney's fees to plaintiff in a child custody action.

APPEAL by defendant from *Ellis (Kenneth R.), Judge.* Order entered 22 September 1982 in District Court, LENOIR County. Heard in the Court of Appeals 12 January 1984.

Plaintiff instituted this action against defendant for alimony, divorce from bed and board, custody of the parties' three minor children, child support and attorney's fees. In his answer and counterclaim defendant alleged that plaintiff had committed adultery and prayed that relief be denied to her.

Prior to the 20 September 1982 hearing, plaintiff dismissed her claim for alimony. The trial judge, sitting without a jury, heard the evidence of both parties and awarded plaintiff custody, child support and attorney's fees. Defendant appeals and assigns error to the award of custody and attorney's fees.

Morris, Rochelle & Duke, by Edwin M. Braswell, Jr., for plaintiff-appellee.

Beech & Jones, by Paul L. Jones, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first argues that the trial court erred in ordering him to pay child support of $100 per month for each child. He contends that there was no competent evidence to support the findings of fact and conclusions of law that this amount was necessary or that defendant had the ability to pay. The trial court made the following findings of fact which were supported by the evidence in the record:

> 5. The plaintiff is employed by the Lenoir County ABC Board and has a net income of $642.00 per month from said employment; that plaintiff earns additional income in the net amount of approximately $400.00 per month as a beautician in a shop at the family residence at 1905 Tower Hill Road, that the total net monthly income of the plaintiff is approximately $1,000.00.
>
> 6. The plaintiff has necessary and reasonable expenses of $400.00 per month in meeting her personal needs and the expenses attendant to earning her supplemental income as a beautician.
>
> 7. The defendant has reasonable and necessary expenses though the evidence did not disclose the amount thereof; though unemployed, defendant has engaged in and is engaged in "running numbers" and gambling which produces an income as high as $1,000-$2,000 per week; that though the defendant has maintained no steady employment since 1974, he and plaintiff have built, lived in and maintained an above-average standard of living in a house whose fair market value is approximately $60,000-$70,000; that defendant has provided well for his family and has "always had money and supported us well"; that he is an able-bodied thirty-eight year old man who lives with his parents; he has a drinking problem, but has always had sufficient money to provide his family material things and pay most, if not all, bills attendant to the family home and other expenses.
>
> 8. The evidence discloses defendant continues to make a living by illegal means; he paid plaintiff $300.00 as child support in June, 1982 and has $600.00 as of the date of this hearing though his testimony disclosed he has held no job since

1974 except for three weeks and one day in 1982 during which time he had net earnings of approximately $365.00.

9. The reasonable and necessary expenses of the three minor children born of the marriage of the parties are at least $600.00 per month, $200.00 per month per child; that plaintiff through her employment provides medical insurance coverage for the entire family; that the plaintiff and the minor children have lived in the family home at 1905 Tower Hill Road since 1971 except when living in the State of New York, but have been evicted from the premises because title to said property is vested in Isaac Darden, defendant's father; said eviction is currently being appealed; that if plaintiff and the minor children are required to vacate the premises known as 1905 Tower Hill Road, a substantial portion, if not all, of the plaintiff's supplemental income will be lost because the beauty shop she operates is on said premises in a garage renovated specifically for her vocation.

Based upon these findings of fact the trial court concluded:

3. That the sum of $100.00 per month per child as child support from the defendant to the plaintiff is necessary to meet the reasonable needs of the minor children for their health, education and maintenance considering the relative abilities of the parties to provide support.

Obviously the court did not believe defendant's testimony that he had stopped gambling and "running numbers" as of May 1982, and the record supports this belief. At the hearing defendant admitted that he presently had $600 which he won gambling. "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, 712-713, 268 S.E. 2d 185, 189 (1980).

Defendant's argument, that the award of child support is unfair because he is not employed in a legitimate profession, defies this Court's sense of justice and fair play. Our primary consideration here is the welfare of the parties' children. The evidence shows that defendant, an able-bodied 38-year-old man, provided extremely well for his family prior to the parties' separation; and

that he performed this duty by gambling. This Court is certainly not condoning defendant's illegitimate profession by affirming the order that any income therefrom be used for child support, but is merely recognizing the welfare of the children as its primary consideration.

Defendant further argues that the order of child support should be vacated and remanded because the court failed to make findings regarding defendant's living expenses and net income, the relative abilities of the parties to provide support and the actual past expenditures for the children. None of these allegations is substantiated by the record.

[2] A finding regarding the amount of defendant's living expenses was properly omitted, since defendant failed to present any evidence of such expenses. We believe under the circumstances here that once plaintiff presented evidence of defendant's income, defendant then had the duty to come forward with evidence of his expenses. The parties have lived apart since 9 May 1982, and plaintiff should not have to guess at defendant's expenses. Moreover, there is uncontradicted evidence that defendant is continuing to earn income by gambling while living with his parents and incurring few, if any, expenses.

Defendant's argument that the trial court failed to make findings regarding defendant's net income and the past expenditures for the children is refuted by the record. The court made a finding regarding net income from defendant's three weeks of employment in 1982. Defendant failed to show that he paid taxes on his income from gambling. The court also heard evidence of the expenses of the three children and made a finding based upon this evidence. The findings of fact show that the court properly considered the relative abilities of the parties to provide support. These findings of fact further support the conclusion of law that defendant is liable for 1/2 of each child's necessary expenses, and, in turn, this conclusion of law supports the order of child support.

[3] Defendant's remaining argument goes to the award of attorney's fees to plaintiff. Defendant argues that this award was impermissible for two reasons: 1. The trial court failed to make the requisite findings set out in G.S. 50-13.6. 2. There was no evidence "as to the scope and nature of the legal services

rendered, the time and skill required, nor any finding or conclusion on that score."

As required by G.S. 50-13.6, the trial court found that plaintiff was an interested party acting in good faith in bringing the action; and that she was without sufficient funds to fully defray the expenses of her suit. The court further found:

> 11. . . . that plaintiff's attorney, Vernon H. Rochelle, Esquire, has rendered necessary and valuable legal services as evidenced by the attached affidavit which is incorporated into this order as a finding of fact by reference the same as if fully set out herein; said legal services are reasonably worth at least $_____.

In the attached affidavit counsel for plaintiff swore that he has been engaged in the practice of law since 1965; that during this time he has been actively engaged in the practice of domestic law and that he is qualified to represent parties in such matters. He then listed his services, giving their scope and nature.

Although the trial court failed to give a monetary figure for the reasonable worth of counsel's services, finding of fact No. 11 and counsel's affidavit constitute sufficient evidence to support the award to plaintiff of a portion of her attorney's fees. The amount of the award rests within the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. *See Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). Defendant was ordered to pay attorney's fees of $450 for 13.25 hours of legal work. This amounts to approximately $35 per hour. In light of the evidence regarding the legal services provided to plaintiff, the skill of counsel and defendant's income, we find no abuse of discretion in this award.

The order awarding plaintiff child support, custody and attorney's fees is

Affirmed.

Judges JOHNSON and PHILLIPS concur.

LILLIE C. CLARK v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, DAVID BERRYHILL, CHARLIE DANNELLY, HARVEY GANTT, LAURA FRECH, RON LEEPER, RALPH MCMILLAN, PAMELA PATTERSON, EDWIN PEACOCK, JR., GEORGE SELDEN, JR., HERBERT SPAUGH, JR., MINETTE TROSCH, AND ROBERT YOUNG

No. 8226SC1349

(Filed 7 February 1984)

Municipal Corporations § 30.20— prohibition of second petition within certain time

Under the Charlotte Zoning Ordinance, a landowner is barred from petitioning the Charlotte City Council a second time for the same or a higher zoning classification within two years from the first denial absent a showing of substantial changes in conditions or circumstances.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 28 September 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 November 1983.

Newitt, Bruny & Koch, by John G. Newitt, Jr., for plaintiff appellant.

Assistant City Attorney David M. Smith, for defendant appellees.

BECTON, Judge.

I

We are asked to decide whether the trial court erred in affirming the Charlotte-Mecklenburg Planning Commission's interpretation of the procedural provisions of the Charlotte Zoning Ordinance, to prohibit a landowner from filing a second petition to amend the zoning classification within two years from a denial of the first petition. We affirm.

II

On 25 January 1982, plaintiff, Lillie C. Clark, owner of a 2.38 acre tract zoned R-9MF (multi-family residential district) first filed a petition with the Commission to lower the zoning classification to B-D(CD) (distributive-warehouse). Clark, at the time, intended to build a mini-warehouse. After the public hearing on the petition on 15 March 1982, but before the City Council finally

denied the petition on 19 April 1982, Clark's real estate agent, Cecil King, began negotiations to sell the land for use as a family steakhouse. King met with a Commission member to discuss submitting a second petition for the now needed B-1(CD) (business) zoning classification, a higher classification than in the original petition. The Commission member informed King that the procedural provisions of the zoning ordinance barred the Commission from accepting a second petition for the same or higher classification within two years from the first denial absent a showing of substantial changes in conditions or circumstances. On 24 May 1982, Clark requested permission from the City Council to file a second petition without a showing of substantial changes in conditions or circumstances. When the City Council failed to respond, Clark brought this declaratory judgment action seeking a mandatory injunction.

From the trial court's decision in favor of the City, Clark appeals.

III

The Commission complied with the procedural provisions of the Charlotte Zoning Ordinance in refusing to consider Clark's second petition. The following provisions of the Charlotte Zoning Ordinance govern the Commission's actions in the present case:

> (a) The city council may from time to time, on its own motion or on petition, after public notice and hearing as provided by law, amend, supplement or change, modify or repeal the boundaries or regulations herein or subsequently established. *The city council may change the existing zoning classification of the area covered by the petition, or any part or parts thereof, to the classification requested or to a higher classification or classifications without the necessity of withdrawal or modification of the petition;* provided, however, notices of hearings on such amendments shall inform the public that such action may be taken.
>
> (b) A petitioner may amend or withdraw his petition only with the approval of the city council. Requests for permission to amend or withdraw petitions for rezoning must be filed with the city council prior to the date established for the public hearing.

. . . .

(d) A petition for an amendment that has been denied shall not be again instituted earlier than two (2) years from the date of denial, unless the city council, after considering the advice of the planning commission, shall find that there have been substantial changes in conditions or circumstances bearing on the application.

Charlotte, N.C., Code § 23-96 (1977) (emphasis added).

Generally, municipal ordinances and statutes enacted by the legislature are to be construed according to the same rules. *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973). "The basic rule is to ascertain and effectuate the intention of the municipal legislative body. [Citations omitted.] We must therefore consider this section of the ordinance as a whole, [citations omitted]; and the provisions *in pari materia* must be construed together." *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E. 2d 877, 880 (1978).

Construing the above provisions, we hold that a landowner is barred from petitioning the Charlotte City Council a second time for the same or higher zoning classification within two years from the first denial absent a showing of substantial changes in conditions or circumstances.

Section 23-96 grants the City Council broad powers to respond to Charlotte's changing needs precipitated by its growth and development. *See generally* 8 E. McQuillin, *The Law of Municipal Corporations* § 25.73, at 207-08 (3d ed. 1983). Pursuant to section 23-96(a), the City Council has the authority to amend a zoning classification on its own motion or on petition. If on petition, the council has the discretion to amend the zoning classification to one *higher* than one requested in the petition without withdrawing or modifying the petition. On petition the Council has no discretion to amend to a lower classification than requested.

Section 23-96(d), the waiting period provision, must be read in light of section 23-96(a). *George*. Therefore, denial of a petition reflects the City Council's consideration of the particular zoning classification requested and all higher classifications. Implicit

within a denial is the City Council's decision that the property's present classification represents its highest proper use at this time. *See Tyrie v. Baltimore County*, 215 Md. 135, 137 A. 2d 156 (1957). The waiting period provision permits the City to grow and develop before the City Council reconsiders the classification. Moreover, the waiting period seems to be designed to protect the residents of the area from "the burden of having to protest and defend against a series of repetitious applications." *George*, 294 N.C. at 686, 242 S.E. 2d at 882 (quoting *Stephens v. Montgomery County Council*, 248 Md. 256, 258, 235 A. 2d 701, 702 (1967)). Our construction of sections 23-96(a) and (d) supports these dual purposes. In light of the intention of the Charlotte City Council, we conclude that the Commission properly interpreted the procedural provisions of the Charlotte Zoning Ordinance.

The trial court's decision is

Affirmed.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. OBADIAH JAY STAFFORD

No. 8321SC726

(Filed 7 February 1984)

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

There was substantial circumstantial evidence tending to show an intentional shooting done without legal excuse so as to support submission of an issue of second degree murder to the jury, although there was also evidence tending to show that defendant acted in self-defense.

2. **Criminal Law § 39— admission of tape on rebuttal—transcript admitted during case in chief—no abuse of discretion**

Although a transcript of a tape recording of a conversation between defendant and the investigating officer was admitted into evidence during the State's case in chief, the trial court did not abuse its discretion in admitting the tape recording into evidence in the rebuttal phase of the trial where the tape recording was largely exculpatory.

APPEAL by defendant from *Mills, Judge.* Judgment entered 2 February 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 January 1984.

Defendant was charged in a proper bill of indictment with second degree murder and found guilty as charged. From a judgment entered on the verdict imposing the presumptive prison sentence of fifteen years, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

White and Crumpler, by Fred G. Crumpler, Jr., and David R. Crawford, for defendant, appellant.

HEDRICK, Judge.

[1] Defendant's Assignment of Error Nos. 1 and 3-5 raise the question whether the evidence was sufficient to require submission of the case to the jury and to support the verdict of second degree murder. The evidence adduced at trial by the State tended to show the following:

On 2 September 1982 the defendant, known as "Buddy" Stafford, and the deceased, David Willard, went to the home of Andy Holcomb. Mr. Holcomb, testifying for the State, stated that the deceased became angry at the defendant, "sort of slapped Buddy around," and "told him if you're lying to me, I'm going to kill you." The defendant persuaded Mr. Holcomb to accompany him to the deceased's house, claiming to be afraid of the deceased. When the trio left Mr. Holcomb's house, the witness put a pistol in the car, "because after I saw him slap Buddy around . . . I figured he was a dangerous fellow." He informed the defendant of the location of the gun.

When they arrived at the victim's house, according to the witness, the deceased took the keys to the ignition and refused to return them. Following an altercation, the deceased put a knife to the witness's throat and threatened to kill him. The witness testified to what followed:

> [A]t that time Buddy pulled the gun out from the floorboard and told David to drop the knife and throw us the keys and David made out like he was trying to be friendly with Buddy

> and everything and he threw the knife toward Buddy and he said I don't want the knife, I want the keys because I want to leave and he picked up the knife and he was walking toward Buddy and Buddy kept backing up the whole time and he told David to stop and throw him the keys and David said just stay here, we'll go off tonight and then Buddy fired a shot in the air and David was still walking toward him and he said Buddy, put the gun up and Buddy said I want the keys and we'll leave and then he took another step and that's when Buddy shot over David's head again and at that point, he sort of run or lunged or whatever you want to call it, at Buddy and when he was about six feet away from Buddy, Buddy shot him and I guess after that, David hit the ground, he fell back behind the car we was in and Buddy had cocked it again and pulled the trigger and he got up beside his foot so that made four shots fired in all. . . .

The defendant then dragged the body of the deceased "ten or fifteen feet" "out of the way," and left the crime scene. Both made formal statements that, while generally consistent with Mr. Holcomb's testimony, contained several discrepancies.

Other evidence presented by the State was to the effect that Mr. Willard "was violent and very mean" "when he was drinking," and that he had been drinking heavily on the night of the shooting. The testimony of several witnesses suggested that the victim did not possess the knife later found at the scene of the crime. A pathologist who performed an autopsy on the victim testified "that the bullet came from behind . . . and from a little above the head . . . and went forward." He also testified that if the victim had "been on his knees at the time he was shot," that would have been "consistent with the wound that he received" and "with the path of the bullet."

"Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Wilkerson*, 295 N.C. 559, 577, 247 S.E. 2d 905, 915 (1978) (citations omitted). "[M]alice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse. . . ." *Id.* at 578, 247 S.E. 2d at 916.

Defendant contends that "the State's evidence in the case at issue negated the existence of an unlawful killing" because "[a]ll the evidence tends to show" that the defendant acted in self-defense. It is true, as defendant asserts, that a motion to dismiss should be granted "when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant." *State v. Carter*, 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961). Such are not the facts of this case, however. While there was evidence tending to show that defendant acted in self-defense, there was also substantial circumstantial evidence tending to show an intentional shooting done without legal excuse. "The credibility and sufficiency of defendant's evidence to establish his plea of self-defense were for the jury to evaluate in the light of the court's instructions." *State v. Smith*, 268 N.C. 659, 662, 151 S.E. 2d 596, 598 (1966), *cert. denied*, 386 U.S. 1032, 18 L.Ed. 2d 593, 87 S.Ct. 1481 (1967). Accordingly, we find no error in the refusal of the trial court to dismiss the charge against the defendant.

[2] Defendant next contends that the court "committed prejudicial error by admitting into evidence a tape recorded conversation between defendant and investigating officer." Defendant attacks admission of the recording on two grounds: he first argues that the State "failed to establish a proper chain of custody," and, second, that the recording impermissibly repeated in the rebuttal phase of the trial evidence brought out during the State's case in chief.

The record discloses that the tape recording in question contained the formal statement made by defendant to arresting officers after he was taken into custody. A transcript of the recording was admitted into evidence without objection during the State's case in chief. The contents of the statement are generally consistent with defendant's claim that he acted in self-defense.

We do not believe the trial court committed prejudicial error in admitting the recording into evidence. In regard to defendant's first asserted ground for exclusion of the recording, we note defendant's objection at trial: "[h]e's already read the statement that's made from this tape." No mention of "chain of custody" was made at that time. "A specific objection, if overruled, will be effective only to the extent of the grounds specified." 1 Brandis on

North Carolina Evidence Sec. 27 (2d rev. ed. 1982). Nor do we find merit in defendant's argument that the repetition of testimony might have caused the jury to give "undue weight . . . to that evidence." As defendant concedes, "the question of rebuttal testimony is generally subject to the sound discretion of the trial court," and "will not be interfered with unless it is abused." *State v. Johnson*, 23 N.C. App. 52, 57, 208 S.E. 2d 206, 210, *cert. denied*, 286 N.C. 339, 210 S.E. 2d 59 (1974). Under these circumstances, where the evidence admitted was largely exculpatory, we think it quite clear that there was no such abuse of discretion.

No error.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. JAMES LEON JOHNSON

No. 824SC1218

(Filed 7 February 1984)

Criminal Law § 89.4; Rape and Allied Offenses § 4.3— inconsistent statements concerning prior sexual assault—admissibility in rape, sexual offense and crime against nature cases

In a prosecution for second degree rape and second degree sexual offense, prior inconsistent statements made by the prosecutrix concerning an alleged sexual assault upon her two years earlier were not rendered inadmissible by the rape victim shield statute, G.S. 8-58.6(b), and were relevant to the issues of the prosecutrix's credibility and consent, and the exclusion of such statements constituted prejudicial error where the only real issue for the jury was the credibility of the prosecutrix's testimony. Furthermore, the exclusion of the prior inconsistent statements was equally prejudicial to defendant on a crime againt nature charge where the only real issue for the jury was the credibility of the prosecutrix's testimony concerning penetration.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 9 April 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 2 September 1983.

Defendant was charged with second degree rape, second degree sexual offense, and one count of crime against nature. The State's evidence tended to show the following: Defendant, a

member of the victim's husband's Marine unit, came to her home late at night while her husband was on maneuvers and knocked on the door. When Mrs. Nichols answered, defendant asked for her husband. Mrs. Nichols replied that he was not home and she then let defendant in the house, after agreeing to give him a ride back to the base. According to Mrs. Nichols, before she had finished changing her clothes, defendant grabbed her and forced her into the bedroom. There he committed cunnilingus and intercourse. Afterwards, he left.

Defendant testified that after Mrs. Nichols had agreed to give him a ride, they both sat around and talked. After some conversation, they embraced and went into the bedroom. There they had sex, both vaginal and oral and then he left.

Defendant did not deny the acts in question, but defended on the ground of consent. The jury found him guilty on all three charges. From a judgment imposing 12 years imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Francis W. Crawley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

JOHNSON, Judge.

Defendant raises one question in his appeal: Whether the trial court improperly excluded evidence that the prosecuting witness suffered a sexual assault about two years previously. For the reasons set forth below, we answer the question in the affirmative. The court ruled that "evidence of and mention of an alleged prior sexual assault" was irrelevant and inadmissible since it did not fall within the purview of any specific exception in the rape victim shield statute, G.S. 8-58.6(b). Defendant proposed to introduce statements concerning the prosecuting witness' prior rape, which statements were allegedly made by the prosecuting witness both to defendant and to the examining physician, and statements concerning the fact that at the preliminary hearing she denied making any such statements.

We believe that the decision of the Supreme Court in *State v. Younger*, 306 N.C. 692, 295 S.E. 2d 453 (1982), directly controls our decision. In *Younger*, as here, the witness' testimony at the preliminary hearing and her previous statement to the examining physician regarding prior sexual activity differed markedly. There, as here, credibility was the critical issue. In holding that the trial court erred in excluding the evidence, the Supreme Court stated:

> Impeachment by prior inconsistent statements is a practice invoked in all types of trials against all types of witnesses. This was not an attempt by the defendant to impeach the credibility of the witness by revealing acts of prior sexual conduct, rather it challenges her credibility through her own prior inconsistent statements. The fact that this question includes a reference to previous sexual behavior does not prevent its admission into evidence, instead the sexual conduct reference goes to the degree of prejudice which must be balanced against the question's probative value.

Id. at 698, 295 S.E. 2d at 456-57. The court must still weigh the prejudicial effect of such evidence against its probative value. *Id.* at 697, 295 S.E. 2d at 456. Here, however, the court failed to do so, and therefore it could not have exercised its discretion in deciding the matter. The witness' testimony in question formed the case both for and against defendant. The only real contest concerned credibility. Under *Younger*, *supra*, exclusion of the evidence of one witness' inconsistent statements was clearly prejudicial and required a new trial.

In any event, the exclusionary rule of the rape victim shield statute does not appear to reach the particular evidence in question here. The statute primarily addresses evidence of a "general reputation for unchastity." *See State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980). One might strain to construe the phrase "sexual behavior" in G.S. 8-58.6(a) to include submission to forcible rape, but we find nothing in the statute or the prior law to show that such a construction is warranted. Traditional rules barring prejudicial evidence of little probative value should serve to ensure that this sort of evidence is routinely excluded except where, as here, it has some other relevant purpose.

As to the charge of rape, the excluded testimony was relevant to both the issue of Mrs. Nichols' credibility and to the defense of consent. Defendant testified that once he was inside the trailer, he used the bathroom and then returned to the living room; that he and Mrs. Nichols had a conversation and then embraced and kissed; that he suggested the bedroom and she agreed; and that they engaged in consensual sexual activity. Further, that the two had a lengthy conversation about Mrs. Nichols' background and wedding; that they looked through a photo album and that Mrs. Nichols gave defendant a picture of herself. Defendant testified that after their talk, he and Mrs. Nichols again engaged in sexual intercourse and afterwards conversed about the possibility of her becoming pregnant.

Mrs. Nichols testified that she changed her clothes and when she came out of the bathroom, the defendant grabbed her from behind, put his hand over her mouth, told her not to scream and pushed her face down on the bed. Then defendant pulled her off the bed and, standing behind her with his hand over her mouth, ultimately removed her clothes. Defendant then alternately performed cunnilingus and intercourse with her; throughout the time that defendant undressed her and partially undressed himself, he held his hand over her mouth. She did not struggle, bite, scratch or scream. Mrs. Nichols testified further that afterwards, defendant washed himself off, pushed her back into the living room, took a picture of her out of the photo album and told her to write something on the back. She did so and then defendant ran out the back door.

It is defendant's contention that the only way he could have learned about an event as personal and intimate as Mrs. Nichols' prior rape was by her statements to him while they were sitting around, looking through her photo album and discussing her background. Further, that disclosure of such personal information is only likely to be made to a person with whom the alleged victim has shared some sort of physical or emotional intimacy and that circumstantial evidence of this nature gives rise to the inference of a consensual sexual encounter. We agree and hold that the exclusion of testimony regarding Mrs. Nichols' prior rape prejudiced the defendant in his attempt to establish a defense on the basis of consent.

Because of the erroneous application of the rape victim shield statute, defendant is entitled to a new trial on the rape and sexual offense charges. He was also convicted of the crime against nature, which the shield statute does not address. G.S. 8-58.6(c). His defense focused on the issue of consent; however, consent is not a defense to the crime against nature. *State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980); *State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843 (1979).

Nevertheless, the State must prove every element of the crime against nature, including the element of penetration. *See State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). The prosecuting witness testified that defendant penetrated her with his tongue; defendant denied penetration. The examining physician's report indicated that cunnilingus was "attempted," but no other evidence of penetration appears in the record. Thus, the credibility of the prosecuting witness' testimony again constituted the only real issue for the jury to resolve. The rationale of *Younger* compels the conclusion that exclusion of the prior inconsistent statements was equally prejudicial to defendant on the crime against nature charge. The prosecuting witness' testimony supplied the essential elements of the State's case and therefore the exclusion of the proffered evidence prejudiced defendant, requiring a new trial. *State v. Younger, supra; State v. Hackett*, 22 N.C. App. 619, 207 S.E. 2d 362 (1974).

We hold that there must be a new trial as to all three charges.

New trial.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. CABARRUS LYNDALE BRUTON

No. 838SC732

(Filed 7 February 1984)

Criminal Law § 101.1— statement by prospective juror—mistrial not warranted

A prospective juror's statement, made in response to a *voir dire* question by the trial court as to whether any of the prospective jurors knew defendant, that defendant was the driver of a motor vehicle in a collision in which two of the juror's relatives were killed did not constitute misconduct of a juror warranting a mistrial in a prosecution for assault with a deadly weapon inflicting serious injury. Furthermore, the trial court's instructions to the effect that the fact that defendant may have been involved in a motor vehicle collision in which someone was killed had nothing to do with this case did not contain opinions of fact prejudicial to the defendant.

APPEAL by defendant from *Winberry, Judge.* Judgment entered 10 March 1983 in Superior Court, LENOIR County. Heard in the Court of Appeals 19 January 1984.

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

Joretta Durant for defendant appellant.

BECTON, Judge.

Defendant appeals from a judgment imposing a ten-year sentence following his conviction of assault with a deadly weapon inflicting serious injury. Defendant's principal assignments of error concern the trial court's response to a prospective juror's statement during jury selection. Defendant's other assignments of error concern the sufficiency of the evidence to sustain the conviction and the trial court's consideration of defendant's prior conviction as an aggravating factor in sentencing defendant. For the reasons that follow, we find no error in the trial.

I

Defendant's arguments that the trial court committed reversible error (a) in denying the defendant's motion for mistrial made during the trial court's *voir dire* because of jury misconduct, and (b) because the trial court's curative instructions contained opin-

ions of fact prejudicial to the defendant, are closely related and are, therefore, treated together.

A. The transcript of the *voir dire* shows the following exchange between the trial judge and the members of the jury panel.

> Do any of you know the defendant, you twelve now in the box know the defendant, Cabarrus Lyndale Bruton?
>
> JUROR: Yes, sir.
>
> COURT: How?
>
> JUROR: He is my sister's grandson.
>
> COURT: Would that fact that he is related to you by blood or marriage cause you any embarrassment?
>
> JUROR: Yes, sir.
>
> COURT: I'll let you step aside. Anyone else?
>
> JUROR NUMBER 3: He was the driver of a motor vehicle in a collision in which two of my relatives were killed.
>
> COURT: Would the fact that you know him cause you any embarrassment to sit on the jury or keep you in any way from being fair and impartial to him?
>
> JUROR NUMBER 3: Yes.
>
> COURT: I'll let you step aside.

The response by juror number 3 does not constitute "misconduct of a juror" that warrants a mistrial. Rather, as the State suggests in its brief, prospective juror number 3 was responding in an orderly manner to the trial judge's *voir dire* questions "and did not make an accusatory impromptu outburst villifying the defendant." We find it significant that the prospective juror's statement does not even suggest that defendant was charged or convicted of a criminal offense. It does not even suggest that defendant was negligent, guilty of misconduct, or in any way responsible for the accident. Not all statements or remarks made by individual prospective jurors in the presence of the jury panel constitute grounds for a challenge to the panel. 50 C.J.S. *Juries* § 262 (1947 & Supp. 1983).

As a further ground for our holding, we point out that the defendant had the burden of establishing that he was prejudiced in some way. The record does not show that the defendant was denied an opportunity to explore any possible prejudice. The record does not show that defendant used his peremptory challenges or that he challenged any jurors for cause. Simply put, the defendant has not established misconduct on the part of juror number 3, or that the statement made by juror number 3 prejudiced him in any way.

B. Defendant also argues that the trial court's curative instructions impressed "upon the panel that the fact that the defendant had been involved in a motor vehicle collision in which someone was killed, ... expressed [the trial court's] opinion on a statement, the truth of which had not been proven." In our view, the trial court's instructions were entirely correct and lead to but one conclusion—mere involvement in an automobile accident does not mean wrongful participation, and such previous involvement has no bearing on the case being tried. Even with time to contemplate, we can think of no better statement than that given by the trial judge in this case. The instructions as given follow:

> Now ladies and gentlemen, let me say to you specifically you've heard the answer that the lady gave about this defendant having been involved in a motor vehicle collision. I want to say to you that the fact that he may have been involved in a motor vehicle collision at one time and that somebody was killed, has nothing to do with this case.
>
> That is a matter that happened sometime ago and has nothing to do with this case. The fact that he has been involved in such an accident is a matter that should not affect your thinking in this case.
>
> I've been involved in a motor vehicle collision in which someone has been killed. I've been the driver of a car that's been involved in a motor vehicle collision in which someone has been killed, and that does not have anything to do with this case or with my ability to sit on this case in any way, and so I specifically instruct you that that should not be of concern to you anyway. The fact that a person has been involved in an accident has nothing to do with this case in the world.

> Now, is there anybody sitting there right now that is going to hold anything against this defendant in any way because he was involved in a motor vehicle in which someone was killed. The fact that he was involved does not mean that anything was wrong and you should not be prejudiced by that. Is there anyone that will be?

C. Because of our holding in parts I-A and I-B, *supra*, it is not necessary to discuss defendant's further assignments of error that the trial court committed reversible error in denying defendant's motion for appropriate relief based on juror misconduct and the trial court's curative instructions.

II

Defense counsel candidly admits that he "cannot find any valid basis, factual or legal, upon which to support" his argument that the evidence was insufficient to sustain the conviction. "[I]n light of the ten-year sentence imposed upon [defendant, he asks] this Court carefully [to] review the evidence to determine if it is, in fact, sufficient to sustain the defendant's conviction." We have, and we agree with defense counsel. Rodney Meadows' testimony, as corroborated by Detective Louis Koonce, Jr., clearly shows that the defendant shot Rodney Meadows. The evidence was therefore sufficient to be submitted to the jury.

III

On the basis of *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), we reject defendant's contention that the trial court committed reversible error in considering defendant's prior conviction as an aggravating factor at the sentencing hearing.

In the trial of this case, we find

No error.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. ALVIN CAMPBLE PHILLIPS, JR.

No. 8318SC238

(Filed 7 February 1984)

Criminal Law § 86.3— impeachment of defendant—prior convictions—details of crimes

In a rape prosecution in which defendant testified on direct examination that he had previously been convicted on two counts of contributing to the delinquency of a minor, the trial court erred in permitting the prosecutor to cross-examine defendant concerning the details of the prior crimes.

APPEAL by defendant from *Hairston, Judge.* Judgment entered 24 June 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 October 1983.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

BECTON, Judge.

Defendant appeals from his conviction for second degree rape.

I

In March 1982 defendant shared a house with his girlfriend and her female friend, the prosecuting witness. The prosecuting witness had a separate bedroom. During the night of 11 March 1982, the defendant's girlfriend left the house without waking her friend, after an argument with the defendant. The alleged rape occurred early on the morning of 12 March 1982 when the defendant entered the prosecuting witness' bedroom. The prosecuting witness testified that the defendant used force to engage in sexual intercourse with her. Defendant testified that he used no force and that she offered no resistance.

II

Defendant first assigns error to the trial court's failure to prohibit cross-examination on the details of defendant's prior convictions for contributing to the delinquency of a minor.

On direct examination, defendant testified that in 1968 he had been convicted of two counts of contributing to the delinquency of a minor. On cross-examination, the district attorney again asked the defendant to admit his prior convictions. The district attorney went on to ask him:

> Q. And the basis for those charges and the conviction was the fact that you had engaged in—
>
> MR. ALEXANDER: Objection.
>
> (By Mr. Coman)—sexual relations—
>
> MR. ALEXANDER: Objection. I want to be heard.

At that point the trial judge excused the jury to rule on the objection. Without clarification, he overruled the objection. Subsequently, the district attorney elicited from the defendant the prosecuting witness' names and ages as well as the acts involved in the convictions for contributing to the delinquency of a minor.

> And I'll ask you if it isn't a fact that in 1968 the contributing to the delinquency of a minor involved a girl by the name of Rebecca Jane Dickerson, who at that time was 15 years of age and with whom you had engaged in sexual contact; isn't that right?
>
> . . . .
>
> And I'll ask you if it isn't a fact that at that time you had sexual relations with a young girl who was 15 by the name of Janice Brogdon?

He also cross-examined the defendant about prior convictions for motor vehicle violations, breaking and entering and assault on a female.

In North Carolina, a witness, including a criminal defendant, may be cross-examined about his prior convictions, for purposes of impeachment. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977); 1 H. Brandis, *North Carolina Evidence* § 112 (2d rev. ed. 1982). Once the witness has admitted a prior conviction, for purposes of impeachment, cross-examination on the prior conviction is limited to an inquiry into the time and place of the conviction and the punishment imposed. *Finch.*

Strong policy reasons support the prohibition on cross-examination as to the details of the prior crime. "Such details unduly distract the jury from the issues properly before it, harass the witness, and inject confusion into the trial of the case." *Id.* at 141, 235 S.E. 2d at 824. The details of defendant's conviction for contributing to the delinquency of a minor had no bearing on the present case. More importantly, an inquiry into the details and circumstances of a prior conviction exceeds the purposes of impeachment, and instead, may prejudice the jury's consideration of the fundamental question at issue, the defendant's guilt or innocence of the *present* crime charged. *United States v. Dow*, 457 F. 2d 246 (7th Cir. 1972). Prejudice is especially likely in this instance since the contested details pertained to a similar offense, a sex crime. We are keenly aware that "[g]uilt must be predicated upon evidence relevant to the offense charged, and not founded upon past crimes." *Dow*, 457 F. 2d at 250.

We conclude that the trial court should have sustained the defense counsel's objection to the district attorney's questions. The evidence admitted constituted prejudicial error. Our holding negates the need to address the defendant's other arguments. We order the case remanded for a

New trial.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY (APPLICANT); NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP; NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION; PEOPLES ALLIANCE; AND PUBLIC STAFF, NORTH CAROLINA UTILITIES COMMISSION v. CONSERVATION COUNCIL OF NORTH CAROLINA; GREAT LAKES CARBON CORPORATION; AND KUDZU ALLIANCE

No. 8210UC854

(Filed 7 February 1984)

Electricity § 3; Utilities Commission § 38— general rate case—use of fuel costs set in expedited proceeding

The Utilities Commission erred in determining the base fuel cost of an electric utility in a general rate case by using the fuel cost previously set in an expedited fuel cost adjustment proceeding under G.S. 62-134(e) without determining the reasonable level of fuel costs for the test period.

Chief Judge VAUGHN concurs in part and dissents in part.

ON rehearing.

Kennedy, Covington, Lobdell & Hickman, by Clarence W. Walker and Stephen K. Rhyne, and Steve C. Griffith, Jr., George W. Ferguson, Jr., and William L. Porter for applicant-appellee Duke Power Company.

Daniel V. Besse for intervenor-appellant Conservation Council of North Carolina.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, P.A., by Robert B. Byrd and Sam J. Ervin, IV, for intervenor-appellant Great Lakes Carbon Corporation.

Edelstein and Payne, by M. Travis Payne, for intervenor-appellant Kudzu Alliance.

BECTON, Judge.

The opinion in this case was filed on 4 October 1983, and is reported in 64 N.C. App. 266, 307 S.E. 2d 375. In apt time, intervenor-appellants, Great Lakes Carbon Corporation and Kudzu Alliance, filed a petition to rehear. The petition was allowed solely for the purposes of (1) noting that our cite to *State ex rel. Utilities Comm'n v. N. C. Textile Mfrs. Ass'n*, appearing in 64

N.C. App. at 273, 307 S.E. 2d at 380, is incomplete (added to the citation should be the following: "*rev'd. on other grounds*, 309 N.C. 238, 306 S.E. 2d 113 (1983)"); and (2) clarifying our opinion by substituting the following for all of Part V of the opinion filed heretofore:

V

Appellants contend the Commission failed to ascertain Duke's reasonable operating expenses as required by N.C. Gen. Stat. § 62-133(b)(3) (1982) when it determined the base fuel cost from a fuel cost previously set in an expedited fuel cost adjustment proceeding pursuant to N.C. Gen. Stat. § 62-134(e) (Supp. 1979) (repealed 1982). Finding of Fact Number 16 indicates the Commission in the present general rate case established a base fuel cost of 1.3093¢ per kWh by taking the 1.4660¢ per kWh cost set in a recent G.S. § 62-134(e) proceeding and reducing it by .1567¢ per kWh for fuel savings related to operation of McGuire Unit One. From the "Evidence and Conclusions for Finding of Fact No. 16" it appears that a Public Staff witness recommended a base fuel cost of 1.1944¢ per kWh, calculated from the cost set in an earlier G.S. § 62-134(e) proceeding less the fuel savings due to McGuire. The only difference between the Public Staff recommendation and the Commission's finding is that the Commission used a fuel cost from a more recent G.S. § 62-134(e) proceeding.

The G.S. § 62-134(e) proceeding was intended to allow a utility to frequently change its rates based solely on fluctuations in fuel costs. *State ex rel. Utilities Comm'n v. Public Staff*, 309 N.C. 195, --- S.E. 2d --- (filed 7 September 1983). The reasonableness of a utility's fuel costs may not be considered in a G.S. § 62-134(e) proceeding. *Id.* Indeed, "[t]he words of G.S. § 62-134(e) make it clear that only changes in rates *based solely upon the increased cost of fuel* are to be considered." *Id.* at ---, --- S.E. 2d at ---. In contrast, the N.C. Gen. Stat. § 62-133(b)(3) (1982) requirement that the Commission ascertain "reasonable operating expenses" has been interpreted to mean the reasonableness of fuel costs must be considered in general rate cases. *Id.*

And the difference in the two statutes makes sense. The general rate hearing—not the expedited fuel adjustment proceeding—is the proper forum for considering the "myriad factors" that relate to the fuel component of rates. N.C. Gen. Stat.

§ 62-133(c) (1982) establishes a 12-month test period for general rate cases. Under G.S. § 62-134(e), only 4 months of data is required. Consequently, our Supreme Court, in a *per curiam* opinion, recently reversed this Court's decision in *State ex rel. Utilities Comm'n v. N. C. Textile Mfrs. Ass'n*, 309 N.C. 238, 306 S.E. 2d 113 (1983), and held that because the reasonableness of rates cannot be determined in an expedited hearing, the Commission cannot "adopt" the 4-month expedited hearing figures in a general rate case. *Id.* at ---, 306 S.E. 2d at 114.

It is true that the hearing transcript contains some testimony concerning the reasonableness of costs incurred by Duke for fuel over a 12-month period. However, there is no indication from the Order of the Commission, that the Commission ever ruled upon the "reasonableness" of fuel costs. Indeed, the Commission, without giving any reasons, seemed to have ignored the historical data and to have adopted higher costs determined as a result of the expedited fuel adjustment hearing. These factors compel us to remand this matter to the Commission for a determination whether the current record contains sufficient evidence of "reasonableness" to provide a basis for new findings on "the proper level of fuel expenses to be included in [Duke's] rates and charges." *Id.* If the Commission is unable to determine reasonable future fuel costs from actual past costs over a 12-month period, adjusted for abnormalities and considering cost changes occurring up to the time of the hearing, then the Commission may reopen the hearing and take evidence on the reasonableness of Duke's fuel costs over the 12-month period.

As we indicated in the opinion heretofore filed on 4 October 1983, "[a]bsence of proper findings is an error of law and basis for remand under G.S. § 62-94(b)(4) because it frustrates appellate review." Except as herein modified, we adhere to the opinion heretofore filed, noting Chief Judge Vaughn's continuing dissent.

Affirmed in part and remanded in part.

Chief Judge VAUGHN concurs in part and dissents in part.

Judge BRASWELL concurs.

STATE OF NORTH CAROLINA v. WILLIAM HENRY JOINES

No. 831SC700

(Filed 7 February 1984)

1. **Criminal Law § 62— admission of polygraph test—prejudicial error**

The trial court erred in the admission of the results of a polygraph examination of defendant even though defendant's attorney had stipulated that the results of the examination could be used at trial by either party, and such error was prejudicial to defendant where defendant's credibility was a crucial aspect of his defense.

2. **Criminal Law § 66.4— chest lineup—competency in rape trial**

A rape victim's identification of defendant's chest as the chest of her assailant in a lineup of males undressed from the waist up with their faces covered was probative and competent.

APPEAL by defendant from denial of motion to suppress by *Walker, Russell G., Judge*, on 4 October 1982 in CURRITUCK County Superior Court, and from sentencing by *Phillips, Herbert O., III, Judge*, 8 November 1982 in DARE County Superior Court. Heard in the Court of Appeals 18 January 1984.

Defendant was charged in a proper bill of indictment with second degree rape of a physically helpless person, second degree sexual offense against a physically helpless person, crime against nature, and felonious breaking and entering.

At trial the state's evidence tended to show that on 3 October 1981, Jennifer Meredith, who suffered from multiple sclerosis, was at home alone in her mobile home on Baker's Road in Universal Park. Shortly after noon, a man wearing a brown ski mask, "doctor's gloves," brown corduroy pants, and "earth" shoes entered Ms. Meredith's home without her permission and engaged her in conversation. The man took her into her bedroom, placed a plastic sheet on the bed, took all his clothes off except for the ski mask and gloves and raped her. After carrying her back to the living room for more conversation, the man returned her to the bedroom where he again raped her and penetrated her vagina and anus with a vibrator. The man left her residence at about 2:00 p.m. During a later search of defendant's residence in Universal Park in an unrelated case, police officers discovered a plastic sheet, plastic gloves, a vibrator, brown pants, and a brown ski mask, all similar to those used by the man who attacked Ms. Meredith. At a police lineup of males undressed from the waist

up, not revealing their faces, Ms. Meredith identified defendant's chest and nipples as being those of the man who attacked her. A polygraph test was administered to defendant with respect to the attack on Ms. Meredith. The results indicated defendant was lying when he denied raping Ms. Meredith.

Defendant's evidence tended to refute that the place where officers found the plastic sheet, gloves, pants and ski mask was his residence, and tended to show Ms. Meredith's identification of him was tentative or uncertain. Defendant also relied on alibi evidence which tended to show that he was in Norfolk, Virginia at the time Ms. Meredith was attacked.

Defendant was convicted of all charges. From judgments entered on the verdicts, defendant has appealed.

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

Aycock & Spence, by W. Mark Spence, for defendant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress the results of a polygraph examination of defendant taken before trial. Defendant's first lawyer had stipulated that the results of the examination could be used at trial by either party, or, that if defendant refused the examination, such refusal could be used against him at trial. Defendant's trial counsel's motion to suppress was denied and at trial, the polygraph examiner's testimony, was admitted. In *State v. Knight*, 65 N.C. App. 595, --- S.E. 2d --- (filed 20 December 1983) we held that our supreme court's ruling on the prejudicial effect of polygraph evidence in *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983) required a new trial in cases decided subsequent to *Grier* where the use of polygraph evidence was prejudicial to defendant. *See also State v. Holden*, 66 N.C. App. 202, --- S.E. 2d --- (1984). In this case, defendant testified, denying his guilt and asserting an alibi. Under such circumstances, defendant's credibility was a crucial aspect of his defense, and the use of the polygraph results against him was clearly prejudicial, requiring a new trial.

[2] In another assignment of error, defendant contends that the trial court erred in not granting his motion to dismiss the charges against him. In his argument, defendant emphasizes and relies upon two aspects of the trial: one, the lack of reliability inherent in identification of defendant by means of a chest lineup; and two, significant inconsistencies in Ms. Meredith's recollection of the physical characteristics of her attacker. Recognizing the unusual, if not ingenious use, of a chest lineup under the circumstances of this case, we nevertheless hold such evidence to be probative and competent. It was for the jury to give such testimony its proper weight. The record at trial does indicate that Ms. Meredith's recollection as to those parts of her attacker's anatomy which she was able to see were at times inconsistent. Such aspects of her testimony simply involved questions of credibility and weight, to be decided by the jury.

After careful review of the record, including Ms. Meredith's testimony and the substantial circumstantial evidence tending to identify defendant as the perpetrator of the offenses with which he was charged, we conclude the evidence was clearly sufficient to allow the case to go to the jury. This assignment is overruled.

As there must be a new trial, we deem it unnecessary to address defendant's other assignments of error and arguments.

New trial.

Judges BRASWELL and PHILLIPS concur.

JOHN HUGH BRYAN v. CANDACE KENDALL BRYAN

No. 8312DC102

(Filed 7 February 1984)

Divorce and Alimony § 26— modification of foreign child custody order—no authority to exercise jurisdiction

The district court was without authority to exercise its jurisdiction to modify a Pennsylvania child custody order where defendant mother was entitled to custody of the child under the Pennsylvania order; one day before the child was to be returned to defendant after a visit to plaintiff in this State pursuant to the order, plaintiff filed a motion in the district court for a modifica-

tion of the order; and the trial court failed to find that plaintiff's retention of the child in this State was with defendant's consent or that the interest of the child required the district court to exercise its jurisdiction. G.S. 50A-8(b).

APPEAL by defendant from *Hair, Judge.* Order entered 14 September 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 10 January 1984.

This is a proceeding wherein the plaintiff seeks modification of a custody order in regard to his seven-year-old son, Kendle Carmer Bryan. The record reveals the following:

On 25 June 1981, the Court of Common Pleas of Montgomery County, Pennsylvania, entered an order awarding custody of Kendle to his mother, the defendant in the present action. On 8 October 1981 the Pennsylvania court entered a "supplemental order" awarding plaintiff, the child's father, "partial custody" and identifying specific time periods throughout the calendar year when plaintiff's "partial custody" was to become effective. In July 1981 defendant moved from Pennsylvania to Ohio, where she continues to live. In December 1981 plaintiff, a medical doctor, moved from Pennsylvania to Cumberland County, North Carolina. Kendle continued to live with his mother in Ohio until 10 July 1982, at which time he came to Cumberland County to stay with his father, the plaintiff, for a seven-week period as provided in the Pennsylvania court order. On 27 August 1982, one day before plaintiff's "partial custody" rights expired, plaintiff filed a motion in the District Court of North Carolina wherein he sought modification of the Pennsylvania decree so as to obtain custody of Kendle. On that date the North Carolina District Court entered an ex parte order awarding temporary custody of Kendle to plaintiff "pending the service of process or Notice on the Defendant, and the hearing of this cause on its merits." On 2 September 1982 defendant filed motions under N.C. Gen. Stat. Sec. 1A-1, Rule 12(b)(1) and (6) seeking dismissal of the action. Defendant filed an additional motion asking that the court decline jurisdiction for inconvenience of forum pursuant to N.C. Gen. Stat. Sec. 50A-7(a), (c), and (f). The record shows that the jurisdiction of the court over both parties to the action was stipulated. In an order filed 8 October 1982, after a hearing on defendant's motions, the trial court concluded that it had jurisdiction to modify the order of the Penn-

sylvania court and continued in effect the ex parte order of 27 August 1982, pending hearing on the merits. Defendant appealed.

Blackwell, Thompson, Swaringen, Johnson & Thompson, P.A., by John V. Blackwell, Jr., for plaintiff, appellee.

Skvarla, Wyrick & From, P.A., by Samuel T. Wyrick, III, and Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, for defendant, appellant.

HEDRICK, Judge.

The order appealed from is essentially an order denying defendant's motion to dismiss the proceeding based on defendant's challenge of the subject matter jurisdiction of the Cumberland County District Court to modify the custody order of the Court of Common Pleas of Montgomery County, Pennsylvania. Such an order is interlocutory and ordinarily not immediately appealable. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982); *Shaver v. Construction Co.*, 54 N.C. App. 486, 283 S.E. 2d 526 (1981). We treat the appeal as a petition for writ of certiorari, however, and allow the same so that we may treat one aspect of the case on its merits.

Assuming *arguendo* that the District Court in this proceeding has jurisdiction pursuant to N.C. Gen. Stat. Sec. 50A-3 to modify the custody order of the Pennsylvania court, we must determine whether the District Court had authority to exercise its jurisdiction.

N.C. Gen. Stat. Sec. 50A-8(b) in pertinent part provides:

> Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, *without consent* of the person entitled to custody, has *improperly* removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody.

(Emphasis added.) When the record shows that the parent seeking modification of a custody order of another state has improperly retained the child after a visit, the law does not allow a district court in this state to exercise its jurisdiction to modify the order

absent findings of fact in support of the conclusion that the interest of the child requires it to do so.

In the present case the record affirmatively discloses that defendant is entitled to custody of Kendle pursuant to the Pennsylvania decree. The child was visiting plaintiff pursuant to the same decree. One day before Kendle was to be returned to his mother, plaintiff filed a motion in the cause for a change of custody. In neither the ex parte order entered 27 August 1982 nor the decision continuing the effect of the ex parte order, entered 14 September 1982, did the trial judge find that plaintiff's retention of the child in this state was with the defendant's consent or that the interest of the child required the District Court to exercise its jurisdiction.

We hold that the trial court erred in concluding that it had authority to exercise its jurisdiction to modify the Pennsylvania custody order, and the order appealed from must thus be vacated. It therefore follows that the District Court was without authority to exercise its jurisdiction regarding custody of Kendle subsequent to the order appealed from.

Vacated.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. CARL CHILDERS

No. 8327SC649

(Filed 7 February 1984)

Narcotics § 4.1— narcotics offenses—insufficient evidence

The State's evidence was insufficient for the jury in a prosecution for possession of a controlled substance with intent to sell, possession of drug paraphernalia, and possession of marijuana where there was no evidence that pills, rolling papers, and vegetable matter analyzed by the State's expert witness were the same materials seized from defendant and his residence so that the record was devoid of evidence that the seized materials were controlled substances and that the rolling papers were possessed for the purpose of introducing controlled substances into the human body in violation of G.S. 90-113.22. G.S. 90-113.21(a).

State v. Childers

APPEAL by defendant from *Ferrell, Judge.* Judgments entered 9 February 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 17 January 1984.

Defendant was charged in proper bills of indictment with possession with intent to sell a Schedule II controlled substance, a felony, possession of drug paraphernalia, a misdemeanor, and possession of less than one ounce of marijuana, a misdemeanor. He was found guilty of misdemeanor possession of a Schedule II controlled substance, misdemeanor possession of drug paraphernalia, and misdemeanor possession of marijuana. From judgments imposing two prison sentences and a fine, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney K. Michele Allison, for the State.

Steve Dolley, Jr., and Charles J. Katzenstein, Jr., for defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the refusal of the trial court to "grant the defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence." Among other things, defendant contends the record is devoid of evidence that the material seized pursuant to execution of the search warrant was contraband in violation of the Controlled Substances Act. The record discloses that the police officers searched the defendant's person and a residence at 306 Pine Street, Gastonia, North Carolina, and seized a bag containing "17 pills," "some rolling papers," and "a plastic bag with some smaller particles of green vegetable material in it." The officers testified that the pills, papers, and vegetable material were sealed in plastic envelopes and placed in "locker No. 2 in the Vice Control Office." Ralph Johnson, a forensic chemist employed by the State Bureau of Investigation, testified as follows:

> I can identify the State's Exhibit Number 14. It is an envelope that had evidence that was sent to the Gastonia City Police Department.
>
> My initials are on it and dated August 2, 1982. It is in the same condition when I mailed it in August, 1982. State's Ex-

hibit Number 15 is an envelope which I received on July 23, 1982. I put a case number on it, initialed it and dated it. State's Exhibit Number 16 are some tablets I received on July 23, 1982, which were in State's Exhibit Number 15. I ran an ultra-violet spectrograph and two thin layer chromatography tests on the tablets. There were 17 tablets. I am of the opinion that the tablets contained hydramorphone. State's Exhibits Numbers 17 and 18 are exhibits that I received also and ran tests on them. I am of the opinion that Exhibits Numbers 17 and 18 are marijuana. I wrote down the last four digits of the case numbers and my initials on all the bags as well as the envelopes.

The record is totally devoid of any evidence that the material analyzed by Mr. Johnson was the same material seized from defendant and his residence. It follows, therefore, that the record is totally devoid of evidence that the materials seized from the defendant and his residence were controlled substances and that the rolling papers seized were possessed for the purpose of "introducing controlled substances into the human body," N.C. Gen. Stat. Sec. 90-113.21(a), in violation of N.C. Gen. Stat. Sec. 90-113.22.

The trial court erred in denying defendant's motions to dismiss. The judgments entered are vacated and defendant is ordered discharged.

Vacated.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. ROBERT LEE COLLINS

No. 8320SC651

(Filed 7 February 1984)

Assault and Battery § 14.6— three charges of assault on law officer—sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on three separate charges of assault on a law enforcement officer with a deadly weapon

where it tended to show that three law officers approached defendant's residence as a group and that defendant opened the door of his residence and shot his rifle toward the group, narrowly missing the officer closest to defendant.

APPEAL by defendant from *Seay, Judge.* Judgment entered 15 February 1983 in Superior Court, RICHMOND County. Heard in the Court of Appeals 17 January 1984.

The facts pertinent to this appeal are as follows: On the morning of 7 November 1982, three members of the Richmond County Sheriff's Department arrived at defendant's residence in order to serve an arrest warrant on defendant. As the three officers approached the front porch of the residence, defendant pushed the door open with a rifle. Defendant fired at the officer leading the group, grazing the officer's hairline. The three officers obtained cover, returned fire, and shortly thereafter apprehended defendant.

Defendant was charged in three separate bills of indictment with assault on a law enforcement officer with a firearm. The charges were consolidated for trial. From the jury's verdict of guilty on each charge, defendant appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General William F. Briley for the State.

George E. Crump, III, for defendant appellant.

HILL, Judge.

The dispositive issue on appeal is whether the evidence was sufficient as a matter of law to support the court's submission of the case to the jury on the separate charges against the defendant of assault on a law enforcement officer with a deadly weapon. We conclude that there was sufficient evidence for a jury to find defendant guilty of assault on each law enforcement officer, and therefore, we affirm the trial court's judgment.

Defendant contends that the evidence at most raises a reasonable inference of an assault on only the officer defendant fired at. "The rules of law in respect to assaults are plain, but their application to the facts is sometimes fraught with difficulty. Each case must depend upon its own peculiar circumstances." *State v.*

Allen, 245 N.C. 185, 189, 95 S.E. 2d 526, 528 (1956). The circumstances of this case, briefly stated in a light most favorable to the State, involve three law enforcement officers approaching defendant's residence as a group. Defendant opened the door and shot his rifle toward the group, narrowly missing the officer closest to defendant.

Such circumstances are sufficient to make out a case of an assault. Defendant's actions clearly manifest a show of violence causing "the reasonable apprehension of immediate bodily harm," *State v. Ingram*, 237 N.C. 197, 201, 74 S.E. 2d 532, 535 (1953), whereby another (in this case all three officers) is put in fear, and thereby forced to leave a place where he has a right to be. *State v. McIver*, 231 N.C. 313, 56 S.E. 2d 604 (1949).

The trial court correctly submitted the charges against the defendant of assault to the jury. In the trial below we find

No error.

Judges HEDRICK and EAGLES concur.

IN THE MATTER OF: RALEIGH WARREN PHILLIPS

No. 8317DC479

(Filed 7 February 1984)

Infants § 20— juvenile delinquent—erroneous restitution order

The trial court erred in ordering a juvenile to pay restitution of $500.00 for damages to a car where the court found as a fact that the car damage amounted only to $232.17.

APPEAL by respondent from *Clark, Foy, Judge.* Order entered 25 February 1983 in District Court, SURRY County. Heard in the Court of Appeals 6 December 1983.

Respondent was charged with being a delinquent juvenile within the meaning of G.S. 7A-517(12). Evidence at the hearing showed that respondent and another juvenile stole a Ford Pinto, drove it around some, and had an accident, which damaged the car.

At the hearing the owner of the car testified that he bought it the day before the theft for $600, but estimated that it was damaged in the amount of $1,000. The trial court's only finding of fact with respect to the car damage was as follows:

> [T]hat damages to the vehicle are found to be as follows: $25.00—wrecker service, $57.21—flywheel, $2.56—new seal, $75.00—transmission, $60.00—labor, $13.40—tune-up for a total of $232.17.

But in its Juvenile Disposition Order, pursuant to G.S. 7A-649, the court ordered the respondent to pay restitution to the car owner in the amount of $500. A similar order was entered against the other juvenile.

Attorney General Edmisten, by Assistant Attorney General Robert E. Cansler, for the State.

W. David White for respondent appellant.

PHILLIPS, Judge.

Since its only support is an express finding of fact that the car damage amounted to $232.17, the order requiring the respondent to pay restitution in the amount of $500 cannot stand. Though it may be, as the State contends, that the court intended to find only that the out of pocket expenses incurred by the owner amounted to $232.17 and did not intend to find that the damages were only in that amount, we cannot rewrite the finding to so state, but are bound by the finding made. Though in handling juvenile cases the courts are allowed considerable leeway and detailed findings are not usually required, *In re Steele*, 20 N.C. App. 522, 201 S.E. 2d 709 (1974), juveniles, as other litigants, are nevertheless entitled to due process and judgments rendered against them contrary to law must fail. *In re Mash*, 63 N.C. App. 130, 303 S.E. 2d 660 (1983).

But because of the irreconcilable conflict between the court's finding of fact and order, the court is directed to reconsider both and correct either or both, as the evidence and the court's appraisal of it warrants. In doing so, however, heed should be taken of the following: Restitution, from its very nature and meaning, is necessarily limited to the amount lost, or damage done, which

amount, however, as the law of damages makes plain, is neither governed by nor limited to the amount of expenses that the owners incurred. G.S. 7A-649(2) requires that joint and several liability for the loss sustained be imposed on all juvenile contributors to the damage *if* all the participants have or can reasonably acquire the means to make restitution. And under Article IX, Section 7 of our Constitution fines and penalties cannot be given to the owners of damaged property, but must go to the school fund.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

CHARLES E. SANFORD v. STARLITE DISCO, INC., D/B/A STARLITE DISCO

No. 8330SC178

(Filed 7 February 1984)

Rules of Civil Procedure § 41.1— voluntary dismissal of action—new action—failure to pay costs of first action in apt time

Where plaintiff voluntarily dismissed his original action against defendant without prejudice pursuant to G.S. 1A-1, Rule 41(a)(1), a second action filed by plaintiff based on the same claim was properly dismissed for failure of plaintiff to pay the costs of the first action within 30 days after an order directing plaintiff to pay such costs without consideration by the court of alleged excusable neglect by plaintiff as an explanation for his late payment of the costs. G.S. 1A-1, Rule 41(d).

APPEAL by plaintiff from *Howell, Judge.* Order entered 5 September 1982 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 18 January 1984.

In 1979 plaintiff instituted a civil action for personal injuries against defendant. Prior to trial, plaintiff voluntarily dismissed the action, without prejudice, pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. In December 1981, plaintiff reinstituted the civil action against defendant. In its answer, defendant included a request that the court order the plaintiff pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure to pay the costs assessed in the earlier action. On 13 May

1982, the court ordered the plaintiff to pay the costs assessed in the first action. Plaintiff did not pay these costs until 7 July 1982. On 21 June 1982, defendant filed a motion to dismiss the second action pursuant to Rule 41(d) for the failure of the plaintiff to pay the costs as ordered. On 5 September 1982, the court entered an order dismissing the second action for the failure of the plaintiff to pay the costs of the first action within 30 days of the 13 May 1982 order as required by Rule 41(d). From the order of dismissal, plaintiff appealed.

Frank G. Queen for plaintiff appellant.

Alley, Killian and Kersten, by Leon M. Killian, III; and Harrell and Leake, by Larry B. Leake, for defendant appellee.

WEBB, Judge.

G.S. 1A-1, Rule 41(d) of the North Carolina Rules of Civil Procedure provides as follows in pertinent part:

> "(d) . . . If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, . . . the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action."

This section of Rule 41 was amended in 1979 to provide for the 30-day period before dismissal of an action. Prior to amendment, the rule provided for summary dismissal of a second action brought before the payment of the costs in a first action.

Plaintiff contends the 30-day provision in Rule 41(d) should be read in conjunction with Rule 6(b) of the North Carolina Rules of Civil Procedure which provides for an enlargement of the time within which to take a given action, and that the court erred in not considering plaintiff's alleged excusable neglect as an explanation for his late payment of the costs. We disagree.

This Court held, in interpreting Rule 41(d) prior to its amendment, that the language of the rule constituted a mandatory

directive. *See Cheshire v. Aircraft Corp.*, 17 N.C. App. 74, 193 S.E. 2d 362 (1972). The 1979 amendment served only to add a 30-day grace period within which the plaintiff could pay the costs assessed and avoid summary dismissal. The language of the rule directing that the court "*shall* dismiss the action" (emphasis added) if the costs assessed have not been paid remains the same, thus the rule as amended still constitutes a mandatory directive. For this reason, we hold that the trial court properly enforced the mandatory provisions of Rule 41(d) when it entered the order dismissing the plaintiff's second action.

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

IN THE MATTER OF CITY OF DURHAM ANNEXATION ORDINANCE No. 5791

NO. 8214SC1357

(Filed 21 February 1984)

1. **Municipal Corporations § 2.6— extension of fire protection to annexed area**

The evidence supported the trial court's determination that a city's plan for the extension of fire protection services into an annexed area met the requirement of G.S. 160A-47(3) that such services be provided "on substantially the same basis and in the same manner" as in the rest of the city prior to annexation, notwithstanding the evidence showed that most of the annexed area is further away from existing fire stations than is most of the pre-annexation city, and there are no plans for the construction of an additional fire station in or near the annexed area.

2. **Municipal Corporations § 2.6— extension of fire protection to annexed area**

A city is not required to show in an annexation report that fire protection services will be at a level that is substantially equal to the "average service" received by citizens of the pre-annexation city.

3. **Municipal Corporations § 2.6— extension of fire protection to annexed area**

Response time is only one of the many factors entering into the court's consideration of whether an annexation report reflects plans to provide fire protection services to an annexed area "on substantially the same basis and in the same manner" as in the pre-annexation city area.

4. Municipal Corporations § 2.2— density of area to be annexed—use of preliminary census data

A city's estimate of population density of an area to be annexed based on preliminary rather than final census data substantially complied with G.S. 160A-54. G.S. 160A-48.

5. Municipal Corporations § 2.2— density of area to be annexed—consideration of apartment complex with surrounding area

Consideration of a densely populated apartment complex together with the surrounding area in determining whether an area to be annexed met the population density test of G.S. 160A-48(c)(1) did not infringe on the spirit of the annexation law and was proper.

6. Rules of Civil Procedure § 32— introduction of answers to opposing party's interrogatories

Where petitioners had previously read into the record answers to their interrogatories concerning distances from municipal fire stations to certain points in an area to be annexed, the trial court did not err in permitting the city to offer answers to petitioners' interrogatories concerning how this distance related to response time. G.S. 1A-1, Rule 32.

7. Evidence § 18— annexation—test runs from fire stations by patrol cars—response time

Test runs made by patrol cars from existing municipal fire stations to points within an area to be annexed were competent to establish a basis for estimating future response times although the test runs were not conducted under substantially similar conditions of an alarm response by a fire engine, since the prospective outlook of this evidence necessarily removed it from the strict requirement of substantial similarity that is invoked in the typical experiment situation.

8. Trial § 57— nonjury trial—presumption that incompetent evidence disregarded

Where a finding of fact made by the judge sitting without a jury is supported in the record by competent as well as incompetent evidence, a rebuttable presumption arises that the judge disregarded the incompetent evidence and based his consideration solely on the competent evidence.

9. Municipal Corporations § 2— time limitations of annexation statutes—constitutionality

The time limitations specified in G.S. 160A-49 (establishing the procedure for annexation) did not violate petitioners' due process rights.

10. Municipal Corporations § 2.4— time limitation for appeal of annexation—constitutionality

The time limitation specified in G.S. 160A-50 for appeals from the adoption of an annexation ordinance did not violate petitioners' due process rights.

11. Municipal Corporations § 2.2— annexation—development for urban purposes—constitutionality of statute

The language of G.S. 160A-48(a)(2) which requires "[e]very part" of the area to be annexed to meet the requirement of subsection (c) that "[p]art of all" of the area must be developed for urban purposes is not unconstitutionally vague.

APPEAL by petitioners from *Clark (Giles R.), Judge.* Judgment entered 5 February 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 November 1983.

This is a civil action wherein petitioners seek to have an annexation ordinance adopted by respondent City of Durham declared null and void.

On 3 August 1981, the Durham City Council adopted a resolution stating its intent to annex certain areas outside the corporate limits of the city. On 17 August 1981, the council approved and made available for public inspection its Annexation Report and on 24 August 1981 approved and made available a Supplemental Annexation Report. A hearing on the proposed annexation was held on 8 September 1981. On 19 October 1981, the ordinance was adopted by the City Council.

Petitioners initiated this action on 18 November 1981 by filing a petition in Superior Court, pursuant to G.S. 160A-50, seeking review of the ordinance. The matter was heard on 11 January 1982 and, on 5 February 1982, the court announced judgment in favor of respondents. After the denial of petitioners' post-trial motions for judgment notwithstanding the verdict, for a new trial, and to amend the judgment, petitioners gave notice of appeal on 14 April 1982.

Petitioners group their assignments of error under four arguments which we consider below. In part III of this opinion, we reject petitioners' challenges to the admissibility of certain evidence. The sufficiency of the evidence is challenged in petitioners' first and second arguments, which we consider in light of our disposition in part III of petitioners' challenge to the admissibility and competence of some of the evidence.

William V. McPherson for petitioner appellants.

John C. Randall pro se.

William I. Thornton, Jr., and Brenda M. Foreman for respondent appellee City of Durham.

EAGLES, Judge.

I

Part three of Chapter 160A of the General Statutes governs the annexation of unincorporated contiguous areas by cities having a population of 5,000 or more. *See* G.S. 160A-45 through 160A-56 (Replacement Volume 3D, Part I, 1982) *amended by* Session Laws 1983, c. 636, s. 37.1, and c. 768, s. 25 (Supp. 1983). The basic question presented by a petition for review under G.S. 160A-50 is whether the procedure followed in adopting the ordinance was in substantial compliance with the applicable statutes. *Food Town Stores, Inc. v. City of Salisbury,* 300 N.C. 21, 265 S.E. 2d 123 (1980); *In re Annexation Ordinance (New Bern),* 278 N.C. 641, 180 S.E. 2d 851 (1971); *McKenzie v. City of High Point,* 61 N.C. App. 393, 301 S.E. 2d 129, *rev. denied,* 308 N.C. 544, 302 S.E. 2d 885 (1983). Where the record of the annexation proceedings demonstrates *prima facie* substantial compliance with the applicable statutes, the burden is on the petitioner to show by competent evidence that the city has failed to meet the statutory requirements or that there was some irregularity in the proceedings that resulted in material prejudice to petitioners' rights. G.S. 160A-50; *In re Annexation Ordinance (Winston-Salem),* 303 N.C. 220, 278 S.E. 2d 224 (1981); *In re Annexation Ordinance (New Bern), supra.*

One of the applicable statutes is G.S. 160A-47 which provides in part as follows:

> A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall . . . prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> . . . .

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

a. Provide for extending police protection, fire protection . . . to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. . . .

[1] Petitioners' first argument is that the court erroneously found from evidence and concluded that the city's plan for the extension of fire protection services into the annexed area was in compliance with G.S. 160A-47(3).

In their argument, petitioners rely primarily on the fact, supported by evidence in the record, that most of the annexed area is further away from existing fire stations than is most of the preannexation city. Petitioners also point out that the planned extension of fire protection services into the annexed area includes no plans for the construction of an additional fire station in or near the annexed area. Petitioners contend that the findings of fact made by the court are not supported by the evidence and that the conclusions of law based on those findings are erroneous.

In the Supplemental Annexation Report, the City's plans for the provision of fire protection services are described as follows:

A patrol unit will be added in order to have sufficient resources to provide law enforcement and fire suppression services in Area 1. A patrol unit consists of one fully equipped Public Safety patrol car, four Public Safety Officers, uniforms and equipment for the officers, and operating costs for the patrol unit (fuel, maintenance). In addition, a relief position will be added to provide support to the additional patrol unit for sick leave and vacation.

Public Safety Station 5 located at 2212 Chapel Hill Road will have Station Area and Fire Suppression responsibility for Area 1. Tanker service will be required to provide adequate fire flow in some sections of Area 1 until water mains and fire hydrants are petitioned for and installed. This need

would be met by the dispatch of Tanker 16 from Fire Station 1. This is the same way the City serves other areas of the City that are without fire hydrants.

The judgment here contains forty-three separate findings of fact and fourteen separate conclusions of law. Twenty-nine of the findings and five of the conclusions deal specifically with the police and fire protection services that the City plans to furnish to the annexed area. Most of the findings dealing with fire protection describe the type and location of available equipment, facilities and manpower, and the manner in which fire protection services are provided in the city. All of the findings were excepted to in the record and ten of them are brought forward under the assignments of error relating to this argument. Three of those findings are set forth below:

> 40. If a fire call is received by the City from a location in the annexation area which indicates the involvement of a structure with two or more stories, an aerial unit will be dispatched by the City from Station No. 2 to the fire call. This is the same response as in the rest of the City where an aerial unit is dispatched from the closest station having such a unit (Station 1, 2 or 3).
>
> 41. Parts of the annexation area lie within two miles of Public Safety Station No. 5. Other parts of the annexation area lie at a distance greater than two miles from Public Safety Station No. 5. Most of the annexation area lies, by road mileage, within two to three and one half miles of Public Safety Station No. 5.
>
> 42. Test runs conducted by the City in marked and unmarked patrol vehicles to the annexation area show that the response times from Stations 5 and 6 to different locations in the annexation area ranged from three to approximately six minutes. Test runs conducted in other areas of the City from Stations 5, 6, and other public safety stations under similar conditions, indicate response times to some locations exceed six minutes.

The pertinent conclusions of law state in effect that the annexation report shows that the City will provide fire protection services to the annexed area in compliance with the requirements of

G.S. 160A-47(3)(a) and that the petitioners failed to carry their burden of proving otherwise.

We note first that there is no lack of evidence that some level of fire protection will be provided to the annexed area. The record emphatically discloses that fire protection was a key issue in the review proceeding below. The question presented is whether the evidence in the record supports the findings that the fire protection to be provided by the City to the annexed area will be provided "on substantially the same basis and in the same manner as [it is] provided within the rest of the municipality prior to annexation." G.S. 160A-47(3)(a).

The undisputed portions of the court's findings concerning existing fire protection facilities and service in the City of Durham are summarized in pertinent part below:

Durham has nine operating fire and public safety stations located throughout the City. These stations are each equipped with one or more pumper trucks; eight of them are manned by public safety officers who are trained fire fighters. The officers from the station patrol an assigned area in a patrol car. Each patrol car carries two fire extinguishers and other fire fighting equipment. Fire alarm calls are received at a central location in the City. Depending on the type and seriousness of the fire, the one or two closest pumper stations and their crews will respond to the call. Officers on patrol in the area respond to the call in their patrol cars and often arrive on the scene before the pumper trucks.

Three of the nine fire stations are equipped not only with pumper trucks but also with more sophisticated fire fighting equipment and a larger complement of fire fighters. The City operates one tanker truck which carries water and responds to fires in areas where there are no fire hydrants. The City operates two aerial trucks which respond to any fire involving a structure of two or more stories. The stations equipped with the tanker and aerial trucks are located towards the center of the City where there is a higher incidence of fires requiring the more sophisticated equipment, i.e., buildings are tall and close together, houses are of wooden frame construction, and there is a higher population density. The stations are also closer to large institu-

tional complexes such as universities and hospitals where many of the same characteristics exist.

The undisputed evidence shows that most of the annexed area is located outside of a two mile radius of the closest pumper stations and outside of a two and a half mile radius of the stations housing the tanker and aerial trucks. Petitioners attempt to translate this distance into increased response time to fire alarm calls. In support of this contention, petitioners introduced what they characterize as the "only competent" evidence of response times. The evidence consisted of a record kept several months in 1980 of actual response times by one engine company to fire calls both within the City and in the annexed area. The evidence, petitioners argue, tends to show that the average response time to fires in the annexed area was approximately the same as the longest response time to fires in the City and over a minute longer than the average response time to fires within the City limits.

[2] Petitioners then argue that the City must show in the annexation report that the services (i.e., fire protection) required to be provided by G.S. 160A-47(3)(a) must be provided at a level that is "substantially equal to the *average service* received by citizens of the pre-annexation City." (Emphasis in petitioners' brief.) Under this theory, evidence tending to show a "significant" difference in response times would preclude a finding or conclusion that the City had complied with the statute and would require the judicial invalidation of the annexation ordinance.

Petitioners' argument, however, is not supported in the statute or by previous judicial interpretation and application of the statute. Petitioners have cited no authority and we have found none that supports petitioners' interpretation. Nowhere in G.S. 160A-47 does the concept of equality with "average service" appear in reference to the municipal services to be supplied by the annexing municipality. No reasonable reading of the statutory language permits that inference.

G.S. 160A-47(3)(a) requires that the annexation report reflect the City's plan to provide certain enumerated services "on substantially the same basis and in the same manner" as in the rest of the City. *See In re Annexation Ordinance (Winston-Salem), supra.* Petitioners' notions of equality and average service are not

consistent with the practical application of this language. As was apparent from the evidence presented by the City, there are many variables that affect the level of fire protection afforded to different areas of a municipality: height and size of buildings, construction materials, proximity of buildings to one another and street pattern, among others. That the City of Durham has accounted for these variables is reflected in its placement of fire stations and the equipment and manpower assigned to each. Obviously, the aerial trucks and tanker will respond to fires in the downtown area in less time than to fires in outlying developments. This distribution of available resources reflects the incidence and location of fires requiring heavier, more specialized equipment.

The City's evidence tended to show also that substantially less than half (39.5%) of all reported fires during 1978, 1979 and 1980 required the use of any extinguishing equipment at all. 91.7% of fires requiring extinguishing equipment were capable of being handled by one pumper truck and crew of the type that would respond to fire alarms in the annexed area. 16.4% of those fires were extinguished by the use of hand extinguishers of the type carried on Public Safety patrol cars. More than 68.2% of all reported fires in Durham during a three year period were capable of being handled by an equipped Public Safety patrol vehicle and crew similar to the patrol unit that the annexation report indicates will be added by the City.

The City points out, as it did at trial, that the presence of a public safety patrol unit in the area will reduce the response time to fires. The evidence also tends to show that as a patrol unit becomes familiar with the patrol area, the response time will be reduced for the patrol cars, the pumper trucks, and where required, the aerial and tanker trucks. There was evidence of test runs made by patrol cars under normal traffic conditions that tended to show that response time from the closest fire stations to the annexed area—the ones that would normally respond to an alarm—ranged from three to more than six minutes.

Petitioners' evidence regarding response time accounts for few, if any, of the variables that affect either response time or the location and use of fire fighting facilities. Petitioners' evidence regarding response times does not take into account the

patrol unit that will be added to patrol the annexed area. Furthermore, the records from which petitioners' evidence is drawn are subject to problems (i.e., sample size) that tend to skew the average in favor of longer times, discrediting petitioners' assertion of "average response time" and undermining its statistical validity.

Even if we were to adopt petitioners' concept of "substantially equal to the average service," which we expressly do not, we know of no judicially accepted interpretation of that language against which to measure this case. An argument could be made that the variance in average response times shown here does *not* preclude a finding that the projected level of service would be "substantially equal to the average service" in the rest of the City.

[3] Response time is only one of many factors that enters into the court's consideration of whether an annexation report reflects plans to provide certain required municipal services "on substantially the same basis and in the same manner" as in the pre-annexation City area. *See Food Town Stores, Inc. v. City of Salisbury, supra* (response time one of several factors considered). In the case of *In re Annexation Ordinance (Charlotte)*, 304 N.C. 549, 284 S.E. 2d 470 (1981), our Supreme Court held that the city's failure to include in its plan a notation of the average response time of police cars to the annexed area did not preclude a finding of compliance with the statute. This holding was buttressed by other evidence tending to show that the availability of police protection was the same in the annexed area as in the rest of the city. In the case of *In re Annexation Ordinance (Jacksonville)*, 255 N.C. 633, 122 S.E. 2d 690 (1961), the Supreme Court held that the requirements of the applicable statute were satisfied where the plans for extension of police protection into the annexed area called only for the extension of jurisdictional boundaries and lengthened patrol routes. In that case, which reversed the trial court on other grounds, there was no indicated expansion of fire protection service, only an assertion by the city that fire protection would be provided to the annexed area on substantially the same basis as in the pre-annexation city. The only evidence of response time was the normal response to an adjoining area. *See also Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E. 2d 288 (1973) (extension of existing police patrol routes into annexed

area held to satisfy similar statutory requirement affecting annexation by municipalities of less than 5,000 population). As our Supreme Court has held:

> The central purpose behind our annexation procedure is to assure that, in return for the added financial burden of municipal taxation, the residents [of the annexed area] receive the benefits of all the major services available to municipal residents. [Citations.] The minimum requirements of the statute are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a non-discriminatory level of service. . . .

In re Annexation Ordinance (Charlotte, 1981), supra at 554, 284 S.E. 2d at 474.

[1] In summary, we find ample evidence in the record to support the court's findings of fact and conclusions of law that the annexation report shows that the City plans to furnish fire protection to the annexed area consistent with the requirements of G.S. 160A-47(3)(a). Petitioners have failed to carry their burden of showing by competent evidence the City's failure to comply with the statute. Their assignments of error in this regard are accordingly overruled.

II

Section 2 of the annexation ordinance adopted by the Durham City Council declares that the area to be annexed meets the statutory criteria that an area must meet before it is eligible for annexation. G.S. 160A-48. One of the eligibility criteria is that an area be "developed for urban purposes." G.S. 160A-48(c). An area may be classified as "developed for urban purposes" if it meets one of three statutory standards. The standard applied by the City here is population density. G.S. 160A-48 provides as follows:

> (a) A municipal governing board may extend the municipal corporate limits to include any area
>
> . . . .
>
> (2) Every part of which meets the requirements of either subsection (c) or subsection (d)
>
> . . . .

(c) Part of all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

(1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries;

. . . .

In the Supplemental Annexation Report, the City describes the method used for estimating population density:

Method A

Population density is calculated in this method by multiplying the non-city average for persons per dwelling unit times the number of dwelling units in the area to obtain estimated population. Population is then divided by the acreage of the area to obtain population density.

Calculations using this method produced a population density figure of 2.31 persons per acre. Population estimates are provided for in the annexation statutes as follows:

In determining population and degree of land subdivision for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in G.S. 160A-48 have been met on appeal to the superior court under G.S. 160A-50, the reviewing court shall accept the estimates of municipality:

(1) As to population, if the estimate is based on the number of dwelling units in the area multiplied by the average family size in such area, or in the township or townships of which such area is a part, as determined by the last preceding federal decennial census, ...

G.S. 160A-54.

a.

[4] In their argument, petitioners contend that the trial court erred in finding as a fact and concluding as a matter of law that the City's estimate of population density was correct and derived in a manner that complied with statutory requirements. Specifically, petitioner contends that the City's estimate of population density is not *prima facie* reliable under G.S. 160A-54(1) because the estimate is based on preliminary rather than final census data. Petitioner argues that the statute, by specifying the use of federal census data, requires the use of *final* rather than *preliminary* census data. We disagree.

The plain language of G.S. 160A-54 contains no requirement regarding the use of final census data and we are aware of no judicially imposed requirement. Furthermore, our Supreme Court in *dicta* has relied on preliminary 1980 census data in reviewing annexation proceedings. *See In re Annexation Ordinance (Winston-Salem), supra.*

Petitioners presented no evidence at trial that the population figures used by the City in computing population density were being challenged or questioned as to verity or accuracy. Rather, petitioners attempt to establish an alternate density figure that incorporates a downward "adjustment" for one bedroom apartments and a "reasonable" 10% vacancy rate for a large apartment complex in the area. Predictably, the figure thus obtained is less than the statutory minimum of two persons per acre. However, the method urged by petitioners is open to considerably more questions than the method that they challenge. The vacancy rate and adjustment for one bedroom apartments are without objective justification. The persons per unit average in any census tract inherently accounts for unit size and vacancy rate. Additionally, the persons per unit and total dwelling unit figures used by the petitioners in establishing their alternate density figure are derived from the same *preliminary* census figures used by the City. We are aware of no authority for petitioners' incorporation of an adjustment for unit size or a vacancy rate for rental property. Inasmuch as census figures are based on actual counts, they are inherently more reliable than any formula that alters the figures by arbitrarily assuming vacancy rates and adjusting for dwelling unit size. The population density figure used by the City

was derived in a manner that warranted *prima facie* acceptance by the court and warranted a finding of substantial compliance with the statute.

b.

[5] Petitioners further contend that G.S. 160A-48 requires that the density standard be applied to "every part" of the annexation area. In connection with this contention, petitioners argue that the presence of one densely populated apartment complex makes possible the annexation of the entire area and that the area is otherwise ineligible. They argue that consideration of the apartment complex together with the surrounding area infringes on the spirit of the annexation laws. We find no merit in this contention. Regarding a similar contention, our Supreme Court said:

> Not only must the entire annexation area *meet* the requirements of [G.S. 160A-48(c)(1)], but even more importantly, the tests to determine whether an area is developed for urban purposes must be *applied* to the annexation area as a whole.

In re Annexation Ordinance (Charlotte, 1974), 284 N.C. 442, 456, 202 S.E. 2d 143, 152 (1974) (emphasis in original). In that case, the Supreme Court held that an application of the population density requirement in the manner urged by petitioners here was contrary to the legislative intent and constituted an "unreasonable departure from statutory standards." *Id.* at 457, 202 S.E. 2d at 152. *See also In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 249 S.E. 2d 698 (1978). The application of the population density standard does not, contrary to the petitioners' contention, produce the absurd result contemplated by the Supreme Court in *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E. 2d 574 (1964). The court in *Lithium Corp.* notes that literal application of the tests for defining urban development "might in some extreme and improbable circumstances bring about absurd results adverse to municipalities." *Id.* at 538-39, 135 S.E. 2d at 579. That case, however, involved the simultaneous application of the "use" and "subdivision" criteria specified in G.S. 160A-48(c)(3), not the population density test of G.S. 160A-48(c)(1). Petitioners' reliance on *Lithium Corp.* in the present context is therefore misplaced.

In summary, petitioners failed to prove by competent evidence that the City was not in substantial compliance with the re-

quirements of G.S. 160A-48. Accordingly, we find no merit in petitioners' assignments of error.

III

In their third argument, petitioners assign as error several evidentiary rulings by the trial court.

a.

[6] Petitioners first contend that the court below erred in allowing the City to present evidence of test runs made by patrol cars from existing municipal fire stations to points within the annexed area. The first occasion on which the evidence was admitted was when the court allowed the City to offer answers to petitioners' interrogatories that were not included in petitioners' presentation of evidence. Petitioners contend: (1) that this procedure violated the rule that discovery not offered by the discovering party is not permitted to be made part of the record during that party's presentation of its case unless necessary to prevent those portions already in the record from being misleading; (2) that the answers read into the record by the City were "essentially non-answers and . . . nothing but conclusory statements" and hearsay; and (3) that a proper foundation had not been laid for the admission of this evidence.

As authority for their contentions, petitioners cite Rules 26 and 32 of the Rules of Civil Procedure. Rule 32 provides in pertinent part:

> If only a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced and any party may introduce any other parts.

Nothing in this rule would prevent the City's offer of the challenged evidence at the time it was introduced. Petitioners had previously read into the record answers to interrogatories concerning the distances from public safety stations to certain points in the annexation area. Other answers relating to how this distance translated into response times are clearly relevant. It was not error for the court to allow those answers to be read into the record.

We find petitioners' contentions regarding the hearsay and conclusory nature of the answers to be without merit.

b.

[7] Petitioners next contend that the evidence of the test runs made by the patrol cars is inadmissible because the test runs were not conducted under conditions that would simulate an alarm response by a fire engine. Petitioners' contention is based on evidentiary rules governing the admission and use of the results of experiments conducted for the purpose of proving or disproving an event or occurrence relevant to an issue in the trial.

We note, however, that the situation before us is not typical of situations in which experimental evidence is normally used. The cases cited by both parties and in Professor Brandis' treatise on North Carolina evidence involve attempts to recreate in an experiment the conditions surrounding events that have *already occurred. See* Brandis, N.C. Evidence § 46 (1982) and cases cited therein. Here, the test runs made by the City were offered as evidence tending to establish a basis upon which future response times could be estimated. The prospective outlook of this evidence necessarily removes it from the strict requirement of substantial similarity that is invoked in the typical experiment situation. *E.g., State v. Jones,* 287 N.C. 84, 214 S.E. 2d 24 (1975); *Hall v. Railroad Co.,* 44 N.C. App. 295, 260 S.E. 2d 798 (1979), *rev. denied,* 299 N.C. 544, 265 S.E. 2d 404 (1980). When seeking to offer a basis for projecting future performance in response to a myriad of possibilities, the substantial similarity requirement would be impossible to apply. While the conditions surrounding the test runs are certainly relevant to the issue before the court, failure to establish similarity to the degree normally required does not render that evidence incompetent. Any discrepancy in conditions may be brought out on cross-examination by the opposing party and would affect the weight rather than the admissibility of such evidence. The weight attached to evidence properly before the court is a question that is not reviewable by us. *Coble v. Coble,* 300 N.C. 708, 268 S.E. 2d 185 (1980). The test runs made by the City, insofar as they are relevant to the issue before the court and have probative value, were competent evidence. It was not error for the trial court to consider it.

c.

Petitioners also contend that the evidence of the test runs is insufficient to support the findings of fact. The question of sufficiency of the evidence to support those findings was considered above in part I of the opinion and resolved in favor of the City. Beyond noting that this is not the only evidence supporting those findings of fact, we do not discuss that question further. Petitioners' contention is without merit.

d.

Petitioners next contend that the persons per dwelling unit and dwelling unit figures used by the City in calculating population density were "obtained by a process of double hearsay" and should have been excluded. Petitioners base this contention on testimony by a witness for the City, a planner with the City of Durham, that he telephoned the Durham County planning department and obtained from an unidentified person figures that he was told were taken from preliminary census data. The same witness testified that the figures thus obtained were subsequently verified by actual census data and that there was no discrepancy. This testimony was admitted over the objection of petitioners.

[8] Our courts have recognized the expediency of applying the formal rules of evidence less strictly in proceedings before a judge than in trials involving a jury. *Cameron v. Cameron*, 232 N.C. 686, 61 S.E. 2d 913 (1950). Thus, where a finding of fact made by the judge sitting without a jury is supported in the record by competent as well as incompetent evidence, a rebuttable presumption arises that the judge disregarded the incompetent evidence and based his consideration solely on the competent evidence. *Mayberry v. Insurance Co.*, 264 N.C. 658, 142 S.E. 2d 626 (1965). *See generally* Brandis, N.C. Evidence § 4a (1982); McCormick on Evidence § 60 (2d ed. 1972).

In the instant case, there is competent evidence in the form of the witness's testimony that the figures used to calculate population density were verified against actual census data. Because there was no discrepancy in the figures as verified, there was no need to recalculate population density. The population density figure used by the City was derived from competent evidence. It was not error for the court to consider it.

IV

Petitioners' final argument purports to question the constitutionality of several of the statutes governing the annexation process. Our review of the record below discloses that none of these questions were raised or considered in the trial court. We are therefore not bound to consider them on appeal. *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982); *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398 (1962). In our discretion, however, we have reviewed petitioners' contentions and dispose of them below.

a.

[9] Petitioners contend that the time limitations specified in G.S. 160A-49 (establishing the procedure for annexation) and G.S. 160A-50 (regarding appeals from the adoption of an annexation ordinance) constitute unreasonable procedural burdens on their due process rights under the United States and North Carolina Constitutions. Petitioners cite no authority for their contention and we are not persuaded by their argument.

In *Kritzer v. Town of Southern Pines*, 33 N.C. App. 152, 234 S.E. 2d 648 (1977), this court held that in annexation proceedings, the rights of the general public and of petitioners under G.S. 160A-49 were adequately protected by G.S. 160A-49(b) and (e). These provisions both contain some of the time limitations which petitioners contend render the statute unconstitutional. The other limitation complained of requires the City to make the annexation report available to the public at least fourteen days prior to the public hearing on annexation. *See* G.S. 160A-49(c). Other than simply asserting an unconstitutional burdening of their rights, petitioners have failed to demonstrate prejudice or even to assert with particularity how their due process rights might have been violated. Accordingly, we hold that they have presented no question of constitutionality to be resolved by us. *Nicholson v. Educational Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969).

b.

[10] In *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980), *reh. denied*, 301 N.C. 728, 274 S.E. 2d 230 (1981), our Supreme Court expressly approved the procedure established in G.S. 160A-50. The court there held that the clear intent of the

legislature was to provide an expedited judicial review, limited in scope, and avoiding unnecessary procedural delays. In view of the lack of contrary authority, the Supreme Court's opinion in *Moody* is dispositive of this issue.

[11] Finally, petitioners argue that G.S. 160A-48 is unconstitutionally vague. Petitioners base their contention on the language of G.S. 160A-48(a)(2) which requires "[e]very part" of the area to be annexed to meet the requirement of subsection (c) that "[p]art of all" of the area must be developed for urban purposes. *See* pertinent text of G.S. 160A-48 set out in part II of this opinion *supra*. Petitioners contend that the quoted words put the two interlocking subsections in direct conflict with one another and render the statute unconstitutionally vague. We disagree.

Our Supreme Court has previously considered and rejected similar contentions based on the same language. *In re Annexation Ordinance (Charlotte, 1974)* and *In re Annexation Ordinance (Jacksonville)*, both *supra*. We considered the application of G.S. 160A-48 in the present case in part II of this opinion. We view the Supreme Court opinions in the above-cited cases as dispositive of the issue and decline to consider it further. Petitioners' contentions are without merit.

V

In light of our decision above, we need not consider respondents' cross-assignment of error and the arguments advanced in support thereof.

For the reasons stated, the judgment of the Superior Court is affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. GRADY MELVIN HOLLOWAY

No. 8323SC116

(Filed 21 February 1984)

1. **Searches and Seizures § 28— official issuing warrant—failure to allow examination concerning impartiality—improper**

The Fourth Amendment requires that warrants be issued only upon a determination by a "neutral and detached magistrate." To reach a decision as to whether the magistrate was impartial, the trial court must find (1) the *office* held by the person issuing the warrant must be independent of "connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires," and (2) that the person holding office performed his duties in a neutral and detached manner. Therefore, although a deputy clerk of superior court was clearly authorized to issue a search warrant, the trial judge erred in failing to admit evidence concerning the "neutrality" of the issuing official where the defendant presented evidence tending to show that the clerk may have issued the warrant *because of* her personal convictions and social relationship with other parties vitally concerned with the judicial function involved.

2. **Searches and Seizures § 28— sufficiency of evidence to support issuance of search warrant**

In a prosecution for trafficking in methaqualone, defendant failed to carry its burden of showing by a preponderance of the evidence that there were false statements knowingly included in an affidavit supporting a search warrant, and the record revealed sufficient competent evidence to support the trial court's findings of fact and conclusion that probable cause existed for the issuance of the warrant. G.S. 15A-977(f).

3. **Searches and Seizures § 39— search warrant for restaurant—search of locked basement proper**

There was no error in the trial court's denial of defendant's motion to suppress evidence seized from the basement portion of the premises where, after executing the search warrant in the upstairs portion of the premises, the law enforcement officers proceeded to the basement which was locked, no key was readily available, and they cut the lock from the door and proceeded to search the basement. G.S. 15A-251.

4. **Searches and Seizures § 40— failure to suppress evidence of items seized which was not listed on warrant—proper**

There was no error in allowing evidence of marijuana which was properly seized when it was found during a search for methaqualone which had been conducted pursuant to a valid search warrant.

Judge HEDRICK dissenting.

State v. Holloway

APPEAL by defendant from *Mills, Judge*. Judgment entered 21 September 1982 in Superior Court, WILKES County. Heard in the Court of Appeals 18 October 1983.

Attorney General Edmisten, by Assistant Attorney General Steven F. Bryant and Special Deputy Attorney General Jo Anne Sanford, for the State.

Moore & Willardson, by Larry S. Moore, John S. Willardson, and William F. Lipscomb, for defendant appellant.

BECTON, Judge.

After the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant, defendant, pursuant to the provisions of N.C. Gen. Stat. § 15A-979(b) (1983), entered a plea of guilty to trafficking in methaqualone in violation of N.C. Gen. Stat. § 90-95(h)(2)(b) (1981 & Supp. 1983) and trafficking in marijuana in violation of N.C. Gen. Stat. § 90-95(h)(1)(b) (1981 & Supp. 1983). Defendant was sentenced to a term of fourteen years. From the court's ruling on his motion to suppress, the defendant appeals.

I

Defendant first assigns error to the trial court's denial of his motion to suppress evidence seized pursuant to a search warrant. Defendant contends, first, that the warrant was not issued by a "neutral and detached magistrate" as required by law; and, second, that the trial court erroneously prevented preservation of evidence to this effect for the record on appeal.

[1] The Fourth Amendment requirement that warrants be issued only upon the determination by a "neutral and detached magistrate" that probable cause exists has long been recognized by the courts of the country. *Johnson v. United States*, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). Our examination of the law as it has developed since *Johnson* reveals that the broad requirement of a "neutral and detached magistrate" involves two distinct concepts. First, the *office* held by the person issuing the warrant must be independent of "connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires." *Shadwick v. City of Tampa,*

407 U.S. 345, 350-51, 32 L.Ed. 2d 783, 789, 92 S.Ct. 2119, 2123 (1972). For example, in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), the Supreme Court held that a state attorney general was not a neutral and detached magistrate by virtue of his office, saying: "[T]here could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances." *Id.* at 450, 29 L.Ed. 2d at 573, 91 S.Ct. at 2029. Similarly, in *Connally v. Georgia*, 429 U.S. 245, 50 L.Ed. 2d 444, 97 S.Ct. 546 (1977), the Supreme Court held that an official who was compensated on a per warrant basis could not be considered neutral and detached.

We turn now to the second concept. It is not enough, say our courts, that the *office* be neutral and detached. The person holding office must perform his duties in a neutral and detached manner. In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 60 L.Ed. 2d 920, 99 S.Ct. 2319 (1979), the Supreme Court held that a judicial officer lost "whatever neutral and detached posture [that] existed at the outset" when he "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation." *Id.* at 327, 60 L.Ed. 2d at 928-29, 99 S.Ct. at 2324. In *State v. Miller*, 16 N.C. App. 1, 190 S.E. 2d 888 (1972), *modified and aff'd*, 282 N.C. 633, 194 S.E. 2d 353 (1973), this Court held that a warrant was not issued by a neutral and detached magistrate where the official failed to read the affidavit offered in support of the warrant application. Under those circumstances, said this Court, the magistrate "utterly failed to perform the important judicial function which it was his duty to perform. . . ." *Miller*, 16 N.C. App. at 10, 190 S.E. 2d at 894.

In the case before us, the motion to suppress on grounds that the warrant was not issued by a neutral and detached official necessitated inquiry by the trial judge into whether the warrant was issued by a person holding proper independent office. Because defendant had produced no evidence to the contrary, this initial inquiry required only that the judge determine from the face of the warrant that it was in fact issued by an official authorized to do so in this State. The issuing official, Janet Handy, as a Deputy Clerk of Superior Court in Wilkes County, was clearly authorized to issue search warrants. *See* N.C. Gen. Stat. § 15A-243(b)(2) (1983) and N.C. Gen. Stat. §§ 7A-180 to 181 (1981).

With regard to the second requirement, the trial judge had to consider the manner in which Ms. Handy performed her judicial function of determining, from the evidence before her, the existence of probable cause. Although the record discloses that Ms. Handy read the supporting affidavit supplied by the officers who requested the warrant and questioned one of the officers as to the contents of the affidavit, these facts do not conclusively demonstrate that Ms. Handy performed her duties in a neutral and detached fashion. Defendant specifically asserted that Ms. Handy's decision to issue the warrant was based on personal reasons and personal relationships. We hold that the trial court erred in denying, on relevancy grounds, defendant an opportunity to develop, even for purposes of the record, matters that could show that Deputy Clerk Handy did not perform her function in a neutral and detached way.[1]

The "neutrality" and "detachment" of the issuing official can be challenged on the basis of personal, political, or economic conditions or relationships. *See generally* 2 W. LaFave, *Search and Seizure* § 4.2 (1978). It begs the question to suggest that defendant's inquiry is irrelevant and goes to a "person's personal life" when defendant's inquiry is specifically designed to show that Ms. Handy issued the warrants *because of* her personal convictions and social relationships with other parties vitally concerned with the judicial function involved.

If the circumstances under which the neutrality and detachment of the issuing official can be challenged are not here presented, will they ever be? Consider the following factors, in the light most favorable to the defendant, known by the trial judge at the suppression hearing:

1. The basis for the trial court's decision is shown in the following excerpt from the Record:

Q. Now, did you have any type of social relationship with any of the officers?

MR. ASHBURN: Objection.

COURT: Sustained.

MR. WILLARDSON: I think at this point this could be important to our motion. We think this goes to the heart of the matter.

a. On 17 March 1982, Wilkes County Magistrate Barry Wood, on the basis of information submitted to him by three law enforcement officers, concluded that there was no probable cause to justify the issuance of a search warrant for Staley's Restaurant in Wilkes County;

b. Michael Ashburn, the District Attorney for the Twenty-Third Judicial District, in a telephone conversation with Magistrate Wood and the three law enforcement officers, confirmed that there was no probable cause to justify the issuance of the search warrant;

c. On the following day, the three law enforcement officers received from Janet Handy, a Deputy Clerk of the Superior Court of Wilkes County, a warrant to search Staley's Restaurant without advising her that Magistrate Wood had turned down a search warrant for the same premises the night before. (The affidavit presented to Ms. Handy presumably included an allegation that an informant had observed methaqualone in Staley's Restaurant within the past 48-hour period.);

d. At the time Ms. Handy issued the search warrant she was allegedly dating one or two of the law enforcement officers who applied to her for the search warrant. (Indeed, the trial court, not being concerned with hearsay at the suppression hearing, allowed Magistrate Wood to testify that he had heard that one or both of the S.B.I. agents were dating Janet Handy at the time the search warrant was issued.);

e. Ms. Handy, at the suppression hearing, stated, among other things, that "I am interested in how much time he

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COURT: It is going to be a sad thing if a person's personal life is going to be called into court. If that happened to me, I would quit, if I worked in the Clerk's office—if I were called into court and had to be questioned about my personal life. That objection is sustained.

MR. WILLARDSON: I ask that it be answered for the record.

COURT: I sustained the objection.

MR. WILLARDSON: Can she whisper the answer for the record?

COURT: I sustained the objection.

[the defendant] is going to get." She further testified that she would like to see Mr. Holloway get some time out of this; and

f. The search warrant was procured on the basis of statements allegedly made to the law enforcement officers by a confidential source of information, later identified as Michael Walter Jarvis. Michael Walter Jarvis, however, testified at defendant's suppression hearing and disavowed every allegation of fact attributed to him by the law enforcement officers in their application for the search warrant.

Now, we do not suggest that the law enforcement officers were forever bound by Magistrate Wood's determination on 17 March 1982 that no probable cause then existed. Nor do we suggest that the trial court could not consider the personal interest or "stake" Michael Walter Jarvis had in disavowing that he was a confidential informant. Rather, we suggest that the factors listed above show that defense counsel was not on a fishing expedition. Defense counsel had a good faith basis for trying to develop a record that Ms. Handy's bias or interest (just like Michael Walter Jarvis' bias or interest) affected the manner in which she purported to perform her duties.

This is not a case in which a defendant merely alleges that the magistrate or other issuing official and the law enforcement officer who seeks the search warrant are neighbors, hunting partners, or lifelong friends. On those facts, the trial court's decision might gain our concurrence. The facts and circumstances in this case are substantially more compelling, however, and defendant is entitled to a plenary hearing to develop an adequate record, at least for appellate purposes, to support his contentions. On the basis of the information available to it, the trial court erred in restricting defendant's examination of Ms. Handy and in concluding that Ms. Handy's personal life should not be called into court.

After all, the search warrant process interposes an orderly procedure in which an impartial magistrate can make an informed decision on the issue of probable cause. 2 W. LaFave, *supra* p. 4, § 4.2, at 29. Were it otherwise, there would be no need to inquire into a magistrate's attributes, motives, or particular conduct in is-

suing a search warrant. Fortunately, the law recognizes that a magistrate may have such a personal interest in a case that the magistrate cannot be deemed to be impartial. It is the *quid pro quo*—the issuing of a warrant in exchange for some benefit—that is important. Simply put, defendant's reliance on *Connally v. Georgia*, 429 U.S. 245, 50 L.Ed. 2d 444, 97 S.Ct. 546 (1977) is not misplaced since his

> situation, again, is one which offers a 'possible temptation to the average [woman] as a judge . . . or [it] might lead [her] not to hold the balance nice, clear and true between the State and the accused.' It is, in other words, another situation where the defendant is subjected to what surely is judicial action by an officer of a court who has 'a direct, personal, substantial, pecuniary interest' in [her] conclusion to issue or deny the warrant.

Id. at 250, 50 L.Ed. 2d at 448, 97 S.Ct. at 548.

II

[2] Defendant next contends the trial court erred in denying his motion to suppress since there was no probable cause for issuance of the search warrant. Defendant attacks the affidavit used to secure the warrant alleging "that the confidential informant described therein was a complete and total fabrication on the part of the law enforcement officers." At the hearing on his motion, defendant presented evidence from one Michael Jarvis who denied each allegation of fact attributed to the confidential informant and stated that he never gave any information to the law enforcement officers as a confidential informant. The law enforcement officers who procured and executed the search warrant then testified that Michael Jarvis was their confidential source and that he gave the information attributed to a confidential source in the search warrant.

Defendant has the burden of establishing by a preponderance of the evidence that false statements were knowingly and intentionally included in the warrant and affidavit by the affiant. *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978). The trial court found the following pertinent facts:

> [T]he court further finds that Officer Sam Winters testified that the confidential informant, on whom he relied, was Mi-

chael Jarvis; and that Officer Winters further testified that the information set forth in the affidavit furnished to the magistrate had indeed been furnished to him by said Michael Jarvis. The court further finds that Michael Jarvis had earlier testified that he was not the confidential informant relied upon by Agent Stubbs or Deputy Sheriff Winters; and that Michael Jarvis, in his testimony, denied furnishing any information to the officers concerning the affidavit used to secure the issuance of this search warrant. The court further finds that prior to taking the stand and testifying, Michael Jarvis took an oath on the Bible to tell the truth and that Detective Winters took an oath on the Bible to tell the truth. The court further finds the court has absolutely no reason to doubt the veracity of Officer Sam Winters; and therefore, the court relies upon the testimony of Detective Winters in reaching its conclusion as to the reliability of the information furnished in the affidavit used to secure the issuance of this search warrant.

N.C. Gen. Stat. § 15A-977(f) (1983) requires the trial court to make findings of fact after a hearing on a motion to suppress. The weight given the testimony is properly for the finder of fact. The facts found by the trial court are binding if supported by competent evidence. *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 (1980). The record reveals sufficient competent evidence to support the court's findings of fact. Therefore, defendant having failed to carry his burden of showing by a preponderance of the evidence that there were false statements knowingly included in the affidavit, the assignment of error is overruled.

III

[3] Defendant finally contends that the trial court erred in denying his motion to suppress evidence seized from the basement portion of the searched premises. After executing the search warrant in the upstairs portion of the premises, which was used as a restaurant, the law enforcement officers proceeded to the basement, which could only be entered from outside the premises. Upon finding the basement locked the officers attempted to obtain a key. When they were told that defendant had just left for Winston-Salem, with the only key, they cut the lock from the door

and proceeded to search the basement. A search of the basement revealed 792 pounds of marijuana and 8,450.9 dosage units of methaqualone.

Defendant contends the officers' forced entry into the basement violated the restrictions set forth in N.C. Gen. Stat. § 15A-251 (1983) which provides:

> An officer may break and enter any premises or vehicle when necessary to the execution of the warrant if:
>
> (1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes either that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or
>
> (2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person.

Defendant argues that since the upstairs portion of the premises was occupied, N.C. Gen. Stat. § 15A-251 required that the officers place the premises under guard and await the return of Mr. Holloway, and that their forced entry was thus unauthorized. The suggested procedure would cause an unreasonable delay and is clearly not mandated by the statute.

[4] Defendant further argues that the marijuana should be suppressed because marijuana was not listed as an item to be seized and because it was not in plain view. The marijuana was discovered while the officers were searching the premises for methaqualone pursuant to a search warrant. "When officers are conducting a valid search for one type of contraband, and find other types . . . , the law is not so unreasonable as to require them to turn their heads." *State v. Oldfield*, 29 N.C. App. 131, 135, 223 S.E. 2d 569, 571, *cert. denied*, 290 N.C. 96, 225 S.E. 2d 325 (1976). The marijuana was properly seized when it was found during the search for methaqualone. The assignment of error is overruled.

IV

For the reasons set forth in part I of this opinion we hold that the trial court's decision to deny defendant an opportunity to

develop, even for purposes of the record on appeal, matters that could show that the person who issued the search warrant did not perform her function in a neutral and detached way was error. Defendant is entitled to a plenary hearing in an effort to support his contention, and this case is accordingly

Reversed and remanded.

Judge HEDRICK dissents.

Judge EAGLES concurs.

Judge HEDRICK dissenting.

I agree with that part of the majority opinion which concludes that the Deputy Clerk had probable cause to issue the search warrant, and that the trial judge did not err in denying defendant's motion to suppress the evidence seized pursuant to a search of the basement of the building described in the warrant. I strenuously disagree, however, with the majority's holding that the trial judge erred in not requiring the issuing magistrate to answer, "even for purposes of the record on appeal," whether she had "any type of social relationship with any of the officers." Further, I question the clarity of the majority's order that reverses "this case," and remands for "a plenary hearing," at which defendant is to be given an opportunity "to develop an adequate record, at least for appellate purposes, to support his contentions."

N.C. Gen. Stat. Sec. 15A-977(a), in pertinent part, provides:

> A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. *The motion must be accompanied by an affidavit containing facts supporting the motion.* The affidavit may be based upon personal knowledge, or upon information and belief, *if the source of the information and the basis for the belief are stated.* The State may file an answer denying or admitting any of the allegations.

(Emphasis added.) The Official Commentary immediately following this statute states:

> This section is structured to produce in as many cases as possible a summary granting or denial of the motion to suppress. The defendant must file an affidavit as to the facts with his motion, and the State may file an answer denying or admitting facts alleged in the affidavit. If the motion cannot be otherwise disposed of, subsection (d) provides for a hearing at which testimony under oath will be given. . . .

In the instant case, the unverified motion to suppress, signed by defendant's counsel, states:

> 4. Defendant is informed and believes and alleges on information and belief that the aforesaid Deputy Clerk of Superior Court of Wilkes County was not a "neutral and detached magistrate" as required to justify the issuance of the search warrant. . . .

The motion did not identify the "source of the information and the basis for the belief," nor was it accompanied by a supporting affidavit. Contrary to the majority's statement that "[d]efendant specifically asserted that Ms. Handy's decision to issue the warrant was based on personal reasons and personal relationships," defendant failed to set out in his motion a single fact or contention even hinting at such an assertion. Because defendant failed to identify any factual basis for his challenge to the Deputy Clerk's issuance of the warrant, I believe the trial judge could have confined his inquiry to an examination of the warrant and affidavit filed in support thereof.

Our conclusion in this regard finds support in a decision by the California Court of Appeals, reached on similar facts. In *People v. Kashani*, 143 Cal. App. 3d 77, 191 Cal. Rptr. 562 (1983), the defendant sought to suppress evidence seized pursuant to a search warrant based on her specific allegation that the issuing magistrate had failed to read all the supporting material prior to issuing the warrant. The trial court quashed service of a subpoena on the issuing official, ruling that defendant had alleged insufficient facts to overcome the "presumption of regularity attending issuance of the warrant." *Id.* at 79, 191 Cal. Rptr. at 563. On appeal, defendant contended she was "prejudicially denied the opportunity to establish fatal irregularity by the magistrate in the issuance of the search warrant." *Id.* The response of the California court is instructive:

> Absent some palpable indication to the contrary, it is assumed the magistrate considered all the material presented him in support of an application for search warrant. . . . This assumption is not indulged where substantial irregularity appears on the face of the record. . . . If the assumption arises, however, the burden of dispelling it rests on defendant. . . . That burden is not satisfied by a sweeping pro forma assertion that the magistrate did not read all material offered in support of the search warrant application. . . . Such an assertion could and, if deemed legally adequate to place in issue the conduct of the magistrate, most assuredly would be made in virtually every instance where a search warrant has been issued.

Id. at 79-80, 191 Cal. Rptr. at 564.

In the present case, examination of the warrant and supporting affidavit discloses no irregularity such as was present in *State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973). And in North Carolina, as in California, "[a] search warrant is presumed to be valid unless irregularity appears on its face." *State v. Dorsey*, 60 N.C. App. 595, 597, 299 S.E. 2d 282, 283, *disc. rev. denied*, 308 N.C. 192, 302 S.E. 2d 245 (1983). I would hold on these facts that the trial judge was not obliged to permit defense counsel to conduct a sweeping inquiry into Ms. Handy's social relationships or personal convictions.

While I believe the trial judge could have summarily disposed of defendant's contention that the search warrant was not issued by a neutral and detached magistrate, I feel compelled to address as well the majority discussion of the substantive law in this area. It is not surprising that the majority cites no authority for the ill-founded notion that the social relationships of a magistrate have possible relevance to her status as a neutral and detached official. My research has failed to disclose a single case in which the issuance of a search warrant was successfully challenged on these grounds. Indeed, the most impressive aspect of research on the matter is the infrequency with which courts and commentators have even recognized the possibility of such a claim.

In a recent Georgia case, *Tabb v. State*, 250 Ga. 317, 297 S.E. 2d 227 (1982), the defendant challenged issuance of a search war-

rant on the grounds that the issuing magistrate was not neutral and detached "because of his personal association with police officers." *Id.* at 321, 297 S.E. 2d at 231. The defendant presented evidence that the issuing magistrate served as county coroner, that he had formerly been employed as a deputy sheriff, and that he "regularly visited the sheriff's office and county jail." *Id.* The Georgia Supreme Court upheld the lower court's ruling that these facts did not destroy the magistrate's status as a neutral and detached official. The court said, "[m]ere personal associations with police officers, without more, do not disqualify a magistrate from issuing a search warrant." *Id.* The court distinguished an earlier case, *Thomason v. State*, 148 Ga. App. 513, 251 S.E. 2d 598 (1978), "where the officer who issued the warrant took part in the actual search and seizure of evidence," saying, "[t]here is no evidence of such misconduct . . . in this case." *Tabb v. State*, 250 Ga. at 321, 297 S.E. 2d at 232.

The focus of the Georgia court on the *manner in which the officer performed his judicial function* is typical of courts confronted with challenges to the neutrality and detachment of issuing magistrates. *See, e.g., Clodfelter v. Commonwealth*, 218 Va. 98, 235 S.E. 2d 340 (1977) (warrant issued two minutes after supporting affidavit filed not *per se* invalid); *State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973) (warrant and supporting affidavit disclosed on face failure to properly perform judicial function); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27, 99 S.Ct. 2319, 2324, 60 L.Ed. 2d 920, 928-29 (1979) ("We need not question the subjective belief of the Town Justice in the propriety of his actions, but the objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset. He allowed himself to become a member, if not the leader of the search party. . . ."). This focus on the facts relating to the official's performance of his judicial function has been echoed by the commentators:

> Sometimes the claim is that the magistrate, while not having a financial interest in the case, had a sufficient personal interest that he cannot be deemed to have been impartial. When based upon nothing more than the fact that the magistrate was previously acquainted with the defendant and was aware of his criminal ways, this contention has rightly been rejected. Somewhat more difficult are those instances in

> which the magistrate is involved or interested in some way in the criminal activity with which the warrant is concerned. It has been held that a search warrant may be issued by a judge who knew he would probably be a witness in the forthcoming prosecution because the affidavit alleged the use of fraudulent court orders in the criminal scheme. Some limited "encouragement" to the police by the magistrate, influencing the obtaining of the warrant, has likewise been deemed not fatal, but the magistrate can go too far. . . . Another way in which the constitutional requirement that a search warrant be issued by a neutral and detached person may come into play is because of the conduct of the magistrate issuing the warrant. It is sometimes alleged that, while the magistrate was not disqualified from issuing warrants, his actions in a particular case demonstrate that he was neither neutral nor detached. But these contentions have seldom prevailed.

2 W. LaFave, *Search and Seizure* Sec. 4.2 (1978). *See also* 8B James Wm. Moore, *Moore's Federal Practice* Sec. 41.03 (2d ed. 1983): "Because of the comparative accessibility to review, this . . . question [of who can be neutral and detached] tends to focus on *situational* neutrality and detachment rather than *emotional* or *intellectual* absence of bias" (emphasis original) (citing *Connally v. Georgia*, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed. 2d 444 (1977); *Lo-Ji Sales, Inc. v. New York, supra*).

Bearing in mind this emphasis on the objective circumstances surrounding the magistrate's performance of her judicial function, we note the following facts. The Deputy Clerk in this case testified that she read the supporting affidavit supplied by the officers requesting the warrant. She testified that she placed one of the officers under oath and interrogated him as to the contents of the affidavit. The majority has upheld the trial court's conclusion that the affidavit established probable cause for issuance of the search warrant. I think these facts establish that Ms. Handy properly performed her judicial function.

Despite the uncontradicted facts set out above, the majority concludes that the court committed prejudicial error when it refused to order Ms. Handy to answer a question about whether she has "any type of social relationship with any of the officers." The majority attempts to bolster its conclusion by listing facts

that are clearly irrelevant to whether the Deputy Clerk was a neutral and detached magistrate. This reliance on extraneous circumstances, such as the testimony of the alleged confidential informant, for example, is in my opinion confusing and misplaced. It makes even more difficult that task I now turn to—determination of "the rule," set forth in the majority decision, by which lower courts are to be guided in the future.

Under the majority opinion, the test to be used in determining the relevance of profferred evidence in a challenge to the neutrality and detachment of a judicial officer is so unclear as to be no test at all. At one point, the majority states: "It is the *quid pro quo*—the issuing of a warrant in exchange for some benefit—that is important," citing *Connally*, with its language about "a direct, personal, substantial, *pecuniary* interest." (Emphasis added.) While I have no quarrel with this "warrant for benefit" test, I am baffled by any suggestion of its relevance to these facts. There is contained nowhere in the record or briefs any slight hint that Ms. Handy issued the warrant in exchange for some benefit. If this is indeed the test, the question concerning Ms. Handy's "social relationships" was clearly irrelevant.

Other portions of the majority opinion suggest that it is not "benefit" that is crucial in determining the neutrality and detachment of the issuing official, but rather the "personal convictions and social relationships" of the magistrate whose performance is called into question. I do not doubt that deputy clerks, like the rest of us, are influenced in their perceptions and behavior by a myriad of factors, not the least of which are their personal convictions and social relationships. Indeed, an entire scientific field is devoted to identifying and understanding the extremely varied and complex causes of human behavior. I think it sheer folly, however, to attempt, as the majority does here, to categorize "personal convictions and social relationships" based on nothing more than one's own personal experiences and unvalidated assumptions. That folly is illustrated, I believe, by the majority's bare assertion that relationships such as those between "neighbors, hunting partners, or lifelong friends" pose less threat to the neutrality and detachment of the issuing official than do the "social relationships" here inquired about. However desirable it may be to understand fully the subjective process underlying every judicial decision, the reality is that this is a goal impossible

of attainment. The law must content itself with assuring that an official charged with performance of a judicial function performs that function in an objectively proper manner. The evidence clearly establishes that Ms. Handy acted properly in issuing the search warrant. To say that a showing of proper performance of duty may be overcome by a showing of possible subjective bias is, to my mind, to create virtually unlimited opportunity for confusion, inconsistency, and "frivolous attacks upon [the] dignity and integrity [of the judiciary]." *United States v. Dowdy*, 440 F. Supp. 894, 896 (W.D. Va. 1977).

Finally, I wish to address this Court's disposition of the case, in light of its resolution of the issues. When an appellate court remands a case for further proceedings, it is the duty of that court to give a clear mandate to the trial court as to how it shall proceed. Consider the confusion occasioned by the decision here that "reverses and remands" "this case" for "a plenary hearing" at which defendant is entitled to be given an opportunity "to support his contention." What is reversed? What is affirmed? Since defendant's "contentions" are nowhere specified, where is the "plenary hearing" to end? To what extent is counsel to be permitted to delve into the "personal convictions and social relationships" of the judicial official, and to what end?

In conclusion, I feel that today's decision represents a radical and ill-advised extension of the law as it relates to the constitutional right to have the determination of probable cause made by a neutral and detached magistrate. More alarming still is the majority's failure to anticipate and respond to the short-term and long-term effects of its unprecedented holding. For these reasons, I dissent and vote to affirm the judgment.

IN THE MATTER OF THE ESTATE OF EDWARD GORDON STERN, DECEASED, H. T. MULLEN, JR., ADMINISTRATOR OF THE ESTATE OF EDWARD GORDON STERN v. CELIA STERN, ROBERT WEISS, MELVENA W. TRAVALIA, AUGUST WEISS, EMMA W. JOHNSTON, AGNES W. TEULON, WILLIAM WEISS, ADELE S. STEIN, A. EDWIN STERN, JR., JENNIE W. MILLSTEIN, HARRY S. WENDER, FLORENCE MARGARET W. LEHN, SHIRLEY JOAN W. UKRAINETZ, GEORGINA L. GEPPERT, EVELYN L. BAETWALDT, HELEN L. McGOVERN, GORDON LISSEL, JEAN L. GESCHWANDTNER, THERESA L. SEIDENS, JAMES LISSELL AND ALL UNKNOWN HEIRS OF EDWARD GORDON STERN

No. 831SC152

(Filed 21 February 1984)

1. **Descent and Distribution § 8— no right of illegitimate's paternal heirs to share in estate**

Paternal heirs of an illegitimate who died intestate were not entitled to share with the maternal heirs in the illegitimate's estate where there was no evidence that the putative father was ever judicially adjudged to be the illegitimate's father as provided in G.S. 29-19(b)(1) or that he ever acknowledged his paternity as provided in G.S. 29-19(b)(2), notwithstanding the putative father's will sufficiently acknowledged the illegitimate as his son to permit the illegitimate to inherit from his putative father pursuant to G.S. 29-19(d).

2. **Descent and Distribution § 8; Constitutional Law § 23.7— right of inheritance by illegitimate's paternal heirs—constitutionality of statute**

While G.S. 29-19 classifies an illegitimate's mother (and her heirs) and the putative father (and his heirs) differently by placing the additional requirement on the father to establish his paternity by one of the statutorily prescribed methods before he is permitted to inherit from the illegitimate, this classification is substantially related to permissible State interests and does not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Judge JOHNSON dissenting.

APPEAL by respondent paternal heirs of Edward Gordon Stern from *Allsbrook, Judge*. Order entered 16 September 1982 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 16 January 1984.

This is an appeal by the paternal heirs of Edward Gordon Stern, an illegitimate who died intestate, from the order of the Pasquotank County Superior Court directing that the decedent's entire estate be distributed to his maternal heirs. The decedent, Edward Gordon Stern, was born in 1927 in the province of

Saskatchewan, Canada and named Edward Gordon Weiss. His birth certificate does not list the name of either parent, but the evidence overwhelmingly indicates that he was the son of Hilda Weiss and Edward D. Stern who were living together at the time of his birth. Apparently, Edward D. Stern and Hilda Weiss (hereinafter referred to as decedent's father and mother) never married because of religious prohibitions in Canada at the time.

The decedent lived with his parents until his mother's death in 1933. Thereafter he remained with his father until he entered the Army many years later. Decedent's name is shown on his medical records as a baby and his school records as Edward Gordon Stern. These school records list Edward D. Stern as decedent's father. The evidence clearly shows Edward D. Stern considered the decedent to be his son and referred to him as such. Later in life, the decedent had his name officially changed to Edward Gordon Stern, both in the United States and in Canada. The name change in Canada was done at the request of Edward D. Stern so as to facilitate the identification of Edward Gordon Stern as his son in his will. In his last will, Edward D. Stern bequeathed "the residue of my estate to my son, Edward Gordon Stern, for his own use absolutely." In 1979 Edward D. Stern died leaving a residuary estate worth over $500,000.

In August of 1980, Edward Gordon Stern died intestate survived only by his aunts and uncles. At the time of his death, the decedent was a citizen and resident of Pasquotank County, North Carolina. The present proceeding was brought to determine the distributees of the decedent's estate. After hearing the evidence, the trial judge concluded that the decedent was survived by only the collateral kindred of his late mother and that the collateral kindred of the late Edward D. Stern were not entitled to share in the estate. From the order entered 16 September 1982, the respondent paternal heirs appealed.

Jennette, Morrison, Austin and Halstead, by John S. Morrison and C. Glenn Austin, for respondent appellants.

Griffin, Gerdes, Mason, Brunson, Wilson and Jeffries, by Joseph M. Griffin and J. David Tolbert, for respondent appellees.

WEBB, Judge.

[1] The question presented on this appeal is whether the heirs of the alleged natural father of Edward Gordon Stern have any rights to the decedent's estate. We believe they do not and affirm the order directing that the decedent's estate be distributed only to his maternal heirs.

G.S. 29-19(a) provides that for purposes of intestate succession, an illegitimate shall be treated as if he were the legitimate child of his mother so that he is entitled to inherit by, through and from his mother and his other maternal kindred, and they are entitled to take from him. There is no dispute that the decedent was illegitimate and that the respondent maternal heirs are entitled to some share of the decedent's estate.

The right of a putative father and the paternal heirs to inherit by, through and from an intestate illegitimate is governed by G.S. 29-19(b) and (c) which state as follows, in pertinent part:

> (b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.
>
> . . . .
>
> (c) Any person described under subdivision (b)(1) or (2) above and his lineal and collateral kin shall be entitled to inherit by, through and from the illegitimate child.

The record is devoid of any evidence indicating that Edward D. Stern was ever judicially adjudged to be the decedent's father as

provided in G.S. 29-19(b)(1) or that he ever acknowledged his paternity as provided in G.S. 29-19(b)(2).

G.S. 29-19(d) provides a further basis through which an illegitimate may inherit from his putative father. That section provides that:

> (d) Any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that such child be treated as expressly provided for in said will or, in the absence of any express provision, the same as a legitimate child.

Edward D. Stern so acknowledged himself as the father of the decedent when he stated in his last will that he bequeathed his residuary estate to "my son, Edward Gordon Stern."

The appellant paternal heirs argue that since this acknowledgment of paternity by Edward D. Stern in his will is sufficient to permit the decedent to inherit from his putative father, it should also be sufficient to permit the putative father or his heirs to inherit from the decedent. They maintain that unless G.S. 29-19 is interpreted so as to permit the paternal heirs to share in the decedent's estate, the resulting distribution will be in violation of the Equal Protection Clause of the Fourteenth Amendment.

In essence, the appellants contend that G.S. 29-19(c) must be judicially amended to include subsection (d) of that statute in order for the statute to pass constitutional muster. We do not agree. G.S. 29-19(c) clearly and unambiguously provides that a putative father and his kindred are only entitled to inherit from an illegitimate child if paternity has been established by one of the methods prescribed in G.S. 29-19(b). Edward D. Stern's paternity was not established by either method; therefore, his heirs are not entitled to inherit from the decedent. It is well settled that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *See* 12 Strong's N.C. Index 3d, *Statutes* § 5.5 (1978). G.S. 29-19(d) is equally clear in its meaning and applies only when the child is taking under a will from the putative father and

not when the putative father or his heirs are attempting to inherit from the child under the intestacy statutes.

[2] Nor do we agree that G.S. 29-19 as applied to this case runs afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. While the statute does classify the illegitimate's mother (and her heirs) and the putative father (and his heirs) differently by placing the additional requirement on the father to establish his paternity by one of the statutorily prescribed methods before he is permitted to inherit, this classification is substantially related to permissible state interests.

The United States Supreme Court has made it clear that when considering statutes based on illegitimacy, courts are to apply an intermediate level of review which requires that the statute be substantially related to permissible state interests. *See Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977); *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed. 2d 503 (1978). Though the classification in the present case differs from those in *Trimble, supra*, and *Lalli, supra*, in that it is not a classification of an individual on the basis of his or her legitimacy, but is a classification of the parents of an illegitimate; nevertheless, we shall apply the intermediate standard of review rather than the lower standard of review because it is at least arguable that the classification here is one "based on illegitimacy." Even applying this more stringent standard, we find that G.S. 29-19 meets the requirements of the Equal Protection Clause.

The North Carolina Supreme Court has previously considered the constitutionality of G.S. 29-19 in the case of *Mitchell v. Freuler*, 297 N.C. 206, 254 S.E. 2d 762 (1979). In *Mitchell, supra*, the Court held that G.S. 29-19 and the statutes *in pari materia* do not violate the Equal Protection and Due Process Clauses of the United States Constitution, since those statutes are substantially related to the permissible state interests they are intended to promote. The Court identified the state's interests as being the following: (1) to mitigate the hardships created by our former law which permitted illegitimates to inherit only from the mother and from each other; (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and (3) at the same

time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. *Id.* at 216.

Although *Mitchell, supra,* is distinguishable from the present case in that it concerns the inheritance rights of an illegitimate rather than the inheritance rights of the parents of an illegitimate, the statute and the state interests involved are the same. Not only does the classification here foster the same state interests recognized in *Mitchell, supra,* it imposes a much lighter burden on the one allegedly discriminated against. Unlike the illegitimate who can do nothing to establish his right to inherit from his father, the father of an illegitimate has the ability to insure that he will be an intestate taker—he simply has to acknowledge his child in the prescribed manner. Unlike the illegitimate, the father can preserve his rights and he should not be rewarded for his failure to do so.

We conclude that the requirement imposed on the father of an illegitimate who would inherit from his illegitimate child is substantially related to the important state interests G.S. 29-19 is intended to promote. For this reason, we find no violation of the Equal Protection Clause.

Affirmed.

Chief Judge VAUGHN concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

The central issue presented by this appeal is not the facial constitutionality of this state's intestate succession laws governing the inheritance rights of illegitimate children and their heirs. Rather, the issue is one of statutory interpretation and application, for it is well established that a statute which is fair and impartial on its face may be unconstitutional in its application in a particular instance if it is administered so as to result in unjust and illegal discrimination between persons similarly situated. *Yick Wo v. Hopkins,* 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886); *Bazemore v. Board of Elections,* 254 N.C. 398, 119 S.E. 2d

637 (1961); *In re Truesdell*, 63 N.C. App. 258, 304 S.E. 2d 793 (1983). In my opinion, the majority's failure to recognize the steps taken by the decedent's father to acknowledge his paternity of the decedent as constituting substantial or constructive compliance with the requirements of G.S. 29-19(b)(2) works a palpable injustice in this case, is erroneous as a matter of statutory construction, and violates the constitutional right to equal protection under the law of the paternal heirs of the decedent.

I

Factually, a more compelling case for recognition of the doctrine of constructive or substantial compliance with the statutory requirement for proof of paternity would be hard to imagine. There is absolutely no doubt that Edward D. Stern is the natural or biological father of the decedent, Edward Gordon Stern (hereafter Gordon Stern). The Certificate of Registration of Birth indicates that Gordon Stern was born to Hilda Weiss on 25 March 1927. At that time, Hilda Weiss listed her address as 2121 Lindsay Street, Regina. According to an affidavit submitted by John and Lea Ermel, neighbors and close family friends of Edward D. Stern and Hilda Weiss, Gordon's father and mother lived together at 2121 Lindsay Street until shortly before Hilda Weiss' death when Gordon was six years old. Although Mrs. Ermel always thought the couple were legally married, Mr. Ermel knew that they were not.

> I . . . knew Edward D. Stern and Hilda Weiss were not legally married. However, Edward D. Stern always said to people that he was married. I remember Hilda telling me they wanted to cross the line to get married because they would not marry them in Regina for the fact that Edward D. Stern was Jewish and she, Hilda Weiss, was Catholic.

After Hilda Weiss' death, Edward D. Stern continued to live with his son Gordon at the family home in Regina.

In 1942, Gordon ran away from home and joined the Canadian Armed Services. After Gordon's return, he and his father had a falling out, and eventually Gordon moved to Norfolk, Virginia and went to work with his father's relatives. Apparently by the early 1960's, Gordon and his father had reconciled their differences. In 1964, Gordon obtained an order changing his name from

Weiss to Stern in the United States. Throughout the 1960's and 1970's, Gordon visited his father regularly and tended to his father's estate and business affairs.

All of Gordon Stern's health and school records indicate that Edward D. Stern was Gordon Stern's father. Edward D. Stern's solicitor, James Griffin, stated in his affidavit that in conversation, Edward D. Stern never mentioned Hilda Weiss, but always referred to Gordon as his son. Further, that upon inquiry, Griffin advised the father to have Gordon officially change his last name in Canada from Weiss to Stern so as to facilitate identification of Gordon as his son in Edward's will.

> I have no doubt whatsoever that the description of Gordon E. [sic] Stern as "my son" in his will is what Edward D. Stern had intended and he believed he had made every necessary arrangement to have Gordon properly described in order to enable him to share in his estate.

The record also contains the affidavit of Josephine Eure, who lived with Gordon Stern as his common-law wife for the last 11 years of his life. Ms. Eure stated that Gordon Stern and his father, Edward D. Stern, considered themselves to be father and son in every respect and maintained several joint bank accounts with rights of survivorship. After Edward D. Stern's death in 1979, Gordon inherited approximately $500,000 from his father, thereby increasing his net worth from approximately $100,000 to $600,000. In addition, Ms. Eure stated that Gordon Stern maintained a very close relationship with his father's brothers and sisters and their children, but only heard infrequently from his mother's brothers and sisters and, in fact, had not even met some of them.

The foregoing evidence demonstrates that the parents of Gordon Stern were apparently prevented from marrying one another because of religious intolerance in the 1920's. Within a few years of Gordon's birth, his mother passed away. Edward D. Stern had always acknowledged that he was Gordon's father and provided for Gordon's needs while he was growing up. When Gordon moved to Virginia, his father's relatives provided him with employment. Through the years, Gordon maintained a close relationship with his father and his father's brothers and sisters, but had little or no contact with his mother's relatives.

Edward D. Stern, was, at all relevant times, a citizen and resident of Regina, in the province of Saskatchewan, Canada. Edward D. Stern, in his duly probated last will acknowledged himself to be the father of Gordon Stern and believed that he had thereby done all that was necessary to ensure that Gordon inherit the residue of his estate. Just one year prior to Gordon's death, he inherited the vast bulk of his estate from his father by that same will.

The issue presented by the foregoing factual summary is whether Edward D. Stern's lineal and collateral kin shall be completely precluded from inheriting from his acknowledged son, Gordon Stern under the North Carolina intestate succession statutes by virtue of the fact that Edward D. Stern failed to acknowledge his paternity by the precise method stated in G.S. 29-19(b)(2). More particularly, the issue of statutory construction is whether a father's acknowledgment of paternity in his duly probated last will is the substantial equivalent of an *inter vivos* acknowledgment of paternity in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b)[1] and filed during the lives of the father and child in the office of the clerk of superior court of the county where either resided. G.S. 29-19(b)(2).

II

The cases arising under G.S. 29-19 have thus far concerned the right of the illegitimate child to inherit from his or her putative father. The issue presented as to the inheritance rights of the paternal heirs in the intestate illegitimate child's estate is one of first impression under our intestate succession statutes. However, general principles of statutory construction and constitutional law are readily applicable to the case under discussion.

Prior to the enactment of G.S. 29-19, children born out of wedlock who were not legitimated, either through marriage of their parents or legitimation proceedings, could not inherit from

1. G.S. 52-10(b) (Cum. Supp. 1983) provides, in pertinent part, as follows:

Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made.

their fathers. *See Jolly v. Queen*, 264 N.C. 711, 142 S.E. 2d 592 (1965); *In re Lucas v. Jarrett*, 55 N.C. App. 185, 284 S.E. 2d 711 (1981). In *Mitchell v. Freuler*, 297 N.C. 206, 254 S.E. 2d 762 (1979), the North Carolina Supreme Court expressly stated that one of the purposes in enacting G.S. 29-19 was the "mitigat[ion of] hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other)." Therefore, G.S. 29-19 is to be considered a remedial statute.

It is well established that a remedial statute must be liberally construed as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained. *Puckett v. Sellars*, 235 N.C. 264, 69 S.E. 2d 497 (1952); *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948). Furthermore, a construction will not be adopted that results in palpable injustice when the language of the statute is susceptible to another reasonable construction which is just and is consonant with the purpose and intent of the act. *Puckett v. Sellars, supra.*

In addition to the mitigation of former hardships visited upon illegitimate children and their families, the purposes of G.S. 29-19 are (1) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children and (2) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under the intestacy laws. *Mitchell v. Freuler, supra.* Obviously, the recognition of the acknowledgment of Edward D. Stern's paternity in his last will as constituting constructive compliance with the requirements of G.S. 29-19(b)(2) would further the remedial purposes of the statute and attain the objective of equalization of the inheritance rights of legitimate and illegitimate children and their heirs. The question then becomes whether recognition of Edward D. Stern's testamentary acknowledgment of paternity would undermine the state's interest in the orderly disposition of his illegitimate son's estate. I am firmly of the opinion that it would not. Edward D. Stern's testamentary acknowledgment can easily and properly be deemed to constitute constructive compliance with the requirements of G.S. 29-19 so as to establish the inheritance rights of his brothers and sisters in Gordon Stern's estate.

This Court has already recognized the applicability of the doctrine of constructive compliance to the provisions of G.S.

29-19(b)(2) in *Herndon v. Robinson*, 55 N.C. App. 318, 291 S.E. 2d 305, *appeal dismissed and cert. denied*, 306 N.C. 557, 294 S.E. 2d 223 (1982). In *Herndon*, the plaintiff illegitimate child offered various written documents to prove that his father had acknowledged paternity and argued that these documents supported constructed compliance with the mandate of G.S. 29-19(b)(2). The documents offered were a life insurance policy insuring the life of the plaintiff, showing the decedent as the father and beneficiary of the policy; a census report showing plaintiff living in the decedent's household as "son"; and an employment application submitted by the decedent that listed the plaintiff as his son. Judge, now Justice, Harry C. Martin, writing for the court, implicitly accepted the argument that strict compliance with G.S. 29-19(b)(2) would not be required in every case, but rejected the sufficiency of the documents tendered to establish constructive compliance, reasoning that none of the writings admitted of "a conscious intent to establish paternity for the purposes of intestate succession."

> The formalities of N.C.G.S. 29-19(b)(2) . . . serve a dual purpose. As a method for establishing paternity, a written instrument acknowledging paternity, executed and filed with the clerk of superior court, assures the requisite degree of certainty. The formalities further assure that the decedent intended that the illegitimate child share in his estate, much the same way that a father intentionally excludes legitimate children as beneficiaries under his will. But, just as a father must act to *exclude* a legitimate child from sharing in his estate, he must also act to *include* an illegitimate child. (Emphasis original.)

57 N.C. App. at 321, 291 S.E. 2d at 307.

In this case, Edward D. Stern did act to include his illegitimate child in his estate. His duly probated last will admits of Edward D. Stern's conscious intent to establish paternity so that Gordon could take under that will. The will instrument itself also assures the requisite degree of certainty as a method for establishing paternity necessary for the orderly and just disposition of an estate under the intestate succession statutes. There is simply no reason to refuse to accept Edward D. Stern's demonstration of a testamentary intent to establish paternity for the purpose of

also establishing paternal inheritance rights under the intestate succession laws. Furthermore, the formalities for executing a valid last will are far more rigorous than those required by G.S. 29-19(b)(2) and once the will has been duly admitted to probate, the purpose behind the filing requirements of subsection (b)(2) has also been served. That purpose is clearly to safeguard the dependability of titles passing under the intestate succession laws.

It is thus evident that recognition of the acknowledgment of paternity contained in a duly probated last will as the substantial equivalent of the statutory *inter vivos* acknowledgment of paternity required by G.S. 29-19(b)(2) threatens absolutely no aspect of the just and orderly disposition of Gordon Stern's estate. On the contrary, the failure to recognize the fact of Edward D. Stern's acknowledged paternity of Gordon so as to establish intestate succession rights in the paternal heirs results in the patently unjust distribution of Gordon Stern's estate. The bulk (nearly 85%) of this estate had just been inherited by Gordon from Edward D. Stern one year prior to Gordon's own death. Disallowance of the right of Edward D. Stern's brothers and sisters and their children to share in Gordon Stern's estate has the practical effect of shifting what was in large part the inheritance of a Stern family estate entirely to the maternal Weiss heirs with whom Gordon had little or no contact. In a case such as this, where there is no doubt as to paternity, where both the father and the father's relatives provided for the needs of the child as he was growing up, and no interest of the state would be adversely affected by a liberal construction of this remedial statute, the requirement of strict compliance works a palpable injustice and is indefensible as a matter of statutory construction.

In addition, the majority errs in concluding that subsection (d) of G.S. 29-19 applies *only* when the illegitimate child is seeking to inherit under the will of the putative father. G.S. 29-19 governs intestate succession by, through and from illegitimate children. By its terms, subsection (d) applies to those cases in which the father died *testate*, acknowledged his paternity of the illegitimate child in his duly probated last will and provided, expressly or by class devise, for the child therein. According to the majority's construction, the provision would serve no purpose other than the restatement of the obvious: the natural father of an illegitimate

child can acknowledge paternity in his last will and provide for the child therein.

More importantly, such a construction fails to account for the fact that the provision is contained at all in an *intestate succession statute.* Because of the context in which it appears, it is not reasonable to assume that subsection (d) is limited in applicability to determining only the right of an illegitimate child to inherit for a *testate* natural father under that father's will. Rather, the legislature must have included the provision in the intestacy statutes to serve a purpose which is related to the intestate inheritance rights of illegitimate children, their natural fathers and the lineal and collateral heirs of both.

Admittedly, the bare inclusion of subsection (d) in the statutory scheme of intestate succession, with no indication as to why it so appears or how it is to relate to subsections (b) or (c), renders the scheme ambiguous. However, in order to further the remedial purposes of the statute, the ambiguity should be resolved so as to equalize the inheritance rights of legitimate and illegitimate children and their heirs. Such a result would be achieved by construing subsection (d) to establish yet another method by which the illegitimate child could establish the unmarried father's paternity and therefore inherit by intestate succession by, through and from his father and paternal heirs and the paternal heirs, in turn, could establish their right to inherit by, through and from the illegitimate intestate child who was fathered by one of their blood relations.

III

Another significant concern raised by the majority's requirement of strict compliance with the evidentiary paternity procedure described in G.S. 29-19(b)(2) is the constitutionality of such a construction and application of the statute with regard to the inheritance rights of the paternal heirs of the illegitimate child. In *Mitchell v. Freuler, supra,* the statutory scheme *as written* was upheld against the illegitimate child's constitutional challenges on the basis of the United States Supreme Court's decision in *Lalli v. Lalli,* 439 U.S. 259, 58 L.Ed. 2d 503, 99 S.Ct. 518 (1978). A significant factor in the *Lalli* opinion which declared a New York statute governing the intestate succession rights of illegitimate

children constitutional was the *liberal interpretation* given the statute by the New York courts.

The *Lalli* court looked specifically to the reach and effect of the statute *as applied* and cited with approval a number of cases in which the New York courts accepted constructive or substantial compliance with the statute so as to avoid "unnecessary injustice" and inequality.

> The New York courts have interpreted § 4-1.2 liberally and in such a way as to enhance its utility to both father and child without sacrificing its strength as a procedural prophylactic . . . In addition, the courts have excused "technical" failures by illegitimate children to comply with the statute in order to prevent unnecessary injustice. (Citations omitted.)

439 U.S. at 273-274. This aspect of the *Lalli* opinion indicates that judicial treatment of remedial statutes aimed at mitigating the hardships endured by illegitimates and their heirs is an important component of equal protection analysis. By implication, a requirement of strict compliance with the purely evidentiary requirement of G.S. 29-19(b)(2) in a case such as this where equally reliable evidence of paternity has been produced and the possibility of delay and uncertainty in estate administration minimized, would take the reach of the statute "far in excess of its justifiable purposes," 439 U.S. at 273, and render the statute violative of the Equal Protection Clause as applied to the paternal heirs of this decedent. *See also* Note, 16 Wake Forest L. Rev. 205 (1980) (judicial impairment of the illegitimate child's paternal inheritance rights can be minimized in both statutory and constitutional respects by recognition of constructive compliance with the evidentiary requirements of G.S. 29-19).

The *Lalli* court's evidence concern that intestate succession statutes not *unnecessarily* exclude those categories of illegitimate children whose inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles passing under the intestacy laws also led to the reversal of the Illinois Supreme Court's upholding of the intestacy statute challenged in *Trimble v. Gordon*, 430 U.S. 762, 52 L.Ed. 2d 31, 97 S.Ct. 1459 (1977). The Court made the following relevant observa-

tion on the proper balancing of the interests at stake in these cases:

> We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. *The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity.* (Emphasis added.)

430 U.S. at 770-771. The Illinois statute was found to set up an impenetrable barrier that worked to shield otherwise invidious discrimination and, in its stringent requirements, the statute was not "carefully attuned to alternative considerations."

Here, the paternal heirs of an intestate illegitimate child constitute a category of persons who are classified *both* on the basis of illegitimacy and on the basis of gender.[2] In those cases where the unmarried father acknowledged paternity in a formal testamentary instrument, the accurate and efficient identification of the father and paternal heirs for purposes of intestate succession poses no greater difficulty for the state courts than does identification of the mother and maternal heirs. Therefore, the paternal heirs' rights to inherit from the intestate illegitimate child can be recognized under G.S. 29-19(c) where the putative father has so acknowledged his paternity of the illegitimate child, without jeopardizing *any* of the state's interests in evidentiary accuracy and administrative efficiency. To completely exclude this category of natural heirs of the illegitimate child from intestate distribution on the basis of an ideal of administrative efficiency, without any consideration of the possibility of accurate and reliable proof of paternity produced in any manner other than those listed in G.S. 29-19(b)(1) or (2) is unnecessary, is not structured to fur-

2. In recent years the constitutional rights of unmarried fathers in the areas of child custody and adoption have been greatly expanded. *See, e.g., Stanley v. Illinois,* 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972) and *Caban v. Mohammed,* 441 U.S. 380, 60 L.Ed. 2d 297, 99 S.Ct. 1760 (1979). Gender-based distinctions must serve governmental objectives and must be substantially related to the achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause. *Craig v. Boren,* 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451 (1976). Accordingly, any distinction between unmarried mothers and unmarried fathers must be structured reasonably to further these ends.

ther any permissible state objective and results in an unconstitutional denial of the paternal heirs' rights to equal protection under the law.

For the foregoing reasons, I would reverse the trial court's ruling and allow paternal heirs to share in the intestate distribution of the estate of Gordon Stern.

DORIS HERMES CRUMPLER MAYER v. VICTOR MAYER

No. 8221DC668

(Filed 21 February 1984)

1. **Divorce and Alimony § 28— refusal to accord legal force and effect to Dominican divorce proper**

For both jurisdictional and public policy reasons, the trial court properly refused to accord legal force and effect to a Dominican divorce decree since (1) the divorce was "ex parte," (2) divorces granted in foreign countries to persons who are domiciliaries of the United States are not valid and enforceable, and (3) the Dominican Republic's "quickie" divorces offend this State's public policy against the hasty dissolution of marriages.

2. **Marriage § 5— second "husband" estopped from asserting invalidity of former divorce decree**

Defendant-"husband" is estopped from questioning plaintiff-"wife's" Dominican Republic divorce from an earlier husband since (a) he participated in her procurement of the invalid divorce; (b) all parties relied upon the divorce's validity until defendant abandoned plaintiff; and (c) a contrary result would create a marriage at will by defendant, who could end the marital relationship at any time he desired, and yet prevent plaintiff from avoiding the obligations of her remarriage. The record suggested that defendant insisted on plaintiff's obtaining a Dominican divorce; that a promise to support her in the manner better than the one she had been accustomed to prompted plaintiff to sign away any alimony she might have had from her former husband; and that he accompanied her on her trip to the Dominican Republic, paying for her transportation and lodging, and other personal expenses. After the divorce, the defendant continued to uphold its validity as he had plaintiff sign a prenuptial agreement and then married her. When they were married, defendant lived in plaintiff's house and borrowed money from her, including $25,000.00 which he admits he has not repaid. Defendant never questioned the validity of the marriage until he abandoned plaintiff, and plaintiff relied on the divorce's validity.

Mayer v. Mayer

APPEAL by plaintiff from *Tash, Judge.* Judgment entered 20 January 1982 *nunc pro tunc* 23 March 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 10 May 1983.

Lewis & Bowden, by Michael J. Lewis, for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by James A. Medford and Robert H. Slater, for defendant appellee.

BECTON, Judge.

This case involves a challenge to a Dominican Republic (Dominican) divorce decree by Victor Mayer, who asserts that his wife's divorce from her first husband, which he actively helped procure, was invalid, and who thereby seeks to avoid paying alimony to his wife. We hold (1) that, although the Dominican divorce decree is invalid, Victor Mayer, based on the facts of this case, is estopped from asserting its invalidity; and (2) that Victor Mayer is estopped from avoiding the consequences of his contract of marriage with Doris Mayer.

It may have been easier for us to have declared the Dominican divorce voidable and challengable only by Doris Mayer's first husband, Fred Crumpler, especially since we hold in part IV, *infra*, that Victor Mayer is estopped from asserting any invalidity in the Dominican proceedings. *See Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617 (1956). We, however, have decided to address the issues "head-on" because of a demonstrated need[1] to definitively resolve questions about "quickie" foreign divorces—that is,

> the concept of foreign country migratory divorces for American domiciliaries—with its jurisdictional and public pol-

1. See, for example, the following articles set forth in Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. Fam. L. 9 (1982-83).

Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L. J. 45 (1960); Currie, *Suitcase Divorce in the Conflict of Laws: Simon, Rosenthiel and Borax*, 34 U. Chi. L. Rev. 26 (1966); Foster, *Recognition of Migratory Divorces: Rosenthiel v. Section 250*, 43 N.Y.U. L. Rev. 429 (1968); Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 Tex. L. Rev. 501 (1980); Leach, *Divorce by Plane-Ticket in the Affluent Society—With a Side Order of Jurisprudence*, 14 Kan. L. Rev. 549 (1966); Lipstein, *Recognition of Foreign Divorces: Retrospects and Prospects*, 2 Ottawa L. Rev. 49 (1967); Peterson, *Foreign*

> icy defects; its alleged 'defense' of estoppel; and with one exception piled upon another—has become so confusing to the lay public and the practicing bar that very few people adequately understand the underlying ramifications and liabilities involved in such divorces.

Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. Fam. L. 9 (1982-83).

I

Procedural History

Praying for divorce from bed and board, permanent alimony, and alimony *pendente lite*, Doris Mayer filed her complaint against Victor Mayer on 15 October 1981. Denying that he was lawfully married to Doris Mayer, and counter-claiming for an annulment, Victor Mayer, in his answer, specifically asserted that at the time of his purported marriage, Doris Mayer was already married to Fred Crumpler; that she had previously attempted to divorce Fred Crumpler by obtaining a divorce decree from a Dominican court; that the Dominican divorce decree was void and in contravention of the laws of North Carolina; and that Doris Mayer knew this, having been so advised by counsel.

This case was heard in the trial court upon Doris Mayer's motions for alimony *pendente lite* and attorney's fees. At the close of Doris Mayer's evidence, the trial court denied the mo-

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Country Judgments and the Second Restatement of Conflict of Laws, 72 Colum. L. Rev. 220 (1972); Peterson, *Res Judicata and Foreign Country Judgments*, 24 Ohio St. L. J. 291 (1963); Phillips, *Equitable Preclusion of Jurisdictional Attacks on Void Divorces*, 37 Fordham L. Rev. 355 (1969); Rosenberg, *How Void is a Void Decree, or The Estoppel Effect of Invalid Divorce Decrees*, 8 Fam. L. Q. 207 (1974); Note, *Domestic Relations Jurisdiction—Extension of Comity to Foreign Nation Divorce*, 46 Tenn. L. Rev. 238 (1978); Note, *United States Recognition of Foreign, Nonjudicial Divorces*, 53 Minn. L. Rev. 612 (1969); Comment, *Mexican Divorces: Are They Recognized in California?*, 4 Cal. W. L. Rev. 341 (1968); Comment, *Mexican Divorce—A Survey*, 33 Fordham L. Rev. 449 (1965).

See also Annot., *Domestic Recognition of Divorce Decree Obtained in Foreign Country and Attacked for Lack of Domicile or Jurisdiction of the Parties*, 13 A.L.R. 3d 1419 (1967).

Id. at 9 n. 1.

tions, after determining (a) that the Dominican divorce was invalid; (b) that the Mayers' marriage was void; and (c) that Victor Mayer was not estopped from denying the validity of Doris Mayer's divorce. Doris Mayer appeals.

II

Appealability

Initially, both parties direct our attention to *Fliehr v. Fliehr*, 56 N.C. App. 465, 289 S.E. 2d 105 (1982) and *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981), which hold that orders for alimony *pendente lite* are interlocutory and not immediately appealable. Although this Court expressed its concern about the "backlog of appeals" in *Fliehr* and *Stephenson*, the primary rationale underlying those decisions is that appeals should not be taken to delay execution of district court orders for alimony *pendente lite*. *Fliehr*, 56 N.C. App. at 466, 289 S.E. 2d at 106. That logic is not frustrated in this case since the wife's request for alimony was denied by the district court.

We believe this matter should be heard because it involves intriguing, if not novel, questions of law, and conflicting policy considerations. Additionally, litigation in the district court is unlikely to resolve the controversy. Further, judicial resources will be conserved by hearing this case, since the same questions raised now would likely be raised on appeal following a final order in district court.

III

Validity of the Dominican Divorce

A. Doris Mayer's Argument

To put Doris Mayer's first argument—that her Dominican divorce was valid—in perspective, we outline it in narrative form.

1. Although the full faith and credit clause of the United States Constitution, Article IV, Section 1, which requires North Carolina to recognize bilateral divorces of sister-states, has no application to foreign judgments, the criteria by which North Carolina grants comity to foreign divorce decrees should reasonably parallel the criteria North Carolina uses when it recog-

nizes divorces of sister-states. In that way, North Carolina can maintain a consistent divorce policy.

2. A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States. Restatement (Second) of Conflict of Laws § 98 (1971). Therefore, the bilateral divorce obtained by Doris Mayer should be recognized since it does not offend the public policy of North Carolina—that is, the grounds upon which the divorce was granted, irreconcilable differences, are substantially equivalent to those of a divorce granted under this State's no-fault divorce statute, N.C. Gen. Stat. § 50-6 (1976), which allows a divorce based on one year's separation of the parties.

3. Because there is neither evidence of partiality on the part of the Dominican court, nor fraud in the procurement of the Dominican divorce judgment, it would be a waste of time and a duplication of efforts for North Carolina's courts to go through the formalities of granting a divorce on the same grounds as did the Dominican court, for a marriage that, for all practical purposes, has already been terminated. North Carolina has no interest in perpetuating a status out of which no good can come and from which harm may result. Or, as stated by the New Jersey Supreme Court: "There remains little, if any, interest in encouraging the resurrection of deceased marriages, even if pronounced dead by other tribunals whose processes are not completely consistent with our own."[2] *Kazin v. Kazin*, 81 N.J. 85, 98, 405 A. 2d 360, 367 (1979).

4. North Carolina has recognized that there is a presumption of the validity of the second marriage which prevails over the presumption of the continuance of the first. *See Denson v. C. R.*

2. The Supreme Court of West Virginia has taken a similar view:

> Divorce is the climax of domestic discord. . . . To compel two persons to live together under such circumstances would seem to do violence to the moral sensibilities of an enlightened age. If time evinces mistake to the errant parties; the law permits them to remarry; if not remarriage to each other, then perhaps a lost paradise regained through another marriage. Is not the interest of society generally best subserved by a dissolution of the marital status and the possibility of future respectability through remarriage rather than a pretended legal cohabitation . . .?

Hatfield v. Hatfield, 113 W.Va. 135, 141, 167 S.E. 89, 91-92 (1932).

Fish Grading Co., 28 N.C. App. 129, 220 S.E. 2d 217 (1975), and *Parker v. Parker*, 46 N.C. App. 254, 265 S.E. 2d 237 (1980). That principle is served better by holding Victor Mayer to his obligations as a husband.

5. Finally, North Carolina's public policy is affected no more by a six-week bilateral Nevada divorce, which North Carolina must acknowledge under the full faith and credit clause, than a five-day foreign divorce. "Nevada gets no closer to the real public concern with the marriage than [the Dominican Republic]," since the establishment of a synthetic domicile in a sister state for the facile termination of a marriage is no less a subterfuge to circumvent North Carolina's interest in marriages. *Rosenstiel v. Rosenstiel*, 16 N.Y. 2d 64, 73, 262 N.Y.S. 2d 86, ---, 209 N.E. 2d 709, 712 (1965), *cert. denied* 384 U.S. 971, 16 L.Ed. 2d 682, 86 S.Ct. 1861 (1966). Consequently, a balanced social policy requires that comity be granted to the present divorce decree.

B. Analysis

Doris Mayer's argument, although masterfully elaborate and powerful, is based on a faulty premise, is contrary to the view held by a majority of the states in this country, and is at odds with an equally powerful and more persuasive public policy argument.

The full faith and credit clause has no application to foreign judgments. Recognition of foreign decrees by a State of the Union is governed by principles of comity. Consequently, based on notions of sovereignty, comity can be applied without regard to a foreign country's jurisdictional basis for entering a judgment. More often than not, however, "many of the American states are likely to refuse recognition [to deny comity] to a divorce decree of a foreign country not founded on" a sufficient jurisdictional basis. 1 R. Lee, *North Carolina Family Law* § 104, at 488 (4th ed. 1979). That is,

> [a] foreign divorce decree will be recognized, if at all, not by reason of any obligation to recognize it, but upon considerations of utility and mutual convenience of nations. Recognition may be withheld in various circumstances, as where the jurisdiction or public policy of the forum has been evaded in obtaining the divorce.

Id. at 487. Since the power of a State of the Union to grant a divorce decree is dependent upon the existence of a sufficient jurisdictional basis—domicile or such a relationship between the parties of the State as would make it reasonable for the State to dissolve the marriage—it follows that the validity of a foreign divorce decree should depend upon an adequate jurisdictional basis. *See* Restatement (Second) of Conflict of Laws § 72 (1971).

1. Jurisdiction

[1] In this case the Dominican Republic had no interest in the marriage of the two North Carolinians, Doris Mayer and Fred Crumpler. Yet, on Doris Mayer's five-day sojourn to the Dominican Republic, the Dominican court purported to dissolve the marriage of two domiciliaries of North Carolina upon the grounds of "irreconcilable differences." Neither of the parties in this lawsuit had any connection with the Dominican Republic, save Doris Mayer's five-day stay there for the sole reason, by her own testimony, to obtain the divorce decree.

Further, Doris Mayer's characterization of the Dominican proceeding as "bilateral" rather than "ex parte" is not supported by the record. There is no evidence that Fred Crumpler appeared, through counsel or personally, in the Dominican proceeding. Doris Mayer did testify that Fred Crumpler signed some "papers" in connection with the Dominican proceeding, but the trial court did not find as a fact that Fred Crumpler made an actual or constructive appearance in the Dominican proceeding. Rather, the trial court found as a fact that "Mr. Crumpler indicated to plaintiff that he would seek a divorce under North Carolina law after he and plaintiff had been separated for one year." And, although a state must acknowledge the validity of a sister state's *bilateral* divorce under the full faith and credit clause, a state is permitted to inquire into the jurisdiction of a sister state in an *ex parte* divorce action. *Williams v. North Carolina*, 325 U.S. 226, 89 L.Ed. 1577, 65 S.Ct. 1092 (1945). *A fortiori*, North Carolina is allowed to inquire into jurisdictional prerequisites in Dominican proceedings.

Doris Mayer correctly cites *Denson* for the proposition that "the second marriage is presumed to be valid . . . [and] overcomes the presumption of the continuance of the first marriage," but that presumption is rebuttable. In this case, Victor Mayer successfully rebutted that presumption by showing that the *ex*

parte Dominican divorce was invalid on jurisdictional grounds and, as we shall show hereinafter, on policy grounds, too.

Even if the Dominican divorce could be found to be bilateral, Doris Mayer would still have on her shoulders the weight of the majority of American jurisdictions. The great weight of authority in this country is that divorces granted in foreign countries to persons who are domiciliaries of the United States are not valid and enforceable. *See* Annot., 13 A.L.R. 3d 1419 (1967).

2. Public Policy

In addition to the above, no constitutional provision or rule of comity requires North Carolina to accord legal force and effect to a divorce decree, like the one at issue here, that offends this State's public policy against the hasty dissolution of marriages. Until 15 July 1983, North Carolina permitted immediate dissolution of marriages only on proof of fault. *See* N.C. Gen. Stat. § 50-5 (1976) (repealed 1983). Acceding to a more enlightened view[3] that divorce should be allowed in some cases without proof of a cause or motivation of the divorce petition, North Carolina, beginning in 1965, also allowed divorces upon proof that the parties had lived separate and apart for one year or more. N.C. Gen. Stat. § 50-6 (Supp. 1983). Efforts to change the one-year period to six months have failed, and that failure is consistent with North Carolina's public policy that a longer waiting period is necessary to protect the institution of marriage from hasty judgments and casual disruptions since differences may in time be reconciled.

We also reject Doris Mayer's argument that "irreconcilable differences" as a ground for divorce under the Dominican law is substantially equivalent to the ground providing for absolute

3. Traditionally, divorce was viewed as "a remedy provided exclusively for an innocent person whose spouse [had] been guilty of a serious marital wrong. Divorce itself [was] looked upon as evil, to be tolerated only in circumstances which strictly [met] the statutory standard. . . ." Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L. J. 45, 53-54 (1960). When divorce statutes were not complied with strictly, states invalidated resulting divorces, both to preserve the institution of marriage and to warn "other erring spouses who might be tempted to evade the legal requirements.

More modern authorities look upon divorce as a regrettable but necessary legal recognition of marital failure . . . [because] the factors leading to breakdown of the marriage are not all on one side." *Id.* at 54.

divorce after one year's separation. As Victor Mayer argued in his brief:

> The appellant sought a Dominican divorce precisely because the law of North Carolina governing divorce is not and was not 'substantially equivalent' to the law of the Dominican Republic. The appellant sought a Dominican divorce because North Carolina law did not permit her to obtain a hasty divorce from her husband in the winter of 1981. It was to avoid the force and effect of the one-year waiting period imposed by North Carolina law that the appellant travelled to the Caribbean and obtained a divorce there.

We cannot sanction a procedure by which citizens of this State with sufficient funds to finance a trip to the Caribbean can avoid our legislature's judgment on the question of divorce. To hold otherwise would be to flout our law; it would permit domiciliaries of North Carolina to submit their marital rights and obligations to the contrary policies and judgments of a foreign nation with which they have no connection.

Considering the circumstances of this case, the applicable law, and the important policy considerations, the trial court properly refused to accord legal force and effect to the Dominican divorce decree.

C. Summary

For the benefit of the bar we have addressed, perhaps in exhaustively detailed fashion, many of the jurisdictional and public policy reasons bearing on—and indeed, the convoluted rationale supporting and opposing—foreign migratory divorces. Much of what we have said impels us to reject Doris Mayer's argument that her Dominican divorce was valid. Our narrow holding, however, must be emphasized—considering the circumstances of this case, Victor Mayer can neither assert the invalidity of Doris Mayer's Dominican divorce nor the invalidity of his subsequent marriage to Doris Mayer.

IV

Estoppel

[2] Doris Mayer next contends that even if we find the Dominican divorce invalid (as we have done in Part III, *supra*),

Victor Mayer should, nevertheless, be estopped from questioning its validity since (a) he participated in her procurement of the invalid divorce; (b) all parties relied upon the divorce's validity until Victor Mayer abandoned Doris Mayer; and (c) a contrary result would create a marriage at will by Victor Mayer, who could end the marital relationship at any time he desired, and yet prevent Doris Mayer from avoiding the obligations of her remarriage. Consequently, Doris Mayer argues that she should receive alimony *pendente lite* and reasonable attorney's fees.

In a forceful response, Victor Mayer argues that *he is not* estopped to assert the invalidity of the Dominican divorce decree, and that *Doris Mayer is* estopped to assert the validity of her marriage to him. Victor Mayer first cites N.C. Gen. Stat. § 51-3 (Supp. 1983), which states that "all marriages . . . between persons either of whom has a husband or wife living at the time of such marriage . . . shall be void." Victor Mayer then argues that even if equity could suspend the operation of G.S. § 51-3, the equities in this case weigh no more heavily for Doris Mayer than for him since (a) she and he are *in pari delicto*; (b) Doris Mayer knew or should have known that the Dominican divorce decree might not be recognized in North Carolina; (c) no substantial equitable rights matured in consequence of the aborted union—no children were born of the union, and no third parties would be affected by nullification of the marriage—and (d) Doris Mayer seeks relief from the legal consequences of her own injudicious haste. Finally, Victor Mayer argues that he was not a party to the Dominican decree and that principles of *res judicata* and estoppel, therefore, do not apply to him.

The question, squarely presented by these contentions, is whether a husband, who actively participates in his wife's procurement of an invalid divorce from her prior husband, is estopped from denying the validity of that divorce. After a careful balancing of legal and policy considerations, we answer that question "yes."

We are persuaded by Doris Mayer's argument, but we could have more quickly and more easily embraced her position had there been a child of her marriage with Victor Mayer; or had the marriage been of long duration. Indeed, we have not lightly dismissed Victor Mayer's implicit argument that Doris Mayer,

with full knowledge of the consequences, gambled and lost—she left her lawyer-husband, releasing him from all alimony obligations, for a greater love, or for what she erroneously thought was a better deal. Notwithstanding the strong legal, factual and policy considerations the above factors engender, and in spite of the criticism that the application of a quasi-estoppel doctrine circumvents a state's divorce law, it would be even more inimical to our law and to our public policy, to permit Victor Mayer to avoid his marital obligations by acting inconsistently with his prior conduct.

Under quasi-estoppel doctrine, one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct. *See generally* Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L. J. 45 (1960); Weiss, *A Flight on the Fantasy of Estoppel in Foreign Divorces*, 50 Colum. L. Rev. 409 (1950); *see also Kazin v. Kazin*, 81 N.J. 85, 405 A. 2d 360 (1979); *Harlan v. Harlan*, 70 Cal. App. 2d Supp. 657, 161 P. 2d 490 (1945).

The development of a quasi-estoppel doctrine is reflected in the Restatement (Second) Conflict of Laws § 74 (1971), which states that "[a] person may be precluded from attacking the validity of a foreign decree if, under the circumstances, it would be inequitable for him to do so." *Id.* at 224. The scope of § 74 is defined in Comment b:

> [It is] not limited to situations of . . . 'true estoppel' where one party induces another to rely to his damage upon certain representations. The rule may be applied whenever, under all the circumstances, it would be inequitable to permit a particular person to challenge the validity of a divorce decree. Such inequity may exist when action has been taken in reliance on the divorce or expectations are based on it or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party.

Id.[4]

4. The successive changes in the American Law Institute's position on this issue are evident when we compare the 1934 and 1948 versions of § 74 to the present version: The 1934 version provided that "[t]he validity of a divorce decree can-

According to Professor Clark, when analyzing quasi-estoppel cases, "[t]hree factors seem to be involved: (1) the attack on the divorce is inconsistent with prior conduct of the attacking party; (2) the party upholding the divorce has relied upon it, or has formed expectations based on it; (3) these relations or expectations will be upset if the divorce is held invalid." *Clark, supra* p. 13, at 56-57. Significantly, all three factors do not have to be present for estoppel to apply. When all three factors are present, however, the application of the estoppel doctrine is especially compelling.

North Carolina courts have recognized the doctrine of equitable estoppel in *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E. 2d 606 (1980), and *McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937). In *Redfern*, the defendant attempted to avoid paying alimony to his second wife by claiming that *he* had not been lawfully divorced from his first wife because the divorce judgment was not actually signed until after the second marriage. The husband contended that the second marriage was void under G.S. § 51-3, but our court, although holding that the question presented was a question of law, not ethics, nevertheless stated that the defendant should be "equitably estopped" from asserting the invalidity of his divorce since he had been guilty of culpable negligence in failing to obtain a signed divorce judgment before entering into the second marriage. *Redfern*, 49 N.C. App. at 97, 270 S.E. 2d at 608.

In *McIntyre*, a husband, with the knowledge of his future second wife, dissolved his marriage with his first wife in an invalid Nevada proceeding. In the second wife's action for alimony, the husband was held to be estopped from questioning the validity of the Nevada divorce that *he* obtained. The *McIntyre* Court said that it would not "be in accord with reason and justice . . . [to allow the husband] to question [the Nevada court's] jurisdiction,

not be questioned . . . either by a spouse who has obtained such decree or divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying." Restatement of Conflict of Laws § 112 (1934). The Comment to the 1948 version states that "[a]ny person may be precluded from questioning the validity of a divorce decree if, under all the circumstances, his conduct has led to the obtaining of the divorce decree, or for any other reason has been such as to make it inequitable to permit him to deny the validity of the divorce decree." Restatement of Conflict of Laws § 112, Comment c, at 110 (Supp. 1948).

when new rights and interests have arisen as a result of his second marriage." 211 N.C. at 699, 191 S.E. at 507.

That both *Redfern* and *McIntyre* are factually distinguishable from this case does not mean that the language used therein is of no value to us. Indeed, these cases show that estoppel principles depend upon the facts of each case.

In addition to the position taken in the Restatement (Second) Conflict of Laws § 74 and this Court's language in *Redfern* and *McIntyre*, there is considerable authority from other jurisdictions that a husband, who encouraged his wife to obtain a divorce from her prior spouse, is estopped from questioning its validity. Professor Clark, as though presciently writing for the case *sub judice*, sets forth the problem this way:

> This problem most commonly arises when a man persuades a married woman to divorce her husband so that she will be free to marry him. He may even finance the divorce, provide a lawyer, or take an active part in other ways. When he does so, or even when he merely marries her with full knowledge of the circumstances surrounding the divorce, he is estopped to question the validity of the divorce. He has engaged in conduct calculated to induce reliance on the divorce, and indeed, he has relied on it himself. Therefore, the reasons of policy which prevent attack by a party to the divorce action are equally persuasive here.

Clark, supra p. 13, at 66-67. Professor Weiss reaches a similar conclusion:

> [W]here W [the wife] and H-1 [the first husband] are both estopped from attacking the foreign divorce, regardless of the basis of such estoppel, to allow H-2 [the second husband] to attack that divorce at will is to place the matrimonial status of the first spouses in uncertainty and to subject them to the mercy of H-2 who, at his own convenience, is gratuitously allowed the bonanza of playing fast and loose when he feels 'the sweet has turned bitter.' H-2 chose to marry and, in the absence of strong considerations to the contrary after taking into account the circumstances of all the spouses affected, he should be held to his election, particular-

> ly if he was aware of the facts when he made that choice—and even more so if he played a part in inducing the divorce.

Weiss, supra p. 13, at 425. The conclusion reached by *Clark* and *Weiss* is no different from that reached by several other state courts that have considered the issue. *See Kazin v. Kazin; In Re Marriage of Winegard*, 278 N.W. 2d 505 (Iowa), *cert. denied*, 444 U.S. 951, 62 L.Ed. 2d 321, 100 S.Ct. 425 (1979); *Poor v. Poor*, 381 Mass. 392, 409 N.E. 2d 758 (1980); *Rosen v. Sitner*, 274 Pa. Super. 445, 418 A. 2d 490 (1980); *Campbell v. Campbell*, 164 Misc. 647, 1 NYS 2d 619 (1937); *Zirkalos v. Zirkalos*, 326 Mich. 420, 40 N.W. 2d 313 (1949); *Goodloe v. Hawk*, 113 F. 2d 753 (D.C. Cir. 1940); *Leatherbury v. Leatherbury*, 233 Md. 344, 196 A. 2d 883 (1964); *Harlan v. Harlan; Mussey v. Mussey*, 251 Ala. 439, 37 So. 2d 921 (1948).

As much as in any area of the law, quasi estoppel cases turn on the particular facts of each case. The facts in this case compel the conclusion we reach. The record suggests that Victor Mayer insisted on Doris Mayer's obtaining a Dominican divorce; that he promised to support her in a manner better than the one she had been accustomed to, prompting Doris Mayer to sign away any alimony she may have been entitled to from Mr. Crumpler; and that he accompanied her on her trip to the Dominican Republic, paying for her transportation and lodging, and other personal expenses. After the divorce, Victor Mayer continued to uphold its validity as he had Doris Mayer sign a prenuptial agreement and then married her. While they were married, Victor Mayer lived in Doris Mayer's house and borrowed money from her, including $25,000 which he admits he has not repaid. Victor Mayer never questioned the validity of the marriage until he abandoned Doris Mayer. In addition, Doris Mayer relied on the divorce's validity.

Failure to estop Victor Mayer in this case would result in matrimonial uncertainty because, as stated earlier, it "creates the impossible situation of [a] wife or [a] husband 'at will' where the divorced party who remarried cannot avoid the obligation of his remarriage, while the second spouse could at any time [get] an annulment." Note, *Enforcement by Estoppel of Divorces Without Domicil: Toward A Uniform Divorce Recognition Act*, 61 Harvard L. Rev. 326, 333 (1948).

We are not unmindful of Victor Mayer's argument that to estop him from questioning the divorce's validity would have, as he puts it, the effect of validating a marriage which G.S. § 51-3 declares a nullity. There is a difference, however, between declaring a marriage valid and preventing one from asserting its invalidity. The theory behind the equitable estoppel doctrine is not to make legally valid a void divorce or to make an invalid marriage valid, but rather, to prevent one from disrupting family relations by allowing one to avoid obligations as a spouse. Stated differently, equitable estoppel is dependent upon events which led to the divorce or which may have occurred after the divorce. It is a personal disability of the party attacking the divorce judgment; it is not a function of the divorce decree itself. *See Clark, supra* p. 13, at 47 and *Swisher, supra* p. 2, at 38-39.

Further, this Court has already recognized that a *party* to an invalid divorce is estopped and that one marrying in reliance on such a divorce is entitled to the benefits of the marriage. *McIntyre*. It, therefore, would be anomalous to argue that estopping a second husband, who participated in his wife's procurement of a divorce, would have any greater impact on this State's public policy than estopping one who is a party to the marriage.

We hold that Victor Mayer is estopped from asserting as a defense the invalidity of Doris Mayer's divorce, and that Doris Mayer is entitled, based on the trial court's findings, to alimony *pendente lite* and reasonable attorney's fees. The question of the validity of the prenuptial agreement limiting Doris Mayer's alimony to $1,000 per month is not before this Court.

For the above reasons, this matter is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges WELLS and EAGLES concur.

JULIUS R. CAUBLE v. CITY OF ASHEVILLE

No. 8328SC253

(Filed 21 February 1984)

1. **Penalties § 1; Schools § 1— fines for overtime parking—use for county schools—meaning of "clear proceeds"**

Items bearing a reasonable relationship to the cost of collecting overtime parking fines may be deducted by a municipality in determining the "clear proceeds" of such fines which must be paid by the municipality to the county finance officer for maintaining free public schools.

2. **Costs § 4.2— class action—allowance of attorney fee**

A class action brought by plaintiff to compel a city to pay fines collected for overtime parking into the county school fund was properly retained by the trial court for a determination as to whether plaintiff is entitled to attorney fees under the rule permitting a court to award attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection or increase of a common fund.

3. **Judgments § 36.2— res judicata—school board not in privy with plaintiff**

In an action brought by a citizen and taxpayer of defendant city to compel the city to pay fines collected for overtime parking into the county school fund, there was no identity of interest required to create a privy relationship between plaintiff and the county board of education so as to make the trial court's finding as to the amount of total collections for overtime parking *res judicata* and binding upon the county board of education.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgment entered 14 October 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 February 1984.

This is the second time this case has been appealed, previous opinions being reported as *Cauble v. City of Asheville* in 45 N.C. App. 152, 263 S.E. 2d 8 (1980) [hereinafter *Cauble* I] and 301 N.C. 340, 271 S.E. 2d 258 (1980) [hereinafter *Cauble* II]. The facts of this matter are set out in those opinions and will only be briefly summarized here.

This is a class action brought by plaintiff in the name of the citizens, residents, and taxpayers of the City of Asheville to compel the city to pay into the Buncombe County School Fund all fines collected pursuant to that city's ordinances forbidding overtime parking. Plaintiff is contending that these monies were being misapplied by the defendant, and that the school fund is entitled

to them pursuant to Article IX, § 7, of the North Carolina Constitution, which provides that:

> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of this State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

The parties entered into the following stipulation pursuant to an agreement made at a pretrial conference:

> [I]t was agreed that this civil action would be tried in two steps. First, a hearing would be held to determine whether or not Article IX, Section 7 of the Constitution of North Carolina applies to the civil penalties for overtime parking. If the Court should rule in favor of the plaintiff in that respect, a second hearing would be held at which a determination of the "clear proceeds" of the civil penalties could be made.

As a result of the first hearing, the trial court concluded that the fines assessed pursuant to the provisions of Asheville's overtime parking ordinances constituted "a penalty, forfeiture, or fine collected for a breach of the penal laws of the State within the meaning of the provisions of Article IX, Section 7, of the Constitution of the State of North Carolina," and that the county school board was entitled to the clear proceeds of such fines. Judgment was entered accordingly, and defendant appealed.

This Court affirmed the trial court's judgment in *Cauble* I, which decision was in turn affirmed by our Supreme Court in *Cauble* II, although that court reversed the portion of the Court of Appeals' opinion affirming that the clear proceeds be paid directly to the Board of Education of Buncombe County rather than the Buncombe County finance officer for distribution. The holdings of both courts were based largely on an application of G.S. § 14-4, which statute makes a criminal misdemeanor of what would otherwise be only a civil penalty for the violation of ordinances.

The first issue having been answered, i.e., that overtime parking fines belong to the school fund pursuant to Article IX,

Section 7, upon remand the trial court proceeded to resolve the second issue by determining what constituted clear proceeds of overtime parking fines. Each party submitted a definition of "clear proceeds" pursuant to a pretrial order issued upon remand, but the trial court was unable to reconcile these definitions, the defendant's list of what deductions should be allowed from gross proceeds in order to arrive at a net figure being predictably more extensive than plaintiff's. The trial court then entered a subsequent pretrial order which provided that:

> [T]o assist the Court in defining the term "clear proceeds" . . . this matter shall be set for a nonjury hearing, at which time this Court shall consider only the process and procedure whereby a citation and, previously, a notice were issued, processed and collected. . . .

The nonjury hearing referred to in the pretrial order was held and judgment was entered, which judgment provided in pertinent part:

> [t]he term *"clear proceeds" means the amount collected by the City for overtime parking and delinquent overtime parking violations undiminished by direct and indirect costs or expenses of collection* [and that] [t]o hold otherwise would interpose the arbitrary, uncertain and perhaps inconsistent exercise of judicial discretion in determining reasonable costs of collection between the Constitutional mandate concerning fines and the school fund.

(Emphasis added.) Defendant is currently appealing this judgment, the primary ground for its appeal being that the trial court erred in defining the term "clear proceeds."

Swain & Stevenson, by Joel V. Stevenson and Robert S. Swain, for plaintiff appellee.

Patla, Straus, Robinson & Moore, by Victor M. Buchanan, for defendant appellant.

Ernest H. Ball, for North Carolina League of Municipalities, Amicus Curiae.

Tharrington, Smith & Hargrove, by Richard A. Schwartz, Roger W. Smith, and Ann L. Majestic, for North Carolina School Boards Association, Inc., Amicus Curiae.

VAUGHN, Chief Judge.

[1] The central issue on this appeal involves the meaning of the term "clear proceeds." The threshold question in this case, whether funds collected from overtime parking violations constitute penalties or fines within the meaning of Article IX, Section 7 of the North Carolina Constitution, the clear proceeds of which shall belong to the county for maintaining free public schools, has already been decided. In *Cauble* I, as affirmed by *Cauble* II, the Court of Appeals and subsequently the Supreme Court held that such monies collected are indeed fines resulting from "a breach of the penal laws of the State," the clear proceeds of which are to be paid to the Buncombe County finance officer for disbursement to the appropriate administrative units. As to the current appeal, insofar as the judgment of the trial court defined "clear proceeds" as the amounts collected by defendant for overtime parking violations undiminished by direct and indirect costs or expenses of collection, it was in error. What will follow is a discussion of the meaning of clear proceeds and the standard by which such proceeds are to be measured on remand.

The term "clear proceeds" as used in Article IX, Section 7, is synonymous with "net proceeds." The North Carolina cases of *State v. Maultsby*, 139 N.C. 583, 51 S.E. 956 (1905) and *Hightower v. Thompson*, 231 N.C. 491, 57 S.E. 2d 763 (1950), by discussing permissible deductions from gross proceeds, indicate that clear proceeds represent a net result. In fact, the court in *Maultsby* used the term "net proceeds" interchangeably with "clear proceeds." *Id.* at 584, 51 S.E. at 956. *See also Sutton v. Phillips*, 116 N.C. 502, 512, 21 S.E. 968, 970 (1895) (noting in dissenting opinion that "clear" and "net" are synonymous terms); *State ex rel. Commissioners of Public Lands v. Anderson*, 56 Wis. 2d 666, 669, 203 N.W. 2d 84, 85 (1973) (interpreting similar provision in Wisconsin Constitution: "Obviously, 'clear proceeds' should mean net proceeds . . .").

Once it is established that "clear proceeds" means "net proceeds," namely, that some deductions from gross amounts collected shall be allowed, we come to the more difficult aspect of this issue—which deductions shall be allowed. North Carolina case law offers minimal guidance on this matter. In *Hightower v. Thompson, supra*, which involved the forfeiture of a criminal ap-

pearance bond, our Supreme Court, relying on *State v. Maultsby, supra*, noted that " '[C]lear proceeds' have been judicially defined as the amount of the forfeit less the cost of collection. . . ." *Id.* at 493, 57 S.E. 2d at 765. The court applied this definition to the facts to identify the costs of collection as "the citations and process against the bondsman usual in the practice." *Id.* at 493, 57 S.E. 2d at 765.

In *State v. Maultsby, supra*, the court held that a statute providing that one-half of a fine imposed on a criminal defendant convicted of violating state prohibition laws be paid to the informant was unconstitutional, observing "[b]y 'clear proceeds' is meant the total sum less only the Sheriff's fees for collection, when the fine and costs are collected in full." *Id.* at 585, 51 S.E. at 956.

Both *State v. Maultsby, supra*, and *Hightower v. Thompson, supra*, involved particularized applications of the general directive that "costs of collection" will be deducted from gross proceeds to calculate clear proceeds. The plain import of these cases is not that any specific item, such as the sheriff's fee, is to be deducted; rather, that the scope of permissible deductions concerns the cost of collecting the fines. In the case at bar no sheriff's fee is involved, and a rule making such a fee the only permissible deduction is patently illogical.

Although no North Carolina statute or case adequately identifies which deductions from gross proceeds are permissible, in arriving at a definition of the term "clear proceeds" it is helpful to understand which deductions are impermissible by examining cases from North Carolina and other jurisdictions holding that funds had been unconstitutionally diverted from the public schools or similar institutions. The North Carolina General Assembly is clearly without power to appropriate or divert by statute all or any part of fines resulting from violations of city ordinances to cities and towns, this being in direct contravention of the constitutional provision. *School Directors v. Asheville*, 137 N.C. 503, 50 S.E. 279 (1905). A subsequent case forbade the clerk of municipal court to retain a five percent commission pursuant to a local ordinance and statute after collecting fines from the criminal division of the municipal court, *Board of Education v. High Point*, 213 N.C. 636, 197 S.E. 191 (1938), and the Supreme Court in *Shore v. Edmisten*, 290 N.C. 628, 227 S.E. 2d 553 (1976) recognized

that monies to be set aside for future enforcement of the law cannot be deducted from fines to arrive at clear proceeds.

In accordance with North Carolina authority, it is generally true that where a state constitution gives the clear proceeds of fines to public schools, any statute which purports to divert the total proceeds derived from a particular type of fine to any other purpose will be held unconstitutional. *See State ex rel. Rodes v. Warner*, 197 Mo. 650, 94 S.W. 962 (1908) (similarly diverting money belonging to school fund); *State v. Parkins*, 63 W.Va. 385, 61 S.E. 337 (1908) (giving all fines relating to violations of fish and game laws to game warden).

The clear implication in North Carolina case law is that costs of collection of a fine will be deducted to determine clear proceeds, *see State v. Maultsby, supra*, and *Hightower v. Thompson, supra*, and this proposition receives support from other jurisdictions. In a Virginia case, although the monies in question were deemed penalties rather than fines and therefore not within the purview of the constitutional provision, the court reasoned in dicta that deduction of costs is a necessarily implied aspect of the constitutional provision:

> It could not have been intended or expected by the framers of the constitution that the laws imposing fines for offenses could be enforced or collected without cost or expense. They must have . . . intended to appropriate to the literary fund the amount coming to the state after deducting such part as the legislature may have set apart to secure their enforcement and collection. . . . This is not an appropriation or diversion of the fine to an object other than that to which the constitution dedicates it.

Southern Exp. Co. v. Commonwealth, 92 Va. 59, 64-5, 22 S.E. 809, 810 (1895). *Accord, State ex rel. Commissioners of Public Lands v. Anderson, supra* (upholding a statute designating a fixed fifty percent of penalties received by the county for state traffic law violations to be retained by the county treasurer to cover costs). *See also State ex rel. Rodes v. Warner, supra* (indicating that a criminal statute giving part proceeds to officers to spur enforcement of law would leave clear proceeds in "full satisfaction of constitutional mandate"); *State v. Parkins, supra* (if portion of fine given to informant, remainder would be net proceeds).

If costs of collection may be validly deducted from amounts collected by the City of Asheville as gross proceeds without violating the constitutional provision, there remains the question of how to arrive at those costs. Case law relating to the determination of costs in similar instances indicates that defining costs of collection is a legislative function. *See, e.g., State ex rel. Rodes v. Warner, supra* (legislature has discretionary power to give part of fine to informant, remainder being clear proceeds); *State ex rel. Guenther v. Miles,* 52 Wis. 488, 9 N.W. 403 (1881) (legislature can appropriate two percent of fines for legal fees); *State ex rel. Commissioners of Public Lands v. Anderson, supra* (legislature has power to define clear proceeds).

The North Carolina General Assembly has not, however, seen fit to provide municipalities with a formula for determining "clear proceeds" of fines realized from traffic violations. Lacking guidance on the subject, this Court is compelled to resort to a less precise measure in order to allow municipalities to retain the costs of collecting the fines in question. *See generally People v. Barber,* 14 Mich. App. 395, 399, 165 N.W. 2d 608, 612 (1968) (to be deemed a cost money must bear "some direct relation" to expense of prosecution); *State ex rel. Commissioners of Public Lands v. Anderson, supra* at 669, 85 ("[A]ny deduction from the amount of the fines should represent the actual or reasonably accurate estimate of the costs of the prosecution").

We therefore hold that the test for determining permissible deductions from gross monies taken in is that the item to be deductible must bear a reasonable relation to the costs of collection of the fine. Although the trial court refused to interpose the "arbitrary, uncertain and perhaps inconsistent exercise of judicial discretion in determining reasonable costs of collection," we believe a determination of costs can be made by qualified accountants, which determination is no more complicated than other problems accountants are daily accustomed to resolving.

We are mindful that in the situation of parking fines, the costs of collection often surpass the amounts collected, the intent of the municipality in passing these ordinances being the regulation of traffic rather than the production of revenue, and that the evidence produced at trial tends to support that proposition. *See People v. Barber, supra* (where act purporting to fund officers'

training council out of a percentage of fines exempted "minor traffic violations"); *State ex rel. Commissioners of Public Lands v. Anderson, supra* (where evidence showed county lost money in collecting traffic fines).

We are equally cognizant of the manifest purpose of the framers of the Constitution in enacting Article IX, § 7, that is, to set aside property and revenue to support the public school system and to prevent the diversion of such property and revenue to other purposes. *Shore v. Edmisten, supra*, at 588, 633, *quoting Boney v. Kinston Graded School*, 229 N.C. 136, 48 S.E. 2d 56 (1948). In balancing the equities here, we wish to note that while it is important that the needs of our school children be met, and met generously, it is also important that a municipality feel free to enact ordinances imposing small fines for overtime parking violations without being economically penalized, if indeed the municipality realizes no revenue from the enforcement of these ordinances.

As to appellant's other assignments of error, the assignments relating to the failure of the trial judge to distinguish between on- and off-street overtime parking violations are without merit. The case was tried generally on a theory of overtime and delinquent overtime parking violations; there was neither allegation nor evidence that any distinction should be made between on- and off-street parking violations.

[2] There is also no error in that part of the judgment that retained the cause for the purpose of awarding attorneys' fees. It is true that attorneys' fees are not usually an element of court costs. However, a rule exists allowing a court to award attorneys' fees "to a litigant who at his [or her] own expense has maintained a successful suit for the preservation, protection, or increase of a common fund," *Horner v. Chamber of Commerce*, 236 N.C. 96, 97-8, 72 S.E. 2d 21, 22 (1952), despite the lack of statutory authority. *Accord, Rider v. Lenoir County*, 238 N.C. 632, 78 S.E. 2d 745 (1953) (listing necessary elements for application of the rule). It was proper for the trial court to retain the cause for a determination of whether the above rule applies at bar and the plaintiff is entitled to attorneys' fees.

[3] As to the assignment of error concerning the trial court's conclusion as a matter of law that the amount of total collections

for parking violations between 22 April 1975 and 30 June 1982 would be *res judicata* and binding upon both the parties and upon the Board of Education, this Court first notes that such information is more properly made a finding of fact rather than a conclusion of law, although no prejudice results from mislabeling it a conclusion of law. Indeed, the trial court made the information concerning the amount of collections one of its findings of fact as well as a conclusion of law. As a finding of fact, the amount of collections is *res judicata* and binding upon the parties to this action.

As to the Board of Education, however, the trial court erred in ruling that such a finding, whether denominated fact or law, would be binding upon that organization. A plea of *res judicata* is customarily sustained only where there is an identity of parties, subject matter, and issues, but there are exceptions to this general rule. The doctrine of *res judicata* also applies to privies as well as parties, privies being persons who have mutual or successive rights to the same interest in property. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962) ("absolute identity of interest is essential"). The identity of interest required to create a privy relationship does not exist between plaintiff and the Board of Education. In addition, a person who is neither party nor privy to an action may be concluded by the judgment if that person assumed and managed the defense of the action with respect to an interest of that person. *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E. 2d 492 (1957). There is no evidence or indication that the Board of Education assumed and managed this action.

That part of the judgment of the trial court that defines clear proceeds, and that part which states that the $491,800.00 figure for total collections for all parking violations between 22 April 1975 and 30 June 1982 shall be *res judicata* upon the Board of Education, are reversed; all other assignments of error are overruled. This cause is remanded for an accounting consistent with this Court's definition of "clear proceeds."

Reversed and remanded.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; SWAIN COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE, GRAHAM AND JACKSON COUNTIES; TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; AND THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; DEROL CRISP v. NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.

No. 8210UC1289

(Filed 21 February 1984)

1. **Utilities Commission § 44— same panel hearing two similar cases—no error**

Defendants were not denied a fair hearing, nor was it necessary for members of a Utilities Commission panel to be disqualified, because the same panel of the Utilities Commission conducted the hearing in this case that conducted a hearing in a previous similar case.

2. **Utilities Commission § 57— finding that two entities are one integrated utility—supported by evidence**

The evidence supported a finding that Nantahala and Tapoco are one integrated utility where the evidence in the record tended to show that the two companies traded all of their power to TVA and received one entitlement in return which they divided between them.

3. **Utilities Commission § 55— allocation of cost among utilities—rational**

The allocation of costs by the Commission between Tapoco and Nantahala was supported by the record.

4. **Utilities Commission § 57— concealed benefit findings supported by record**

The Utilities Commission analyzed the evidence and made findings of fact which were supported by the evidence as to concealed benefits which flowed from Nantahala to Tapoco and Alcoa under the NFA and the 1971 Apportionment Agreement.

APPEAL by respondents from order of North Carolina Utilities Commission entered 8 June 1982. Heard in the Court of Appeals 24 October 1983.

This is an appeal from an order of the North Carolina Utilities Commission reducing rates and requiring a refund by Nantahala Power and Light Company and Alcoa. This case is similar in many ways to another rate case which has been in the appellate courts of this state. *See Utilities Comm. v. Edmisten, Attorney General,* 40 N.C. App. 109, 252 S.E. 2d 516 (1979), *aff'd in part and rev'd in part,* 299 N.C. 432, 263 S.E. 2d 583 (1980) and

State ex rel. Util. Comm'n v. Nantahala Power, 65 N.C. App. 198, 309 S.E. 2d 473 (1983). We refer to those cases for a more detailed statement of facts. We note that the New Fontana Agreement (NFA) and the 1971 Apportionment Agreement expired by their own terms on 31 December 1982. Nantahala has now negotiated, independently of Alcoa and Tapoco, an interconnection agreement with TVA. *See* Notice of Decision and Order In the Matter of Nantahala Power and Light Company, Docket No. E-13, Sub. 44, State of North Carolina Utilities Commission.

Nantahala filed on 31 December 1980 an application to increase its rates for retail electrical services effective 1 February 1981. On 16 July 1981 Alcoa and Tapoco were joined as parties to the proceedings. After a panel had taken evidence, the Commission entered an order in which it found that Nantahala, Tapoco, and Alcoa are public utilities under Chapter 62 of the General Statutes. The Commission also found that the NFA and the 1971 Apportionment Agreement resulted in substantial benefits to Alcoa to the significant detriment of the customers of Nantahala and the Nantahala and Tapoco systems should be treated as one entity in setting retail rates for Nantahala. The Commission found that Nantahala's rates were excessive and ordered a refund to its North Carolina retail customers. Alcoa was ordered to make the refunds to the extent Nantahala is financially unable to do so.

Respondents appealed.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, and Executive Director of The Public Staff Robert Fischback, by Staff Attorney Thomas K. Austin, for the Using and Consuming Public.

Crisp, Davis, Schwentker and Page, by William T. Crisp and Robert B. Schwentker, for Henry J. Truett; the Counties of Cherokee, Graham, Swain, Jackson; Towns of Andrews, Dillsboro, Robbinsville, Bryson City, Sylva; and the Tribal Council of the Eastern Band of the Cherokee Indians.

Joseph A. Pachnowski for the County of Swain and the Town of Bryson City.

Western North Carolina Legal Services, Indian Law Unit, by Larry Nestler, for Derol Crisp.

LeBouef, Lamb, Leiby and MacRae, by Ronald D. Jones and David R. Poe, for Aluminum Company of America and Tapoco, Inc.

Hunton and Williams, by Robert C. Howison, Jr., James E. Tucker, and Edward S. Finley, Jr., for Nantahala Power and Light Company.

WEBB, Judge.

Appellants contend (1) the Utilities Commission is preempted by Federal Energy Regulatory Commission regulations from setting rates that ignore the NFA and the 1971 Apportionment Agreement; (2) the Commission has unconstitutionally burdened interstate commerce; (3) the Commission has intruded into the exclusive and preemptive jurisdiction of the FERC under the Federal Power Act; (4) the Commission did not base its findings that Nantahala and Tapoco constitute a single integrated system and should be treated as one entity with respect to determining rates to applicant's retail customers on evidence in the record but treated these matters as findings by the Supreme Court; (5) the Utilities Commission has disregarded the determination by the FERC in Nantahala Power and Light Co., 19 FERC [CCH] par. 61, 152 (May 14, 1982) and 20 FERC [CCH] par. 61, 430 (September 30, 1982) that the power exchange agreements are reasonable; (6) that the Commission was in error in finding concealed benefits to Tapoco and Alcoa in the power exchange agreements; (7) that the roll-in is fatally flawed because it does not allocate 100% of the demand factors for Nantahala and Tapoco; and (8) that Alcoa and Tapoco are not North Carolina public utilities. We overrule all these assignments of error on the basis of our opinion reported at 65 N.C. App. 198, 309 S.E. 2d 473 (1983).

Nantahala argues that the Commission has erroneously assumed that our Supreme Court directed in its opinion that the Commission set rates through the implementation of a roll-in. Nantahala contends that as a result the Commission treated certain statements in the Supreme Court's opinion as findings of fact and did not consider some of the evidence. Nantahala says that the Commission did not consider uncontradicted evidence that on an hour to hour basis, which is the only way it can be considered, that Nantahala's generation is poorly suited to meet its load. It

argues that the Commission ignored evidence as to the distinction between primary and secondary energy, which evidence shows that under the NFA and the 1971 Apportionment Agreement, Nantahala fares better than Tapoco and Alcoa. Nantahala also argues that the Commission ignored evidence that Nantahala and Tapoco are not an integrated company but quoted from our Supreme Court's opinion that they are, and accepted our Supreme Court's conclusion as an established fact.

Nantahala argues that the Commission did not properly analyze the NFA and the 1971 Apportionment Agreement and if it had it would have concluded the power exchange agreements are fair and the roll-in used is not fair. It contends that the Commission assumed that Nantahala traded its generation for something of less value, which assumption is not correct. Nantahala argues that the value of its generation as a stand-alone system is not as valuable as the Commission assumed. It does not generate enough power at the right time to serve its customers and not enough reserve for maintenance allowance was assigned to it by the Commission. Nantahala argues that the only way the Commission could assign so small a reserve is by considering it a part of the TVA system which cannot be done without the NFA and the 1971 Apportionment Agreement which the Commission refused to recognize in setting rates.

Nantahala argues further that the Commission erroneously assumed that its generation is of the same value to its customers that it is to TVA. This is not correct because TVA can utilize all the energy when generated by Nantahala while Nantahala's customers cannot do so. For this reason, in a bargain with TVA, Nantahala has to take less energy than it gives in order to secure firm energy which is useful to its customers. Both Nantahala and Tapoco received less energy than they gave, but this does not prove Nantahala was shortchanged in the bargain. It simply proves that neither could bargain with TVA to get the same amount of energy they generated. No analysis was made to determine whether Tapoco had benefitted at the expense of Nantahala in the power exchange agreements, and if such an analysis had been made, it would be found that there was no such benefit.

Nantahala argues that the Commission is wrong in its finding that the NFA is unfair to Nantahala. The evidence is that Nan-

tahala received sufficient energy under it to meet its needs for the first ten years of its existence. It says the evidence shows that the 1963 Agreement was negotiated in conjunction with a sales contract under which Nantahala sold energy to Tapoco. The Commission voided this sales contract and the parties then renegotiated the apportionment agreement. It does not mean the 1971 Agreement is unfair because the 1963 Agreement contained terms more favorable to Nantahala.

Nantahala makes a persuasive argument which we might accept if our function were the same as the Utilities Commission. It is not our function to find the facts or to dictate to the Utilities Commission the weight to be given material facts. The evidence in this case as to the unfairness of the NFA and the 1971 Apportionment Agreement to the customers of Nantahala was similar to the evidence adduced in the case previously decided. *See Nantahala Power*, 65 N.C. App. at 209-10, 309 S.E. 2d at 482-83. The Commission's findings of fact were similar in both cases. We believe the evidence was sufficient to support these findings of fact and we cannot disturb the weight given to the facts found.

The appellants argue that the Commission has set rates that will not allow Nantahala to recover its costs, has required a refund in excess of the net worth of Nantahala and that this confiscates the assets of Nantahala and Alcoa in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, § 19 of the North Carolina Constitution. They also argue that this violates G.S. 62-133 which requires that a public utility be given an adequate rate of return. In light of our holding that the Utilities Commission set a reasonable rate of return we overrule these assignments of error.

Alcoa and Tapoco contend that the cause should be remanded to the Utilities Commission to consider the evidence. We believe that the Commission has made findings of fact based on the evidence which supports its order. This assignment of error is overruled.

[1] Alcoa and Tapoco contend they were denied a fair hearing because the same panel of the Utilities Commission conducted the hearing that conducted the hearing in the previous case. Prior to the hearing, Nantahala made a motion that none of the Commissioners who heard the case in the previous docket be assigned to

this case. This motion was denied. Alcoa and Tapoco argue that since the panel's findings of fact and order in this docket is almost identical to its findings of fact and order in the previous docket, although the evidence is different, this shows the bias of the panel. We do not believe we should hold that because the panel made very similar findings of fact and conclusions of law in both cases that this shows they were biased. We believe the evidence in this case supports the findings of fact. We presume the panel based its findings on the evidence. We do not believe the members of the panel had to be disqualified because they had heard a previous case involving the same parties and issues.

Alcoa and Tapoco argue that the Commission could not pierce the corporate veil of Alcoa and Tapoco. Although the Commission recited "that it should pierce the corporate veil" we do not believe this was done. It did not disregard the corporate entity of either Alcoa or Tapoco. It did treat Nantahala and Tapoco as being one integrated utility for the purpose of setting rates and it did require Alcoa to be responsible for a part of the refund. We do not believe it was necessary to pierce the corporate veil of either Tapoco or Alcoa to do this.

[2] Alcoa and Tapoco argue that the finding that Nantahala and Tapoco are one integrated utility is not supported by the evidence. They argue that the Utilities Commission readopted its order in the previous docket although the evidence was substantially different. There was evidence in the record that the two companies traded all their power to TVA and received one entitlement in return which they divided between them. Although there is contrary evidence in the record, we believe this was substantial evidence which supports the finding of the Commission.

[3] Tapoco and Nantahala argue that the allocation of costs by the Commission is without rational basis in the record. They say this is so because the Commission should have held that Tapoco wheels power bought by Alcoa from the TVA and this power should have been included in the power of the combined system. They argue that the Commission based its determination not to include this power on three additional grounds none of which are valid. They are (1) the Alcoa-TVA purchases are far greater than other sources of power transmitted by the combined system; (2)

the Alcoa-TVA purchases are not suited to the public load; and (3) to include the TVA purchases by Alcoa would "warp and twist" the cost allocation methodology resulting in a cost increase to Nantahala. They say that it is irrelevant whether Alcoa's TVA purchases are large or small, that Nantahala's TVA purchases are not suited to Alcoa's Tennessee operations, and yet they are included, and the fact that a factor would increase the cost to Nantahala should not keep it from being used.

In a previous opinion we held that the Commission was not required to include Alcoa's TVA purchases in the roll-in. *See Nantahala Power*, 65 N.C. App. at 212, 309 S.E. 2d at 484. The evidence in that case and in this case shows that Alcoa purchases large amounts of power from TVA in addition to the power it receives from Tapoco. This power is transmitted to Alcoa on Tapoco's lines. Whether or not Tapoco wheels this power we believe it is power purchased by Alcoa outside the unified system and the Commission was not required to consider it in setting a rate.

[4] In finding that the NFA and 1971 Agreement resulted in concealed benefits to Tapoco and Alcoa at the expense of Nantahala, the Commission relied on evidence which it analyzed very similarly to its analysis in the previous case decided by this Court. *See Id.* at 209-10, 309 S.E. 2d at 482-83. It found that under the Apportionment Agreement Nantahala was deprived of 66,000,000 kwh average energy production annually which went to Tapoco. It found that Nantahala had a demand generating capacity of 81,800 kw but was limited by the agreement to 54,300 kw which requires Nantahala to pay an unnecessary demand charge because of this 27,500 kw loss. It found that Nantahala received no compensation under the apportionment agreement for the value of its upstream storage capacity to Tapoco or for its relinquishment to TVA of the right to control stream flow. It also found that under the 1971 Apportionment Agreement Nantahala did not receive the benefits it should have received as being part of an integrated system. The Commission found that the NFA was unfair to Nantahala in that it was structured to meet Alcoa's need for a certain amount of stable energy and not Nantahala's need for peaking capacity.

Tapoco and Alcoa argue that in this case they have offered evidence which refutes this analysis of the evidence. They say

that the conclusion that Nantahala was deprived of 66,000,000 kwh per year was based on a 1960 Ebasco study which is contradicted by more recent evidence. They also say that the evidence shows that although Nantahala's aggregated annual generation may exceed its sales, much of the energy is generated at a time when it cannot be used by Nantahala's customers. As to what the Commission found was a 27,500 kw loss of demand capacity to Nantahala they say that if this calculation is correct there is no evidence that because Nantahala received less than its generation capacity this gave a benefit to Tapoco. As a matter of fact, Tapoco received proportionately less under the agreement for its capacity than did Nantahala.

As to the upstream storage of water by Nantahala, Tapoco and Alcoa argue that the Federal Power Act does not permit upstream licensees to assess a downstream governmental plant for downstream benefits. Tapoco and Alcoa argue that the NFA was not structured to meet Alcoa's needs any more than Nantahala's needs. Nantahala received firm power under the NFA which is what it needs to serve its customers.

Tapoco and Alcoa make persuasive arguments which we might accept if our function was that of the Utilities Commission. We believe the Utilities Commission has analyzed the evidence and made findings of fact that are supported by the evidence as to the concealed benefits which flow from Nantahala to Tapoco and Alcoa under the NFA and the 1971 Apportionment Agreement.

Tapoco argues that it should be dismissed from the case. It says no order has been entered affecting it and it is not a proper party. It argues that it is incurring substantial legal fees which it should not be required to do. We believe Tapoco is a proper party to this proceeding. Nantahala and Tapoco have been held to be one utility for ratemaking purposes in this case. We hold that Tapoco should remain a party and bound by any order entered in this proceeding.

Affirmed.

Judges ARNOLD and BRASWELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 FEBRUARY 1984

CHRYSLER CREDIT CORP. v. REBHAN No. 8326SC320	Mecklenburg (82CVS5500)	Affirmed
HARRELL v. HARRELL No. 831DC766	Gates (82CVD78)	Affirmed
IN RE SIMMONS No. 8318DC558	Guilford (82SP1121)	Reversed
IN RE WALKER No. 831DC833	Pasquotank (80J45)	Affirmed
IN RE WILL OF BENNETT No. 8318SC954	Guilford (81CVS6644)	No Error
STATE v. BARRETT No. 8320SC844	Union (82CRS7063)	No Error
STATE v. CAYTON No. 838SC813	Wayne (83CRS2305)	No Error
STATE v. CLARK No. 8311SC939	Johnston (82CRS12778)	No Error
STATE v. CROMARTIE No. 8312SC814	Cumberland (79CRS13174)	No Error
STATE v. FORREST No. 8321SC868	Forsyth (82CRS34685)	No Error
STATE v. GILES No. 8314SC800	Durham (82CRS20088) (82CRS20089) (82CRS20090)	No Error
STATE v. HARTSHORN No. 8325SC864	Catawba (82CRS14774)	No Error
STATE v. JONES No. 833SC837	Craven (83CRS275) (83CRS277)	Remanded for Resentencing
STATE v. LOCKLEAR No. 8316SC834	Robeson (82CRS16627) (82CRS16628) (82CRS16629)	No Error
STATE v. McKINNEY No. 8314SC763	Durham (82CRS12831)	No Error

STATE v. MARTIN No. 8328SC751	Buncombe (82CRS28478)	Remanded for Resentencing
STATE v. PAYNE No. 8317SC738	Surry (82CRS1597) (82CRS1598)	Appeal Dismissed
STATE v. SPENCER No. 832SC888	Tyrrell (83CRS23)	No Error
STATE v. VICKERS No. 8327SC827	Gaston (82CR1630)	No Error
STATE v. WRIGHT No. 839SC808	Granville (82CRS6535)	No Error
STATE v. WRIGHT No. 8325SC820	Catawba (82CRS14641)	No Error

JOHNNY W. BALLENGER v. BURRIS INDUSTRIES, INC. AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 8210IC1177

(Filed 21 February 1984)

1. **Master and Servant § 93.3— deposition of doctor—no formal introduction into evidence**

A doctor's deposition was of record in a workers' compensation case, although it was not formally introduced into evidence, where defense counsel indicated at the conclusion of the initial hearing that they wished to take the doctor's testimony at Duke University Medical Center; the hearing commissioner gave the parties 60 days in which to depose the doctor; and once the doctor's deposition was completed, the original transcript was forwarded to the hearing commissioner by the court reporter, with a copy sent to each attorney. Industrial Commission Rule XXA.

2. **Master and Servant § 93.2— workers' compensation—additional deposition testimony—objections and motions to strike—ruling by hearing commissioner**

It is incumbent upon the party wishing to exercise his reserved right to object or move to strike additional deposition testimony to request the hearing commissioner to rule on the specific deposition questions and answers which the party finds objectionable, with the grounds upon which the objection is taken clearly stated, and the hearing commissioner, in turn, must formally enter his or her ruling into the record before an award.

3. **Master and Servant § 93.2— workers' compensation—ruling on objections to deposition testimony**

A hearing commissioner sufficiently ruled on plaintiff's objections to additional deposition testimony where a note containing the ruling was stapled to the deposition.

4. **Evidence § 50— opinion by expert medical witness—information supplied by others**

An expert medical witness may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable, even though it is not independently admissible into evidence. If his opinion is admissible, the expert may testify to the information he relied on in forming his opinion for the purpose of showing the basis thereof.

5. **Evidence § 50.2; Master and Servant § 93.3— workers' compensation—medical testimony incompetent on question of causation**

A physician's "educated guess" that plaintiff would have deteriorated from his degenerative nerve disease at about the same time regardless of his compensable work-related injury was incompetent as expert opinion evidence on causation.

6. Master and Servant § 67.3— workers' compensation—aggravation or acceleration of preexisting condition—insufficient evidence to support finding

The evidence in a workers' compensation proceeding was insufficient to support a determination by the Industrial Commission that plaintiff's preexisting hereditary degenerative nerve disease was not aggravated or accelerated by a compensable work-related fracture of his leg and the resulting inactivity while his leg was in a cast for some seven months, and the cause must be remanded for appropriate findings and conclusions where there was evidence to support a contrary determination.

APPEAL by claimant from the North Carolina Industrial Commission. Opinion and award entered 29 September 1982. Heard in the Court of Appeals 28 September 1983.

On 21 September 1979 claimant, Johnny W. Ballenger, was injured when he slipped and fell on the defendant employer's premises in the course of his work as a furniture upholsterer for Burris Industries, Inc. The fall caused claimant to break his left leg. The claim was accepted as compensable by the defendant carrier, and workers' compensation benefits were paid to claimant for temporary total disability during the seven month period he was confined to a leg cast.

Claimant suffers from a hereditary degenerative nerve disorder, diagnosed as Charcot-Marie-Tooth disease. The disease causes muscular atrophy which is essentially irreversible. In the several months following removal of his leg cast in April, 1980, claimant developed weakness in his legs, low back pain and then weakness in his hands. By 21 September 1980, claimant had suffered moderately severe muscle wasting of his trunk and all four extremities. As a result, claimant has become totally disabled. Prior to his accidental injury in September, 1979, claimant's nerve disease did not lessen or diminish in any way his ability to perform his job during the 23 years that he was employed by Burris Industries, Inc.

A hearing was held before the Industrial Commission in December, 1981, to determine whether claimant was entitled to compensation for permanent and total disability under G.S. 97-29. At the conclusion of the hearing, Deputy Commissioner Scott ordered the deposition of two additional medical witnesses. Based upon the hearing and deposition testimony, Deputy Commissioner Scott made certain findings and conclusions to the effect that

claimant's disability was caused by his Charcot-Marie-Tooth disease and that his disease was neither caused by nor aggravated by his fracture and subsequent inactivity during convalescence. Accordingly, only an award for 5% permanent partial disability to the claimant's leg resulting from the fracture was entered.

The claimant appealed to the Full Commission. With one commissioner dissenting, a majority of the Full Commission adopted as its own the findings of fact, conclusions of law, and award of the Deputy Commissioner. Claimant appeals from the denial of his claim from permanent and total disability.

Whitesides, Robinson and Blue, by Henry M. Whitesides, for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendant appellees.

JOHNSON, Judge.

The various questions claimant has presented for review concern whether the Industrial Commission erred in finding and concluding that the claimant's preexisting condition was not aggravated or accelerated by his compensable accidental injury and subsequent convalescence, and consequently that his disability was entirely caused by his nerve disease. For the reasons set forth below, we hold that the crucial findings of fact on the lack of causal relation between claimant's disability and the industrial accident are not supported by any sufficient competent evidence of record, and therefore may not serve as the basis for denial of workers' compensation benefits to the claimant.

After hearing evidence for claimant and defendants, Deputy Commissioner Scott concluded that claimant's "preexisting degenerative nerve disease was neither caused by nor aggravated by the injury by accident on September 21, 1979 or the resulting inactivity while his leg was in a cast." This conclusion was based in part on the following summarized factual findings to which no exception has been taken: Plaintiff was 47 years old on 21 June 1981. He began working for defendant employer, a furniture manufacturing company in 1957. In September, 1979, plaintiff's duties included upholstering furniture, a job that required him to

stand and use his hands and arms a great deal. He was also quite active at home, reupholstered furniture an additional ten to fifteen hours per week for individuals, grew vegetables in his greenhouse to sell, and kept up a five-acre garden.

On 21 September 1979, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer when he fell at work and fractured his left tibia. Dr. Sanders (an orthopedic surgeon) saw him in the emergency room and placed his left leg in a cast. Plaintiff had to use crutches and to keep his weight off his left leg until he was given a shortleg walking cast. On 11 February 1980, he was advised to resume weight bearing. His cast was removed on 28 April 1980.

During the next few months, plaintiff developed weakness in his legs, low back pain and then weakness in his hands. Dr. Sanders recommended a leg brace and physical therapy. By August, 1980, plaintiff was complaining of increasing weakness throughout his body. Dr. Sanders referred him to Dr. Nesbit, a neurologist.

Based upon Dr. Nesbit's deposition, the Deputy Commissioner made the following finding of fact:

> 4. Dr. Nesbit examined plaintiff on September 21, 1979 and found him to have moderately severe muscle wasting of his trunk and extremities. He diagnosed plaintiff's condition as chronic peripheral neuropathy of uncertain cause. He was unable to determine the cause of plaintiff's condition and in that plaintiff was totally disabled after having previously been fully functional, Dr. Nesbit referred him to Dr. Hurwitz at Duke University Medical Center for a complete evaluation.

In addition, it was also found that claimant's brother, who is a couple of years older, has Charcot-Marie-Tooth disease.

The following pertinent findings of fact were excepted to by the claimant:

> 5. Dr. Hurwitz first saw plaintiff on December 10, 1980. He conducted various tests which revealed moderately severe degenerative changes of the nerves which indicated the presence of a problem over a prolonged period of time. Dr.

Hurwitz diagnosed plaintiff's condition as Charcot-Marie-Tooth disease, a hereditary degenerative nerve disease which manifests itself in different ways from family to family and case to case. It sometimes, however, runs a similar course in the same family. Dr. Hurwitz was of the opinion that the fracture of one leg would not be related to weakness in all four extremities.

7. Before his accident in September 1979, plaintiff had some problems with his hands and a drop-foot limp with his right foot, but these problems did not give him enough trouble to affect his work or other activities. Since his accident, he has been totally disabled and his condition is not likely to improve. Plaintiff is permanently and totally disabled as a result of his hereditary Charcot-Marie-Tooth disease.

8. Plaintiff's injury by accident on September 21, 1979 and his subsequent convalescence, during which his leg was in a cast and he was comparatively inactive, did not cause or aggravate his preexisting degenerative nerve disease. He would be disabled as a result of the disease had he not broken his leg.

The statutes controlling the claimant's right to an award for total disability provide that "where the incapacity for work resulting from the injury is total, the employer shall pay . . ." G.S. 97-29. G.S. 97-2(6) defines "injury" to mean "only injury by accident arising out of and in the course of the employment . . ." G.S. 97-2(9) defines the term "disability" to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." The principles of law determining compensability in those cases in which the claimant suffers from a preexisting illness are summarized in *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E. 2d 458, 470 (1981) as follows:

In summary: (1) an employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses. (2) When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal

person to that extent. (3) On the other hand, when a preexisting, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work without any aggravation or acceleration of it by a compensable accident . . . the resulting incapacity so caused is not compensable. (Emphasis original.)

It is well established that, except as to questions of jurisdiction, the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even though there is evidence to support a contrary finding of fact. *Morrison v. Burlington Industries, supra.* The appellate court merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact. *Id.; Moses v. Bartholomew*, 238 N.C. 714, 78 S.E. 2d 923 (1953). However, a finding not supported by any sufficient competent evidence or a finding based on incompetent evidence, is not conclusive and such findings must be set aside. 8 Strong's N.C. Index 3d, Master and Servant, § 96.1, p. 698.

[1] The claimant first contends that the deposition of Dr. Barrie Hurwitz, which forms the basis for the Commission's denial of total disability, was never offered in evidence and therefore was not properly before the Commission and that portions of the Hurwitz testimony were inadmissible hearsay and were erroneously admitted into evidence. We do not agree. The record discloses that at the conclusion of the initial hearing, claimant's counsel advised the Deputy Commissioner that he wished to take the testimony of Dr. Nesbit in Charlotte. Defense counsel then indicated that they wished to take the testimony of Dr. Hurwitz at Duke University Medical Center. Deputy Commissioner Scott entered an order on 7 December 1981, giving the parties 60 days in which to depose Dr. Nesbit and Dr. Hurwitz.

Pursuant to Rule XXA of the Rules of the Industrial Commission, when additional medical testimony is necessary to the disposition of a case, the original hearing officer may order the deposition of medical witnesses. The rule does not detail any specific procedure following the taking of such depositions for their formal offer into evidence. In this case, once Dr. Hurwitz's deposition was completed, the original transcript was forwarded to Deputy Commissioner Scott by the court reporter, with a copy

of the transcript sent to each attorney. This procedure would appear to be sufficient to comply with Rule XXA, *supra*, and, as such, the testimony of Dr. Hurwitz is of record in this case.

Each additional deposition begins with stipulations that all questions were deemed objected and excepted to in the same manner as if objections and exceptions were noted and appeared of record, and that the answers of the witnesses to each question were deemed to have been subjected to a motion to strike and that exception to the ruling of each such motion is reserved. Further, that the right to enter such objections and exceptions to each question, and the right to move to strike each answer and to except to an adverse ruling on such a motion at the time of the offering of the depositions into evidence is reserved and that such objections and motions may be passed upon by the judge at the time of the offering of the depositions into evidence. Claimant's counsel contends that he was not given the opportunity to exercise these rights, with the result that erroneous and incompetent testimony by Dr. Hurwitz regarding, *inter alia*, claimant's brother was admitted into evidence. Further, that a written request was made that the Deputy Commissioner make evidentiary rulings, but that "this was never done, or if it was done, plaintiff was not given a copy of any such rulings."

[2] Rule XXA does not establish a specific procedure by which counsel can obtain rulings on their objections or motions to strike in a situation like this. However, we are of the opinion that general rules of practice should govern such situations. Therefore, it is incumbent upon the party wishing to exercise his reserved right to object or move to strike testimony, to separately request the hearing commissioner to rule on the specific deposition questions and answers that the party finds objectionable, with the grounds upon which the objection is taken clearly stated. The hearing commissioner, in turn, must formally enter his or her ruling into the record before making the award. *See Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970).

[3] In essence, this procedure was followed in this case. Claimant's counsel requested, by letter to Deputy Commissioner Morgan Scott, that she "make determinations on the objections [so that] the appeal can be pinpointed with more clarity, especially as to any material dealing with the brother."

The record on appeal does not contain any formal evidentiary rulings. However, stapled to page 9 of the Hurwitz deposition is a copy of a note which reads as follows:

> NOTE—
>
> [Plaintiff's] objections regarding the reports on the brother are sustained except that Dr. H[urwitz] may testify that he had access to them (without giving details), who the doctor was, [and] Dr. H. [urwitz] may base his opinion on them in that they are inherently reliable. (*State v. Wade*)
>
> /s/
> MS

Although the informality of this manner of ruling on objections is not approved, the fact remains that claimant's only specific objection to Dr. Hurwitz's testimony was expressly ruled upon.

The claimant devotes large portions of his appellate brief to the creation of doubt as to the accuracy of the information Dr. Hurwitz possessed concerning claimant's brother and the course of his Charcot-Marie-Tooth disease. Furthermore, claimant argues that all the testimony concerning his brother Ralph Ballenger was hearsay and improperly admitted into evidence. These are indeed important points because Dr. Hurwitz based his opinion as to the lack of causal relation between the fracture, consequent immobility of claimant's leg and the rapid degeneration of his overall condition, in part, on a parallel he drew between the course of the brother's disease and the claimant's. However, there is *no* evidence of record concerning the brother to support claimant's argument that *because of these alleged inaccuracies* Dr. Hurwitz's opinion is incompetent. We will treat the issue of the competency of Dr. Hurwitz's "opinions" on causation more fully *infra*.

[4] As to claimant's argument, we note that Dr. Hurwitz testified that he had access to information from the plaintiff's brother's neurologist, Dr. Dennis Hill of Winston-Salem, North Carolina. A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable, even though it is not independently admissible into evidence. *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979); *State v. DeGregory*, 285 N.C.

122, 203 S.E. 2d 794 (1974). If his opinion is admissible, the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. *State v. Wade, supra; Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957). Insofar as Dr. Hurwitz's testimony does consist of statements of his expert opinion, and those opinions are admissible, he was properly permitted to testify about the information he obtained concerning the plaintiff's brother's condition from another physician. Claimant's counsel was free to bring out any factual errors or lacunae in the information Dr. Hurwitz received from Dr. Hill on cross-examination, but may not introduce such information for the first time in his appellate brief.

The gravamen of claimant's appeal, however, is that the testimony by Dr. Hurwitz is incompetent on the issue of whether claimant's preexisting degenerative nerve disease was aggravated or accelerated by the inactivity of the leg and the claimant generally while the leg was healing from the fracture. Claimant contends that the only competent evidence before the Commission was that of Dr. Sanders, the treating physician, and Dr. Nesbit, the neurologist Dr. Sanders referred claimant to. We agree.

The most striking aspect of the Hurwitz deposition testimony is that, taken as a whole, it was wholly and totally contradictory on the issue of whether, in Dr. Hurwitz's opinion, aggravation or acceleration of the disease occurred as a result of the injury. On direct examination, Dr. Hurwitz testified that he examined Ballenger once in December, 1980. At that time he performed a nerve biopsy on Ballenger and testified that the nerves showed "moderately severe" degenerative changes, indicating that the problem had been there for some time, probably for more than a year. Dr. Hurwitz was unable to say exactly how long such changes had been there. Dr. Hurwitz testified on cross-examination that the disease progressed gradually in some people and more rapidly in others, with physical activity playing a role in maintaining existing muscle function.

As to the effect of the fracture on Ballenger's condition, Dr. Hurwitz testified on direct examination as follows:

> Q. Do you have any opinion as to what relation, if any, there was between his previous weakness and the fracture?

A. Yeah, it seemed to me that the fracture was an incidental event that occurred. It may well be that the underlying neuropathy rendered him more susceptible to the fracture.

* * *

Q. Okay. You also stated that you felt the fracture was an incidental event. Could you explain a little more in detail what you meant by that statement?

A. Yes.

* * *

A. . . . Now, when we examined him he had problems with both legs not just the left leg. He had frail feet. In other words, the feet were exceptionally weak and he had great difficulty elevating them upwards against any resistance. You know this involved both feet. This was not just one foot, the left foot being significantly weaker than the right foot.

He had some problems with his arms as well and I cannot relate weakness in all four extremities just to a single fracture of one leg.

It would seem to me that if the fracture had caused severe nerve damage to his left leg, that the left leg should have been significantly different to [sic] the right leg. And we—did not find that.

Q. So is it your opinion, Doctor, that the nerve damage you found when you examined this man was a natural result of the progressive nature of the disease and was not related to or did not reflect any aggravation as a result of the fracture?

A. *Yes, I would think that the problems that he had were the result of this degenerative nerve disease. I would guess that the fracture was an incidental event in the natural history of the disease.*

He related a lot of his problems to this fracture, but I would think that this was something which brought his attention to the illness. And from the evidence we had from the studies and so on, *I could not state that the fracture was the direct*

cause of the diffuse weakness that he showed in both legs and in the arms.

* * *

Q. So, is it your opinion that he more than likely would have been disabled as a result of his disease—

A. (Interposing) *I would think so.*

Q. —without—without the fracture ever occurring?

A. *I would think so.*

On cross-examination, Dr. Hurwitz was asked if Ballenger's work record indicated any disability due to his disease before his injury. He answered,

> No, I think as I mentioned earlier I thought he was an exceptional individual who was very hard working, very well motivated and as I said when I saw him, I was surprised that he was working that well. I'm sure many other people would —would not have.

Dr. Hurwitz was also unable to say when Ballenger might have been disabled in the future by the disease if he had not slipped and broken his leg.

> *If he were working well up until the time and he had not fallen, I would guess that he probably would have been able to continue working* . . . So, clearly between 1979 and when I saw him there was a change and that change if he had not fallen and been kept out of work because of the cast, I would guess would have been a gradual decline. *And it would be a guess as to exactly what point in time he would have been unable to work. I— I can't answer that.*

Claimant's counsel essentially repeated the question later, and again Dr. Hurwitz testified that Ballenger *probably* would have been able to continue at his job indefinitely had he not injured his leg. Further, Dr. Hurwitz admitted that he could only *speculate* as to when a significant deterioration would have occurred in the natural course of the disease's progression between 1979 and his December, 1980 examination had the injury not occurred. Dr. Hurwitz then elaborated as follows:

A. . . . And at what point he would have changed from 1979 until then I could not answer.

Q. It would be only a speculation.

A. Exactly. I think the—the *interesting learned speculation or shall I say educated guess would be that it probably would have occurred somewhere in that period.* If you take into account the history of his brother, Mr. Ralph Ballenger, who apparently also about age forty-seven (47) developed significant problems that would only come on within a space of a few years . . . *So my guess would be that he was behaving in a similar fashion to his brother. That's an educated guess.*

[5] At the outset, we note that the number of times that the word "guess" appears throughout Dr. Hurwitz's testimony is striking. Expert medical witnesses are called to testify on issues of causation in disease or illness for the purpose of giving their *expert opinions* as to the *reasonable scientific certainty* of a causal relation or the lack thereof. An expert witness may base his opinion upon facts within his own knowledge or upon information supplied to him by others; however, an expert is not competent to testify as to the issue of causal relation founded upon mere speculation or possibility. *Dean v. Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89 (1975); *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541 (1964). On the crucial issue of whether Johnny Ballenger's condition was the result of his disease alone or resulted from the combination of his relative inactivity and immobility during his convalescence and his underlying nondisabling disease, Dr. Hurwitz testified only to his "educated guess" that Ballenger would have deteriorated at about that time regardless of his injury, in parallel fashion to events in the course of his brother's disease. These portions of Dr. Hurwitz's testimony, which, in large part, form the basis of the Commission's factual findings, are incompetent as expert opinion evidence on causation.

[6] Defendants contend that Dr. Hurwitz also based his opinion that the fracture and confinement of claimant's left leg to a cast did not aggravate or accelerate his Charcot-Marie-Tooth disease on his examination of the claimant and the results of the tests he performed. However, the major problem with Dr. Hurwitz's testimony lies not with the bases of his "opinions," but in the

totally contradictory propositions that they stand for, to wit: that despite the disease, had Ballenger not injured his leg in September, 1979, he probably could have continued working for an indeterminate amount of time and to the contrary, that his total disability as of December, 1980, was solely attributable to the natural progression of the degenerative nerve disease. Dr. Hurwitz simply could not give a competent opinion as to whether a significant deterioration would have occurred between 1979 and 1980 in the natural course of events. As a result of these deficiencies and contradictions, Dr. Hurwitz's opinion on causation simply does not constitute any sufficient competent evidence on which to base a denial of disability benefits to this claimant. Therefore, the findings of fact that claimant's injury and convalescence did not aggravate his preexisting disease and that he would be disabled as a result of the disease had he not broken his leg must be set aside.

Furthermore, we note that the absolute nature of these findings totally ignores the directly conflicting statements in the testimony of the two other expert medical witnesses, Dr. Sanders and Dr. Nesbit. As this Court observed in *Thompson v. Transfer Co.*, 48 N.C. App. 47, 53, 268 S.E. 2d 534, 538, *cert. denied*, 301 N.C. 405, 273 S.E. 2d 450 (1980), "it is one thing for the commissioner to reject evidence as being incredible, but it is another to say that evidence does not exist *at all*." In this case, we find a considerable amount of competent evidence which would tend to show that the progress of claimant's preexisting disease was aggravated or accelerated by his accidental injury:

1. Dr. Sanders testified that orthopedic surgeons frequently deal with complications of Charcot-Marie-Tooth disease either separately or in conjunction with a neurologist; that the disease produces changes in the nerves, resulting in loss of nerve function and as a consequence, deterioration of the muscles because of lack of nerve supply; that basically only symptomatic treatment is available for the disease and that is to maintain physical activity at an even level.

2. In Dr. Sanders' opinion, Ballenger's prolonged period of inactivity while his leg was in a cast and his not being able to carry out his usual day-to-day activities was a factor in the abrupt, rapid progression of his disease.

3. Dr. Nesbit testified that Charcot-Marie-Tooth disease is genetically based, causing steadily progressive deterioration of the peripheral nerves with resultant progressive loss of strength in muscle mass, usually beginning in the lower extremities and progressing to the hands and arms; that the treatment used is mainly supportive, to maintain muscle condition and brace weak joints when necessary; that the maintenance of a normally active life, with the avoidance of periods of relative inactivity may slow the impairing effects of the disease; that Ballenger's previous level of activity would be conducive to retarding the impairing effects of the disease; and that there was evidence of the presence of the disease in Ballenger's hands and legs as early as 1975.

4. Dr. Nesbit testified that it was his opinion that Ballenger's disease had been progressing slowly until 1979, when it accelerated with devastating rapidity; that the likely effect of seven months of inactivity due to a broken leg and the leg being in a cast on a previously active person would be an increase in muscle wasting and weakness in those extremities that are affected by the disease; that Ballenger's preexisting condition was accelerated by his being immobilized in a cast; and that Ballenger most probably would not have reached the degree of disability that he did by late 1980 were it not for the period of inactivity while his fractured leg was in a cast.

In conclusion, we hold that the Commission's factual findings on the lack of a causal relation between claimant's injury by accident and his total disability are not supported by any sufficient competent evidence and therefore must be set aside. There was sufficient competent evidence of record to enable the Industrial Commission to find that claimant's preexisting disease was aggravated or accelerated by a compensable injury, resulting in total and permanent disability. *Morrison v. Burlington Industries, supra.* Therefore, the opinion and award of the Industrial Commission is vacated, and the cause remanded for findings of fact, conclusion of law, and an award consistent with this opinion.

Vacated and remanded.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. ALTON GORDON SMITH

No. 8316SC547

(Filed 21 February 1984)

1. **Criminal Law § 91— speedy trial—excludable time sufficient to bring within statutory limit**

Although defendant was not tried until 218 days after he was indicted, most of the time between the time he was indicted and the time of trial was excludable under G.S. 15A-701. One period was excludable as the result of a continuance granted by the trial judge, G.S. 15A-701(b)7; another period was properly excluded since a delay in appointing counsel was attributable to defendant, G.S. 7A-450; periods of delay between defense counsel's pretrial motions and the judge's ruling on such motions were excluded pursuant to G.S. 15A-701(b)1(d); and time periods when defendant was released to another county on another charge and when defendant was released to testify in a federal case were excludable under G.S. 15A-701(b)(3)(b) and G.S. 15A-701(b)9.

2. **Criminal Law § 26.5— breaking or entering not lesser-included offense of felonious larceny**

There was no error in convicting defendant of both felonious breaking or entering pursuant to G.S. 14-54(a) and felonious larceny pursuant to G.S. 14-72(b) since the offenses of breaking or entering and larceny, which require proof of different elements, are clearly separate and distinct crimes, neither one a lesser included offense of the other.

3. **Criminal Law § 34.8— evidence of other offenses—admissible to show modus operandi**

The trial court properly admitted evidence of offenses committed by defendant other than those charged where the evidence tended to show a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tended to prove the crime charged and connected the defendant with its commission.

4. **Criminal Law § 72.2— detective's determination that shop owners' descriptions of seller fit defendant—not inadmissible hearsay**

A detective's testimony that, after talking to shop owners where defendant allegedly sold stolen property, he determined that the shop owners' descriptions of the seller fit the defendant was not inadmissible hearsay since the detective did not testify as to what the shop owners said but rather based his testimony on personal knowledge.

5. **Criminal Law § 35— evidence of witness's monetary status irrelevant**

The trial court correctly excluded evidence that the State's witness had ready money and that defendant did not since, contrary to defendant's contention, evidence of the witness's financial status was irrelevant and had no tendency to exculpate defendant.

6. **Criminal Law § 86.8— prior convictions of State's witness—juvenile—improperly excluded**

Although the trial court erred in excluding evidence of prior convictions which the State's witness had committed as a juvenile, defendant failed to show that the error was prejudicial since the record does not indicate the nature of the witness's prior juvenile convictions and defendant failed to show how the admission of the evidence would have changed the results at trial. G.S. 15A-1443.

7. **Criminal Law § 138— aggravating factor that offense was committed for hire or pecuniary gain—improperly considered**

In a prosecution for felonious breaking or entering and felonious larceny, the trial court erred in considering at the sentencing phase as an aggravating factor that the offenses were committed for hire or pecuniary gain since there was no evidence suggesting that defendant was hired or paid to commit the offenses. G.S. 15A-1340.4(a)(1)(c).

8. **Criminal Law § 138— aggravating factor of prior convictions properly considered**

In a prosecution for felonious breaking or entering and felonious larceny, the trial court properly found as an aggravating factor that defendant had a record of prior convictions.

Judge BECTON concurring in the result.

APPEAL by defendant from *Herring, Jr., Judge*. Judgment entered 30 September 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 9 January 1984. Defendant was found guilty of aiding and abetting felonious breaking or entering and felonious larceny and received a total sentence of fifteen years.

The State's evidence tended to show: On 9 December 1981, Timmy Cox broke into and entered the home of Monroe Lane and stole some jewelry. Cox, the State's chief witness, explained the events leading up to the 9 December break-in: Cox testified that he first became aware of the Lane household while driving with defendant in defendant's wife's car. Defendant pointed out Lane's home and told Cox that Lane was wealthy and probably had money and valuables in his house.

On 9 December, Cox was again a passenger in defendant's car when defendant drove by the Lane home. Defendant noted that it looked like no one was home. Defendant and Cox then drove to a store operated by Lane. Both Mr. and Mrs. Lane were working in the store. Defendant remarked to Mrs. Lane that she

must be busy and asked her if she ever had a chance to do her housework. Defendant and Cox left the store and once in the car, defendant explained that he had asked Mrs. Lane that question to determine whether she had a maid and whether anyone else would be at home. Defendant drove toward the Lane home and then dropped off Cox. Previously, defendant had taught Cox how to break into a house using lock pliers and had warned Cox to leave a window open in case he was caught inside. Defendant had also explained what to look for and where to look once a home was broken into.

On 9 December, using defendant's channel lock pliers, Cox broke into the Lane home and stole some jewelry. Defendant picked up Cox and they drove to defendant's house. Cox gave defendant the jewelry which defendant buried in his backyard and later sold.

Defendant's evidence tended to show: Defendant testified that he did not know where he was on 9 December 1981, but that he was not with Cox when Cox broke into the Lane residence. Defendant, who made money by buying and reselling gold, silver, scrap metal, old radiators, batteries and other items, testified that he was probably out buying or selling when the break-in occurred.

Defendant knew Cox because Cox had worked for defendant, doing odd jobs around the house. Defendant testified that one day he noticed that some batteries were missing, and upon questioning Cox, Cox admitted to stealing and selling them. Defendant told Cox not to come to his house anymore if he planned to steal batteries and Cox replied, "I'll get you. I'll get even with you." Defendant also testified that on a previous occasion, Cox had been arrested and charged with shoplifting. Defendant had paid his bond and convinced the judge to drop charges.

Cox, at one time, had dated defendant's niece. Defendant's witness, James Horton, testified that when he told Cox that defendant said defendant had stopped Cox and his niece from dating, Cox replied that he would get him for that one.

Defendant appeals from a jury verdict and sentence imposed.

Attorney General Edmisten, by Lucien Capone, III, Assistant Attorney General, for the State.

Ann B. Petersen, Assistant Appellate Defender, for the defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant first contends that the trial court erred when it denied defendant's motion to dismiss under the Speedy Trial Act. G.S. 15A-701, *et seq.* We find no error.

G.S. 15A-701(a1)1 provides that the trial of a criminal defendant shall begin within 120 days from the date defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last. The indictment in this case, returned on 22 February 1982, triggered the 120 day period. Defendant showed that the time between the indictment and trial was more than 120 days: Defendant was not tried until 28 September 1982, 218 days after he was indicted. Nevertheless, this time period contained excludable time sufficient to bring it within the statutory limit. *See* G.S. 15A-701 and 15A-703.

The following timetable sets out the relevant periods involved herein:

22 February 1982:	Defendant indicted.
	Defendant's motion for continuance to next session granted.
	Defendant's motion for appointment of counsel denied.
23 March 1982:	Defendant brought to trial, but not tried.
	Judge left question of appointment of counsel open.
20-23 April 1982:	Defendant released to another county on other charges.
24 April 1982:	Counsel for defendant appointed.

5 May 1982:	Defense counsel filed the following motions: (1) Motion for a Continuance. (2) Motion for Bill of Particulars. (3) Motion for Disclosure of Favorable Evidence. (4) Motion for Production of Evidence and Disclosure of Witnesses.
8 July-20 August 1982:	Defendant released to federal authorities under a writ of habeas corpus ad testificandum.
28 September 1982:	Defendant's trial.

After reviewing this table, we find most of the time periods to be excluded under G.S. 15A-701. Pursuant to G.S. 15A-701(b)7, the period between 22 February and 23 March is excludable as the result of a continuance granted by the trial judge.

The period extending to 24 April is furthermore excludable since the delay in appointing counsel was attributable to defendant. *See State v. Rogers*, 49 N.C. App. 337, 271 S.E. 2d 535, *cert. denied*, 301 N.C. 530, 273 S.E. 2d 464 (1980); *State v. Edwards*, 49 N.C. App. 426, 271 S.E. 2d 533 (1980), *cert. denied and appeal dismissed*, 301 N.C. 724, 276 S.E. 2d 289 (1981). In his order dated 22 February denying defendant's motion to have counsel appointed, the trial judge found

> from the affirmations made by the applicant and after due inquiry made, that the applicant is financially able to provide the necessary expenses of legal representation, it is, therefore,
>
> ORDERED AND ADJUDGED that he is not an indigent, and his request is hereby denied.

Defendant's right to have counsel appointed is conditioned on a showing of indigency and an inability to procure his own counsel. *State v. Turner*, 283 N.C. 53, 194 S.E. 2d 831 (1973); *See* G.S. 7A-450. Defendant did not, at the outset, adequately demon-

strate to the trial judge his financial inability to procure counsel and, therefore, was responsible for the delay in the appointment of counsel.

The time period between 5 May, when defense counsel made several pretrial motions and 28 September, when the motions were withdrawn and defendant was tried, is also excludable. Pursuant to G.S. 15A-701(b)1(d), the excludable period of delay covers the period between the making of a motion and the judge's ruling on such motion. The period of delay in this case was reasonable and, thus, excludable. *See State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

Finally, we note that the time periods between 20 and 23 April when defendant was released to another county on other charges and between 8 July and 20 August, when defendant was released to testify in a federal case are excludable under G.S. 15A-701(b)(3)(b) and G.S. 15A-701(b)9. Taking into account the excludable periods of delay, defendant was not denied his statutory right to a speedy trial.

[2] Defendant next contends that the trial court erred in convicting him of both felonious breaking or entering pursuant to G.S. 14-54(a) and felonious larceny pursuant to G.S. 14-72(b), since breaking or entering is a lesser-included offense. We find no merit in defendant's contention.

Where the same act or transaction violates two distinct statutory provisions, the test to apply to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. *State v. Sanderson*, 60 N.C. App. 604, 300 S.E. 2d 9, *review denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983); *see Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Using this test, the offenses of breaking or entering and larceny, which require proof of different elements, are clearly separate and distinct crimes, neither one a lesser included offense of the other.

The elements of felonious breaking or entering include:

(1) breaking or entering a building

(2) with intent to commit any felony or larceny therein.

A defendant convicted of felonious breaking or entering need not have completed the crime of larceny. *See* G.S. 14-54(a); *State v. Brown*, 266 N.C. 55, 145 S.E. 2d 297 (1965), overruled on other grounds, *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969), overruled on other grounds, *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). The elements of larceny include:

(1) the wrongful taking and carrying away of the personal property of another without his consent

(2) with the intent to permanently deprive the owner of his property and to appropriate it to the taker's own use.

See State v. Bowers, 273 N.C. 652, 161 S.E. 2d 11 (1968); *State v. Perry*, 21 N.C. App. 478, 204 S.E. 2d 889 (1974).

In 1969, the legislature amended G.S. 14-72 to make larceny a felony regardless of the value of property stolen, if committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57. G.S. 14-72(b)2; An Act to Clarify the Laws Relating to Larceny, Ch. 522, 1969 N.C. Sess. Laws, 447. The statutory provision upgrading misdemeanor larceny to felony larceny does not change the nature of the crime; the elements of proof remain the same. The criminal statutes involved herein declare the legislative intent to make breaking or entering with intent to commit larceny or any felony a more serious crime than breaking or entering without such intent and to make larceny committed pursuant to a breaking or entering a more serious crime than simple larceny. *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978).

[3] Defendant next contends that the trial court erred by admitting evidence of offenses committed by defendant other than those charged. The general rule prohibiting evidence that tends to show the defendant has committed other distinct and independent offenses is subject to certain well recognized exceptions. One such exception, relevant to this case, is when the evidence shows a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and connect the defendant with its commission. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1106, 51 L.Ed. 2d 539 (1977); *See* 1 Brandis on North Carolina Evidence, § 92 (1982).

Defendant objects to testimony from two of the State's witnesses. The first witness, Timmy Cox, testified that during a three or four week period, he had had discussions with defendant in which defendant taught Cox how to use channel lock pliers to break into a house and where to look for valuables hidden therein. Cox testified, over objection, that such discussions pertained to five houses in another county as well as the victim's house in this case. In all the break-ins, Cox testified that he used defendant's channel lock pliers and screwdriver and that afterwards, defendant buried the stolen items in his backyard and later sold them. The second witness, Julie Patton, testified that defendant told her that if she could get hold of any valuables belonging to a friend of hers, to bring them to him. Patton testified that she stole a ring from her friend, which defendant then sold. The testimony of both Cox and Patton showed that the offenses charged in this case were part of a series of related crimes involving the same *modus operandi.*

[4] During trial, State's witness, Detective Ray Strickland, was allowed to testify, over objection, that after talking to shop owners where defendant allegedly sold the stolen property, he determined that the shop owners' descriptions of the seller fit the defendant. Defendant contends that this testimony was inadmissible hearsay. We disagree. Detective Strickland did not testify as to what the shop owners said. His testimony was based on personal knowledge and was entitled to jury consideration. Our holding is not unlike that of the Supreme Court in *State v. Fulcher,* 294 N.C. 503, 243 S.E. 2d 338 (1978), in which a hotel manager's testimony that after hearing some women describe their assailant, he told the police that the description fit a man staying at the hotel was deemed admissible.

[5] Defendant next contends that the trial court erred by excluding evidence that Timmy Cox had ready money and defendant did not. Defendant argues that this evidence helps prove that Cox committed the offenses charged and defendant did not. We find no merit in defendant's contention. Generally, evidence tending to show the guilt of one other than the accused is admissible if it is relevant and probative, i.e., it logically tends to prove a material fact in issue. *State v. Britt,* 42 N.C. App. 637, 257 S.E. 2d 468 (1979); *see State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973). In this case, evidence of financial status was irrelevant and had no

tendency to exculpate defendant. The trial court was correct in excluding such evidence.

[6] During cross-examination, defense counsel asked Timmy Cox, age eighteen, if he had ever been tried and convicted of anything. Cox replied that he had as a juvenile. Upon the prosecutor's objection, the court ruled that juvenile matters were inadmissible. Defendant contends that this ruling constituted prejudicial error.

In general, for purposes of impeachment, a witness, including the defendant in a criminal case, is subject to cross-examination regarding any prior convictions for a crime. *State v. Miller*, 281 N.C. 70, 187 S.E. 2d 729 (1972). Our courts have previously held that cross-examination of a criminal defendant may cover prior convictions for crimes committed as a juvenile. *See Id.; State v. Tuttle*, 28 N.C. App. 198, 220 S.E. 2d 630 (1975), *cert. denied*, 291 N.C. 716, 232 S.E. 2d 207 (1977). We see no reason to change the rule when cross-examination concerns a witness other than the defendant. The trial court, therefore, erred in excluding testimony regarding Cox's prior juvenile convictions, admissible for impeachment purposes. Nevertheless, defendant has failed to show that such error was prejudicial. *See* G.S. 15A-1443. The record does not indicate the nature of Cox's prior juvenile convictions. We do not see how the admission of this evidence would have changed the results at trial. *See State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981).

[7] After the jury verdict was returned, the trial judge sentenced defendant to ten years for felonious breaking or entering and five years for felonious larceny. Defendant contends that the trial judge erred in imposing sentences exceeding the presumptive terms.

The trial judge found as aggravating factors that:

(1) defendant induced others to participate in the commission of the offense or occupied a portion of leadership or dominance of other participants;

(2) the offense was committed for hire or pecuniary gain; and

(3) the defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement.

The judge found no mitigating factors.

Defendant contends that the trial judge erred in finding as an aggravating factor that the offense was committed for hire or pecuniary gain. We agree. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). We find no evidence suggesting that defendant was hired or paid to commit the offense, which our court has previously held is required. The 1983 amendment of G.S. 15A-1340.4(a)(1)(c) removes any doubt.

[8] Defendant next contends that the trial judge erred in finding as an aggravating factor that defendant had a record of prior convictions. With this contention, we find no merit. During cross-examination, defendant admitted to two prior convictions. Prior convictions may be proved by a defendant's own statements, under oath. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). To challenge a prior conviction, defendant has the initial burden before or during trial to raise the issues of indigency and lack of assistance of counsel. *Id.* Defendant, not having met this burden, cannot now complain.

No error in the trial. Remanded for resentencing.

Judge HILL concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Believing that defendant had a trial free of prejudicial error, I concur in the result reached by the majority. I write this concurring opinion only because I believe it was error to allow Detective Ray Strickland "to testify, over objection, that after talking to shop owners where defendant allegedly sold the stolen property, he determined that the shop owners' descriptions of the seller fit the defendant," ante p. 9. This testimony, in my view, is inadmissible hearsay. Further, because the out-of-court statements of the shop owners form the basis for Strickland's conclusion and opinion—that "the shop owners' descriptions of the seller fit the defendant"—the conclusion and opinion are inadmissible. Additionally, any examination of Strickland concerning the specifics of the descriptions given creates a confrontation problem. However,

given the evidence against the defendant, I do not believe that the admission of the challenged evidence in any way contributed to defendant's conviction. The error was harmless.

B & H SUPPLY COMPANY, INC. v. INSURANCE COMPANY OF NORTH AMERICA

No. 8321SC208

(Filed 21 February 1984)

1. **Insurance § 142— embezzlement insurance—waiver of timely filing of proof of loss**

Defendant insurer waived timely filing of a proof of loss as required by a policy insuring against employee theft or embezzlement where defendant insurer had given an independent agent authority to receive information from the insured about a loss and to furnish proof of loss forms to the insured; the insured notified the agent of the embezzlement and asked whether the insurer would agree for the insured to attempt to collect from the embezzler by continuing to employ him and deducting from his commissions; and a few days later the agent told the insured that such plan was all right with the insurer but to let him know if the effort failed.

2. **Insurance § 142— embezzlement insurance—set-offs**

In an action to recover under a policy insuring against employee theft, defendant insurer was entitled to a set-off for an amount collected by the insured from an embezzler. However, where the embezzler gave the insured a third deed of trust on his house to secure a note for the embezzled amount, the insured purchased the house at a foreclosure sale under the first deed of trust, and the insured later sold the house at a profit, defendant insurer was not entitled to a set-off for the amount of the profit on the sale of the house.

3. **Insurance § 142— embezzlement insurance—discovery of embezzlements by employer—no recovery for further embezzlements**

Provisions of an employee theft or embezzlement insurance policy excluding from coverage any employee who to the employer's knowledge has committed a dishonest act while in its employment and providing for cancellation of coverage as to any individual immediately upon the insured's discovery of any dishonest or fraudulent act by that individual barred the insured's recovery for an employee's second series of embezzlements after the first series of embezzlements had been discovered by the employer and the employer had agreed to continue to employ the embezzler so that he could pay back the embezzled amounts.

APPEAL by defendant and cross-appeal by plaintiff from *Wood, William Z., Judge.* Judgment entered 21 December 1982 in

Superior Court, FORSYTH County. Heard in the Court of Appeals 20 January 1984.

This is a civil action wherein the plaintiff seeks to recover on an insurance contract which covered *inter alia* employee theft and embezzlement. In March 1975, plaintiff and defendant entered into an insurance contract whereby the defendant agreed to protect plaintiff against losses occasioned by employee dishonesty. The policy contained the following pertinent provisions:

> Section 7. The coverage of Insurance Agreement 1A, 1B, or 1C shall not apply to any Employee from and after the time that the Insured or any partner or officer thereof not in collusion with such Employee shall have knowledge or information that such Employee has committed any fraudulent or dishonest act in the service of the Insured or otherwise, whether such act be committed before or after the date of employment by the Insured.
>
> . . . .
>
> Section 8. Upon knowledge or discovery of loss or of an occurrence which may give rise to a claim for loss, the Insured shall: (a) give notice thereof as soon as practicable to the Company or any of its authorized agents and, except under Insuring Agreements 1A, 1B, or 1C and V, also to the police if the loss is due to a violation of law; (b) file detailed proof of loss, duly sworn to, with the Company within four months after discovery of loss.
>
> Proof of loss under Insuring Agreement V shall include the instrument which is the basis of claim for such loss, or if it shall be impossible to file such instrument, the affidavit of the Insured or the Insured's bank of deposit setting forth the amount and cause of loss shall be accepted in lieu thereof.
>
> Upon the Company's request, the Insured shall submit to examination by the Company, subscribe the same, under oath if required, and produce for the Company's examination all pertinent records, all at such reasonable times and places as the Company shall designate, and shall cooperate with the Company in all matters pertaining to loss or claims with respect thereto.

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of the Policy nor until ninety days after the required proofs of loss have been filed with the Company, nor at all unless commenced within two years from the date when the Insured discovers the loss. If any limitation of time for notice of loss or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under any statute controlling the construction of this Policy the shortest permissible statutory limitation of time shall govern and shall supersede the time limitation herein stated.

. . . .

Section 18. Insuring Agreement 1A, 1B or 1C shall be deemed canceled as to any Employee: (a) immediately upon discovery by the Insured, or by any partner or officer thereof not in collusion with such Employee, of any fraudulent or dishonest act on the part of such Employee; or (b) at noon, standard time as aforesaid, upon the effective date specified in a written notice mailed to the Insured. Such date shall be not less than fifteen days after the date of mailing. The mailing by the Company of notice as aforesaid to the Insured at the address shown in this Policy shall be sufficient proof of notice. Delivery of such written notice by the Company shall be equivalent to mailing.

. . . .

Section 22. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy or estop the Company from asserting any right under the terms of this Policy nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy signed by an officer of the Company.

. . . .

For several months prior to May 1979, plaintiff's employee Martin had been embezzling payments he had collected from various of plaintiff's customers. On 25 May 1979, Martin confessed to plaintiff's president that he had embezzled $9,486.57 and listed the

date and amount of each payment taken and the name of the customer that made it. On 29 May 1979, plaintiff, through its president Harrison, notified John J. Dillon of the loss; Dillon, not on the defendant's payroll, was an independent agent through whom plaintiff purchased the insurance and was the person to contact in the event of a loss or other problems involving the policy. Harrison told Dillon that he might be able to work out a way to collect from Martin, rather than the insurance company, by continuing to employ him and deducting from his commissions, and asked if that would be alright with the company. Dillon told Harrison he would check with the company and let him know. Two or three days later Dillon called Harrison and told him it was alright to try and collect from Martin, as discussed, but to let him know if the effort failed. Between then and November 1979, the plaintiff collected $2,786.57 from Martin; but in December 1979, Martin confessed to Harrison that he had embezzled an additional $5,485.22 since the repayment plan was put into effect. Plaintiff immediately terminated Martin's employment, and later discovered an additional embezzlement in the amount of $143.92. In negotiations with Martin plaintiff agreed not to initiate criminal charges against him. Martin gave plaintiff a note covering all the embezzlements and secured it to some extent by a third deed of trust on his house. During January and February 1980, $1,604.49 in salary and commissions earned by Martin but not paid were retained by plaintiff and credited to Martin's account.

On 18 January 1980, Harrison notified Dillon of the second series of embezzlements and asked that he notify the defendant, and Dillon thereafter supplied plaintiff with a proof of loss form. Defendant contends that was the first notice it had of any of the losses. On 26 February 1980, plaintiff filed a sworn proof of loss covering both series of embezzlements. On 1 April 1980, defendant refused to honor the claims. Its refusal to pay for the first embezzlements was based on Section 8 of the policy, requiring timely proof of loss. The basis for not paying the second loss was Section 7 of the policy, excluding from coverage employees known to be dishonest.

The embezzling employee soon got behind in the payments due under the first deed of trust on his house and the holder foreclosed. At the foreclosure sale plaintiff was the last and highest bidder in the amount of $28,000, which covered the

amounts due the holders of the first and second deeds of trust and the costs of foreclosure. A year later plaintiff sold the house for approximately $41,000.

Following the filing of the complaint, answer and response and after discovery was had, defendant filed a motion for summary judgment. This motion was denied by Judge Albright. Trial was before Judge Wood sitting without a jury. The court found facts consistent with those set out above, and based upon these facts reached the following conclusions of law:

(1) That the said John J. Dillon Insurance Agency was authorized by the defendant to receive claims of loss from insureds and there, therefore, the giving of notice by the plaintiff to the said John J. Dillon Insurance Agency of the original embezzlement of $9,486.57 constituted the giving of notice to the defendant;

(2) That the plaintiff gave notice of the original $9,486.57 embezzlement to the defendant as soon as practicable under the terms and provisions of Section 8 of the insured's policy;

(3) That the plaintiff's failure to file the official "Proof of Loss" with the defendant within four months after the discovery of the loss on the original embezzlement was in good faith as said failure was authorized by the John J. Dillon Insurance Agency at the time that the plaintiff notified the said John J. Dillon Insurance Agency of the original loss;

(4) That as the plaintiff's failure to file its official "Proof of Loss" within four months as required by Section 8 of the insurance policy was in good faith and as the defendant has failed to prove by the greater weight of the evidence that the defendant was prejudiced in any manner by said failure, the plaintiff is entitled to recover judgment against the defendant on the insurance contract of the parties on the original embezzlement of $9,486.57;

(5) That as Section 7 of the insurance policy of the parties provides specifically that ". . . coverage of [employee dishonesty] shall not apply to any Employee from and after the time that the Employee shall have knowledge or information that such Employee has committed any fraudulent or dishonest act in the service of the Insured or otherwise . . .",

[sic] the plaintiff is not entitled to recover a judgment against the defendant on the subsequent embezzlement of $5,485.22 as said subsequent embezzlement occurred after the plaintiff had knowledge of the original embezzlement;

(6) That as the credits listed on the official "Proof of Loss" occurred during the time that the employee, Billy Martin, was embezzling amounts in excess of said credits and amounts not covered by the insurance policy, the defendant is not entitled to said credits;

Based upon these conclusions of law the court entered judgment for the plaintiff for $9,486.57, the sum of the original embezzlements. Defendant appealed from this judgment and the order of Judge Albright denying its motion for summary judgment. Plaintiff cross-appealed from the court's ruling that the employee's second series of embezzlements was not covered by the policy.

Morrow and Reavis, by John F. Morrow and Clifton R. Long, Jr., for plaintiff appellee/cross-appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Dudley Humphrey and Leon E. Porter, Jr., for defendant appellant.

PHILLIPS, Judge.

Defendant's Appeal

[1] The primary question raised by defendant's appeal is whether the failure of the insured to comply with Section 8 of the insurance policy, which required plaintiff to file a sworn proof of loss within four months of the discovery of the loss, relieved the insurer of liability. The trial court's holding that it did not was based on the rule adopted by our Supreme Court in *Great American Insurance Co. v. C. G. Tate Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981). In that case it was held that unexcused delay in notifying the insurer of a loss or claim does not relieve the company of its policy obligations if the delay does not materially prejudice the insurer and the insured acted in good faith. The trial court's ruling was well based, in our judgment, though, as our later discussion shows, plaintiff's delay in filing a

proof of loss was excused; for even if the delay had not been excused, it benefited rather than prejudiced defendant and the insured's good faith was clearly established.

Defendant nevertheless contends that *Great American v. Tate* has no application to this case because the policy involved there insured against liability while the policy here insured against embezzlement. The basis stated for adopting the rule there enunciated, and rejecting the strict breach of contract rule earlier followed, was that, unlike other contracts, the terms of insurance policies are not freely negotiated, but are mostly imposed by the companies; and the Court's declared purpose in adopting the rule was to prevent insurance companies from unjustly using harmless breaches of policy notice and filing terms as a basis for escaping their policy obligations. The Court did not limit this salutary rule to liability insurance cases, and no sound reason exists for doing so, in our opinion. Indeed, if anything, the rule is needed more in embezzlement insurance cases, where delay in filing proofs of loss is much less likely to harm insurers than it is in liability insurance cases, where the defenses of no negligence and contributory negligence often depend upon early investigation.

But the trial court's decision that plaintiff's failure to file timely proof of loss did not relieve defendant of liability was correct, we think, for another and stronger reason. Since long before *Great American v. Tate* our law has been that despite policy terms to the contrary insurance companies, through their agents and employees, can waive the timely filing of notice or proof of loss, and that when such waivers are made and insureds rely thereon, the companies are estopped to maintain otherwise. One of the better statements of this principle is in *Dibbrell v. Georgia Home Insurance Co.*, 110 N.C. 193, 209, 14 S.E. 783, 788 (1892), where it was said:

> The usual stipulation in a policy that no agent of the company is authorized to change its terms and conditions, and that they shall not be waived except in writing endorsed on the policy, does not apply to conditions to be performed after the loss is incurred. . . . Where . . . the insured is led by the conduct of an agent of the company . . . to believe that the

> stipulations will not be insisted on . . . the condition is deemed waived without the endorsement on the policy.

This rule has been reiterated and followed in many cases since then, including *Brandon v. Nationwide Mutual Insurance Co.*, 301 N.C. 366, 271 S.E. 2d 380 (1980).

Defendant contends, however, that this principle does not apply to this case because Dillon was neither its employee nor agent, but operated and functioned as an independent agent. But nomenclature is not to be confused with reality; and the reality in this case, according to the evidence, was that Dillon was the company's only conduit for receiving information from plaintiff about a loss and for getting proof of loss forms to him and that he thus was the company's agent and representative for that purpose, which is all that now concerns us. The evidence was and the trial court found that this large corporation has no employees anywhere that insureds are instructed to contact in regard to losses or claims, and that the company authorized Dillon to process proofs of loss for the plaintiff and other insureds. This uncontested finding was warranted by events that both preceded and followed the loss in question. In the past plaintiff had not contacted the company directly about losses, but had dealt with Dillon, the so-called independent agent who sold and serviced the policy; and Dillon, in turn, informed the company, obtained a proof of loss form from it, submitted it to the policyholder, and upon it being completed, returned it to the company. A similar course was followed in regard to the losses involved in this case. When the first embezzlement was discovered the insured notified Dillon and asked if it would be alright if they tried to collect from the employee, rather than the company. Dillon told plaintiff he would check with the company and after doing so, according to the testimony, told plaintiff that the arrangement suggested suited the company, but to keep him informed. At that time Dillon neither furnished plaintiff a proof of loss form nor suggested the necessity of one; but he did furnish plaintiff a proof of loss form after the subsequent embezzlements were discovered and reported. These unrefuted facts caused the trial court to conclude, correctly, in our judgment, that defendant had received prompt notice of the loss. It necessarily follows from these findings and conclusions that the defendant also waived its right to insist upon a sworn to proof of loss under Section 8 of the policy.

To hold otherwise would permit insurers to avoid their obligations because of their own failings, an absurdity that the law cannot contribute to.

Having decided that the trial court correctly concluded that the insured's right to recover for the first loss was not barred by the absence of a timely proof of loss, we must next determine whether defendant is entitled to any set offs against the $9,486.57 that is otherwise due plaintiff. Defendant contends that it is entitled to three set offs, none of which were allowed by the trial court. But the first set off claimed, for the policy stated deductible in the amount of $250, cannot be considered on the merits, since an examination of the record reveals that appellant failed to properly preserve this exception for appeal. *See* Rule 10(a), North Carolina Rules of Appellate Procedure.

[2] The second set off defendant claims is the $4,391.06 that plaintiff collected from Martin after the first embezzlement was discovered and reported. These funds were received after the insurer, through its agent Dillon, waived a proof of loss for the purpose of allowing the insured an opportunity to collect the loss without filing a claim. This arrangement, it should be noted, was intended to benefit both parties, since if collection was made without resorting to the insurance coverage the cost of plaintiff's insurance thereafter would not be increased thereby, whereas if the insurer paid the loss it would be. Since the waiver cannot be separated from the collections it was given to facilitate, equity requires that the insurer's liability be credited accordingly and we so hold.

The third set off that defendant claims is the nearly $13,000 profit that the insured made from the transaction involving the embezzler's house. The insured received nothing, however, from the note and deed of trust it obtained from the embezzler; the profit at issue arose from the insured's venture in buying the Martin property at a public foreclosure sale and holding it for a year, which anybody else, including the defendant, could have done. We know of no legal theory under which defendant might be entitled to a profit so made, appellant cites no authority in support of its claim, and we therefore deny it.

Thus, though defendant is indebted to plaintiff in the sum of $9,486.57 because of the first embezzlement, it is entitled to set

off against that claim the sum of $4,391.06, and upon remand the judgment will be reduced by that amount and allow plaintiff to recover of the defendant the sum of $5,095.51.

Plaintiff's Cross-Appeal

[3] The sole question presented by plaintiff's cross-appeal is whether the court erred in concluding that plaintiff is barred from recovering for the second series of embezzlements by Martin. In our opinion the court's conclusion in this regard was correct. Section 7 of the policy excludes from coverage any employee that to the employer's knowledge had committed a dishonest act while in its employment; and Section 18 provides for cancellation of coverage as to any individual immediately upon the insured discovering any dishonest or fraudulent act by that individual. Since these provisions had not been eliminated from the policy by any amendments or endorsements executed during the interim, they necessarily remained in force unless they were waived by the acts of the local agent Dillon. First of all, no authority has been found for the proposition that under North Carolina law a local agent can waive substantive conditions of coverage such as employee dishonesty in an embezzlement policy—a different matter entirely from waiving things that are supposed to be done after an insured loss has already occurred. But even if the law authorized such waivers, the evidence fails to show that one was made. Thus, since coverage for the embezzling employee terminated before the second embezzlements occurred, the court correctly ruled that defendant is not liable for them.

As to defendant's appeal, judgment modified and remanded.

As to plaintiff's cross-appeal, judgment affirmed.

Judges WELLS and BRASWELL concur.

MELZIE E. ELLIOTT v. DUKE UNIVERSITY, INC.

No. 8214SC1262

(Filed 21 February 1984)

1. **Contracts § 25.1— allegation of "contract" between plaintiff and Divinity School—summary judgment for defendant proper**

In an action in which plaintiff alleged that defendant university had contracted with plaintiff to permit her to change her status in defendant's Divinity School from special student to regular degree candidate in the Masters of Religious Education degree program, plaintiff's forecast of evidence was insufficient to survive defendant's motion for summary judgment where plaintiff asserted that the alleged agreement between the parties consisted of a statement by the director of admissions that plaintiff was "in transition from the status of special student to that of a regular student." The absence of a mutual agreement upon plaintiff's acceptance into the degree program was made clear by plaintiff's statement that the director of admissions did not promise that she would become a degree candidate, that he did not tell her when the transition period would end, that he did not tell her how long the transition period would be nor what she would have to accomplish in order to complete the transition, and that no one else at the Divinity School ever told plaintiff after the beginning of the Fall 1977 semester that she was a regular degree candidate. Although plaintiff may have understood the director of admissions' statements to mean that if she paid her tuition, took the selected courses suggested, and did her work she would be *in transition* to regular degree status, this was not the same as agreement that she would thereby *attain* regular degree status.

2. **Contracts § 25.4; Principal and Agent § 4— contract claim—failure to prove agency**

In an action in which plaintiff alleged that defendant, through its agent, the director of admissions at the Duke Divinity School, had contracted with plaintiff to permit her to change her status in defendant's Divinity School from special student to regular degree candidate in the Masters of Religious Education degree program, plaintiff's contract claim was deficient in that she failed to allege and prove that the director of admissions was an agent of defendant with either the authority or apparent authority to alter the recognized procedure by which an individual becomes a regular degree candidate, and she had to establish this agency in order to establish her right to recover against the defendant.

APPEAL by plaintiff from *McLelland, Judge*. Judgment entered 27 April 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 October 1983.

Plaintiff, Melzie E. Elliott, initiated this action on 26 July 1979 by filing a complaint against defendant, Duke University, Inc., alleging that defendant, through its agent, B. Maurice

Ritchie, had contracted with plaintiff to permit her to change her status in defendant's Divinity School from special student to regular degree candidate in the Masters of Religious Education degree program. As her first claim for relief, plaintiff requested specific performance of the alleged contract and in addition, money damages for rental expenses incurred between May, 1978 and July, 1979. In the alternative, plaintiff requested money damages for breach of the alleged contract and special damages incident thereto. Plaintiff's second and third claims for relief were based on theories of implied contract or detrimental reliance and unjust enrichment, respectively.

Defendant answered on 5 October 1979, denying plaintiff's allegation as to the formation and existence of such a contract and alleging as affirmative defenses that plaintiff's reliance upon the alleged representations was not reasonable in light of the information available to plaintiff and the lack of actual, implied or apparent authority on the part of the University personnel who dealt with plaintiff to either contract with plaintiff to change her status from special student to regular degree candidate, or to bind Duke University to any change in plaintiff's status.

Following extensive discovery by the parties in which the deposition of plaintiff and several employees of defendant were taken, defendant filed a motion for summary judgment. Plaintiff presented no affidavits in opposition to the motion, and defendant relied solely upon the pleadings, depositions and other discovery materials on file. Defendant's motion for summary judgment was granted, summary judgment was entered against plaintiff, and plaintiff appeals.

Loflin & Loflin, by Thomas F. Loflin, III, for plaintiff appellant.

Powe, Porter and Alphin, P.A., by Edward L. Embree, III, for defendant appellee.

JOHNSON, Judge.

This is an appeal from an order granting summary judgment to defendant Duke University in plaintiff's action seeking, *inter alia*, specific performance of an alleged contract between plaintiff and the Director of Admissions of the defendant's Divinity School.

The complaint alleged that pursuant to the purported contract, plaintiff, then a non-degree special student, would be permitted to enter the Master of Religious Education (M.R.E.) degree program, bypassing the traditional admissions process, by simply taking certain courses allegedly selected for her by the Director of Admissions in the fall of 1977. We find no error in the trial court's ruling.

The question before the court on motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions for file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972). This burden may be carried by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce enough evidence to support an essential element of his claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Id.*

The evidentiary forecast plaintiff presented tends to show the following facts: Plaintiff served as an employee in the public school system of Miami, Florida for a period of 29 years. After retiring from that system as a librarian, plaintiff developed a desire to write articles on religious subjects and visited Duke University to determine how she might take courses through its Divinity School. Officials there explained that although most individuals taking courses at the Divinity School did so as regular degree candidates, it was also possible to take courses and be classified as a special student.

The major difference between special student status and degree candidate status is that individuals classified in the latter category work towards obtaining a recognized degree, while individuals in the former category take the same courses, pay the

same tuition (with the exception of certain student activity fees), but receive full course credit only in the event that they subsequently enter into a recognized degree program at Duke University. Upon filing an application to enter the Divinity School as a special student, plaintiff received a copy of the Divinity School's official Bulletin setting forth the requirements for becoming both a regular degree candidate and a special student. All applicants for admission as regular degree candidates were required to submit an application to the Divinity School, and to have that application acted upon favorably by an Admissions Committee consisting of Divinity School faculty and students. In contrast, special student status may be granted with just the approval of the Director of Admissions and the Dean of the Divinity School. In his deposition, Thomas A. Langford, Dean of the Divinity School, testified that the Director of Admissions does have authority to admit someone to special student status, but has no authority whatsoever to admit an applicant to a regular degree program.

Plaintiff went through the proper procedure for attaining special student status in the fall of 1976. Her application was accepted, and she paid her tuition and enrolled in courses during the 1976-1977 academic year and during the 1977 summer session. Although initially it was plaintiff's desire to attend the Divinity School for approximately one year only, she subsequently decided that to write upon religious subjects from a black perspective it would be necessary for her to take certain courses which were not offered by the Divinity School on a regular basis. As such, it would be necessary for her to attend classes for more than one year. Plaintiff then decided that she would like to pursue the degree of Master of Religious Education in the Duke Divinity School.

During the late summer of 1977, plaintiff conferred with Mr. B. Maurice Ritchie, who was then Director of Admissions for the Divinity School, and learned that in the past special students had on occasion switched over into the regular degree program. Mr. Ritchie indicated that he and plaintiff would talk further on the subject another time.

Just prior to the beginning of the 1977-1978 academic year, plaintiff and Mr. Ritchie had a second conference. Plaintiff testified that at this time, Mr. Ritchie selected plaintiff's courses

for the fall 1977 term. This selection included certain courses that were "core courses," or courses required of all students working for a degree in the Divinity School. According to plaintiff's deposition, Mr. Ritchie stated to her that "he had talked with someone and that we have decided to let you go into the regular program." Further, that in connection with his selection of core courses for her, Mr. Ritchie stated that he was giving plaintiff such courses because she was "in transition from the status of special student to that of regular student."

According to Mr. Ritchie's deposition, he informed plaintiff of the standard admissions process for all degree candidates, and he denied ever having used the phrase "in transition" in discussing plaintiff's status with her. Ritchie explained that there were only two "categories" or "routes" for students in the Divinity School, degree program or special student. "My terminology, again, would be . . . she remained a special student, making the case for admission through the selection of core courses." Mr. Ritchie testified further that the primary issue discussed was the nature of the courses plaintiff had taken to date, the inadequacy of those courses for purposes of evaluating plaintiff's capabilities, and the necessity for her moving in her course selection into core courses where she should make a credible academic showing in order to establish credibility with the committee for admission to the degree program.

As a result of this meeting, plaintiff enrolled in the courses selected for her in the Divinity School, paid her tuition for the first semester of the 1977-1978 academic year, and took the selected courses. She repeated this process for the spring 1978 semester. The tuition plaintiff paid for both semesters of the 1977-1978 academic year included a charge for student activity fees, normally only charged to regular degree candidates and not special students. During the 1977-1978 year, plaintiff attended her classes under the belief that she had made "the transition" from special student status to regular degree status. Plaintiff then remained in Durham during the summer of 1978, preparing to resume her studies toward the M.R.E. degree in September, 1978. On 28 August 1978 plaintiff was informed by Divinity School officials that she was not considered a regular degree candidate and that she had not made a proper application to enter the program. Subsequently, plaintiff submitted a proper application to the

University for admission as a regular degree candidate. Ultimately, the Divinity School Admissions Committee denied plaintiff's application for admission to degree status.

[1] Plaintiff argues that the foregoing evidence raises a genuine issue of material fact as to whether plaintiff and defendant's agent, Mr. Ritchie, reached a meeting of the minds as to what performance by plaintiff would serve to effect her acceptance into the school's program leading to the Master of Religious Education degree. Plaintiff grounds her right of recovery almost exclusively upon the following facts: Director of Admissions Ritchie told her she was "in transition" from special status to regular degree candidate status, selected core courses for her to take one semester, and never told her there were procedures to follow besides taking courses to switch from special to degree status. Plaintiff contends that she performed her part of the agreement, paid tuition, took the prescribed courses, and therefore is entitled to specific performance of the alleged contract to admit her to the degree program. We do not agree.

Considered in the light most favorable to her, plaintiff, in both her verified complaint and deposition, at most alleges an agreement that she be placed "in transition," and that was, in effect, done. The record discloses that plaintiff took the prescribed courses, but that her record in those courses was not sufficient to get her admitted into the degree program on the basis of her course performance. Furthermore, despite the differing recollections of the facts presented by plaintiff and Mr. Ritchie in their depositions, it is clear that defendant met its burden at the hearing for summary judgment by showing that no matter what plaintiff understood or inferred from Mr. Ritchie's statements, plaintiff's own deposition testimony revealed that there was never a concrete agreement regarding admission between the parties with definite terms capable of enforcement.

It is well established that a valid contract comes into existence only where the parties involved mutually assent to the same agreement. *Goeckel v. Stokely*, 236 N.C. 604, 73 S.E. 2d 618 (1952). Where one party simply believes that a contract exists, but there is no meeting of the minds, the individual seeking to enforce the obligation upon a contract theory is without a remedy. *Brown v. Williams*, 196 N.C. 247, 145 S.E. 233 (1928).

> There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. "A contract, express or implied, executed or executory results from the concurrence of two minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree . . ." (Citations omitted.)

Id. at 250, 145 S.E. at 234. Furthermore, to be binding, the terms of a contract must be definite and certain or capable of being made so; the minds of the parties must meet upon a definite proposition. *Horton v. Refining Company*, 255 N.C. 675, 122 S.E. 2d 716 (1961). Summary judgment in favor of the defendant is properly entered when the evidentiary forecast discloses that the parties never reached a mutual understanding or meeting of the minds as to the essential terms of the contract. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980).

It is evident from plaintiff's deposition testimony that during the 1977-1978 academic year she believed that she had become a regular degree student primarily on the basis of certain statements made to her by Mr. Ritchie. However, nowhere in the verified complaint or her deposition does plaintiff assert that the alleged agreement between the parties consists of anything more than Mr. Ritchie's statement that plaintiff was "in transition from the status of special student to that of a regular student." The absence of a mutual agreement upon plaintiff's acceptance into the degree program is made clear by the following exchange which occurred during plaintiff's deposition testimony upon questions from defendant's attorney:

> Q. Okay. And the basis that, upon which you felt that Duke had committed itself to a contract was Dean Ritchie's alleged representation to you that you were in transition—
>
> A. Right.
>
> Q. —From special student to a degree candidate?
>
> A. Right.

Q. Did Dean Ritchie ever promise you that you would become a regular degree candidate?

A. He said I was in transition.

Q. Is that all he said?

A. He said: I am giving you—if you want the exact words—I am giving you these courses because you are in transition from the regular—from the special student status to that of a regular student.

Q. Did he promise that if you completed those courses you would be a regular degree candidate?

A. If I, if I completed the work.

Q. Did he promise you that, Ms. Elliott, or did he merely say that you are in transition and these courses are part of the transition?

A. I repeat. He said: I am giving you these courses because you are in transition from—

Q. He never did promise that you would become a degree candidate, did he, Ms. Elliott?

A. You mean did he ask—just tell me, now, you'll become a degree candidate?

Q. Yes. Did he ever make that statement to you?

A. I don't remember that he did.

Plaintiff states further in her deposition that Mr. Ritchie did not promise that she would become a degree candidate, that he did not tell her when the transition period would end, that he did not tell her how long the transition period would be nor what she would have to accomplish in order to complete the transition, and that no one else at the Divinity School ever told plaintiff after the beginning of the fall, 1977 semester that she was a regular degree candidate.

Although plaintiff may have understood Mr. Ritchie's statements to mean that if she paid her tuition, took the selected courses and did her work she would be *in transition* to regular degree status, this is not the same as an agreement that she

would thereby *attain* regular degree status. In normal parlance, "in transition" implies that one is on the way to a desired goal, not that one has arrived. Plaintiff's unilateral belief that they had reached an agreement as to what steps were necessary for her to take to reach degree status is insufficient to prove the existence of a contract to admit her to the degree program. Furthermore, the statement of Mr. Ritchie itself is too indefinite to provide the basis of an enforceable contract. In sum, no evidence of any specific facts showing mutual assent to a well defined agreement was ever offered. Therefore, the grant of defendant's motion for summary judgment was entirely proper on the basis of plaintiff's inability to prove the existence of a contract due to the lack of mutual assent.

[2] Furthermore, the preview of plaintiff's evidence reveals another respect in which plaintiff's contract claim is deficient. In order to establish her right to recover against the defendant Duke University, a corporate entity, on the basis of an alleged contract, plaintiff must allege and prove that Mr. Ritchie was an agent of defendant with either the authority or apparent authority to alter the recognized procedure by which an individual becomes a regular degree candidate. *See Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974).

The discovery conducted by the plaintiff established that Mr. Ritchie as Director of Admissions had no actual authority to admit students as regular degree candidates other than through the regular admissions process. All applicants for admission as regular degree candidates were required to submit an application to the Divinity School, demonstrating certain vocational objectives and academic achievement and to have that application acted upon favorably by an Admissions Committee consisting of Divinity School faculty and students. Director of Admissions Ritchie had no actual authority to admit students at all except as special students.

The rule as to the apparent authority of an agent to bind his principal is as follows:

> [W]hether or not the agent is acting within the apparent scope of his authority must be determined by what the principal has done, not by the unratified acts and declarations of the agent. If the facts and circumstances of the particular

> case reveal that an ordinarily prudent man would have been put on notice that one with whom he was dealing was not acting within the apparent scope of his authority, the principal is not bound under well-settled principles of agency law.

Zimmerman, supra, 286 N.C. at 31, 209 S.E. 2d at 799. The only manifestations made by the defendant principal with regard to which individuals had authority to admit applicants to regular degree programs in defendant's Divinity School were those contained in the Divinity School Bulletin which was received by plaintiff prior to her first semester as a special student. The Bulletin states that the Director of Admissions may admit special students, but that a faculty-student Admissions Committee passes upon degree applications. Plaintiff's evidence includes no statement showing that defendant made other representations to her regarding Mr. Ritchie's authority to admit her as a regular degree student. All of plaintiff's assertions regarding Mr. Ritchie's authority to bind defendant are based solely upon his own representations and not upon representations of the defendant principal. Under these circumstances, the forecast of plaintiff's evidence indicates that plaintiff cannot establish that Mr. Ritchie had actual authority to admit her as a regular degree student, nor did he have apparent authority to do so upon which any reasonably prudent person could rely without further investigation.

We have carefully examined plaintiff's other arguments and find them to be without merit. In conclusion, we hold that when plaintiff's evidentiary forecast is examined, it reveals merely that plaintiff believed that she had become a regular degree candidate and there was never any mutual assent to an agreement between plaintiff and any agent of the defendant University with the authority to admit her into the degree program. Therefore, summary judgment in defendant's favor was properly entered.

Affirmed.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. JOHNNIE GATLIN PUCKETT, JR.

No. 837SC692

(Filed 21 February 1984)

1. **Criminal Law § 138— use of same evidence for two aggravating factors**

The trial court erred in using the same evidence in finding as aggravating factors that defendant had engaged in violent conduct which is a threat to society and that defendant is a dangerous mentally abnormal person.

2. **Criminal Law § 138— felonious assault—killing of another as aggravating factor**

In imposing a sentence for an assault with a deadly weapon with intent to kill inflicting serious injury which had been joined for trial with a second degree murder charge, the trial court could not properly consider as a factor in aggravation that defendant killed another person in the course of the assault. G.S. 15A-1340.4(a)(1)(o).

3. **Criminal Law § 138— felonious assault—lying in wait as aggravating factor**

In imposing a sentence for an assault with a deadly weapon with intent to kill inflicting serious injury, the trial court could not properly find as a factor in aggravation that defendant committed the offense while "lying in wait" since such factor constitutes an element of the separate but joinable offense of secret assault.

4. **Criminal Law § 138— felonious assault—extenuating relationship mitigating factor—insufficient evidence**

The trial court did not err in failing to find as a factor in mitigation of a felonious assault that the relationship between defendant and the victim was otherwise extenuating, G.S. 15A-1340.4(a)(2)(i), where the evidence showed only that defendant was distraught over the breakup of his relationship with the victim.

5. **Criminal Law § 138— acknowledgment of wrongdoing mitigating factor—sufficient evidence**

The trial court should have found as a factor in mitigation of a felonious assault that defendant acknowledged wrongdoing at an early stage of the criminal process where defendant told the arresting officers that he shot the victim, notwithstanding defendant later attempted to contest the legal effect of his actions by attempting to prove that he was suffering from a mental disorder. G.S. 15A-1340.4(a)(2)(1).

6. **Criminal Law § 138— exercise of caution mitigating circumstance—insufficient evidence**

Evidence of defendant's attempts to get psychiatric treatment did not require the trial court to find as a factor in mitigation of a felonious assault that defendant "exercised caution to avoid such consequences," G.S. 15A-1340.4 (a)(2)(j), since (1) the statute does not include attempts by a criminal defendant to restrain himself from committing the criminal act itself, and (2) the evidence

was not uncontradicted and inherently credible but would have warranted a conclusion that defendant was simply erecting a defense or excuse by seeking medical help.

APPEAL by defendant from *Brown, Judge.* Judgment entered 31 March 1983 in EDGECOMBE County Superior Court. Heard in the Court of Appeals 18 January 1984.

Defendant was charged with the second degree murder of Steve Cantrell and assaulting Sherrill Williams with a deadly weapon with intent to kill inflicting serious injury on 8 August 1982.

The evidence, which is largely uncontradicted, tended to show that defendant was a Vietnam veteran who began experiencing personality changes and mental disorders after his return to civilian life. Defendant separated from his wife after at least one incident in which he threatened her with a knife. Thereafter, defendant had difficulties maintaining steady employment and relationships with women and became suspicious and withdrawn. In about 1980, defendant began living with Ms. Williams. The couple separated after about eighteen months, at defendant's request, but defendant later tried to convince Ms. Williams to return to him. In July, 1982 defendant visited Ms. Williams' home one morning about 3:00 a.m. and threatened her with a gun, which later discharged into her refrigerator. Although the pair reconciled briefly after the shooting, a week later defendant forced Ms. Williams to drive him around town, and threatened to kill her some evening as she left work. Defendant visited hospitals and clinics in Fayetteville, Durham and Rocky Mount seeking treatment for his mental condition. At least one physician tentatively diagnosed defendant as suffering from "post traumatic stress disorder," in which defendant "flashed back" to his Vietnam combat experiences. Defendant was treated with drugs, but was not hospitalized for his condition prior to the August shooting.

On 8 August 1982 as Ms. Williams and Cantrell were leaving work, defendant shot and wounded Ms. Williams and killed Cantrell. Defendant pleaded guilty to both offenses, and under a plea agreement, was sentenced to life imprisonment for the killing. A sentencing hearing was held 28 March 1983 pursuant to North Carolina's Fair Sentencing Act, Gen. Stat. § 15A-1340.1 to -1340.7

(1983), for the purpose of determining punishment in the assault case.

Following the sentencing hearing, the trial judge found that the aggravating factors outweighed the mitigating factors, and sentenced defendant to fifteen years in prison, nine years more than the presumptive term provided in N.C. Gen. Stat. § 15A-1340.4(f) (1983). The trial judge found as aggravating factors that:

1. The defendant had previously threatened the victim of this assault, exhibited violence toward her and engaged in violent conduct which indicates a serious danger to society.

2. The offense was committed by lying in wait.

3. The defendant is a dangerous mentally abnormal person whose commitment is necessary for the protection of the public.

4. The defendant killed another person in the course of this assault.

The trial judge found as mitigating factors that

1. The defendant was suffering from a mental condition that was insufficient to constitute a defense, but reduced his culpability for the offense.

2. Defendant's only conviction was for an offense punishable by less than 60 days' confinement.

3. The defendant has been a person of good character and has had a good reputation in the community in which he lives.

From imposition of a sentence greater than the presumptive term, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General G. Criston Windham, for the State.

Meadows, Johnson & Spinks, by Lee A. Spinks, for defendant.

WELLS, Judge.

[1] In his first argument, defendant contends that the trial judge erred in three ways: by using the same evidence to support two aggravating factors, by relying on defendant's mental condition as an aggravating factor when there was no showing that the illness would last beyond the presumptive jail term, and by failing to notify defendant that the judge was considering using defendant's mental condition as an aggravating factor. On appeal

> '[t]here 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. . . . 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. Ahearn, 307 N.C. 584, 300 S.E. 2d 689 (1983), *citing State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). Defendant first contends that the trial judge erroneously relied upon the same evidence to prove the first and the third aggravating factors. Our analysis is complicated by the fact that the trial judge actually grouped two conclusions in his first aggravating factor, linking the finding that defendant threatened the assault victim with the broader finding that defendant is a threat to society at large. The better practice is to list only one finding in each factor in mitigation or aggravation, *State v. Ahearn*, *supra*. Our review of the record and the trial judge's findings leads us to conclude that evidence showing defendant had engaged in violent conduct which is a threat to society (second part of first aggravating factor) is the same evidence supporting the finding that defendant is a dangerous mentally abnormal person (third factor). The use of the same evidence to prove more than one factor in aggravation was error. *See State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). We are not convinced by the state's argument that evidence that defendant planned to shoot Ms. Williams and claim his illness as a defense demonstrates that defendant is a dangerous, mentally abnormal person, independent of proof of defendant's acts of violence. Assuming that there was sufficient evidence that defendant "manipulated" his illness, this alone does not prove that

he is dangerous. A person may plot without being dangerous, if there is no likelihood that he will act on his plans. It is the risk that the schemer will carry out his plans of violence which makes him dangerous. Thus, it is defendant's history of violence which makes him dangerous, not his beliefs that his illness could shield him from punishment.

Because we hold that the trial judge erred in finding defendant's mental condition as an aggravating factor, we need not consider defendant's other two arguments under this assignment of error.

In his second argument, defendant contends that there was insufficient evidence that defendant committed the offense while "lying in wait," and further, that the trial judge should have provided defendant with advance notice that he was considering this factor in aggravation. For reasons stated by us in disposing of defendant's third assignment of error, we hold that the trial court erred in finding lying in wait as an aggravating factor and we therefore do not reach defendant's "notice" argument presented in this assignment.

[2] In his third argument, defendant contends that the trial judge erred in finding as an aggravating factor that defendant killed another person in the course of the assault. Under N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1983), prior *convictions* may be considered in aggravation, except those for crimes which are joinable with the offense for which defendant is being sentenced. In the case before us, the assault charge was joined with the second degree murder charge, and therefore the trial judge could not have properly considered that defendant had been convicted of killing Cantrell. It would frustrate the purpose of the statute to permit the trial judge to consider that defendant killed Cantrell during the assault on Ms. Williams, where he clearly could not consider the fact that defendant had been convicted of killing Cantrell. *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984) and *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984). We therefore hold that the trial court erroneously found as a factor in aggravation that defendant killed another person in the course of the assault.

[3] Applying the reasoning in *Lattimore* to the "lying in wait" factor requires us to reach the same result as to that factor. In

the context of an assault case, "lying in wait" is nothing more or less than taking the victim by surprise, an element of secret assault, a separate but joinable offense.[1] We are aware of the results reached by other panels of this court and our supreme court in *State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983) and *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920 (1983), where evidence which tended to show additional criminal acts committed during the crime for which defendants were being sentenced was considered as factors in aggravation. In those cases, however, the statutory prohibition against use of joinable offenses was not considered or addressed. In light of *Winnex* and *Lattimore*, we must conclude that the use of evidence of an element of a joinable offense with which defendant has not been charged is even less valid than the use of evidence of the commission of joinable offense for which a defendant has been convicted, and that this factor was erroneously found.

In his fourth argument defendant contends that the trial judge erred in failing to find at least one of the following mitigating factors: (1) defendant's limited mental capacity at the time of the offense significantly reduced his culpability; (2) defendant acted under strong provocation or the relationship between defendant and the victim was otherwise extenuating; (3) defendant acknowledged wrongdoing at an early stage of the criminal process; (4) defendant's ability to conform his conduct to the requirements of the law was impaired; (5) defendant attempted to avoid the consequences of the offense by seeking treatment for his mental condition or (6) that defendant was using medication which altered his mental state and reduced his culpability for his actions.

The first, fourth and fifth proposed factors are all alternative findings based on defendant's mental condition and thus will be considered together. An examination of the trial record seems to indicate that the trial judge did find as a mitigating factor that defendant suffered from a mental condition insufficient to constitute a defense but which reduced his culpability for the

1. N.C. Gen. Stat. § 14-31. *Maliciously assaulting in a secret manner.* If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class F felon.

defense. N.C. Gen. Stat. § 15A-1340.4(a)(2)(d) (1983). Because the record appears to be in conflict with the briefs of the parties, and because defendant must receive a new sentencing hearing based on other errors already discussed, we reserve further discussion on defendant's arguments concerning his mental condition.

[4] Defendant also contends that the trial judge should have found that defendant acted under strong provocation or that the relationship between defendant and the victim was otherwise extenuating. N.C. Gen. Stat. § 15A-1340.4(a)(2)(i) (1983). Defendant does not contend that the facts show that he was provoked within the meaning of the statute, which requires a showing of a threat or challenge by the victim to the defendant. *See, e.g., State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983) (victim pointed gun at defendant); *State v. Wood*, 61 N.C. App. 446, 300 S.E. 2d 903 (1983) (victim threatened and argued with defendant). Instead, defendant contends that the evidence shows that "the relationship between defendant and the victim was otherwise extenuating." Defendant apparently contends that because he was distraught over the breakup of his relationship with Ms. Williams, his actions should be viewed in a more forgiving light. We disagree. There is nothing on the face of the statute to indicate that our legislature meant to provide shorter prison terms for defendants motivated by jealousy or rage.

[5] Defendant next argues that the trial judge should have found that defendant acknowledged wrongdoing at an early stage of the criminal process, as provided in N.C. Gen. Stat. § 15A-1340.4 (a)(2)(1) (1983). The uncontradicted evidence in this case demonstrates that after the shooting, defendant went to his mother's home and announced "I think I have done something terrible, Mom. . . . I think I have killed Sherrill." Defendant then waited while his mother called the police. Soon after the police arrived, defendant told them "I shot Sherrill, didn't I?" This is sufficient to satisfy the requirements of the statute. The fact that defendant later attempted to contest the legal *effect* of his actions by attempting to prove he was suffering from a mental disorder does not negate the fact that defendant did admit performing the underlying act of shooting Ms. Williams. Nothing in the language of the Fair Sentencing Act requires a defendant to forego all possible defenses before he may take advantage of the statutory mitigating factors. *Compare State v. Simmons*, --- N.C. App. ---,

310 S.E. 2d 139 (1984) (the court did not err in refusing to consider in mitigation that defendant turned himself in after he learned a warrant had been issued for his arrest but did not admit he had done the deed he was charged with). The trial court erred in not finding this factor in mitigation.

[6] Defendant contends finally that the trial judge should have found in mitigation that defendant ". . . could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences." Careful reading of the statute indicates that this mitigating factor is present where a defendant takes action to avoid harmful results of his criminal action, such as ensuring that accomplices are not armed with weapons. *See, e.g., State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983) (insufficient showing of this factor where defendant knew accomplice had a gun, although defendant pleaded with accomplice not to shoot victim). The statute does not refer to attempts by a criminal defendant to restrain himself from committing the criminal act itself, as in the case before us. Further, evidence of defendant's attempts to get psychiatric treatment and thereby control his violent urges was neither uncontradicted nor inherently credible. A judge need only find the existence of a mitigating factor if evidence of its existence is both uncontradicted and manifestly credible. *State v. Jones, supra.* In the case before us, however, there was evidence that defendant predicted he would shoot Ms. Williams as she was leaving work, that he told Ms. Williams he could escape punishment because he was receiving psychiatric treatment and that he wrote a letter expressing the same view after the shootings. This evidence is sufficient to warrant a conclusion that defendant was simply erecting a defense or excuse by seeking medical help, rather than attempting to restrain himself from harming Ms. Williams, and we hold that the trial judge did not err in failing to find a mitigating factor based on this evidence.

We have carefully considered defendant's other assignments of error and conclude we need not discuss them in light of our holding that defendant must receive a new sentencing hearing consistent with this opinion.

Remanded for resentencing.

Judges BRASWELL and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ROBERT JOHN DARACK

No. 831SC575

(Filed 21 February 1984)

Searches and Seizures § 12— denial of motion to suppress evidence—findings of fact supported by evidence

The detention of defendant and his airplane until a dog trained in the detection of narcotics signified the presence of controlled substances in the airplane was not an unreasonable seizure, and a subsequent search of the airplane under a warrant and the seizure of marijuana found therein were lawful, where the evidence tended to show that defendant landed his plane at the Manteo Airport, an uncontrolled airport, in the predawn hours; the airport is in close proximity to the open ocean; the defendant gave evasive or uncertain answers regarding the registration of the aircraft; there was an absence of any severe weather conditions which would have forced defendant to land; the defendant taxied around the airport for some ten minutes before shutting off his engines; defendant gave the appearance of being lost; the airplane's rear windows were covered; the airplane appeared to be loaded with cargo up to the pilot's seat; the defendant answered that it contained only personal effects and baggage and nothing else of value; the defendant's path of travel was from somewhere in the south Atlantic states by way of a stop at Myrtle Beach, South Carolina, to the northern part of the United States; the defendant's flight pattern was consistent with the usual pattern of aircraft carrying illegal drugs; there was information from the U.S. Customs Office that defendant was a suspect in cocaine smuggling in Florida in October 1981 and was then believed armed and dangerous; the defendant's use of the airplane was not readily traceable as to either actual ownership or name of the individuals who put defendant in possession; the defendant only purchased fuel at Myrtle Beach and did not tie down there as he had said; and a trained agent gave an opinion that the defendant and airplane fitted a smuggling profile.

APPEAL by defendant from *Winberry* and *Stevens, Judges.* Judgment entered 10 February 1983 in Superior Court, DARE County. Heard in the Court of Appeals 10 January 1984.

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

Purser, Cheshire, Manning & Parker, by Thomas C. Manning and Barbara A. Smith, for the defendant appellant.

BRASWELL, Judge.

While reserving his right to appeal pursuant to G.S. 15A-979(b) from an order of Judge Winberry denying his motion to suppress evidence obtained from a search and seizure, defendant pled guilty before Judge Stevens and was sentenced to five years for trafficking in marijuana. At issue is whether the detention of defendant and his airplane was an unreasonable seizure under the Fourth Amendment of the United States Constitution. For the reasons that follow, we hold that the detention was not an unreasonable seizure.

The only motion to suppress, dated 2 April 1982, fails to contain a statement of any grounds to support the motion. The defendant made no affidavit. *See* G.S. 15A-977(a). The court, however, proceeded to hold an evidentiary hearing on the general motion. The order denying relief was filed 14 July 1982.

In denying defendant's motion to suppress, Judge Winberry made 84 findings of fact and concluded that none of defendant's rights under the United States and North Carolina Constitutions had been violated. In reviewing the order, we must determine whether the findings of fact are supported by competent evidence and whether the findings of fact support the court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E. 2d 618, 619 (1982); and *State v. Jackson*, 306 N.C. 642, 649, 295 S.E. 2d 383, 387 (1982).

Exceptions to six specific findings of fact appear of record. An exception was made to each of the three conclusions of law, and a tenth exception was made to the order itself. Each exception to a finding of fact has been carefully reviewed against the whole of the evidence and the trial court's findings of fact are held to be fully supported in every instance.

In summary, the competent evidence at trial upon which the trial court's findings of fact are based show the following:

At approximately 3:50 a.m. on 22 February 1982, Deputy Sheriff Robert Mauldin was at his residence in Dare County near the Manteo Airport when he heard an airplane circling the Manteo Airport. Deputy Mauldin dispatched a Manteo police officer, Officer Samuel Pledger, to the airport. Officer Pledger arrived and observed an airplane land and taxi around the runways.

The airplane was on the ground approximately ten minutes before it cut off the motors. To Officer Pledger the pilot of the airplane appeared to be lost.

When the airplane stopped, Officer Pledger and Deputy Mauldin, who had then arrived, approached the airplane on foot. The time was then 4:15 a.m. The pilot, the defendant, told Officer Pledger that he had been having icing problems and that he was going to wait for it to warm up. Defendant produced his pilot's license at Officer Pledger's second request. When asked if he had filed a flight plan, defendant replied that he was flying instrument flight rules. When asked about the plane's registration, defendant first replied that it was registered in his name, then he said it was in his name and his partner's, and finally he said it was registered to a corporation. Defendant was unable to produce an airworthiness certificate or registration for the aircraft upon request. Defendant also refused consent to a search of the airplane at 4:30 a.m.

The defendant also told Deputy Mauldin, who repeated it to Agent Hoggard, that he had landed because of icing problems and had come down to wait for it to warm up. The defendant also said that he was somewhat low on fuel and was going to wait for the airport to open, obtain fuel, and proceed north to Hartford. These statements were later made directly to Agent Hoggard. Subsequent evidence showed that the fuel dock at the airport did not open until approximately 8:00 a.m. In fact, at approximately 8:15 to 8:20 the defendant did refuel the airplane after taxing it to the fuel dock.

The officers moved their vehicles behind the airplane about 4:30 a.m. and kept the airplane under observation until Special Agent W. A. Hoggard, III, of the North Carolina State Bureau of Investigation arrived at 5:40 a.m. In the meantime Agent Hoggard had been informed that the plane was registered as "Sale Reported," with an address in Factoryville, Pennsylvania. "Sale Reported" means that the plane is being sold and the sale is being reported to the FAA until the aircraft was re-registered. Agent Hoggard had also been informed about 5:00 a.m. by the U.S. Customs Sector Office in Washington, D. C., that a Robert Jason Darack with the same date of birth, pilot's license number and same Social Security number was a suspect in aircraft co-

caine smuggling in Tampa, Florida, in October 1981, and that at that time he was believed to be carrying concealed weapons and possibly armed and dangerous. Later, the defendant said he was sometimes called Jason. Agent Hoggard also discovered, through the Dare County Sheriff's Office, that there was no identifiable criminal record on Robert John Darack and no stolen report on the aircraft. Upon Agent Hoggard's arrival, Officer Pledger and Deputy Mauldin related to him what they had gathered from defendant.

The airplane had three windows per side, with the two rear windows on each side being covered with a reflective covering. The passenger area of the aircraft seemed to be fully loaded with something up to the pilot's seat.

At 7:02 a.m., defendant started an engine of the aircraft and turned on some of the aircraft lights, at which point Agent Hoggard moved his vehicle in front of the airplane, got out of the vehicle, showed his badge, and motioned for defendant to cut the engine. Deputy Mauldin moved his vehicle to the plane's left wing, got out of the car, and placed a rifle on top of the car. Officer Pledger's vehicle remained behind the airplane. Defendant shut the engine off and got out of the plane at Agent Hoggard's request. Agent Hoggard told defendant that he was not under arrest, that he just wanted to talk to defendant, and that he was trying to obtain some information about the aircraft's registration.

While seated in Agent Hoggard's car, defendant told Agent Hoggard, in response to questioning, that the aircraft was registered to a corporation but he did not know the name of the official registered owner. He did not know of any registration information in the aircraft. Defendant stated that he was not getting ready to leave when he cranked the airplane, but was merely attempting to warm the aircraft. He had departed from Myrtle Beach, South Carolina, en route to Hartford, Connecticut, when he was forced to land at Manteo because of icing conditions. He was also low on fuel and was waiting for the fuel docks to open in the morning. He was unable to produce an airworthiness certificate, a maintenance log, or a pilot's log. He explained that he was driving the airplane around the airport because he was looking for the aircraft parking area. When Agent Hoggard asked if

he objected to a search of the aircraft for registration information, defendant replied that he did object. At that time, approximately 7:35 a.m., Agent Hoggard told the defendant that he believed the defendant was either piloting a stolen aircraft or involved in smuggling, and that he was going to obtain a search warrant for the aircraft. Agent Hoggard further explained to the defendant that he was not in any way detained, that he could come and go as he pleased, but that he could not take the airplane. If he attempted to take the airplane, the officers would attempt to stop the airplane and conduct an emergency search.

While Agent Hoggard was attempting to obtain a search warrant, defendant was allowed to refuel the airplane. All exits, however, for the plane remained blocked.

At approximately 9:00 a.m., while Agent Hoggard was typing the affidavit for the search warrant, U.S. Customs Agents arrived at the Dare County Courthouse. The Customs Officers, accompanied by Agent Hoggard, went to the airport and questioned defendant regarding customs and his travels. Defendant told the customs agents that he had tied down and refueled in Myrtle Beach, South Carolina. The agents telephoned the Myrtle Beach Airport to verify defendant's statement and discovered that defendant had only refueled at Myrtle Beach, and had not tied down as defendant had indicated. Defendant could not produce any tie-down records or any other verification of his travels. At 9:15 a.m., the Customs Officers informed defendant that they were detaining him because he had not satisfied them that he had not come from outside the United States.

At 10:02 a.m., a dog specially trained in the detection of controlled substances "alerted," signifying the presence of controlled substances in the aircraft. Agent Hoggard had initiated the call for the dog about 6:00 a.m. The handler and his dog were in Norfolk, Virginia. It was about 8:00 a.m. before the handler's dog and government car could be obtained. Traveling from Norfolk the dog and handler arrived at the airport about 10:00 a.m. The dog had proven reliable in the past in twelve other court cases. At 11:35 a.m. a search warrant was issued, and was executed at 11:45 a.m. As a result of the search, approximately 1,000 pounds of marijuana was found on the aircraft.

Between 7:35 a.m., the time Agent Hoggard told defendant the airplane was being detained, and about 11:45 a.m. when the search warrant was served, the defendant left the airplane, went into the base operations office, drank coffee, went to an outside pay telephone booth and made phone calls. His personal movements were not physically restricted until the search warrant was served. However, the Customs Officer did tell him verbally that he was being detained at about 9:15 a.m.

A simplified timetable is now given in order to bring the major events into focus:

4:00 a.m.—Approximate time airplane lands.

4:15 a.m.—Officers first make contact with defendant; defendant to wait until fuel dock opened.

5:00 a.m.—Agent Hoggard gets information Robert Jason Darack was a suspect in a 1981 aircraft cocaine smuggling in Florida and then believed armed and dangerous.

7:02 a.m.—Defendant starts engine.

7:35 a.m.—Agent Hoggard detains airplane and said he would attempt to get a search warrant.

9:00 a.m.—U.S. Customs Officers arrive while Hoggard at courthouse.

9:15 a.m.—Customs Officers detain defendant's person, though not arrested.

10:02 a.m.—Dog alerts to controlled substance on airplane.

11:35 a.m.—Search Warrant issued.

11:45 a.m.—Search Warrant executed and marijuana found.

We now review and balance the competing interests for a limited seizure of the person and a limited seizure of personal property "to determine the reasonableness of the type of seizure involved within the meaning of 'the Fourth Amendment's general proscription against unreasonable searches and seizures.' " *United States v. Place*, --- U.S. ---, ---, 103 S.Ct. 2637, 2642, 77 L.Ed. 2d 110, 118 (1983), *quoting Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed. 2d 889, 905 (1968). In considering Fourth

Amendment constitutional issues we observe that a copious quantity of cases exists. For the law applicable to the present case, we feel that the one citation to *Place* suffices to provide an avenue to locate other citations to the basic search and seizure holdings, and upon which the review for reasonableness emanates.

The *Place* decision answers "yes" to the issue that law enforcement officers can temporarily detain personal property "for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the [personal property] contains narcotics . . . [and that] the Fourth Amendment does not prohibit such a detention." *United States v. Place, supra,* at ---, 103 S.Ct. at 2639, 77 L.Ed. 2d at 114-15.

Under the totality of the circumstances in the case before us we apply the principles of *Terry v. Ohio, supra,* as did *Place, supra,* at ---, 103 S.Ct. at 2641-42, 77 L.Ed. 2d at 117, and hold that these cases permit "warrantless seizures of personal [property] from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation . . . [and] permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the [personal property] contains contraband or evidence of a crime." *Place* formally recognizes an exception to the standard probable cause requirements for a limited seizure of both the person and property, and in context, examines and tests whether the competing law enforcement interests are substantial.

Here, the type of stop and subsequent detention of defendant Darack were "substantially less intrusive of a person's liberty interests than a formal arrest." *Place, supra,* at ---, 103 S.Ct. at 2643, 77 L.Ed. 2d at 119. In the light most favorable to defendant under both the State and defendant's evidence, the defendant had not intended to leave until he could refuel his airplane. This could not be done until the fuel pumps opened and the attendant arrived at 8:00 a.m. In fact, the defendant did refuel at about 8:00 a.m. Both before and after 9:15 a.m., the first time any officer told defendant he was himself being detained, he was permitted freedom of movement about the airport where he used the outside pay telephone without restraint. We hold that the detention of Darack from 9:15 to 10:02 when the dog alerted to the law enforcement officers the presence of controlled substances by the

sniff test was reasonable. After 10:02 a.m. the total circumstances shifted to the rank of probable cause to detain for the subsequent search of the airplane.

There was no seizure of the airplane at 4:15 a.m. The pilot, the defendant, on his own volition, chose to remain with the plane until the fuel pumps opened at 8:00 a.m. There was a detention of the airplane at 7:02 a.m. when the engines were started, even though the ensuing conversations between officers and the defendant did not result in an announced detention of the plane by Agent Hoggard until 7:35 a.m. The detention from 7:02 a.m. to 10:02 a.m. when the snift test of the dog indicated the presence of a controlled substance was not unreasonable under the law of *Place* and *Terry.* After 10:02 a.m. there was probable cause to continue to hold the airplane for the subsequent search by search warrant.

At all times the officers were pursuing a legitimate limited course of investigation. Intertwined with their suspicion of the presence of controlled substances was their suspicion that the aircraft had been stolen. The basis of the reasonable articulable suspicion, premised on objective facts that the airplane contained controlled substances or was evidence of a crime, include these facts and circumstances: the landing of the plane in an uncontrolled airport in the predawn hours; the proximity of the airport to the open ocean; the defendant's evasive or uncertain answers regarding the registration of the aircraft; the absence of any severe weather conditions which would have forced defendant to land; the taxiing around the airport for some 10 minutes before shutting off his engines; the pilot's appearance of being lost; the covering on the airplane's rear windows; the appearance of the airplane being loaded with cargo up to the pilot's seat; the pilot's answer that it contained only his personal effects and baggage and nothing else of value; the pilot's path of travel from somewhere in the South Atlantic States by way of a stop at Myrtle Beach, South Carolina, to the northern part of the United States; the defendant's flight pattern was consistent with the usual pattern of aircraft carrying illegal drugs; the information from the U.S. Customs Office that defendant was a suspect in cocaine smuggling in Florida in October 1981 [the date of the events of this present case is 22 February 1982, approximately four months time span] and was then believed armed and dangerous;

the use of the airplane by Darack was not readily traceable as to either actual ownership or name of the individual who put defendant in possession; the pilot only having purchased fuel at Myrtle Beach and not having tied down there as he had said; and the trained opinion of Agent Hoggard that the defendant and airplane fitted a smuggling profile. The dog, "King," subsequently added an additional observable fact by his alerting to the presence of a controlled substance in the snift test at the airplane. The detention, therefore, whether it be of person or property, and regardless of the hour, was not unreasonable.

We conclude that the trial court's findings of fact manifestly support the conclusions of law, and that none of the defendant's constitutional rights were violated. The general motion to suppress, even after an extended evidentiary hearing in which all facets of the events were developed, was properly denied.

Affirmed.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. ROLAND PATRICK COBBINS

No. 8321SC708

(Filed 21 February 1984)

1. **Criminal Law § 77.1— conversation competent as admission by defendant**

In a prosecution for hit and run in which defendant allegedly attempted to run over a State's witness and struck the witness's girl friend, a conversation between defendant and the witness wherein the witness accused defendant of breaking into his girl friend's apartment and defendant threatened to kill the witness was competent as an admission by defendant and was relevant as tending to show his motive for the hit and run.

2. **Criminal Law §§ 69, 77.1— telephone conversations—proper foundation—competency as admissions by defendant**

A proper foundation was laid for the admission of defendant's telephone conversations with two State's witnesses where the witnesses testified that they were familiar with and recognized the voices of their respective callers, and the conversations were competent as admissions by defendant and were relevant to explain defendant's later actions against the witnesses.

3. Criminal Law § 43— diagram of crime scene

A diagram of the crime scene was properly admitted to illustrate the testimony of a witness.

4. Criminal Law § 42.2— pistol barrel—sufficiency of identification

A witness's teatimony that during the evening of the crime, he picked up a barrel of an old gun and pointed it at defendant and defendant's brother in an attempt to scare them and that a State's exhibit was the pistol barrel in question constituted sufficient identification of the pistol barrel for its admission into evidence without showing of a chain of custody.

5. Criminal Law § 50— testimony not invasion of province of jury

A witness's testimony that defendant stopped hitting him with a bat when he pulled out a pistol barrel because "I guess he figured that it was a gun" involved a preliminary fact and did not invade the province of the jury.

6. Criminal Law § 73.2— testimony not hearsay

Testimony that defendant informed his brother that a pistol barrel pulled out by the witness was not a gun was not inadmissible hearsay since it was not offered to prove the truth of the matter asserted.

7. Criminal Law § 81— use of report to refresh memory—best evidence rule inapplicable

The best evidence rule did not apply to an officer's use of her investigation report to refresh her recollection.

8. Criminal Law § 77.2— exclusion of self-serving declaration

The trial court did not err in sustaining the State's objection to cross-examination of an officer as to whether defendant had told her what happened during the evening in question since it appears that the excluded testimony would have been a self-serving declaration at a time when defendant had not yet testified, and since the excluded testimony was not placed in the record.

9. Criminal Law § 131.1— hit and run driving—sufficiency of evidence

The State produced plenary evidence supporting the inference that defendant knew he had hit and caused injury to another person so as to support conviction of defendant for failing to stop immediately at the scene when defendant was the driver of a vehicle involved in an accident or collision which resulted in injury to another. G.S. 20-166(a).

10. Criminal Law § 86.2— impeachment of defendant and witness—general question about prior convictions

The trial court did not err in permitting the prosecutor to cross-examine defendant and his brother by asking a general question as to what they had been tried and convicted of in a court of law without restricting the questions to specific crimes and dates.

11. Criminal Law § 86.3— defendant's prior convictions—sifting the witness

When defendant testified on cross-examination about several prior convictions and then stated that he couldn't say what else he had been convicted of

because it had been a while, the prosecutor's question as to whether defendant had so many that he couldn't remember constituted a proper "sifting" of the witness by further cross-examination.

12. Criminal Law § 86.5— impeachment of defendant—threats to witnesses

The prosecutor was properly permitted to cross-examine defendant for impeachment purposes concerning threatening remarks defendant had made to two of the State's witnesses.

APPEAL by defendant from *Mills, Judge.* Judgment entered 17 March 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 18 January 1984.

Defendant was convicted, pursuant to G.S. 20-166, for failing to stop immediately at the scene when he was the driver of a vehicle involved in an accident or collision which resulted in injury to another.

The State's evidence tended to show:

At around 6:30 p.m. on 19 November 1982, defendant and State's witness, Malcolm Warren, quarreled after Warren accused defendant of breaking into his girlfriend's apartment. Defendant threatened Warren, telling him he would kill him. Shortly thereafter, Warren received a telephone call at home from defendant, in which defendant again threatened to kill him.

At around 7:00 p.m. on 19 November 1982, defendant and his brother, Reginald, drove to a convenience store where Angela Grimes, Warren's girlfriend, worked. Defendant told Ms. Grimes that he and his brother planned to beat up Warren and asked her if she knew where he was. Defendant grabbed Ms. Grimes by the neck, pushed her to the floor, and knocked a crockpot of chili and a stand of confectioneries to the floor. Ms. Grimes telephoned Warren, told him what had happened, and asked him to come to the store.

Warren arrived at the store at around 8:30 p.m. Soon thereafter, defendant and Reginald came to the store. They chased Warren out of the store, caught him, and defendant began beating him with a bat. Warren tried to scare his attackers by pointing a pistol barrel at them. When the brothers realized, however, that Warren did not have a gun, they continued their attack.

After some time, a group of people at a Dunkin Donuts across the street from the store's parking lot became aware of

the fight and began yelling to break it up. Defendant and Reginald ran to their car. Ms. Grimes ran out of the store to find out if Warren, doubled up in the parking lot, was all right.

From his position, Warren saw defendant drive away with his brother in the passenger seat. Defendant then turned around, and with the car lights off, drove toward Ms. Grimes and Warren at a high rate of speed. Warren grabbed Ms. Grimes, pulled her out of the way, but she was hit by the car in her leg. The parking lot was well lit and nothing therein could have blocked a driver's view. A witness, standing fifty to seventy-five yards away, saw and heard the collision. Afterwards, defendant drove away without stopping.

Defendant's evidence tended to show: On 19 November 1982, defendant and Reginald drove to the convenience store where Ms. Grimes worked, in order to get gas. Reginald went into the store and began fighting with Warren. Warren pulled out a gun, but dropped it during the fight. Outside the store, Warren pulled a knife on Reginald. Defendant snatched the knife away and threw it to the ground. Defendant and his brother then ran to their car and defendant drove straight away.

Attorney General Edmisten, by Lucien Capone, III, Assistant Attorney General, for the State.

Alice E. Patterson, for the defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant first contends that the trial court erred by admitting testimony, over defendant's objection, about a conversation between defendant and Warren. Specifically, defendant contends that the conversation wherein Warren accused him of breaking into Ms. Grimes' apartment was inadmissible hearsay, irrelevant, and prejudicial. We find no merit in defendant's contention.

Defendant's statements during his conversation with Warren were admissible against him as admissions. *See* 2 Brandis on North Carolina Evidence § 167 (1982). Defendant's statements were, furthermore, relevant, tending to show his motive in the hit-and-run. *See State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977).

[2] Defendant next contends that the trial court erred by admitting testimony, over defendant's objections, regarding alleged telephone calls made by defendant and defendant's brother in that no proper foundation was laid and the substance of such telephone conversations was hearsay and irrelevant. Defendant's contention has no merit.

Specifically, defendant objects to testimony relating to three telephone calls: Warren testified about two calls he had received, one from defendant and one from defendant's brother. Ms. Grimes testified about a call she had received from defendant. Both Warren and Grimes testified that they were familiar with and recognized the voices of their respective callers. Recognition of a caller's voice is sufficient to establish identity and lay the proper foundation for admitting a subsequent conversation. *Manufacturing Co. v. Bray*, 193 N.C. 350, 137 S.E. 151 (1927); *see* 1 Brandis on North Carolina Evidence, § 96 (1982). Defendant's telephone conversations were, furthermore, admissible as admissions and were relevant in helping to explain defendant's later actions.

Upon defendant's request, the trial court instructed the jury to disregard the substance of the telephone conversation Warren had with defendant's brother. This was a proper instruction; defendant's brother was not a party to the action and his statements, therefore, constituted hearsay.

Defendant also objects to testimony by Police Officer Norris regarding her interview with Warren, wherein Warren told her of his telephone conversation with defendant. The record shows that upon defendant's objection, the trial judge instructed the jury that the officer's testimony would be "allowed in for the purpose of corroboration of other witnesses," but that if it did not corroborate what had already been said, to "disregard it." The instruction was correct; the officer's testimony was properly admitted for the limited purpose of corroboration.

[3] Defendant next contends that the trial court erred by admitting into evidence a diagram of the crime scene. The record shows that the diagram was introduced to help illustrate Warren's testimony and that Warren testified to the diagram's accuracy. Defendant's contention, therefore, has no merit. *See Tankard v. R. R.*, 117 N.C. 558, 23 S.E. 46 (1895).

[4] Defendant next contends that the trial court erred by admitting into evidence State's Exhibit Two, a pistol barrel, before it had been sufficiently identified. There are no simple standards for determining whether "real evidence" sought to be admitted has been sufficiently identified as being the object involved in the incident in question. The trial judge has discretion to determine the standard of certainty necessary to show that the object offered is the same as the object involved in the incident and that the object has remained unchanged prior to trial. *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977). Warren testified that during the evening of the crime, he picked up a barrel of an old gun and pointed it at defendant and defendant's brother in an attempt to scare them. He identified State's Exhibit Two as the pistol barrel in question. Warren's testimony was sufficient identification of the pistol barrel to permit it into evidence without showing a chain of custody. *See State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). We find no abuse of discretion on the part of the trial judge.

[5] Warren testified, during direct examination, that defendant had been beating him with a bat when Warren pulled out the pistol barrel and told defendant to "knock it out or I'll kill you." At that point, defendant stopped swinging the bat "because," Warren testified, "I guess he figured that it was a gun." Defendant argues that Warren's testimony as to what the defendant "figured" was Warren's opinion, and thus, inadmissible. Generally, a lay witness is not allowed to give his opinion on the very question which the jury will decide. *Wood v. Insurance Co.*, 243 N.C. 158, 90 S.E. 2d 310 (1955). Warren's testimony, which involved a preliminary fact, did not invade the jury province. Defendant was not prejudiced by and we find no error in Warren's description of what happened prior to the commission of the crime for which defendant was charged.

[6] Warren testified that defendant's brother realized that the pistol barrel was not a gun and so informed his brother. Defendant argues that Warren's testimony as to what Reginald told his brother was inadmissible hearsay. We disagree. Warren's testimony was not "offered to prove the truth of the matter asserted," and thus, was not hearsay. *See State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973); 1 Brandis on North Carolina Evidence § 138 (1982). Similarly, Ms. Grimes' testimony that Reginald said "that's

right," while Reginald and defendant were in the convenience store was not hearsay, and thus, admissible.

[7] Defendant next contends that it was error, under the best evidence rule to allow Officer Norris to refresh her recollection by using a copy of her investigation report. Defendant's contention has no merit. The best evidence rule applies only where the contents or terms of a document are in question; the rule does not apply when a document is used merely to trigger a witness' memory and is not even offered into evidence. *See State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); 2 Brandis on North Carolina Evidence § 191 (1982).

[8] During cross-examination, defense counsel asked Officer Norris if defendant had told her what had happened during the evening of 19 November. The trial judge sustained the State's objection to the question. Defendant contends that Officer Norris' testimony would have shown that Warren was the aggressor in the fight between Warren and defendant and that the exclusion of such testimony denied him of his right to cross-examination. Defendant's contention has no merit. First, it appears that the excluded testimony would have been a self-serving declaration at a time when defendant had not yet testified. As such, it was properly excluded. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976), *reconsideration denied*, 293 N.C. 259, 243 S.E. 2d 143 (1977). Furthermore, the answer that Officer Norris would have given, had she been allowed, was not placed in the record. We have no way to determine, therefore, whether such ruling was prejudicial. *Id.*

[9] Defendant contends that the trial court erred in denying his motions to dismiss, made both at the close of the State's evidence and at the close of all the evidence. In a prosecution under G.S. 20-166(a), the State must prove that the defendant knew (1) that he had been involved in an accident or collision and (2) that a person was killed or physically injured in the collision. The knowledge required may be actual or implied. *State v. Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981). Implied knowledge can be inferred from the circumstances of an accident. *Id.* The State produced plenary evidence supporting the inference that defendant knew he had hit and caused injury to Ms. Grimes. The trial court was correct in submitting the case to the jury.

[10] Defendant next contends that the trial court erred by permitting the district attorney to cross-examine defendant and his brother about their prior convictions, without restricting his questions to specific crimes and dates. We find no merit in defendant's contention. The district attorney asked defendant and his brother, "What have you been tried and convicted of in a court of law?" Although such questions were broad in scope, there is no indication that they were asked in bad faith. A criminal defendant and any other witness who testified may be cross-examined regarding prior criminal convictions. *State v. Murray*, 21 N.C. App. 573, 205 S.E. 2d 587 (1974).

[11] When the district attorney was cross-examining defendant about his prior convictions, defendant testified as to several offenses before the following exchange occurred:

> [Defendant]: I can't really say what else because I don't really know. It's been a while.
>
> [Mr. Cole]: So many you can't remember, is that a fair statement?

Defendant argues that the district attorney's question was improperly admitted over his objection and prejudiced the defendant. We find no error. Although the State is bound by a defendant's answer when he denies prior convictions, defendant here did not deny his prior convictions. It is an acceptable practice, as exemplified here, to press or "sift" a witness by further cross-examination. *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972).

[12] Defendant next contends that the trial court erred by permitting the district attorney to question defendant and Officer Norris about threatening remarks defendant made to two of the State's witnesses. We find no error. When a criminal defendant elects to testify in his own behalf, he is subject to cross-examination for purposes of impeachment regarding prior criminal acts or misconduct for which there is no conviction. *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980).

The trial court procedures were entirely proper; contrary to defendant's contentions, therefore, the judgment and sentence defendant received were also proper.

No error.

Judges WEBB and JOHNSON concur.

ETHEL K. CLARK, EMPLOYEE v. AMERICAN & EFIRD MILLS, EMPLOYER AND AETNA LIFE AND CASUALTY INSURANCE COMPANY, CARRIER

No. 8210IC1283

(Filed 21 February 1984)

Master and Servant § 68— workers' compensation—occupational disease—insufficient finding on "significant contribution" to disease

In a workers' compensation case in which plaintiff established the existence of COPD with chronic bronchitis as the only element thereof, in order to conclude that plaintiff did not have an occupational disease within the meaning of G.S. 97-53(13), consistent with *Rutledge v. Tultex*, 308 N.C. 85 (1983), the Commission would have had to make findings, supported by competent record evidence, that plaintiff's exposure to cotton dust was neither a significant contribution to nor a significant causal factor in the development of her disease.

Judge WEBB dissenting.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission. Opinion and award filed 9 August 1982. Heard in the Court of Appeals 26 October 1983.

On 8 June 1978, plaintiff filed a claim for workers' compensation benefits. Plaintiff alleged that she had worked in defendant's textile mill in Albemarle, North Carolina for thirty-three years. Plaintiff further alleged that her exposure to cotton dust in the mill during that time had resulted in an occupational disease that led to her early retirement at age sixty-two. Plaintiff was referred by the Industrial Commission to a pulmonary specialist, Dr. Kelling, who diagnosed plaintiff as having byssinosis and chronic bronchitis but could not say that plaintiff was disabled. Defendant denied plaintiff's claim for benefits. At defendant's request, plaintiff was examined by a Dr. Harris, who diagnosed her as having chronic respiratory problems, specifically chronic bronchitis, that were not related to cotton dust exposure.

The matter was heard before a deputy commissioner for the Industrial Commission on 7 March 1979 and on 27 November 1979.

The deposition of Dr. Harris was taken on 29 April 1980 and made part of the evidence. On 27 January 1982, an opinion and award was entered which contained the following pertinent findings of fact.

1. Claimant was born on 26 February 1914. She has an eighth grade education. She went to work for defendant employer during 1943 in the winding room.

2. Claimant's initial job involved running threads off bobbins onto cones. She retired on 26 February 1976. During this period of employment claimant worked in the winding room. It was adjacent to the spinning room. The machinery she operated during this period of employment included winders, packers, twisters, auto-combers and warpers.

3. Defendant employer processed cotton. The winding room where claimant worked was quite dusty, especially while the machinery was being blown off. Copious amounts of lint accumulated on claimant during the workday.

4. Claimant noticed the onset of a severe cough during January 1969. The cough had been occurring to a lesser extent for approximately one year. She was hospitalized for treatment of the cough by Dr. Thomas F. Kelly during February 1969. She was suffering from acute tracheobronchitis. Claimant was unable to work for approximately six months following the February 1969 hospitalization.

5. Dr. Kelly provided treatment throughout the winter and spring of 1969 for claimant's pulmonary condition. Chest x-ray on 28 March 1969 was negative. Treatment was rendered during March 1969 for infection superimposed on the original cough.

6. Claimant has never smoked tobacco products.

7. Claimant retired when she reached age sixty-two because she could no longer work in the dust and lint. She is a reactor to many types of dust and lint.

8. Respirable material in the winding room where claimant worked aggravated her cough. The cotton dust did not, however, cause or aggravate her basic illness which is chronic bronchitis.

9. Claimant has good preservation of pulmonary function. Her only restrictions are those of a healthy pulmonary environment. She should not be exposed to dust, smoke, fog, fumes or any other respirable pulmonary irritant.

10. Claimant experienced long-term exposure from 1943 through 26 February 1976 to causes and conditions characteristic of and peculiar to the cotton textile industry known to result in chronic obstructive pulmonary disease. The exposure did not, however, cause or materially aggravate her underlying pulmonary disease, which is chronic bronchitis.

Based on the above findings, the deputy commissioner made the following conclusion of law:

Claimant's pulmonary disease, chronic bronchitis, was not caused or materially aggravated by long-term exposure while in defendant's employ to causes and conditions characteristic of and peculiar to the cotton textile industry known to result in chronic obstructive pulmonary disease.

Plaintiff's claim for workers' compensation was denied. Plaintiff appealed this denial to the Full Industrial Commission, which affirmed the Opinion and Award of the deputy commissioner on 9 August 1982. Plaintiff appealed from the order of the Full Commission.

Hassell, Hudson and Lore, by Charles R. Hassell, Jr., for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner and Kincheloe, by Hatcher Kincheloe, for defendant appellees.

EAGLES, Judge.

Our review of the order of the Industrial Commission is limited to determining (1) whether the Commission's findings of fact are supported by any competent evidence, and (2) whether those findings justify the legal conclusions and decision of the Commission. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The question presented is whether the findings of fact regarding plaintiff's chronic bronchitis justify the Commission's conclusion that she did not have an occupational disease within the meaning of the law. G.S. 97-53 provides, in part, as follows:

> The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
>
> . . . .
>
> (13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

Regarding this provision, our Supreme Court, in *Rutledge v. Tultex*, 308 N.C. 85, 301 S.E. 2d 359 (1983), recently held:

> [C]hronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Id. at 101, 301 S.E. 2d at 369-70.

According to *Rutledge*, chronic obstructive lung disease or chronic obstructive pulmonary disease (COPD) is a condition composed of several elements or components. *Id.* at 94-95, 301 S.E. 2d 365-66, *citing* Bouhuys, Schoenberg, Beck and Schilling, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, Service Volume Five of Traumatic Medicine and Surgery for the Attorney 607, reprinted from *Lung-An International Journal on Lungs, Airways, and Breathing*, 154(3): 167-86 (1977). In the present case, the Industrial Commission found as a fact that plaintiff had chronic bronchitis which is, by definition, a chronic lung disease. By the effects that it has on a person, chronic bronchitis, which is not necessarily a work-related disease, is indistinguishable from byssinosis, which is peculiarly if not exclusively related to the work environment in textile mills. *Id.*

We understand *Rutledge* to say that a claimant under the workers' compensation law is not required to establish work-

related byssinosis as a causal element of his or her COPD in order to prove the existence of an occupational disease within the meaning of G.S. 97-53(13). Rather, he or she needs only to establish the existence of COPD and to establish that exposure to cotton dust in the work environment "significantly contributed to, or was a significant causal factor in" the development of the disease. *Rutledge v. Tultex, supra* at 101, 301 S.E. 2d at 369-70.

In the present case, plaintiff has established the existence of COPD with chronic bronchitis as the only element thereof. In order to conclude that plaintiff did not have an occupational disease within the meaning of G.S. 97-53(13) consistent with *Rutledge v. Tultex*, the Commission would have had to make findings, supported by competent record evidence, that plaintiff's exposure to cotton dust was neither a significant contribution to nor a significant causal factor in the development of her disease.

In the recent case of *Swink v. Cone Mills*, 65 N.C. App. 397, 309 S.E. 2d 271 (1983), factually similar to the present case, this Court relied on the *Rutledge* opinion in remanding the cause to the Industrial Commission for findings on the question of "significant contribution." That opinion superseded an earlier opinion in the same case affirming the order of the Industrial Commission denying workers' compensation to the claimant. *Swink v. Cone Mills*, 61 N.C. App. 475, 300 S.E. 2d 848, *superseded and withdrawn*, 65 N.C. App. 397, 309 S.E. 2d 271 (1983). In its opinion and rehearing, the court in *Swink* noted that "the Supreme Court [in *Rutledge*] outlined additional factors to be considered by the Industrial Commission in determining work-relatedness of a particular illness." *Id.*, 309 S.E. 2d at 272. The factors cited were: "(1) [T]he extent of the worker's exposure to cotton dust . . .; (2) the extent of other non-work-related, but contributory exposures and components . . .; and (3) the manner in which the disease developed with reference to claimant's work history." *Id.*

The findings of fact made by the Commission in this case do not adequately address the factors outlined in the *Rutledge* and *Swink* opinions. Both *supra*. Specifically, (1) there are no findings on the question of "significant contribution;" (2) other than noting that claimant was a non-smoker, there is no indication that the Commission considered the extent of other non-work-related but contributory exposures and components; and (3) the findings

regarding the manner in which claimant's disease developed are not sufficiently related to her work history. If the necessary findings cannot be fairly made from the record evidence, an additional evidentiary proceeding would be required.

We reverse the order of the Industrial Commission and remand the cause for disposition in accordance with this opinion.

Reversed and remanded.

Judge PHILLIPS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not believe *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983) or *Swink v. Cone Mills*, 65 N.C. App. 397, 309 S.E. 2d 271 (1983) require that this case be remanded. In *Rutledge* the Industrial Commission found that exposure at the claimant's last place of employment did not cause or significantly contribute to the claimant's chronic obstructive lung disease and denied coverage. Our Supreme Court held that this did not determine the case and ordered a remand to determine whether the claimant's exposure to cotton dust while working at the defendant's plant as well as others had significantly contributed to, or had been a significant causative factor in her chronic obstructive lung disease.

In this case the Commission has found as facts that "The cotton dust did not, however, cause or aggravate her basic illness which is chronic bronchitis," and "The exposure did not, however, cause or materially aggravate her underlying pulmonary disease, which is chronic bronchitis." I believe the findings of fact are supported by the evidence and they support the Commission's conclusion that the claimant's illness is not compensable.

STATE OF NORTH CAROLINA v. ROY LEE CAUTHEN

No. 8321SC563

(Filed 21 February 1984)

1. **Constitutional Law § 31— indigent defendant—denial of motion for fees for second expert**

Where the State had supplied an indigent defendant with one expert psychiatric witness who testified favorably in his behalf with respect to his insanity defense, the trial court did not abuse its discretion in denying defendant's motion for fees for a second expert psychiatric witness to examine defendant and testify at trial. G.S. 7A-450(b); G.S. 7A-454.

2. **Criminal Law §§ 5, 102.5— question concerning defendant's qualifications for involuntary commitment**

The prosecutor's question to a psychiatrist as to whether he had stated in his recommendations that defendant wouldn't meet the qualifications for involuntary commitment did not improperly convey to the jury that defendant would be released if found insane, especially in view of the witness's response that he believed defendant would meet the criteria for involuntary commitment.

3. **Criminal Law § 112.6— instructions—burden of proof of insanity**

Any confusion about the burden of proof on the issue of insanity caused by the court's instruction that "if you are in doubt as to the insanity of the defendant, then the defendant is presumed to be sane and you would find the defendant guilty of the charges, if the state has satisfied you as to the other issues" was cured by other instructions making it clear that the elements of the offense had to be proved "beyond a reasonable doubt" and that defendant was required to prove the issue of insanity only to the satisfaction of the jury.

4. **Criminal Law § 163— assignment of error to instructions—necessity for objection at trial**

Instructions concerning the burden of proof on the issue of insanity were not "plain error" and could not be assigned as error on appeal where defendant did not object thereto at the trial. App. R. 10(b)(2).

5. **Criminal Law § 114.1— disparity of time in stating evidence for the parties—no error**

The trial judge did not give more weight to the State's evidence than to defendant's evidence where the State presented more evidence than defendant, thus justifying a longer summary of the State's evidence, and where the judge gave accurate instructions on the elements of the crime and the insanity defense.

6. **Criminal Law § 5.1— insanity defense—uncontradicted expert testimony—jury question**

The fact that an expert's testimony that defendant did not know the difference between right and wrong at the time of the crime was uncontradicted

did not entitle defendant to have a guilty verdict set aside as being against the greater weight of the evidence, since an expert's diagnosis of mental illness is not conclusive, and the question of insanity is for the jury. G.S. 15A-1414(b)(2).

7. **Criminal Law § 138— aggravating factors—dangerousness to self and others**

While the trial court properly found as an aggravating factor in sentencing that defendant was dangerous to others, a finding that he was dangerous to himself bore no relation to the statutory purposes of sentencing or the length of sentence and was improperly considered as an aggravating factor.

8. **Criminal Law § 138— assault on adult—young age of victims—improper aggravating factor**

In sentencing defendant for assault on an adult and two children, the trial court incorrectly found as an aggravating factor in imposing the sentence for assault on the adult that "the victims were young" since the age of the victims was irrelevant to the sentence to be imposed for the assault on the adult.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 25 January 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 January 1984.

On 12 July 1982, defendant was arrested and charged with three counts of assault with a deadly weapon inflicting serious injury. Defendant was indigent and counsel was appointed for his defense. Prior to trial, defendant gave timely notice of his intention to rely on the insanity defense and to introduce expert medical testimony relating to that defense.

At trial, the State presented evidence that on 12 July 1982, defendant walked into a day care center near his home, pulled out a pocketknife, stabbed one child in the chest, another in the abdomen, and cut a teacher on the arm. The defendant said nothing, but chanted "Dog food, dog food," while he was in the day care center.

Defendant's evidence showed that, after his arrest, defendant was sent to Dorothea Dix Hospital for observation and treatment. Dr. Bob Rollins diagnosed defendant as having paranoid schizophrenia, a mental illness from which defendant had suffered for many years. Dr. Rollins, an expert in forensic psychiatry, testified that it was his opinion that, at the time of the crime, defendant did not know the nature and quality of his act and did not know the difference between right and wrong.

A jury found defendant guilty on all three counts of assault with a deadly weapon inflicting serious injury. Defendant re-

ceived the maximum sentence of ten years for each count, the sentence in the second case to begin at the expiration of the sentence in the first case. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Donald W. Grimes, for the State.

Hebert & Miller, by Carol S. Hebert, for defendant-appellant.

EAGLES, Judge.

[1] Defendant first assigns as error the trial judge's denial of defendant's motion for fees for a second expert medical witness to examine defendant and testify at trial. We find no error in the trial judge's ruling.

G.S. 7A-450(b) provides that: "Whenever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." Authorization for fees for expert witnesses is within the sound discretion of the trial judge. G.S. 7A-454; *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). The United States Supreme Court has held that there is no constitutional mandate on the State to appoint an expert witness for an indigent defendant. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953). Our Supreme Court found no violation of due process or equal protection in a trial court's refusal to appoint an additional expert psychiatric witness when the State had already provided two experts. *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976); see also, *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980).

Defendant contends that an indigent defendant has, pursuant to his right to effective assistance of counsel, the same right to a second medical expert as a defendant who can afford to hire one. We do not agree. A second expert opinion is necessary only when "substantial prejudice" will result from the denial of fees. *State v. Parton*, 303 N.C. 55, 66, 277 S.E. 2d 410, 418 (1981). Here, there was no "substantial prejudice" because the State had already supplied defendant with one medical expert who had testified favorably in his behalf. A defendant's constitutional right to effective assistance of counsel does not require that the State "furnish

a defendant with a particular service simply because the service might be of some benefit to his defense." *Parton, supra*; see also, Note, *An Indigent's Constitutional Right to a State-Paid Expert*, 16 Wake Forest L. Rev. 1031 (1980). We hold that there was no abuse of discretion when the trial judge here denied defendant's request for fees for a second medical expert. The State had already supplied defendant with one expert and there was no showing of substantial prejudice resulting from the denial of fees.

[2] Defendant's second assignment of error concerns Dr. Rollins' testimony that defendant did not meet the qualifications for involuntary commitment. Defendant contends that the trial judge admitted this testimony in violation of an order in limine prohibiting the State from conveying to the jury that defendant would not be incarcerated if found insane. We do not agree.

The prosecutor's question to Dr. Rollins was: "In your recommendations you said he wouldn't meet the qualifications for an involuntary commitment, didn't you?" We find that this question was a proper means of testing Dr. Rollins' expert opinion. This did not convey to the jury that defendant would be released if found insane, especially in view of Dr. Rollins' response that "I believe he would meet the criteria which are that you be mentally ill and dangerous to yourself or others." Defendant relies on *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976), for the proposition that any mention of a defendant's qualification for involuntary commitment is reversible error. This reliance is inappropriate because the reversible error in *Hammonds* occurred after a district attorney's remark that defendant would be back in the community if found not guilty by reason of insanity. There, the trial judge denied defendant's request to instruct the jury on the consequences of a verdict of not guilty by reason of insanity. Here, the trial judge instructed the jury on the commitment proceedings that would take place if the jury found defendant not guilty by reason of insanity. Therefore, we hold that the question as to whether defendant met the qualifications for involuntary commitment did not, under this set of facts, convey to the jury that defendant would be released if found not guilty by reason of insanity.

[3] Defendant's third assignment of error is that the trial judge incorrectly instructed the jury as to the burden of proof that

defendant must meet to prove his defense of insanity. We find no error.

[4] The trial judge originally instructed the jury that "unlike the State which must prove all of their elements of the crime beyond a reasonable doubt, the defendant need only prove this issue of insanity to your satisfaction." This was a correct statement of the burden of proving the affirmative defense of insanity. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969). Thereafter, the trial court stated, "[I]f you are in doubt as to the insanity of the defendant, then the defendant is presumed to be sane and you would find the defendant guilty of the charges, if the state has satisfied you as to the other issues." This statement did not refer to "proof beyond a reasonable doubt." If this statement caused any confusion, the trial judge resolved that confusion by (1) instructing the jury that the elements of the offense had to be proved "beyond a reasonable doubt," and (2) phrasing the second issue: "Do you find the defendant not guilty because you are satisfied that he was insane?" We find that these subsequent instructions cured any error regarding defendant's burden of proof on the insanity issue. In any event, defendant did not object to the jury instructions at trial. Because he did not and we find no "plain error" in the instructions, defendant may not assign these instructions as error on appeal. N.C. R. App. P. 10(b)(2); *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[5] Defendant's fourth assignment of error is that the trial judge incorrectly gave more weight to the State's evidence than to defendant's evidence. We find no merit in this contention, because (1) the State presented more evidence than defendant, thus justifying a longer summary of the State's evidence, *State v. Murray*, 21 N.C. App. 573, 205 S.E. 2d 587 (1974); (2) the trial judge gave fair and accurate instructions on the elements of the crime and the insanity defense; and (3) defendant did not object at trial to the trial judge's summary of the evidence, thereby waiving this objection on appeal. N.C. R. App. P. 10(b)(2).

[6] Defendant's fifth assignment of error is that the trial judge incorrectly denied defendant's motion to set aside the verdict as against the weight of the evidence because Dr. Rollins' testimony as to defendant's mental condition was not contradicted. A ruling on a G.S. 15A-1414(b)(2) motion is within the discretion of the trial

judge, and refusal to grant such a motion is not error absent a showing of abuse of that discretion. *State v. Batts*, 303 N.C. 155, 277 S.E. 2d 385 (1981). An expert's diagnosis of mental illness is not conclusive, and the question of insanity is one for the jury. *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631 (1980). We find here no abuse of the trial judge's discretion in denying defendant's motion to set aside the verdict.

[7] Finally, defendant asserts that there was error in the sentencing phase of his trial. We find error in the aggravating factors found in all three cases. In each case, the trial judge improperly found, as an additional finding in aggravation, that "Dr. Bob Rollins testified that because of the mental condition of the defendant he was dangerous to himself and others. He also testified that the defendant should receive his medication under supervision." Here, as in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), there was no error in finding as an aggravating factor, that defendant was dangerous to others. "However, defendant's dangerousness to himself, while a valid consideration in determining whether he should be confined, bears no relation to the statutory purposes of sentencing or the length of his sentence. G.S. § 15A-1340.1(a)." *Id.* at 604, 300 S.E. 2d at 702. As to that portion of the findings in aggravation, we hold that there was error.

[8] An additional error in sentencing was present in 82CR28230, where the victim was an adult teacher at the day care center. The trial judge incorrectly found, as an aggravating factor, that "[t]he victims were young." The young age of the victims in 82CR28228 and 82CR28229 was irrelevant to the sentence to be imposed for defendant's assault on this adult, for "each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense." *Id.* at 598, 300 S.E. 2d at 698.

Because the trial judge erred in finding these aggravating factors and imposed a sentence beyond the presumptive term, we must remand the cases for new sentencing hearings. *State v. Ahearn, supra.*

No error in the trial; remand for resentencing.

Judges HEDRICK and BRASWELL concur.

BOBBY W. HOUSE v. MABLE LEE STOKES AND WIFE, LILLIE MAE STOKES

No. 839SC180

(Filed 21 February 1984)

Vendor and Purchaser § 3.1— contract to convey—sufficiency of description—latently ambiguous

In an action in which plaintiff sought specific performance of a contract to convey, the trial court properly entered judgment in favor of plaintiff where the contract was in writing and signed by all parties, and where the description in the contract to convey was latently ambiguous but was capable of being rendered certain by the survey to which it referred.

APPEAL by defendants from *Bailey, Judge.* Judgment entered 2 November 1982 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 18 January 1984.

The question in this case is whether an option contract, with an indefinite description of land, incorporated by reference a land survey and map, so as to render the description valid and the contract enforceable under the statute of frauds.

The facts, as found by the trial court, are, in essence:

On 20 October 1981, defendants, the owners of approximately thirteen acres of land in Cedar Rock Township, Franklin County, orally agreed with plaintiff to sell approximately eleven of the thirteen acres for $10,000. On 20 October, plaintiff gave defendants a check for $200.00 as a deposit on the land.

On 2 November 1981, plaintiff paid defendants an additional $800.00. Also on that date, the parties entered into and signed a written contract providing:

AGREEMENT

TO WHOM IT MAY CONCERN: November 2, 1981

I, Mable Lee Stokes, and Lillie Mae Stokes, received $200.00 option on October 20, 1981 on 11 acres of land, more or less, in Franklin County, N.C. from Bobby W. House.

$800.00 paid as additional option on November 2, 1981, making a total option of $1,000.00. Option is good till 45 days, thereafter, balance due on or before December 17, 1981 in the amount of $9,000.00 for a total purchase price of $10,000.00.

Sellers: Mable Lee Stokes and Lillie Mae Stokes agree to pay for deed and land surveys on two acres, more or less. These two acres include a house. These two acres, more or less, to be divided out of the 13 acres more or less, leaving 11 acres, more or less to buyer.

Buyer: Bobby W. House agree to pay for deed land surveys and maps to the 11 acres, more or less. It is further stated that the sellers, Mable Lee Stokes and Lillie Mae Stokes are to furnish a clean deed and to be free of all liens to the 11 acres, more or less.

It is further stated that the sellers, Mable Lee Stokes and Lillie Mae Stokes, have in writing to the buyer, Bobby W. House, will have the first option or refusal on said two acres of land, more or less, including house, if and when said land and house is sold, given away, or disposed of in any manner.

On 20 November 1981, a registered land surveyor, employed by plaintiff, surveyed the thirteen acre tract. The land survey showed and the parties agreed that plaintiff would purchase 11.32 acres and defendants would retain 1.58 acres. The 1.58 acre tract included a house in which defendant, Mable Stokes' parents lived.

Prior to 17 December, the expiration date of the option, plaintiff tendered payment of the $9,000.00 balance due. Defendants refused to execute and deliver a deed to plaintiff.

The trial court found that the contract between the parties was valid and that plaintiff, having performed his part of the bargain, was entitled to specific performance. The court ordered defendants to convey fee simple title to the 11.32 acres designated on the land survey upon plaintiff's payment of the $9,000.00 balance.

Davis, Sturges and Tomlinson, by Charles M. Davis, for the plaintiff appellee.

Frank W. Ballance, Jr., for defendant appellants.

VAUGHN, Chief Judge.

Defendants contend that the trial court erred in denying their motions for summary judgment and dismissal and in grant-

ing judgment for plaintiff since the contract between the parties was void under the statute of frauds, G.S. 22-2. We find no error.

Pursuant to G.S. 22-2, a contract to convey land is void unless the contract, or some memorandum or note thereof, is put in writing and signed by the party to be charged therewith. The writing must contain a description of the land to be conveyed, certain in itself, or capable of being rendered certain by reference to an external source referred to therein. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964).

There is no question that the contract in this case was in writing and signed by all the parties. The question is whether the contract was patently ambiguous, and, therefore, void under the statute of frauds. A description is patently ambiguous when it leaves the subject of the contract, the land, in a state of absolute uncertainty and refers to nothing extrinsic by which the land might be identified with certainty. Parol evidence is inadmissible and the contract in such case is void. *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E. 2d 908 (1983). The question of patent ambiguity is one of law for the court. *Kidd v. Early, supra.* Had the contract in this case contained no reference to an extrinsic document, we would agree with defendants that the contract was patently ambiguous. The contract provided that defendants, sellers, received payment from plaintiff, purchaser, as an option "on 11 acres of land, more or less, in Franklin County." Under this provision, the location of the land was undeterminable and nowhere within the contract itself was the land described more accurately. The contract, however, also provided that plaintiff "agree[s] to pay for deed land surveys and maps to the eleven acres, more or less." The contract, through this provision, incorporated by reference an external document by which identification of the land could be made certain. This internal reference rendered the contract latently, rather than patently ambiguous.

A description is latently ambiguous if it is insufficient, by itself, to identify the land, but refers to something external by which identification might be made. *Bradshaw v. McElroy, supra.* The reference must be to another document; that two documents refer to the same subject matter does not make them part of the same contract. *Fuller v. Southland Corp.*, 57 N.C. App. 1, 290 S.E.

2d 754, *review denied*, 306 N.C. 556, 294 S.E. 2d 223 (1982). The connection between documents must be clear and cannot be shown by extrinsic evidence. *Smith v. Joyce*, 214 N.C. 602, 200 S.E. 431 (1939).

It is not ground for objection that the survey was prepared subsequent to the execution of the contract. *Kidd v. Early, supra.* The facts in this case are not unlike those in the *Kidd* case, wherein, an option contract contained the following description of the land: "a certain tract or parcel of land located in Monroe Township, Guilford County, North Carolina, and described as follows: 200 acres more or less of the C. F. Early farm. To be determined by a new survey furnished by sellers." *Id.* at 353, 222 S.E. 2d at 400. The court found that this description was latently ambiguous, but that, had there been no reference to the survey, it would have been patently ambiguous. *Id.* The description of the land in the case *sub judice*, which referred only to eleven acres, more or less, in Franklin County, was ambiguous, but like the description in the *Kidd* case, was capable of being rendered certain by the survey to which it referred.

We are aware that the Restatement of Contracts and several other jurisdictions have adopted a more liberal interpretation regarding the proof necessary to show the connection between documents allegedly comprising a single contract. *See* Restatement (Second) Contracts § 132, comment a (1979); *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E. 2d 551 (1953); *Young v. Independent Publishing Co.*, 273 S.C. 107, 254 S.E. 2d 681 (1979); Williston on Contracts, §§ 581-584 (3d ed. 1961) (and cases cited therein). Under the more liberal interpretation, explicit incorporation by reference is unnecessary and extrinsic evidence may be used to show the connection between writings referring to the same transaction or subject matter. Our holding does not go this far. Since the contract in this case explicitly referred to the land survey plaintiff thereafter furnished, we need not rely on extrinsic evidence to show the connection.

Although, generally, extrinsic evidence is not allowed in this state to show the connection between two documents, once the connection is shown to exist, extrinsic evidence *is* admissible to explain or refute identification of the land therein described. *Bradshaw v. McElroy, supra.* The evidence in this case shows that

in 1981, defendants owned a thirteen acre tract of land in Franklin County. On or about 1 November 1981, defendants came to plaintiff's residence in Franklin County and asked plaintiff if he wanted to purchase said thirteen acre tract, which adjoined plaintiff's property. Plaintiff responded affirmatively. Defendant Mr. Stokes' parents, however, lived in a house on the tract, and defendant wanted to ensure that his parents could retain a life interest in the house and surrounding land. Plaintiff told defendants that he was interested in purchasing their land, but uninterested in purchasing the house and surrounding land. The parties, thereupon, agreed that plaintiff would purchase a tract of approximately eleven acres, more or less, to be divided out of the thirteen acre tract and that defendants would retain title to a tract of approximately two acres surrounding the house. On 2 November the parties executed a written option contract confirming their oral agreement. Pursuant to such contract, plaintiff hired a registered land surveyor, who surveyed the thirteen acre tract and divided it into a 11.32 acre parcel for plaintiff and a 1.58 acre parcel for defendant, such parcel to include the house. Defendant agreed with and approved of the survey results. Plaintiff's testimony was corroborated by Mr. Gene Bobbit, the registered land surveyor, who testified that he delivered the survey and maps to defendant, Mr. Stokes, who voiced approval.

Plaintiff also submitted into evidence an unsigned deed he had prepared in anticipation of the conveyance, describing the same parcel of land as that in the survey. Also submitted into evidence were two checks, one for $200 and one for $800, drawn by plaintiff and endorsed by defendants. On such checks, plaintiff had written the notation, "option on 11 acres of land," and defendant had endorsed one of the checks with the notation "45 day option." Defendant presented no evidence. The evidence in this case supports the conclusion that defendant intended to convey to plaintiff 11.32 acres of land in Franklin County, described in the incorporated survey.

> The presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate. . . . When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiation took

place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement.

Hurdle v. White, 34 N.C. App. 644, 649-650, 239 S.E. 2d 589, 593 (1977), *cert. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978), *quoting Lewis v. Murray*, 177 N.C. 17, 20-21, 97 S.E. 750, 752 (1919). The evidence adduced at trial removed the latent ambiguity in the description, thus, rendering the contract valid and enforceable.

There were plenary facts in the record to support the trial court order of specific performance. The statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made. *Manhattan Fuel Co., Inc. v. New England Petroleum*, 422 F. Supp. 797 (S.D.N.Y. 1976).

Affirmed.

Judges WEBB and JOHNSON concur.

ELLIS JONES, INC., FORMERLY D/B/A ELLIS JONES, JR., TILE CONTRACTOR, INC. v. WESTERN WATERPROOFING CO., INC.

No. 838SC52

(Filed 21 February 1984)

1. Contracts § 27.2; Quasi Contracts and Restitution § 2.1 — contract implied in fact and contract implied in law — sufficiency of evidence

Plaintiff's evidence was sufficient to be submitted to the jury under theories of breach of a contract implied in fact and a contract implied in law based on unjust enrichment where it tended to show that plaintiff agreed to do certain splay base and other extra work in installing tile flooring in a hospital under construction and that defendant construction subcontractor agreed to pay plaintiff for this work; plaintiff did the work, defendant knowingly accepted and benefited from plaintiff's work, and defendant did not pay plaintiff; and the reasonable value of the work performed was a certain amount.

2. **Quasi Contracts and Restitution § 1.2— contract implied in law based on unjust enrichment**

A contract implied in law is not the product of an agreement between the parties but is imposed by law to prevent unjust enrichment of a defendant when he should not be permitted to retain a benefit that he has received from plaintiff.

3. **Contracts § 29.1— breach of contract implied in fact—measure of damages**

The measure of damages for a breach of contract implied in fact is the reasonable value of plaintiff's services.

4. **Quasi Contracts and Restitution § 2.2— contract implied in law—measure of damages**

The measure of recovery under a contract implied in law is the reasonable value of materials and services rendered by the plaintiff which are accepted and appropriated by defendant.

5. **Contracts § 28.2; Quasi Contracts and Restitution § 2.2— contract implied in fact and in law—evidence supporting both theories—instructions on damages under one theory—harmless error**

Where plaintiff's pleadings and evidence supported alternative theories of a contract implied in fact and a contract implied in law, the trial court should have instructed on both theories. However, the court's failure to instruct on the measure of damages under a contract implied in law was not prejudicial error where the court properly instructed on the measure of damages for a contract implied in fact, the reasonable value of plaintiff's services was equivalent to the reasonable value of plaintiff's services which were accepted by and benefited defendant, and the jury's verdict would have been the same under either theory of recovery.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 13 August 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 6 December 1983.

On 3 May 1978, plaintiff, a tile flooring subcontractor, and defendant, a construction subcontractor, entered into a written contract whereby plaintiff would install tile flooring at the Florence General Hospital Annex, Florence, South Carolina. The contract specified that plaintiff would install terrazzo tile flooring according to drawings and specifications prepared by the architect. The flooring was to be installed on an "open slab" (before partitions were installed).

During negotiations prior to the 3 May 1978 contract, plaintiff determined that the architect's plans called for installation of terrazzo tile flooring and for both terrazzo "splay" and "topset" base. Splay base tile projects from the walls and is more expen-

sive to purchase and install than terrazzo "topset" base. Plaintiff gave defendant a price of $136,000.00 to $138,000.00 for the job. Defendant responded that there was to be no splay base and only 4,000 linear feet of topset base. Plaintiff then gave defendant a price of $108,000.00 for the terrazzo floor and 4,000 linear feet of topset base. Before signing the contract, plaintiff added, on the face of the contract, the words, "any over 4,000 feet as extra," after a provision that "there will be 4000 LF [linear feet] of base included in this contract." The contract also provided that changes from the architect's plans could be made only after plaintiff submitted the cost to defendant and received written orders for the change from defendant.

Subsequent to the signing of the contract, defendant contacted plaintiff and, according to plaintiff's evidence, directed that "they were going to put splay base on the job and that they had plenty of money to do it with." A letter dated 1 June 1978 from defendant confirmed this change and requested a price for the splay base work. On 13 July 1978, plaintiff sent to defendant drawings for the installation of the splay base, based on plaintiff's understanding of the architect's plans. On 25 July 1978, plaintiff, in a letter, requested defendant's approval of the plans for installation of the splay base. Plaintiff never sent defendant a price quote for the work, and defendant never approved plaintiff's plans to install the splay base.

Plaintiff installed the terrazzo floor and splay base during 1979. The installation of the splay base took two to three months and was completed prior to 9 November 1979. Representatives of defendant were on the job during this time period, and plaintiff was not told to stop the work or to furnish a price for the splay base. Because of delays in other aspects of construction (not caused by plaintiff), defendants proceeded to put up the interior walls before plaintiff installed the terrazzo floor. Thus, the job was not on open slab, as planned, and extra "grinding" work was required along the edges of the interior walls. Defendant agreed to pay plaintiff 50¢ per linear foot for necessary grinding.

The terrazzo floor and base work was accepted and approved by the architect in April or May 1980. Plaintiff submitted invoices to defendant for the splay base work, the extra grinding needed because the job was not on open slab, and other "extras," which

have not been paid (because, according to defendant, defendant has not been paid by the general contractor).

Plaintiff filed suit against defendant for breach of contract on 17 April 1981. The case was tried before a jury, which returned a verdict of $33,300.00 in favor of plaintiff. Defendant's motions for judgment notwithstanding the verdict and a new trial were each denied. Defendant appeals.

Erwin and Beddow, by Fenton T. Erwin, Jr., for defendant-appellant.

Marcus, Whitley and Coley, by Robert E. Whitley, for plaintiff-appellee.

EAGLES, Judge.

Defendant first assigns as error the trial court's denial of defendant's motion for a directed verdict. Defendant contends that the evidence was insufficient, as a matter of law, to be submitted to the jury. We do not agree.

[1] A motion for directed verdict must be denied when the trial court finds any evidence more than a scintilla to support plaintiff's case in all its constituent elements. The evidence must be considered in the light most favorable to the plaintiff, and he is entitled to all reasonable inferences that can be drawn from it. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). In this contract action, plaintiff presented ample evidence that there was an agreement that plaintiff would do the splay base and other extra work and that defendant would pay plaintiff for that work, that plaintiff did the work, that defendant knowingly accepted and benefited from plaintiff's work, and that defendant did not pay plaintiff. Plaintiff also presented sufficient evidence to show the reasonable value of the work performed. Therefore, the trial court's denial of defendant's motion for a directed verdict was proper.

Defendant's remaining assignments of error concern the trial judge's instructions on damages. The trial judge submitted issues to the jury that were directed to a contract theory of liability. The issues submitted were: (1) whether the parties entered "into a Contract subsequent to the written contract for work to be done at the Florence, South Carolina General Hospital"; (2) if so,

whether the contract was breached; and (3) what amount, if any, the plaintiff was entitled to recover from defendant. The trial judge then proceeded to charge the jury as to matters relating to breach of contract. After some deliberation, the jury asked for further instructions on whether price was a necessary element of an oral contract. The trial judge then charged the jury that:

> The law implies a promise to pay for services rendered by one party to another where the recipient knowingly and voluntarily accepts the services and there is no showing that the services were gratuitously given.
>
> Where there is no agreement as to the amount of compensation to be paid for services, the person or company performing them is entitled to recover what the services are reasonably worth, based on the time and labor expended, skill, knowledge and experience involved and other surrounding circumstances.

Because the first paragraph of this supplementary instruction describes a contract implied in law while the rest of the judge's charge was based on a contract implied in fact, there was an inconsistency in the trial judge's instructions, but under these facts, we find no prejudicial error.

[2] There are at least three variations of contract theory under which a trial judge could instruct a jury: express contract, contract implied in fact, and contract implied in law. The first two theories are based on "real" contracts, genuine agreements between the parties. A contract implied in law is not the product of an agreement between the parties but is imposed by law to prevent unjust enrichment of a defendant when he should not be permitted to retain a benefit that he has received from plaintiff. DOBBS, REMEDIES § 4.2. The issues of fact presented to the jury will differ according to which theory the trial judge instructs on, and damages are computed differently under each theory. The amount of plaintiff's recovery may vary significantly, depending on which method of computing damages the jury is instructed to use. Where pleadings are broad enough to support recovery on two of these theories and where evidence is presented to support either theory, the trial judge should submit to the jury separate issues directed to each theory of liability. *Yates v. Mickey Body Co.*, 258 N.C. 16, 128 S.E. 2d 11 (1962).

Plaintiff's complaint first alleged breach of an implied in fact contract. An implied in fact contract is a genuine agreement between parties; its terms may not be expressed in words, or at least not fully in words. The term, implied in fact contract, only means that the parties had a contract that can be seen in their conduct rather than in any explicit set of words. DOBBS, *supra.* Here, plaintiff's complaint describes "a contract . . . whereby plaintiff agreed to furnish material and to perform work . . . and defendant agreed to pay plaintiff for the performance of this work." Plaintiff's evidence tended to show that there was an agreement that plaintiff would do the splay base work and other work and that defendant would pay plaintiff for this work (defendant's statement that there was "plenty of money to do it with.") The fact that defendant's representatives observed plaintiff doing the work and did not tell plaintiff to stop the job was conduct consistent with the existence of a contract. Plaintiff presented evidence that he performed the job and that defendant did not pay him. Plaintiff also put on sufficient evidence of the reasonable value of the work performed.

[3] Under such an implied in fact contract, damages are based on the reasonable value of the services "rendered pursuant to request and agreement to pay therefor (sic)." *Turner v. Marsh Furniture Co.*, 217 N.C. 695, 697, 9 S.E. 2d 379, 380 (1940); see DOBBS, REMEDIES § 4.5. Under this implied in fact contract, the "circumstances to be considered in determining the compensation to be recovered are the amount and character of services rendered, the responsibility imposed, the labor, time and trouble involved. . . ." *Turner v. Marsh Furniture Co.*, 217 N.C. at 697, 9 S.E. 2d at 380. The trial judge here correctly and adequately instructed the jury on an implied in fact contract and the measure of damages under this theory.

Plaintiff's complaint alleged, in the alternative, that there was an implied in law contract based on unjust enrichment. An implied in law contract "will usually lie wherever one man has been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer." *Thormer v. Lexington Mail Order Co.*, 241 N.C. 249, 252, 85 S.E. 2d 140, 143 (1954); see DOBBS, REMEDIES § 4.2. Here, plaintiff's complaint alleged: "Even if some of the work provided by plaintiff were not specifically provided

for in the contract, and plaintiff maintains that it was, all of plaintiff's work was accepted and was worth the sum of at least $45,050.05." Plaintiff's evidence tended to show that defendant knowingly and voluntarily accepted plaintiff's services and benefited by having the work performed satisfactorily. Plaintiff also put on evidence of the value to defendant of the finished job from which defendant benefited.

[4] Under a contract implied in law, the measure of recovery is *quantum meruit*, the reasonable value of materials and services rendered by the plaintiff that are "accepted and appropriated by defendant." *Thormer v. Lexington Mail Order Co.*, 241 N.C. at 252, 85 S.E. 2d at 143; DOBBS, *supra*. The trial judge here, while describing an implied in law contract in his supplementary instructions, failed to instruct the jury as to the proper measure of damages under this theory.

[5] Because plaintiff's pleadings and evidence were broad enough to support the alternative theories of an implied in fact contract and an implied in law contract, the trial judge should have instructed on both theories. *Yates v. Mickey Body Co., supra.* Although there will be cases where the reasonable value of plaintiff's services (the damages under an implied in fact contract) will vary significantly from the reasonable value of plaintiff's services *that are accepted by and that benefit defendant* (the damages under an implied in law contract), this is not such a case. Here, the reasonable value of plaintiff's services is equivalent to the reasonable value of plaintiff's services that were accepted by and that benefited defendant.

While there was technical error in the trial judge's instructions in that he failed to instruct on the measure of damages under an implied in law contract, the jury's verdict demonstrates that they found that plaintiff did provide a service, that defendant did accept the benefit of that service, and that defendant should pay plaintiff a reasonable value for the work performed by plaintiff. We therefore find no prejudicial error in the trial judge's instructions to the jury on damages.

For the reasons given above, we find

No error.

Judges HEDRICK and BRASWELL concur.

RESSIE DEHART v. R/S FINANCIAL CORPORATION

No. 8330DC171

(Filed 21 February 1984)

Usury § 1.2— usurious loan supported by evidence

In an action for usury, the trial court improperly granted defendant's motion for directed verdict where plaintiff's evidence indicated that plaintiff signed a promissory note in the amount of $9,645.12, but nothing supported that sum as being the base amount of the loan. It appeared from the evidence that interest was computed in some manner on $5,600.00, the only sum testified as being the amount of the loan, and added to it so as to equal the face amount of the note. The interest was charged in advance, and added to the amount of the note in advance. The evidence indicated that plaintiff, on this 1965 loan, was charged an interest rate of 10% which was sufficient evidence of all the constituent elements of usury.

Judge PHILLIPS concurring in the result.

APPEAL by plaintiff from *Leatherwood, Judge.* Judgment entered 5 September 1982 in District Court, SWAIN County. Heard in the Court of Appeals 18 January 1984.

Pachnowski & Collins by Joseph A. Pachnowski for plaintiff appellant.

Holt, Haire, Bridgers & Bryant by R. Phillip Haire for defendant appellee.

BRASWELL, Judge.

This is an action for usury. Plaintiff appeals from the granting of a directed verdict in favor of defendant at the close of plaintiff's evidence.

Plaintiff alleged in her complaint that she and her husband, since deceased, applied for a loan from the Modern Homes Construction Company (Modern Homes) on 9 February 1965. Modern Homes agreed to make the loan and required plaintiff and her

husband to execute a promissory note in the amount of $9,645.12, due and payable in 144 equal installments of $66.98, and secured by a deed of trust. Modern Homes thereafter assigned the note and deed of trust to G.A.C. Trans-World Acceptance Corporation, which in turn assigned the note and deed of trust to defendant. Plaintiff alleged that the interest rate on the note was usurious in that it exceeded the maximum legal rate of interest of six per cent (6%).

Defendant filed an answer in which it denied the allegations of usury and asserted a counterclaim for money owed it by plaintiff for payment of insurance premiums on behalf of plaintiff in accordance with the terms of the deed of trust. Defendant took a voluntary dismissal of its counterclaim upon the granting of its motion for a directed verdict.

A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In considering a defendant's motion for a directed verdict, the court must examine the evidence in the light most favorable to the plaintiff, resolving all conflicts in his favor and giving the plaintiff the benefit of every inference that reasonably can be drawn in his favor. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978). The motion should be allowed only when the evidence presented by the plaintiff, taken in the light most favorable to the plaintiff, is insufficient as a matter of law to support a verdict for the plaintiff. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972), *vacated on other grounds*, 283 N.C. 277, 196 S.E. 2d 262 (1973). When the question of granting a motion for directed verdict is close, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982).

To maintain an action for usury, the claimant must show that there was (1) a loan or forbearance of money, (2) an understanding between the parties that the money loaned shall be repaid, (3) a payment or an agreement to pay a rate of interest greater than that allowed by law, and (4) a corrupt intent to take a greater return than that allowed by law for the use of the money loaned. *Auto Supply v. Vick*, 303 N.C. 30, 277 S.E. 2d 360 (1981); *Bank v. Merrimon*, 260 N.C. 335, 132 S.E. 2d 692 (1963).

Based upon our examination of the plaintiff's evidence in the light most favorable to the plaintiff and giving the plaintiff the benefit of every inference which can be drawn in her favor, we hold that plaintiff presented sufficient evidence to support a prima facie case of usury. The plaintiff's evidence shows the following: In 1965, plaintiff and her late husband, having learned that Modern Homes would lend 100% of the money required to build a house, applied to Modern Homes for a loan for that purpose. Modern Homes agreed not only to lend them $5,600.00, which was 100% of the cost of building the house, but also to build the house for them. Plaintiff and her late husband executed a promissory note in the amount of $9,645.12, payable in 144 equal installments of $66.98. The first payment was due on 1 December 1965, and "payable monthly thereafter on the same day of each month in monthly installments, as specified hereon, until said whole amount has been paid with interest on each installment from maturity thereof until paid at six percentum (6%) per annum." She and her husband also executed a deed of trust as security for the loan. She has made all payments.

In the deed of trust attached as an exhibit to the complaint the amount of insurance coverage is stated to be $5,600.00. In all of the plaintiff's evidence the only sum of money testified about as being the amount of the loan is $5,600.00. Although plaintiff does not deny signing the promissory note in the amount of $9,645.12, nothing supports that sum as being the base amount of the loan. It would appear that interest was computed in some manner on $5,600.00 and added to it so as to equal the face amount of the note. The interest was charged in advance, and added to the amount of the note in advance. The note itself only provides for interest in case of default and from maturity of each installment payment.

Although the figure $5,600.00 does not appear in the complaint, the notice pleading does fully apprise the defendant of the very transaction out of which the claim for usury arises. The evidence of $5,600.00 as being the amount of the loan was not objected to at the trial. Since the usury theory is the only theory for relief raised in the pleadings, no formal amendment of the pleadings was necessary here. As said in *Securities & Exchange Commission v. Rapp*, 304 F. 2d 786, 790 (2d Cir. 1962), cited with approval in *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d

721 (1972), and in *Taylor v. Gillespie*, 66 N.C. App. 302, 305, 311 S.E. 2d 362, 364 (filed 7 February 1984), [No. 8317SC209], "A formal amendment to the pleadings 'is needed only when evidence is objected to at trial as not within the scope of the pleadings.' " And, as further stated in *Taylor*, "Because no objection was made to the introduction of the evidence, the pleadings were amended by implication." *Id.*

A certified public accountant testified that, based upon amortization tables, six per cent (6%) interest on $5,600.00, the principal amount, would yield a monthly payment of $54.65 over twelve years. Payments of interest and principal would therefore total the sum of $7,871.04 over twelve years. Deducting $5,600.00 principal from that total would yield a total of interest of $2,271.04 over twelve years. In contrast, plaintiff was charged $4,045.12 in interest. Further, based upon the same tables, a ten per cent (10%) interest rate would yield a monthly payment of $66.93, which closely approximates the $66.98 monthly payment charged plaintiff, tending to indicate that plaintiff was charged a ten per cent (10%) rate.

Since plaintiff did produce sufficient evidence of all of the constituent elements of usury, the trial court improperly granted the defendant's motion for a directed verdict. Accordingly, the case must be remanded for a new trial.

Reversed and remanded.

Judge WELLS concurs.

Judge PHILLIPS concurs in result.

Judge PHILLIPS concurring in result.

I agree that the verdict was improperly directed against the plaintiff and she is entitled to have the jury pass on her claim, but I do not agree with the majority's statement that: "When the question of granting a motion for directed verdict is close, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury." Though this same statement or one substantially similar to it has been made in several decisions of this Court and our Supreme

Court, it is correct only as far as it goes and certainly does not go far enough. The only proper practice for trial judges to follow in regard to motions for a directed verdict, I am sure, is to reserve their decisions until after the jury verdict in all cases where it is not crystal clear that there has been a failure of proof, and dismissal as a matter of law is therefore necessary.

Following such a course has overwhelming advantages. When such motions have merit, it will usually make it unnecessary for the judge to rule at all, since jurors are as apt to discern an absence of proof as judges are. When such motions are without merit, it will often save the participants and the courts from the inconvenience, delay and expense of an appeal and retrial. And in both instances the litigants will have had their full day in court, no small thing to people in this country, who nearly always prefer the assessment of a jury to that of a judge, and go to court in the firm belief, which our law encourages, that they will receive it.

On the other hand, dismissing actions when the merits of such motions are at all in doubt has only the advantage of possibly shortening the court week and makes no sense whatever. When such motions are first made the trials are nearly always far more than half over; and when they are next made the trials *are* over, except for the relatively trifling tasks of arguing to and charging the jury. In that setting, since the safety valve of judgment notwithstanding the verdict is always available, it would seem that every trial judge would be loath to take a case from the jury and precipitately terminate the trial, thereby risking the possibility that a year or two later, after much expense and effort, the parties, witnesses, lawyers, court, and a new jury will have to start all over again from the beginning.

WILLIAM B. STARLING, JR. AND WIFE, PATRICIA D. STARLING v. WALTON H. SPROLES AND WIFE, JANICE S. SPROLES, HAROLD L. PARKER AND WIFE, JOANNE S. PARKER AND HAROLD PARKER REALTY COMPANY

No. 835DC272

(Filed 21 February 1984)

1. **Brokers and Factors § 4.1; Unfair Competition § 1— unfair trade practice—broker's purchase of property from vendor—failure to disclose offer by third party**

Defendant real estate brokers committed an unfair or deceptive act in violation of G.S. 75-1.1 by failing to disclose, prior to their purchase of property which had been listed with them for sale by the vendors, that they had an offer from a third party to purchase the property.

2. **Brokers and Factors § 4.1— broker's purchase of property from vendor**

The general rule is that a real estate broker can neither purchase from nor sell to the principal unless the latter expressly consents thereto or with full knowledge of all the facts and circumstances agrees to the transaction.

APPEAL by defendants Walton and Janice Sproles from directed verdict entered by *Lambeth, Judge*, on the Sproles' cross-claim against defendants Harold and Joanne Parker and Harold Parker Realty Company entered 4 August 1982 in District Court, NEW HANOVER County. Heard in the Court of Appeals 9 February 1984.

Defendants Walton and Janice Sproles contracted to purchase a house and lot on Windermere Drive in New Hanover County shown them by a sales agent working with Harold Parker Realty Company, a partnership owned by Harold and Joanne Parker. In order to acquire sufficient money for a down payment, the Sproles listed their house located on Scottsdale Drive with Harold Parker Realty Company at a sales price of $43,500.00. Harold Parker advised the Sproles that he would purchase their Scottsdale property for $3,000.00 cash and assume their existing mortgage if the Scottsdale property had not sold by the closing date on the Windermere property.

On 16 January 1978 the Sproles went to the office of Harold Parker Realty Company to complete the purchase of the Windermere property. They signed and delivered a deed to the Scottsdale house and lot to Harold and Joanne Parker, and received a check for $3,000.00 less small closing charges to be paid by the

sellers. The deed from the Sproles to the Parkers provided for the assumption by the Parkers of an existing note bearing interest at 8¾% secured by a deed of trust.

During the closing of the Windermere property one of the real estate agents working for Harold Parker Realty Company informed Walton Sproles, "By the way, we may have sold your house yesterday." Mr. Sproles replied, "How about that. Congratulations." He later stated: "I didn't figure the price they had received would be of any interest to me, because we already had decided to go ahead and sell to Parker. We didn't get a whole lot for it, but we used the money as a part of the purchase price. It was necessary in order to close Windermere."

On the same day, 16 January 1978, Harold Parker signed the plaintiffs' offer to purchase the Scottsdale house as follows: "Walt Sproles, Harold Parker, Agent." Harold Parker later stated: "I was signing on their behalf and if it closed and if there was any profit in it, that was what was in my mind, they would get the benefit of it. . . . If there had been any profit, I assure you that he would have been paid."

Shortly thereafter, Harold Parker Realty Company closed the sale to the plaintiffs, paid a real estate commission to Harold Parker Realty Company, and transferred the balance of $3,238.77 to Harold and Joanne Parker. The balance due on the Sproles' loan assumed by Parker was $34,728.74. Parker paid $20.00 for a termite inspection and $81.61 to Cannon Heating and Air Conditioning for repairs. He contends that he lost money on the transaction. It would appear that his real estate company did collect a commission on the sale to plaintiffs before transferring the balance to Harold and Joanne Parker, and the Parkers otherwise reaped a profit of $341.25 on the sale.

Plaintiffs seek recovery from the defendants as a class for breach of contract grounded on a change in the interest rates on the note and deed of trust assumed first by Harold and Joanne Parker and subsequently by the plaintiffs. Defendants Walton and Janice Sproles answered the complaint of the plaintiffs with general denials. In addition, the Sproles filed a cross-claim against the defendants, Harold and Joanne Parker and Harold Parker Realty Company for any sums which the Sproles may have to pay plaintiffs. The Sproles also sought recovery and treble damages

against the Parkers and Harold Parker Realty Company under G.S. 75-1.1, alleging unfair or deceptive acts or practices in or affecting commerce.

Defendants Harold and Joanne Parker answered the Sproles' cross-claim admitting the sale of a house listed by the Sproles with Harold Parker Realty Company and purchased by Harold Parker individually. The Parkers admitted that the Sproles purchased a house located on Windermere Drive. Otherwise, the Parkers deny any wrongdoing or liability. The Parkers and Harold Parker Realty Company filed a cross-claim against the Sproles alleging misrepresentation, breach of contract, and breach of warranty.

At the close of the plaintiffs' evidence the trial judge allowed a motion to dismiss made by the Sproles against the plaintiffs. Thereafter at the close of the Sproles' evidence, the court allowed a motion to dismiss made by the Parkers and Harold Parker Realty Company against the Sproles.

The trial continued on the plaintiffs' claim against the Parkers and Harold Parker Realty Company, and on Parker's cross-claim against the Sproles. Judgment was entered therein on 7 October 1982, but that matter is not before us.

The Sproles appeal the order of the trial judge allowing dismissal of their cross-claim against the Parkers and Harold Parker Realty Company.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellees.

Yow, Yow, Culbreth & Fox by Stephen E. Culbreth for defendant appellants.

HILL, Judge.

[1] We are confronted for the purpose of this appeal with the dismissal of the cross-claim which the Sproles assert against the Parkers and Harold Parker Realty Company. We address the following question: Did the defendants Harold and Joanne Parker and Harold Parker Realty Company commit an unfair or deceptive act in violation of G.S. 75-1.1 by failing to disclose prior to the Parkers' purchase of the property which the Sproles had

listed with Harold Parker Realty Company that they had an offer to purchase the same property from a third party? We conclude there was an obligation on the part of the Parkers and Harold Parker Realty Company to have divulged completely the offer and its terms for consideration to the Sproles before transfer of the property to the Parkers.

[2] Our Courts have repeatedly held that an agent employed to sell his principal's property may not himself become the purchaser absent both a good faith full disclosure to the principal of all material facts surrounding the transaction and consent by the principal after receiving full disclosure. *Real Estate Exchange & Investors v. Tongue*, 17 N.C. App. 575, 194 S.E. 2d 873 (1973). The general rule is that a broker can neither purchase from nor sell to the principal unless the latter expressly consents thereto or with full knowledge of all the facts and circumstances agrees to the transaction. *Real Estate Licensing Bd. v. Gallman*, 52 N.C. App. 118, 277 S.E. 2d 853 (1981).

In *State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 (1960), our Supreme Court stated that a real estate broker and client have a measure of trust analogous to that of an attorney and his client; that the broker stands in a relation of trust and confidence. With constant opportunities by concealment or collusion to make illicit gains, the real estate broker is accredited by his position in the minds of inexperienced clients with a knowledge greater than their own. It is readily apparent that that was the case at hand where the Sproles felt they had no standing to complain after having signed the deed conveying the property to the Parkers before they were told of the possibility of another sale of their property.

The decision of the trial judge is

Reversed and remanded for trial.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. CHARLES PATTERSON, JR.

No. 8326SC557

(Filed 21 February 1984)

1. **Criminal Law § 34.7— second degree sexual offense—evidence of prior offenses—properly admitted to show intent or motive**

In a prosecution for a second degree sexual offense, the trial court did not err in allowing evidence of at least 50 other occasions of similar sexual activity which defendant had conducted with his stepson since the evidence was limited to the purpose of determining defendant's intent or motive at the time he was alleged to have committed the act for which he was being tried.

2. **Criminal Law § 96— improper evidence stricken and jury instructed not to consider it—no prejudicial error**

Where, during the course of direct examination, an officer gave an unresponsive answer and stated defendant refused to sign a "waiver of rights," the trial court's immediate allowance of defendant's motion to strike the answer and immediate instruction to the jury to disregard the officer's statement sufficed to remove any possible prejudice to the defendant.

3. **Rape and Allied Offenses § 6.1— second degree rape—failure to instruct on lesser degrees of crime proper**

In a prosecution for second degree sexual offense, the trial court properly failed to instruct on lesser included offenses since the defendant denied his conduct, and there was no evidence raised which even supported an inference that the sexual assault was consensual.

APPEAL by defendant from *Howell, Judge*. Judgment entered 26 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 January 1984.

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

Gene H. Kendall, for defendant appellant.

BECTON, Judge.

On 26 May 1982, a Mecklenburg County jury found defendant, Charles Patterson, Jr., guilty of committing a second degree sexual offense by manually manipulating and orally stimulating the penis of his fifteen-year-old stepson. From a judgment imposing the maximum prison term allowed by law for this offense, forty years, defendant appeals.

I

Defendant brings forward three arguments on appeal. He contends the trial court erred (1) by allowing the State to introduce the stepson's testimony concerning as many as fifty prior similar offenses; (2) in denying his motion for mistrial; and (3) in refusing to instruct the jury on lesser included offenses. For the reasons that follow, we find no error.

II

[1] The sexual activity involved in this case took place on the night of 12 October 1981 or in the early morning hours of 13 October 1981. Defendant's stepson, after describing how defendant rubbed his penis and then committed fellatio for more than two hours on the night in question, was asked by the district attorney if his stepfather had ever done anything like this to him before. The stepson answered, "Yes, sir. Occasionally." Defendant's counsel objected. A *voir dire* was then conducted, and the stepson testified how, on at least fifty occasions beginning when the stepson was 10 or 11, defendant had subjected him to similar sexual activity. The stepson also testified about defendant's several unsuccessful attempts to engage in anal intercourse with him.

The trial court admitted substantially all of the evidence which had been received during the *voir dire* hearing, except the evidence indicating an attempt at anal intercourse. The trial court instructed the jury that they were to consider the evidence only for the purpose of determining the defendant's intent or motive at the time he was alleged to have committed the act for which he was being tried.

Contending that his motive and intent—personal sexual gratification—were not at issue, the defendant argues that the trial court erred in admitting the objected to testimony. We disagree. Generally, evidence that the accused committed other crimes, though they be of the same nature as the one charged, is inadmissible. 1 H. Brandis, *North Carolina Evidence* § 91 (2d rev. ed. 1982). So many exceptions to the general rule have been recognized, however, that it is difficult to determine which is more extensive, the doctrine of exclusion or its acknowledged exceptions. *Id.; State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *see also* Annot., 88 A.L.R. 3d 8 (1978). One of the exceptions relates to

"motive and intent." This exception has long withstood challenge, and it is familiar: Evidence of other crimes is "competent to show the *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial . . . ." *State v. Christopher*, 258 N.C. 249, 253, 128 S.E. 2d 667, 670 (1962); *see* 1 H. Brandis, *supra* p. 2, § 92.

Based on *McClain*, *Christopher*, and a wealth of comparable authorities, we hold that the trial court properly allowed the State to offer evidence of as many as fifty (50) prior offenses. Even if, as defendant argues, intent and motive were clear, we perceive no prejudicial error. First, if intent and motive were that clear, then the objected to testimony did not unduly influence the jury. Second, the State is not prohibited from putting on more evidence than is minimally required to meet its burden of proof.

III

[2] Defendant next argues that the trial court erred in denying his motion for a mistrial since the jury found out that defendant refused to sign a "waiver of rights." We do not agree.

Officer John McAuley, called by the State to corroborate the stepson, testified that the stepson had made prior consistent statements. During the course of the direct examination, McAuley gave an unresponsive answer concerning the defendant's refusal to sign a "waiver of rights."[1] The trial court immediately allowed defendant's motion to strike the answer and instructed the jury to disregard the officer's statement. No motion for mistrial was made at this time; rather, the motion for mistrial was not made until the next day.

Defendant acknowledges that the trial court's curative instruction was "accurate and fair," but, nevertheless, contends

1. DISTRICT ATTORNEY CALVIN MURPHY: At any time after you picked him up at Belmont did you undertake to talk with him at all about the events of October 13?

OFFICER JOHN F. MCAULEY: I did, I brought him back to Mecklenburg County and advised him of his rights, a waiver of rights, and he refused to sign a waiver of rights.

DEFENSE ATTORNEY GENE H. KENDALL: Objection. Move to strike.

JUDGE RONALD HOWELL: Motion allowed. The jury will not consider the last statement of the witness.

"that this instruction was not sufficient, nor would any instruction have been sufficient to remove the overwhelming prejudice deliberately created by the State in the introduction of this testimony." We disagree. There is no suggestion that the district attorney acted in bad faith since, as noted above, McAuley's answer was not responsive to the question posed. Further, the statement, itself, was not so inherently prejudicial, especially since the word "confession" was never mentioned, that it could not be cured by prompt and proper curative instructions. The trial court's instructions to the jury suffice to remove any possible prejudice to the defendant. *See State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981).

It must be remembered that a denial of a motion for mistrial is equivalent to a finding by the trial court that prejudicial conduct has not been shown. *Farmer v. Lands*, 257 N.C. 768, 127 S.E. 2d 553 (1962). Further, a motion for mistrial is addressed to the discretion of the trial judge. *See State v. Williams*, 7 N.C. App. 51, 171 S.E. 2d 39 (1969). Considering the fact that defendant's guilt was shown by competent evidence, that defendant has failed to establish an abuse of discretion by the trial court or any error prejudicial to his case, this assignment of error is overruled.

IV

[3] In his final assignment of error, defendant contends that although he did not engage in any of the alleged sexual activities, he was, nevertheless, entitled to "instructions permitting the jury to convict [him] of lesser included offenses in view of the reasonable inferences raised by the State's evidence" that the sexual assault was consensual. We do not agree with defendant that the "record creates serious and real doubt [concerning] consent [or] whether or not force sufficient to meet the requirements of the statute was in fact used." The fact that the stepson accepted money from the defendant on some of the prior fifty or more occasions of similar sexual contact, or that he refused the defendant's several attempts at anal intercourse, does not require an instruction on lesser included offenses. On the night of 12 October or early morning of 13 October, the stepson told defendant on more than one occasion to "quit." Defendant's responses were: "Just shut up and lie still," and "I told you once, you better lie still." Moreover, at one point defendant slapped his stepson's leg.

There was no conflict in the evidence about what happened on the night in question. "In the absence of a conflict in the evidence, the contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense." *State v. Coats*, 46 N.C. App. 615, 617, 265 S.E. 2d 486, 487, *aff'd* 301 N.C. 216, 270 S.E. 2d 422 (1980). In this case we find no evidence to raise even an inference that the sexual assault was consensual. Therefore, the trial court "is not obligated to give such [a requested] instruction if the record is devoid of evidence which might convince a rational trier of fact that defendant was at most guilty of the less grievous offense." *State v. Oxendine*, 305 N.C. 126, 131, 286 S.E. 2d 546, 549 (1982).

We hold that the following statement made by the trial court was correct:

> Let the record show that pursuant to Rules 11 and 12 the court stated at the precharge conference yesterday it would state in the morning on what if any lesser included offense would be submitted. The court has determined that since the defendant has denied his conduct, the child having testified that he was in fear, that a lesser included offense is not appropriate; that the issues will be was the defendant guilty of the second-degree sexual offense or is the defendant not guilty?

For the foregoing reasons, we find

No error.

Chief Judge VAUGHN and Judge HILL concur.

STATE OF NORTH CAROLINA v. ORMAND BARRY CRABTREE

No. 8327SC474

(Filed 21 February 1984)

1. **Narcotics § 5— trafficking in marijuana—lesser sentence for substantial assistance—exemption from service of minimum term before release**

Where defendant pled guilty to trafficking in marijuana for which the minimum sentence was three years, and the trial court sentenced defendant to a lesser term of 23 months based on his "substantial assistance" pursuant to G.S. 90-95(h)(6), the language of former G.S. 90-95(h)(5), "except as provided in G.S. 90-95(h)(6)," exempted defendant from the requirement of the statute that defendant "serve the applicable minimum prison term . . . before either unconditional release or parole." Therefore, defendant was entitled to receive credit for good time or gain time under the appropriate regulations of the Department of Correction and was properly discharged unconditionally by the Department of Correction before he had served the 23 months on a day-to-day basis.

2. **Arrest and Bail § 9.2— conditions of release pending appeal**

Conditions of defendant's release pending appeal which restricted defendant's right to leave the county and to possess firearms unless he posted a $20,000.00 secured bond were within the trial court's discretion. G.S. 15A-536.

3. **Judges § 5— motion to recuse—failure to hold hearing**

The trial judge did not err in failing to conduct a hearing on defendant's motion to recuse where there were no facts to cause a reasonable man knowing all the circumstances to doubt the judge's ability to rule on the motion to recuse in an impartial manner.

APPEAL by defendant from *Burroughs, Judge.* Orders entered 8 December 1982 in Superior Court, LINCOLN County. Heard in the Court of Appeals 6 December 1983.

On 14 November 1980, defendant was arrested for trafficking in marijuana. Defendant was indicted on 5 January 1981, and on 3 April 1981 he entered a plea of guilty to trafficking in marijuana in violation of G.S. 90-95(h)(1)(b), for which the mandatory minimum sentence was three years. On 13 May 1981, based on defendant's assistance to law enforcement officers, the trial court, acting pursuant to G.S. 90-95(h)(6), sentenced defendant to a lesser term of 23 months in prison and a $20,000.00 fine, to be paid no later than 31 December 1981.

On 23 November 1981, after serving seven months of his sentence in the custody of the Department of Correction and

receiving administrative credits against his prison sentence for jail time, good conduct time, and gain time, defendant was unconditionally discharged.

On 27 October 1982, Judge Burroughs ordered defendant to appear at a hearing to show cause why he should not be held in contempt for failure to pay his fine of $20,000.00 and why he should not be recommitted to the Department of Correction to serve the balance of his 23 month sentence. The hearing was held on 10 November 1982 and was continued until 8 December 1982 so that a plan for defendant to pay the unpaid portion of his fine could be worked out. As of 10 November 1982, defendant had paid $895.00 of his fine.

At the beginning of the 8 December 1982 hearing, the trial judge rejected defendant's motion that the judge recuse himself from the proceeding because of his bias against both defendant and defendant's attorney. After the hearing, an order was entered, on 8 December 1982, committing defendant to the custody of the Department of Correction to complete serving "the entire minimum sentence of 23 months on a day for day basis." Defendant appealed. A second order of 8 December 1982 set conditions of release pending appeal which restricted, *inter alia*, defendant's right to leave Lincoln County and his right to possess any firearms. These restrictions were to be lifted only if defendant posted a $20,000.00 secured bond.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Triggs and Clontz, by C. Gary Triggs, for defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the trial judge's entry of the 8 December 1982 order recommitting defendant to the Department of Correction. We agree.

At issue here is the interpretation of G.S. 90-95(h) which was enacted by the General Assembly in two different versions. 1979 Session Laws (2d Session), ch. 1251, s. 6 (first version) and 1979 S.L. (2d Session), ch. 1251, s. 7; 1981 S.L., ch. 63, s. 1(e); 1981 S.L.,

ch. 179, s. 14 (second version). Missing from the second version is subdivision (h)(5) of the first version of G.S. 90-95.

Defendant pled guilty to a violation of G.S. 90-95(h)(1)(b) that occurred on 14 November 1980. The first version of G.S. 90-95(h) applies to this offense since it was committed after 1 July 1980 and before 1 July 1981. Subdivisions (h)(5) and (h)(6) of the first version provide that:

> (5) Notwithstanding any other provisions 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.

G.S. 90-95(h)(1)(b) mandates that defendant's sentence be "not less than three years," but the trial judge may reduce a defendant's sentence to a lesser amount upon a finding that defendant rendered substantial assistance as provided in G.S. 90-95(h)(6). In the case *sub judice*, the trial court sentenced defendant to a lesser term of 23 months based on his "substantial assistance" as contemplated by subsection (h)(6).

[1] The issue here is whether the language of subdivision (h)(5) of G.S. 90-95 (first version), "except as provided in G.S. 90-95(h)(6)," exempts a defendant sentenced to a lesser prison term pursuant to G.S. 90-95(h)(6) from the requirement that he "serve the applicable minimum prison term . . . before either un-

conditional release or parole." We hold that it does. We hold that defendant was entitled to receive credit for good time or gain time under the appropriate regulations of the Department of Correction. Here, because of time credited against his sentence by the Department of Correction, defendant was not required to serve the sentence of 23 months on a day for day basis. The Department of Correction properly released defendant, and Judge Burroughs erred in ordering him recommitted.

We note that the second version of G.S. 90-95, applicable to offenses committed on or after 1 July 1981, does not contain subsection (h)(5) as it appears in the first version.

Since we reverse the order to recommit defendant, we do not address defendant's argument that Judge Burroughs did not have the authority to review the propriety of the unconditional release of defendant by the Department of Correction. We note, however, that at least one jurisdiction has dealt with the issue of improper early release of a prisoner who had not fully served a minimum sentence through a contempt proceeding against a superintendent of prisons. *State ex rel. Murphy v. Superior Court of Maricopa County*, 30 Ariz. 332, 246 P. 1033 (1926).

[2] Defendant also assigns as error the trial judge's failure to require the State to offer some evidence to justify the restrictions placed on defendant while he was on release pending appeal. We find no error. G.S. 15A-536 provides that the trial court *may* release a defendant, pending appeal, and may impose restrictions on the defendant. The terms of the release are within the discretion of the court, *State v. Sparks*, 297 N.C. 314, 255 S.E. 2d 373 (1979), and we find here no abuse of discretion.

[3] Defendant also contends that the trial judge erred in failing to conduct a hearing on defendant's motion to recuse. G.S. 15A-1223(b) provides that a judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal proceeding if he is, for any reason, unable to perform the duties required of him in an impartial manner. A trial judge must refer a motion to recuse to another judge "for consideration and disposition when 'a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner.'" *State v. Hill*, 45 N.C. App. 136, 141, 263 S.E. 2d 14 (1980) (quoting *McClendon v. Clinard*, 38 N.C.

App. 353, 356, 247 S.E. 2d 783, 785 (1978)). Here, there are no facts to cause a reasonable man knowing all the circumstances to doubt the judge's ability to rule on the motion to recuse in an impartial manner. Accordingly there was no error in the trial judge's failure to schedule a hearing on defendant's motion to recuse.

Order committing defendant to the custody of the Department of Correction is

Reversed.

Judges HEDRICK and BRASWELL concur.

STATE OF NORTH CAROLINA v. LARRY DONNELL ANDERSON

No. 838SC617

(Filed 21 February 1984)

Criminal Law § 66.9— photographic identification procedure—objections and arguments on appeal failing to address properness of procedure

On the basis of the record, there was nothing to indicate that a pretrial photographic identification procedure was improper, and, if through his brief, defendant tried to challenge the admission of in-court eyewitness identification by the prosecuting witness in that her testimony was confused and contradictory, defendant failed to properly raise this issue by failing to object or except in the record to the prosecuting witness's in-court identification.

APPEAL by defendant from *Phillips, Judge.* Judgment entered 2 February 1983 in Superior Court, LENOIR County. Heard in the Court of Appeals 12 January 1984.

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

Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

BRASWELL, Judge.

In a trial for first-degree burglary, the defendant was convicted of misdemeanor breaking or entering and received an ac-

tive sentence of two years less credit for jail time. The brief brings forward one assignment of error. "Did the trial court err by failing to conduct a *voir dire* prior to overruling the defendant's objection to evidence of eyewitness identification of the defendant as the perpetrator of the crime?" Under the circumstances here, we answer "no."

The prosecuting witness, Ms. Geraldine Bruington, awakened from her sleep about 2:00 or 2:30 a.m. on 24 July 1982 at her home on South Orion Street in Kinston, saw a man standing over her bed. She screamed; both ran from the house, he to go elsewhere, and she to call the police.

The next day at the police station Ms. Bruington viewed a photographic lineup and picked out a picture of the defendant as being the intruder. The defendant testified that he had never been in Ms. Bruington's house.

The objection to evidence came during the use by the State of State's Exhibit No. 1, which was a folder containing the photographs used by the police as viewed by Ms. Bruington on the day after the incident. The transcript reveals how the objection occurred.

Q. Mrs. Bruington, look at what's been marked as State's Exhibit Number 1; do you recognize that?

Objection.

Court: Sir?

Mr. Marcus: May I approach the bench?

Court: Yes. (A discussion is held)

Mr. Marcus: Your Honor, I object to all this line of questions.

Court: Overruled.

Subsequently, Ms. Bruington testified that she saw the exhibit when Sgt. Heath showed the pictures to her at the police department, and from them "I picked out the one that was in my house." She wrote her name, time, and the date under one picture, which is that of the defendant.

Thereafter, Ms. Bruington was questioned about her education. Then, she was asked if the person who was in her bedroom that night was in the courtroom. She pointed out the defendant as that person. There was no objection to this in-court identification.

Trial defense counsel, who is not the counsel on appeal, conducted an extensive cross-examination of Ms. Bruington covering 37 pages in the transcript. After the night's recess, she having been the last witness the previous day, the court said: "And I think the cross-examination had [*sic*] ended. Is there anything further on cross, Mr. Marcus? [Defense Counsel] Mr. Marcus: Not at this time." The State's direct examination covers 13 pages in the transcript. There was no redirect examination. During the cross-examination the subject of the photographic identification at the police station was not mentioned in any manner. The court did not restrict the defendant's right to ask any type of questions during cross-examination.

Kinston Police Sergeant Cranford Heath testified to his conversation with Ms. Bruington at the police department on the morning after the incident. During Heath's direct examination the following took place:

Q. What occurred at the police department?

A. I had a photographic lineup consisting of—

Court: Does the State plan to pursue this?

Mrs. Barwick: Yes, sir.

Court: Could I speak with you here. (A discussion is held) The defendant makes an objection and the objection is overruled, and the defendant is allowed a continuing objection to the State's photographic identification.

Thereafter the witness described his preparation of State's Exhibit No. 1, the photographic lineup of five photographs in a folder, and that Ms. Bruington picked out the second photograph, which was the defendant's. At the conclusion of this direct testimony the State moved to introduce the exhibit into evidence, the defendant made a general objection which was overruled, and the photographs were admitted into evidence.

In defendant's brief we note this apparent concession: "Police Sergeant Heath's description of the photo lineup procedure (put

into evidence over defendant's continuing objection) tended to show the procedure was proper." [Parenthetic matter in the original.] The real contention appears to be that Ms. Bruington's testimony was confused and contradictory, and thus not credible. The evidence shows that even though she had seen the defendant two or three times before the night in question and had told the initial investigating officers she knew the man but couldn't remember his name, the next morning she was able to identify the intruder as Larry Anderson, the defendant. During cross-examination of a neighbor, Marquetta Miles, who had seen a man run from the back of Ms. Bruington's house at the time, responded that the defendant "really doesn't look like the man that I saw." A defense witness, Jevan Anderson, related a post-offense conversation with Ms. Bruington in which she told him that the intruder never actually entered the house and that she did not know who he was. In her own testimony Ms. Bruington told how she knew the defendant socially and how he once had bought a beer for her.

There is a problem with the way the subject matter of the assignment of error is designated. If by the words used it is meant that the challenge on appeal is to the admission of evidence of in-court eyewitness identification by Ms. Bruington, then we point out that there was no objection or exception in the record to her in-court identification of the defendant. If the assignment of error is meant to challenge the admissibility of the photographs, State's Exhibit No. 1, by the making of a general objection, followed by an objection to the general line of questions and if it be conceded that the general objection was sufficient to raise the issue of whether the out-of-court photographic lineup identification procedure was proper, then on the record before us we are compelled to conclude, as defendant apparently did in his brief, that the procedure was proper. Even on appeal there are no specific challenges to any of the procedures of the out-of-court photographic identification. The thrust of the argument is that Ms. Bruington's testimony "was confused and contradictory" as a whole. The issue of credibility of the prosecutrix was tested by a thorough cross-examination and believability was solely within the province of the jury.

Defendant argues further "that there *might* be a legitimate question as to the suggestiveness of the photo display or the in-

dependent basis of the in-court identification." [Emphasis in original.] However, this jury through other witnesses had heard testimony which directly tended to impeach Ms. Bruington's testimony that the defendant was the perpetrator of the crime. In spite of the absence of a *voir dire*, the issue of reliability of the identification lies within the province of the jury, and their acceptance or rejection of her credibility was a determination for them alone.

The defendant holds up the case of *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972), as placing a duty on the trial judge to hold a *voir dire* upon a general objection. We feel that the defendant has misconstrued that case. As explained in *Stepney*, at 313, 185 S.E. 2d at 849, "a general objection is sufficient to challenge the admissibility of a *confession*, and failure of the trial judge to conduct a voir dire to determine its voluntariness was prejudicial error requiring a new trial." [Emphasis in original.] The Supreme Court went on to say: "However, this rule has never been applied directly to pretrial photographic identification procedures." *Id.* Thereafter, *Stepney* suggests as the best policy that even upon a general objection a *voir dire* should be conducted, but that "[f]ailure to conduct the voir dire, however, does not necessarily render such evidence incompetent." *Id.* at 314, 185 S.E. 2d at 850. As in *Stepney* we hold that "[a] different result could not reasonably be expected upon a retrial if all evidence of pretrial photographic identification were excluded." *Id.* The failure to hold a *voir dire* is deemed to be harmless error.

Trusting that some additional observations about objections would be useful, we extract the following from Braswell, *Objections—Howls of A Dog-Pound Quarrel*, 4 Campbell L. Rev. 339 (1982):

> By objecting, ". . . the opponent merely invokes the law; if it is applicable to the evidence, the proponent must make the evidence satisfy the law." The party who makes the objection has an affirmative duty, concisely and without argument, to tell the court and the offering counsel the "rule or rules of evidence he contends has been violated." *Id.* at 360.
>
> Because the ground for ruling on an objection is not always apparent to either judge or opposing counsel, the judge needs help and guidance from the objecting parties.

This need can be met by requiring all objections to be specific. This requirement takes away the element of surprise, ultimately allows the jury to hear more facts from the witness, and reduces inadvertent errors in the ruling of the trial judge because he then has knowledge of the very ground upon which the objecting party relied. Thus, the number of mistrials and new trials would be reduced as errors in the reception or rejection of evidence are eliminated, and the losing party at trial might not appeal if, on a later study of the transcript, he was convinced the trial judge correctly applied the appropriate rules. *Id.* at 345.

No error.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. DAVID CREWS

No. 8322SC148

(Filed 21 February 1984)

1. **Searches and Seizures § 3— lawful entry into defendant's home to render aid—warrantless search after defendant has left**

Where an officer, responding to a call for aid, made a proper warrantless entry into defendant's home and found defendant lying on a couch in his home with a gunshot wound in his shoulder, and the officer investigated the bedroom while defendant's wife was present and found a bullet entry hole inside an open closet, the officer's further warrantless search for the bullet exit hole after defendant and his wife left for the hospital and his discovery of marijuana when he opened a closet door in an adjoining room were illegal absent proof that the search came within an exception to the requirements for a warrant.

2. **Searches and Seizures § 44— suppression hearing—failure of court to make findings concerning consent—remand of case**

Where there was evidence at a suppression hearing that defendant's wife consented to an officer's warrantless search of defendant's home after defendant and his wife had left for a hospital, but the trial court made no findings of fact concerning consent, the case will be remanded to the trial court for further hearing, findings of fact and conclusions.

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 20 October 1982, in Superior Court, DAVIE County. Heard in the Court of Appeals 19 October 1983.

Defendant, David Crews, entered a plea of guilty to felony possession of marijuana after his motion to suppress was denied. He received a sentence of two years imprisonment, part of which was suspended.

The evidence at the hearing on the motion showed that the sheriff's department received a call for immediate aid. Deputy Boger responded and found defendant lying on a couch in his home with a gunshot wound in his shoulder. The ambulance crew had already arrived. The deputy talked with the defendant's wife, who told him defendant had shot himself with a .45 caliber pistol. Before he was carried out, defendant confirmed this information. Deputy Boger investigated the bedroom while Mrs. Crews was present and found a bullet entry hole inside an open closet. Before he completed his investigation, defendant and Mrs. Crews left for the hospital. Deputy Boger continued looking for the bullet and bullet exit hole and opened a closet on the opposite (living room) side of the wall from where he saw the bullet entry hole in the bedroom. He found a large quantity of marijuana inside the closet.

Following the hearing, the court found facts as outlined above. It denied the motion, concluding as a matter of law:

> (1) That Deputy R. C. Boger came to the residence of David Crews in response to an ambulance call involving a shooting incident and that he thereafter executed a warrantless entry of the Crews' premises in the reasonable belief that David Crews or a person in the residence was in the need of immediate aid.
>
> (2) That upon discovering the nature of the shooting, Deputy Boger conducting a normal and routine investigation to determine the entry and exit holes of the bullet fired from the .45 caliber semiautomatic pistol used in the shooting. That upon finding the entry hole, the deputy continued into the living room to examine the same wall in which the bullet had entered. That upon not discovering the exit hole initially in the wall, the deputy opened the closet door which was on the same living room wall.

(3) That upon continuing his reasonable investigation, the deputy opened the door and observed in plain view the burlap bag on the floor of the closet which contained a visible plastic bag with a vegetable material examined subsequently and found to be marijuana.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Gary W. Williard and Bruce C. Fraser, for defendant appellant.

JOHNSON, Judge.

[1] The sole issue presented for review is whether the trial court erred in denying defendant's motion to suppress the evidence seized from his home. The court apparently relied on the "routine" investigative nature of the deputy's conduct in concluding that the evidence was admissible. However, this conclusion was erroneous.

The State argues that *Harris v. United States*, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968), sanctions routine police procedures such as the warrantless search for the bullet here. We disagree. In *Harris* a police regulation required impoundment searches of vehicles to secure valuables and protect the vehicle itself. Therefore evidence in plain view when an officer entered the car pursuant to the regulation could properly be seized. The Court, in a *per curiam* opinion, carefully limited *Harris* to the "narrow circumstances" before it. Nothing in the record suggests any similar regulatory requirement here. We note also that *Harris* applies to automobiles, for which there has traditionally been a lessened expectation of privacy. *See United States v. Ross*, 455 U.S. 798, 72 L.Ed. 2d 572, 102 S.Ct. 2157 (1982). We hesitate to extend its application to private homes. Furthermore, the mere fact that certain police procedures are "routine" does not remove them from constitutional scrutiny. *See e.g. Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966) (discussing typical interrogation techniques). Therefore, *Harris* does not provide constitutional justification for this search.

More recently, in *Mincey v. Arizona*, 437 U.S. 385, 57 L.Ed. 2d 290, 98 S.Ct. 2408 (1978), the Court held that officers may prop-

erly enter and search without warrants when they reasonably believe a person within is in need of immediate aid, or to promptly search for other victims of a homicide or a killer still on the premises. However, once these or similar exigent circumstances cease to exist, the conduct of any further warrantless search is not justified. In *Mincey*, as here, there was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. (In fact, the officer testified that he was "in control" of the premises.) Furthermore, as in *Mincey*, here there was also nothing to suggest any inconvenience in obtaining a warrant. Therefore, unless the circumstances satisfied one of the exceptions to the warrant requirement, Deputy Boger had no constitutional authority to continue his search. *See also United States v. Presler*, 610 F. 2d 1206 (4th Cir. 1979).

The State contends that the officer's conduct was not a search at all, but part of a routine investigation. However, *Mincey, supra*, makes it clear that police may not conduct such routine investigations within private homes without a warrant except in very limited circumstances not applicable here.

Of course, if the officer had discovered the marijuana in plain view in one of the rooms he entered to render aid or to talk to Mrs. Crews, he could have legitimately seized it. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). Here, however, he continued to search after defendant and Mrs. Crews had left. The original proper warrantless entry did not justify such an extended search. *See Wallace v. King*, 626 F. 2d 1157 (4th Cir. 1980), *cert. denied*, 451 U.S. 969, 68 L.Ed. 2d 348, 101 S.Ct. 2045 (1981) (lack of consent to search beyond entry hall made search improper); *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied sub nom., Jolly v. North Carolina*, 446 U.S. 929, 64 L.Ed. 2d 282, 100 S.Ct. 1867 (1980). It is axiomatic that defendant had a legitimate expectation of privacy in a closed closet in his own home. Therefore, the State must satisfy one of the exceptions to the warrant requirement to justify the warrantless entry into it.

[2] The State argues that Mrs. Crews had authority to consent to the search and that she did in fact give her implicit consent. While the evidence at the hearing might have supported such a

theory, the court made no findings of fact to that effect. Mrs. Crews did not testify. *State v. Cooke*, 306 N.C. 132, 291 S.E. 2d 618 (1982) is dispositive of the State's contention on the issue of consent. There, the Supreme Court denied the State's appeal from an order suppressing evidence on Fourth Amendment grounds, stating:

> [T]he scope of appellate review of an order such as this is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

Id. at 134, 291 S.E. 2d at 619. As discussed above, although the Court's findings are supported by the evidence, they support neither its conclusions of law nor the State's theory of consent. The State has the burden, ". . . *at the suppression hearing*, of demonstrating with particularity a constitutionally sufficient justification of the officers' search. . . ." *Id.* at 136, 291 S.E. 2d at 620 (emphasis original). An appellate court does not sit as the finder of fact, and it would be unfair to the defendant to consider the State's contention on the record presented in this case. *See id.* at 137-38, 291 S.E. 2d at 621. Therefore, we hold that the State failed to meet its burden and that the court erred in denying defendant's motion. Unlike the situation presented in *Cooke*, however, we see no prejudice to the defendant in remanding this case to the trial court for further hearing, findings of fact, and conclusions of law.

Therefore, the order denying defendant's motion is vacated, the judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Judge WELLS concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

I believe the motion to suppress was properly denied and, therefore, vote to affirm the judgment.

JAKE ALLEN McGINNIS, SR. v. BETTY JEAN McGINNIS

No. 8327DC301

(Filed 21 February 1984)

Evidence § 14— psychiatrist's testimony improperly admitted—physician-patient privilege applicable

In an action for divorce and alimony, the trial court erred in allowing into evidence testimony by a psychiatrist concerning treatment of defendant since defendant did not waive the privilege and since there was no finding that the interest of justice required that the privilege be withheld. G.S. 8-53.

APPEAL by defendant from *Carpenter, Judge.* Judgment entered 3 December 1982 in District Court, GASTON County. Heard in the Court of Appeals 14 February 1984.

Plaintiff brought an action against his wife in which he sought a divorce from bed and board and sole possession of the home titled in the name of the plaintiff individually. Defendant filed an answer and counterclaim seeking equitable distribution of the marital assets, a divorce from bed and board, permanent alimony, and attorney fees. Plaintiff filed a reply in which he denied the allegations of the counterclaim.

The parties lived in the same house intermittently following the filing of the present action until Gaston County District Court ordered defendant to vacate the house and directed defendant not to remove numerous items of personal property from the residence. Plaintiff filed a motion to have defendant held in contempt for removing the aforesaid items of personal property. Defendant was held in contempt with punishment to be determined by the judge presiding at the jury trial on the permanent alimony issue.

When the case was called for trial, plaintiff announced that he had filed for an absolute divorce in Mecklenburg County, and that he was abandoning his prayer for relief for a divorce from

bed and board. Defendant went forward with her evidence. Issues were submitted to the jury and answered as follows:

1. Has the Plaintiff rendered such indignities to the person of the Defendant so as to render her condition intolerable and life burdensome? *Yes.*

2. Has the Defendant rendered such indignities to the person of the Plaintiff so as to render his condition intolerable and life burdensome? *Yes.*

The trial court denied defendant's claim for permanent alimony and ordered the defendant to serve thirty days in jail for contempt. Defendant appealed.

No brief filed for plaintiff appellee.

Childers, Fowler & Childers by Max L. Childers and David C. Childers for defendant appellant.

HILL, Judge.

Defendant contends the trial court erred in allowing in its entirety the testimony of defendant's psychiatrist concerning treatment defendant received from him in his capacity as a psychiatrist. Objection was made to the psychiatrist's testimony by defendant on the grounds that any communication regarding the psychiatrist was privileged information.

North Carolina has created by statute a privilege for communications between physician and patient. See G.S. 8-53 (for doctors); see also G.S. 8-53.3 (for psychologists). "It is the purpose of such statutes to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination." *Sims v. Insurance Co.*, 257 N.C. 32, 36, 125 S.E. 2d 326, 329 (1962). The physician-patient privilege "extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." *Smith v. Lumber Co.*, 147 N.C. 62, 64, 60 S.E. 717, 718 (1908). The privilege is for the benefit of the patient alone; the patient may waive the privilege. *Capps v. Lynch*, 253

N.C. 18, 116 S.E. 2d 137 (1960). The privilege is a qualified, rather than an absolute, privilege in that the judge has discretion to "compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." G.S. 8-53.

Applying these basic tenets to the case under review, we are of the opinion that the psychiatrist cannot divulge defendant's communications unless defendant waived the physician-patient privilege, or the interests of justice required that the privilege be withheld. Neither exception existed in the case under review.

1. *Waiver.* The physician-patient privilege was not waived. Defendant did not offer the testimony of her treating psychiatrist which would open the door and waive the privilege. Rather, the psychiatrist was presented as a witness by the plaintiff, and when such an offer was made, defendant by her objections refused to waive her legal right not to have the psychiatrist disclose the nature of her visits.

2. *The interests of justice.* The trial judge "may, in his discretion, compel disclosure of such communications if, in his opinion, it is necessary to a proper administration of justice and he so finds and enters such finding on the record." *Capps v. Lynch, supra* at 22, 116 S.E. 2d at 141. In the case under review, the trial judge did not find nor did he enter a finding on the record that disclosure of defendant's communications was necessary to the administration of justice. Instead, the psychiatrist's testimony concerning defendant's mental condition was admitted in its entirety over objection by defendant. The beneficial effects that may emerge from a therapeutic relationship cannot be fully achieved unless there is a trusting relationship between a psychologist and patient which is founded on a sense of complete confidentiality. Only on that basis are most people willing to open up their innermost personalities and disclose the most private and sometimes painful aspects of their inner selves. Absent a finding that the interests of justice require the privilege be withheld, we hold that the breach of defendant's confidential therapeutic relationship in this jury trial constituted prejudicial error necessitating a new trial.

Finally, because of our disposition contained herein, defendant's motion to amend the record on appeal becomes moot.

New trial.

Judges HEDRICK and EAGLES concur.

STATE OF NORTH CAROLINA v. SHERMAN ARTHUR THOMPSON

No. 8318SC792

(Filed 21 February 1984)

1. **Criminal Law § 138— position of leadership aggravating factor—insufficient evidence**

The evidence was insufficient to support the court's finding as an aggravating factor in sentencing defendant for armed robbery that "defendant used others to participate in the commission of the offense and occupied a position of leadership in carrying it out" where it tended to show only that defendant was accompanied by a codefendant at the time he committed the robbery and that defendant told the codefendant of his intention to rob the victim prior to doing so.

2. **Criminal Law § 138— great monetary value aggravating factor—insufficient evidence**

The evidence was insufficient to support the court's finding as a factor in aggravation in sentencing defendant for armed robbery that the offense involved a taking of property of great monetary value where it showed only that defendant took the victim's car keys before leaving the scene but there was no evidence that defendant made any attempt to take the car itself.

3. **Criminal Law § 138— attempt to escape aggravating factor—insufficient evidence**

In imposing a sentence upon defendant for assault with a deadly weapon with intent to kill, the evidence did not support the trial court's finding as an aggravating factor that the offense was committed in an effort to escape or prevent lawful arrest for an armed robbery where it did not disclose that defendant was threatened with arrest at the time he committed the offense or that defendant was restrained in any way at the time.

4. **Criminal Law § 138— especially atrocious aggravating factor—insufficient evidence**

The evidence did not support the trial court's finding as an aggravating factor that an assault with a deadly weapon with intent to kill was "especially atrocious" where it showed that defendant shot the victim in the back; defendant twice told the victim prior to the actual shooting that he intended to kill him; and the victim required hospitalization and extended medical treatment for his injuries.

APPEAL by defendant from *Hairston, Judge*. Judgment entered 29 April 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 February 1984.

Defendant was charged in proper bills of indictment with robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. In exchange for the State's agreement to reduce the latter charge, defendant agreed to plead guilty to robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. In connection with defendant's plea of guilty to armed robbery, Judge Hairston found the following aggravating factors pursuant to N.C. Gen. Stat. Sec. 15A-1340.4(a)(1):

> [1]. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.
>
> [2]. The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

The court also found factors in mitigation. Upon finding that the factors in aggravation outweighed the factors in mitigation, the court imposed a prison sentence of twenty-five years, which exceeds the presumptive term, established by N.C. Gen. Stat. Sec. 14-87, of fourteen years.

In connection with defendant's conviction of assault with a deadly weapon inflicting serious injury, the court found the following factors in aggravation:

> [1]. The offense was committed for the purpose of avoiding lawful arrest or effecting an escape after the armed robbery had been committed.
>
> [2]. The offense was especially atrocious.

The court also found factors in mitigation. Upon finding that the factors in aggravation outweighed factors in mitigation, the court imposed a prison sentence of eight years, which exceeds the presumptive term of three years. This sentence is to begin at the expiration of the sentence imposed in connection with defendant's

conviction of armed robbery. Pursuant to the provisions of N.C. Gen. Stat. Sec. 15A-1444(a1), defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Graham, Cooke, Miles & Bogan, by Donald T. Bogan, for defendant, appellant.

HEDRICK, Judge.

The sole question presented on appeal is whether the court erred "in its findings of aggravating and mitigating factors" and in sentencing defendant to prison terms exceeding the presumptive terms.

Under N.C. Gen. Stat. Sec. 15A-1340.4(b), a trial judge who imposes a prison term in excess of the presumptive must ground his decision on specifically identified aggravating factors "proved by a preponderance of the evidence." Our Supreme Court has defined "preponderance" in this context as "the greater weight of the evidence." *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E. 2d 689, 697 (1983). Defendant's contention on appeal is that there was insufficient evidence to support each of the aggravating factors. We agree, and for that reason remand the case for resentencing.

[1] The first factor in aggravation as articulated by the trial judge in open court is that "defendant used others to participate in the commission of the offense and occupied a position of leadership in carrying it out." The record discloses that defendant was accompanied by a co-defendant, Mr. Huntley, at the time he committed the robbery. A statement made by defendant following his arrest and introduced at the hearing indicates that defendant told Mr. Huntley of his intention to rob the victim prior to doing so. The record contains no other evidence of Mr. Huntley's participation in the crime or of the relationship between defendant and Mr. Huntley. This evidence is insufficient support for the court's finding in this regard.

[2] The trial court also found that "there was an attempt to steal the automobile, . . . and that this was a taking of property of great monetary value." The record discloses that defendant took the victim's car keys before leaving the scene. There was no evidence that defendant made any attempt to take the car itself.

The court's finding in this regard was thus without evidentiary support.

[3] With respect to defendant's conviction of assault with a deadly weapon inflicting serious injury, the court found as an aggravating factor that "this was committed after the armed robbery had been completed," and "that it was committed in an effort to escape or to prevent lawful arrest." The record does not disclose that defendant was threatened with arrest at the time he committed the offense. Nor do we believe he can be said to have committed the offense in an effort to "escape," since he was not restrained in any way at the time. Thus there was no evidence that would support the court's finding in this regard.

[4] The last factor in aggravation found by the trial court was that the assault of which defendant was convicted was "especially atrocious." Our Supreme Court discussed this factor at length in *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983): "[T]he focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." (Emphasis original.) In the instant case, the record discloses that defendant shot the victim in the back. The State presented evidence indicating that the defendant twice told the victim prior to the actual shooting that he intended to kill him. Further, there was evidence that the victim required hospitalization and extended medical treatment for his injuries. Nevertheless, we think it clear that these circumstances are not so unusual in connection with the offense of assault with a deadly weapon inflicting serious injury as to establish that the offense was "especially atrocious." For this reason we find the evidence insufficient to support the court's finding in this regard.

These errors in finding factors in aggravation require a new sentencing hearing.

Remanded for resentencing.

Judges HILL and EAGLES concur.

DANIEL W. THOMASSON v. VICKY DARLENE BROWN AND JAMES FRANKLIN BROWN

No. 8315SC329

(Filed 21 February 1984)

Appeal and Error § 49— exclusion of evidence not prejudicial

In an action in which plaintiff sought to recover damages for personal injuries allegedly resulting from the negligence of defendant in the operation of a motor vehicle, any error committed by the trial judge in excluding testimony which tended to show that defendant was negligent when she drove a van through a stop sign into an intersection and blocked plaintiff's lane of travel could not have been prejudicial to the plaintiff since the jury concluded that defendant was negligent and that her negligence was a proximate cause of plaintiff's injury.

APPEAL by plaintiff from *Bowen, Judge*. Judgment entered 1 September 1982 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 16 February 1984.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries allegedly resulting from the negligence of defendant Vicky Brown in the operation of a motor vehicle. At trial, the evidence tended to show the following:

Inside the city of Burlington, North Carolina, Maple Avenue is a four-lane highway running north and south. Maple Avenue is intersected by Cameron Street, which runs east and west. Before the accident herein involved, defendant Vicky Brown was operating a 1976 Dodge van in an easterly direction along Cameron Street, approaching the Maple Avenue intersection. Plaintiff was operating a 1975 Jeep owned by the United States Postal Service in a northerly direction on Maple Avenue, approaching the Cameron Street intersection. At the intersection, Maple Avenue is the dominant street and Cameron Street the servient. Defendant Vicky Brown drove her vehicle into the intersection and stopped the van, blocking at least a portion of the inside northbound lane of Maple Avenue. Plaintiff, approaching from the south in the inside northbound lane of Maple Avenue at approximately twenty-five miles per hour, "turned the wheels sharply to the right" to avoid hitting defendants' van. The Jeep "hit the curbing and rolled over," injuring plaintiff. Plaintiff's vehicle did not strike defendants' van.

The following issues were submitted to and answered by the jury as indicated:

1. Was the plaintiff, Daniel W. Thomasson, injured and damaged by the negligence of the defendant Vicky Darlene Brown?

ANSWER: Yes

2. Did the plaintiff, Daniel W. Thomasson, contribute to his own injuries and damages?

ANSWER: Yes

3. What amount of damages, if any, is the plaintiff, Daniel W. Thomasson, entitled to recover?

ANSWER:

From a judgment entered on the verdict, plaintiff appealed.

Ross and Dodge, by Harold T. Dodge, for plaintiff, appellant.

Perry C. Henson, Jr., and Jill R. Wilson for defendants, appellees.

HEDRICK, Judge.

Plaintiff brings foward and argues in his brief only three assignments of error. The first two relate to the exclusion of testimony regarding "visibility" from the crest of the hill south of the intersection to the intersection. The third relates to the exclusion of a statement given by one of plaintiff's witnesses to another, a Post Office official.

With regard to how the accident occurred, plaintiff testified as follows:

I was in the inside lane on the right-hand side of the road going back toward the Post Office delivering the Jeep and I stopped at Tucker Street for the stoplight and I pulled off and crested the hill and I was about halfway down the hill between there and Cameron Street and this van shot out of Cameron Street and did not stop, and I looked in the little mirror they got on the side of the Jeeps, on each side, to see if there was anything coming to the right and wasn't nothing coming and I touched the brakes, and I seen that wasn't go-

ing to work, so I cut my wheels hard to the right and blowed the horn, and I went in Cameron Street and hit the curbing and rolled over. . . . I was driving in the center lane on the right-hand side traveling in a northerly direction. . . . Between Tucker Street and Cameron Street, it's an incline there, a knoll, and I went up that grade and went over it, and I was approximately eighty-five feet from the intersection when I seen the van come out. I was done over the hillcrest, and between the hillcrest and Cameron Street when I first saw the van come out. The van was coming out of Cameron Street. I was doing approximately twenty-five miles an hour and when I saw this vehicle coming out into the street I touched my brakes and I seen that wasn't going to work. . . . I looked in that side mirror to see if there was anything beside of me, and it wasn't anything beside of me and I blowed the horn and cut the wheels sharp, just as sharp as they'd go. . . . I was right on him when I turned the wheels sharply to the right. I was in the center lane and the van was sitting right in front of me. It was setting right in my lane setting still. It had done stopped. It was completely in my lane blocking it. . . . I turned my wheels to the right because I didn't want to hit him head-on in that little old Jeep. I didn't want to hit them head-on in the side. If I hadn't turned my wheels to the right I would have hit them head-on right in the side. My vehicle came within two feet of this van. My Jeep went over and hit the curbing on Cameron Street and Maple Avenue and laid over on the side. . . . My opinion is that when I hit the curbing it was probably below twenty miles an hour, 'cause it laid over so easy. . . . As I was traveling north on Maple Avenue my vehicle was located approximately 200 feet south of the intersection of Cameron Street the first time I could see the intersection. There is a hill which prevented me from seeing the intersection of Cameron Street more than 200 feet away from it. . . . When I came up Maple Avenue and came over the hillcrest I didn't see a thing. When I got about halfway down the hill, I seen this yellow van dart out of Cameron Street in front of me, and I looked out the mirror on the right-hand side and didn't see nothing on that side. I touched my brakes and seen I wasn't going to stop and I cut it hard to the right to miss hitting them in the side. When I first saw the van I was about midways from this

intersection and I heard them say it was 166 feet and I'd say I must have been about 85 feet there. I was about halfway between the crest and Tucker and Cameron. . . . The van did not stop at the stop sign. I'm saying that it couldn't have stopped at the speed it was going. It was going pretty rapid. . . . It isn't true that when I came over that hillcrest Vicky Brown's van was already in South Maple Avenue. When I came over the hill, sir, I told you one time it was coming out of Cameron Street. When I came over the hill there and got halfway down, it went—she wasn't coming nowhere until I got halfway down and then she shot out of Cameron Street.

The exceptions on which plaintiff's assignments of error are based challenge the rulings of the trial judge in excluding testimony which tended to show that defendant Vicky Brown was negligent when she drove the van through the stop sign into the intersection and blocked plaintiff's lane of travel. Since the jury concluded that defendant Vicky Brown was negligent and that her negligence was a proximate cause of plaintiff's injury, any error committed by the trial judge in excluding this testimony could not have been prejudicial to the plaintiff. Plaintiff lost his case because the jury found that the plaintiff was negligent and that plaintiff's negligence was a proximate cause of his injuries. The excluded evidence was in no way relevant to the issue of contributory negligence.

No error.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. CURTIS DOWNING

No. 832SC335

(Filed 21 February 1984)

1. **Criminal Law § 26.5— convictions of felonious breaking or entering and felonious larceny pursuant to a breaking or entering**

Defendant could properly be convicted and punished for both felonious breaking or entering in violation of G.S. 14-54(a) and felonious larceny pursuant to a breaking or entering in violation of G.S. 14-72(b).

2. Larceny § 7.3— ownership of stolen property—no fatal variance

There was no fatal variance between an indictment charging larceny of property from the owner of a building and evidence that the stolen property belonged to the owner's daughter who had a business in the building, since the owner of the building had a sufficient property interest in the stolen items to support a charge of larceny.

3. Arrest and Bail §6.2— obstructing an officer—sufficiency of evidence

The evidence was sufficient to support defendant's conviction for obstructing an officer in violation of G.S. 14-223 where it tended to show that the officer brought defendant to the courthouse, the jailer called the magistrate, and defendant went into the jail cell area and refused to come out; the officer went into the cell area to get defendant and defendant raised his fists as if to hit her; the jailer stepped in and helped the officer take defendant to the magistrate's office; and once at the magistrate's office, defendant continued to be verbally abusive and refused to sit down.

4. Criminal Law § 138— aggravating factor—proof of prior conviction

Prior convictions may be proved by defendant's own statement under oath, and to challenge a prior conviction, defendant has the initial burden before or during trial to raise the issues of indigency and lack of assistance of counsel.

5. Arrest and Bail § 6— obstructing police officer—excessive sentence

A sentence of two years for obstructing an officer in violation of G.S. 14-223 was beyond the maximum term allowed by the statute and was therefore unlawful.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 22 October 1982 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 17 November 1983.

Attorney General Edmisten, by Assistant Attorney General Jane P. Gray, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

BECTON, Judge.

After a Washington County jury found defendant guilty of felonious breaking or entering, felonious larceny, and misdemeanor obstructing an officer, the trial court entered judgments imposing sentences totalling twenty-two years. Defendant appeals, contending (1) that he cannot be convicted and punished for both breaking or entering and felonious larceny pursuant to a breaking or entering; (2) that the variance between the indictment

and the evidence as to the owner of property allegedly stolen requires that the larceny judgment be arrested; (3) that the evidence was insufficient to support a conviction for obstructing an officer; and (4) that the sentences imposed were improper or in excess of the statutory maximum terms.

I

[1] Seeking to have the judgment of conviction for felonious breaking or entering arrested, defendant first argues that he cannot be convicted of both felonious breaking or entering pursuant to N.C. Gen. Stat. § 14-54(a) (1981) and felonious larceny pursuant to N.C. Gen. Stat. § 14-72(b) (1981), since "[i]n this circumstance, the felonious breaking and entering is a lesser included offense of the felonious larceny." This argument, although ingeniously presented, has this day been rejected by this Court in *State v. Alton Gordon Smith*, 66 N.C. App. 570, --- S.E. 2d --- (1984). On the authority of *State v. Smith*, we, too, find no merit in this argument.

II

[2] Seeking to have the judgment of conviction for felonious larceny vacated, defendant next argues that "[t]here is a fatal variance between the indictment and the evidence as to the owner of the property allegedly stolen." The felonious larceny count of the indictment identified the property stolen as two television sets, one clock radio, five dollars and 93 cents in change, one carton and two packages of cigarettes, three bottles of wine, and one package of Dentyne gum. The indictment further alleges that all of the items stolen were "the personal property of Helen Atamanchuk." The State's evidence, however, showed that Helen Atamanchuk owned the building from which the items were stolen. Helen Atamanchuk's daughter, Mary A. Ruska, owned the business in the building, and the items stolen belonged to Mary A. Ruska.

An indictment for larceny must correctly allege the owner *or* the person in possession of the property stolen. *State v. McKoy*, 265 N.C. 380, 144 S.E. 2d 46 (1965). An indictment is sufficient, however, if the person alleged to be the owner of the property is shown to have a special property interest in the stolen property or if the evidence shows the person named in the indictment was

in possession of the property at the time of the theft. *See State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966) and *State v. Dees*, 14 N.C. App. 110, 187 S.E. 2d 433 (1972).

In this case, the evidence was sufficient to support a finding that Helen Atamanchuk, owner of the building in which the larceny was committed, was in possession of, *or* had a sufficient property interest in, the stolen items. More importantly, the defendant was not prejudiced in preparing his defense by the allegation of ownership in Helen Atamanchuk, rather than Mary Ruska. The reference to Atamanchuk's East Haven Food Mart, in addition to the individual named in the indictment sufficiently informed the defendant of the crime with which he was charged so he could determine whether he was charged with an indictable offense. Further, Mary Ruska testified for the State in defendant's trial. She, therefore, cannot have defendant indicted for a larceny of the same property from her. Defendant is clearly able to plead the verdict in this case in bar of a subsequent prosecution for the same offense. *See State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976).

For the reasons stated, we find no fatal variance between the indictment and proof of the larceny count, and we further find that defendant in no way was prejudiced.

III

[3] Defendant next contends that the evidence was not sufficient to permit a conviction for obstructing an officer since "his actions on August 13, 1982, were not such as to give rise to a violation of [N.C. Gen. Stat. § 14-223 (1981)]."

Defendant allegedly obstructed Officer Evelyn Hardy who, at the time, was attempting to complete the arrest of defendant. The manner in which the defendant allegedly obstructed or impeded her was by going into the jail (the cell area) and refusing to come out. To support his position, defendant points out that Officer Hardy was "simply waiting for the magistrate to get down to the courthouse" and that "nothing of significance to the arrest process was going on when the defendant went back to the cell area."

Again, we disagree with defendant. G.S. § 14-223 makes it a criminal offense to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge

a duty of his office." The case law is clear and straightforward. Neither actual physical assault or force is required to constitute a violation of G.S. § 14-223. *State v. Kirby*, 15 N.C. App. 480, 190 S.E. 2d 320, *appeal dismissed*, 281 N.C. 761, 191 S.E. 2d 363 (1972). Neither is it necessary to prove that the defendant's conduct permanently prevented the officer from discharging her duties. *State v. Leigh*, 10 N.C. App. 202, 178 S.E. 2d 85 (1970), *rev'd on other grounds*, 278 N.C. 243, 179 S.E. 2d 708 (1971). Further, the State's evidence is not as weak as defendant suggests. When Officer Hardy brought the defendant to the courthouse, the jailer called the magistrate. Instead of waiting with Officer Hardy, the defendant walked directly to the cell area. Officer Hardy requested the defendant to come out since he didn't belong there unless he had commitment papers. Defendant refused, and Officer Hardy asked him to come out again. The defendant then said: "If you want me, come and get me." Officer Hardy went in to get the defendant, and he raised his fists as if to hit her. The jailer stepped in and helped her get the defendant out of the cell area and also helped her take defendant down to the magistrate's office. Once in the magistrate's office, defendant continued to be verbally abusive and refused to sit down. Indeed, Officer Hardy had to handcuff defendant to restrain him.

IV

[4] On the authority of *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), we summarily reject defendant's argument that "the sentences for the felony counts in excess of the presumptive term were unlawful because they were based on a single aggravating factor not properly proven." As stated in *State v. Alton Gordon Smith*: "Prior convictions may be proved by a defendant's own statement, under oath. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). To challenge a prior conviction, defendant has the initial burden before or during trial to raise the issues of indigency and lack of assistance of counsel. [Citation omitted.] Defendant, not having met his burden, cannot now complain." --- N.C. App. at ---, --- S.E. 2d at ---.

[5] Defendant also assigns error to the imposition of a sentence for obstructing an officer which was in excess of the statutory maximum. We find merit in this assignment of error. G.S. § 14-223 provides that obstructing an officer is a misdemeanor

"punishable by a fine not to exceed Five Hundred Dollars ($500.00), imprisonment for not more than six months, or both." A sentence beyond the maximum term allowed by the statute is unlawful. *State v. Templeton*, 237 N.C. 440, 75 S.E. 2d 243 (1953). In this case, defendant was given a two-year sentence for obstructing an officer. Since this sentence was to run at the expiration of the felony sentences, the case must be remanded for resentencing pursuant to the proper statute.

In the trial of this case, we find

No error.

For error in imposing sentence that exceeded the statutory maximum on the obstructing an officer charge, this case is

Remanded for resentencing.

Judges HEDRICK and HILL concur.

DOUGLAS WOHLFAHRT AND WIFE, LYNN WOHLFAHRT v. LARRY G. SCHNEIDER, M.D.

No. 825SC1254

(Filed 21 February 1984)

Constitutional Law § 24.7; Process § 9.1— nonresident defendant—jurisdiction—minimum contacts

In an action in which plaintiffs, who reside in North Carolina, sued defendant, a resident of Texas, for the balance allegedly due them under the terms of a note executed by defendant incident to purchasing various articles of medical equipment, the trial court properly found our courts could exercise *in personam* jurisdiction over defendant since defendant's promise in the note to make payments to plaintiff in Wilmington, North Carolina was clearly a promise to deliver a thing of value within this state within the purview of G.S. 1-75.4(5) and constituted a sufficient contact with this state so as to satisfy due process.

APPEAL by defendant from *Barefoot, Judge.* Order entered 9 August 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 21 October 1983.

The plaintiffs, who reside in New Hanover County, North Carolina, sued defendant, a resident of Harris County, Texas, for the $43,500 balance allegedly due them under the terms of a note executed by defendant incident to purchasing various articles of medical equipment from plaintiffs. The note, secured by a security agreement covering the articles purchased, required defendant to pay plaintiffs or their order in Wilmington, North Carolina $1,034.87 or more each month, beginning November 1, 1981 and continuing monthly thereafter, until the principal balance, together with interest thereon at the rate of 15% per annum, was paid; but according to the complaint defendant made no payments on the note and under its terms the full amount became due. Copies of the complaint, summons, note, and security agreement were served on defendant in Texas. The defendant, before answering or otherwise pleading, specially appeared and moved to dismiss on the grounds that the court had no jurisdiction over his person or property. According to defendant's affidavit, which accompanied the motion to dismiss, neither he nor the equipment that he bought from plaintiffs had ever been in this state and he had never engaged in any kind of activity herein.

After considering the complaint, summons, note, security agreement, motion and affidavit, the trial judge found and concluded that the court did have *in personam* jurisdiction over the defendant and denied the motion.

Elton G. Tucker for plaintiff appellees.

Murchison, Taylor & Shell, by Joseph O. Taylor, Jr., for defendant appellant.

PHILLIPS, Judge.

Defendant's appeal challenges the power of our courts to exercise *in personam* jurisdiction over him in this action. When a non-resident defendant contests *in personam* jurisdiction, a two step process is required. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). The first step is to determine whether a statute authorizes the exercise of jurisdiction over a non-resident defendant under the circumstances involved. In this instance, there is statutory authority for the exercise of personal jurisdiction over the non-resident defendant. G.S. 1-75.4(5) confers jurisdiction to our courts in any action which

. . . .

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value.

. . . .

Obviously, money is a thing of value, and defendant's promise in the note to make payments to plaintiff in Wilmington, North Carolina was clearly a promise to deliver a thing of value within this state, and thus within the purview of the statute. *Pope v. Pope*, 38 N.C. App. 328, 248 S.E. 2d 260 (1978). The second step is to determine whether permitting the non-resident defendant to be sued in the particular case violates due process of law, as guaranteed by the Constitution of the United States. "This is the crucial inquiry and the ultimate determinative factor in assessing whether jurisdiction may be asserted under the 'long-arm' statute." *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 530, 265 S.E. 2d 476, 479 (1980). In our opinion this suit against the defendant meets the requirements of due process, and the order appealed from is affirmed.

In determining whether a suit against a non-resident defendant meets due process, we have few principles and no reliable rules of thumb to guide us. Before a non-resident defendant can be subjected to *in personam* jurisdiction, however, it is necessary that he have had at least minimum contact with the forum state theretofore. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). The nature of the necessary contact has not been clearly defined as yet, but the importance of its relationship to the suit has been stressed. "[T]he relationship among the defendant, the forum, and the litigation [is the] central concern of the inquiry into personal jurisdiction." *Shaffer v. Heitner*, 433 U.S. 186, 204, 53 L.Ed. 2d 683, 698, 97 S.Ct. 2569, 2580 (1977). A single contact that has a substantial connection with the forum state can be sufficient. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957). In the last analysis, however, as has been held in each of the foregoing decisions and many others by the Supreme Court of the United States, as well as by our own Supreme Court in *Farm-*

er v. Ferris, 260 N.C. 619, 133 S.E. 2d 492 (1963), due process depends upon whether it is fair and reasonable to require a non-resident defendant to litigate the particular case involved in the forum state. Requiring the defendant to litigate his obligation under the note here seems entirely fair to us. He is the one that promised to make the note payments here, and in doing so he must have anticipated that here is where he would be sued if the payments were not made. Thus, the suit will be permitted to go forward.

Defendant cites *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958) for the proposition that making payments in the forum state by itself is an insufficient contact to justify a state exercising jurisdiction over a non-resident defendant. But the circumstances in that case are materially different from the circumstances of this case, and in our judgment that case has no application to this one. In *Hanson*, the only contact that the defendant trustee, a Delaware resident, had with Florida, the forum state, was remitting trust income to the plaintiff settlor who *moved* there after the trust had been set up and was operating; whereas, in this case, as has been stated, defendant contracted to make the payments here from the outset.

Affirmed.

Judges WEBB and EAGLES concur.

WILLIAM W. GILLIKIN AND JO ANN J. GILLIKIN v. ROBERT E. WHITLEY, TRUSTEE, AND ELLIS JONES, JR., PLAN ADMINISTRATOR OF THE ELLIS JONES, JR., TILE CONTRACTOR, INC. PROFIT-SHARING PLAN AND TRUST AGREEMENT

No. 838SC303

(Filed 21 February 1984)

Contracts § 6— note and deed of trust—suppressing criminal prosecution—void as against public policy

A promissory note and a deed of trust which were executed by plaintiff in exchange for defendant's implicit agreement not to initiate criminal proceedings against the male plaintiff for embezzlement were void as against public policy.

Gillikin v. Whitley

APPEAL by plaintiff and defendants from *Llewellyn, Judge.* Judgment entered 20 October 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 14 February 1984.

This is an action to enjoin a foreclosure proceeding and to set aside a promissory note signed by plaintiff William W. Gillikin and a deed of trust signed by both plaintiffs. This case was consolidated for judgment with proceeding #81SP300 instituted before the Clerk of Superior Court to foreclose on the deed of trust hereinafter described. The Clerk's order, which authorized the trustee to foreclose, was appealed by plaintiffs to the Superior Court. Following trial before the judge, the court made detailed findings of fact and conclusions of law and entered the following order:

> 1. That the promissory note dated January 2, 1981, be and the same is declared null and void and of no effect as to plaintiff, Jo Anne J. Gillikin.
>
> 2. That the deed of trust dated January 2, 1981, executed by William W. Gillikin and wife, Jo Anne J. Gillikin, to Robert E. Whitley, Trustee for Ellis Jones, Jr., Plan Administrator of the Ellis Jones, Jr., Tile Contractor, Inc., Profit-Sharing Plan and Trust Agreement, which is recorded in Book 764, Page 300, of the Lenoir County Registry, be and the same is hereby declared to be null and void, and of no effect as to the plaintiff, Jo Anne J. Gillikin.
>
> 3. That the deed of trust executed by plaintiffs, which is recorded in Book 764, Page 300, of the Lenoir County Registry be and the same is hereby cancelled as to the plaintiff, Jo Anne J. Gillikin, and the Register of Deeds of Lenoir County be and she is hereby ordered to mark said deed of trust cancelled as to plaintiff, Jo Anne J. Gillikin, upon the public records of Lenoir County.
>
> 4. That the Order of the Clerk of Superior Court of Lenoir County entered in File #81SP300, which authorized the Trustee to foreclose upon the property described in said deed of Trust recorded in Book 764, at Page 300, of the Office of the Register of Deeds of Lenoir County, be and the same is hereby remanded to said Clerk for said Clerk to amend said Order in accordance with this Judgment.

5. That the costs of this action be and the same are hereby taxed against the plaintiff, William W. Gillikin.

Plaintiff William Gillikin and defendants appealed.

White, Allen, Hooten, Hodges & Hines, P.A., by John R. Hooten, for plaintiff William Gillikin, appellant, and plaintiffs, appellees.

Harvey W. Marcus for defendant, Robert E. Whitley, appellant and appellee, and Thomas H. Morris for defendant, Ellis Jones, Jr., appellant and appellee.

HEDRICK, Judge.

Because of our disposition of this case, set out below, we treat both appeals together.

The record discloses that plaintiffs executed the instruments in question after receiving the following certified letter from an attorney who represented defendant Ellis Jones, Jr.:

Dear Mr. Gillikin:

I am writing this letter on behalf of Ellis Jones, Jr. and in regard to his business's Profit Sharing Plan.

As you know, we have evidence that you have misapplied funds in the amount of $90,916.57. I have prepared a Promissory Note in the principal amount of $90,916.57, with interest at 16%. I have also prepared a Deed of Trust securing this Note on all of the tracts of real property which you presently own in Lenoir County. The Note is payable upon demand and provides for interest at the rate of 16% per annum.

The Note has been prepared for your signature and the Deed of Trust has been prepared for your's and your wife's signature. [T]he Note will remain in my office and you and your wife may come in to sign the Note and Deed of Trust during any of our office hours. We shall be open from 8:30 a.m. to 5:30 p.m. on Tuesday, December 23, 1980 and will be closed until Monday, December 29, 1980, at 8:30 a.m.

Please be advised that in the event the Note and Deed of Trust have not been signed by you and your wife by 10:00

a.m. on Tuesday, December 30, 1980, I will take the following action:

1. I will institute a civil procedure against you for the entire balance and will seek to attach all real property in which you have an interest in Lenoir County.

2. I will request the District Attorney of our Judicial District to investigate the facts and to bring the appropriate criminal action against you. In addition to possible Federal criminal violations and perhaps additional State violations, it is my opinion that you have clearly violated N.C.G.S. 14-90, a copy of which I have attached to this letter. This alone is a ten year felony.

If you have any questions regarding this letter or its contents, please direct your communications to me and not to Ellis Jones, Jr. As you know, this whole matter has greatly upset Ellis and he is having to take action which he does not desire but which I have advised him to take in view of the great seriousness of this matter.

Sincerely,

s/ ROBERT E. WHITLEY

Cc: Mr. Ellis Jones, Jr.

Attachment.

Enclosed with this letter was a copy of N.C. Gen. Stat. Sec. 14-90, with the word "Embezzlement" underlined in red. On 2 January 1981, after receiving this letter, plaintiffs went to the attorney's office and signed the deed of trust. Mr. Gillikin also signed a promissory note. The findings made by the trial judge clearly establish that plaintiffs would not have signed either instrument had Gillikin not been threatened with criminal prosecution.

"It is well-settled law that executory agreements . . . made in consideration of preventing, refraining, or suppressing prosecution for a crime are void as against public policy." *Frye v. Sovine*, 58 N.C. App. 731, 733, 294 S.E. 2d 748, 750 (1982). We think the rule is well stated in 17 Am. Jur. 2d, *Contracts* Sec. 206 (1964):

There appears to be no doubt that an agreement to make restitution of property stolen or funds embezzled is valid, so

long as the agreement does not contemplate that a criminal prosecution therefor shall be suppressed or stayed. . . . On the other hand, it is generally held . . . that if a threat to prosecute criminally induced the execution of a contract for the repayment of embezzled money, the agreement is invalid.

In the instant case, it is clear that plaintiffs signed the note and deed of trust in exchange for defendant's implicit agreement not to take the action, threatened in Mr. Whitley's letter, of requesting the District Attorney to investigate and "bring the appropriate criminal action" against Mr. Gillikin. We hold that the promissory note and the deed of trust, both dated 2 January 1981, are void as against public policy.

Because of our disposition as above set out, we find it unnecessary to discuss the several questions raised by plaintiff and defendants in their briefs. The result is: the judgment with respect to plaintiff Jo Anne J. Gillikin is affirmed; the judgment with respect to plaintiff William Gillikin is reversed, and the cause is remanded to the Superior Court for entry of an order declaring the note and deed of trust as it relates to Mr. Gillikin null and void and to be cancelled from the record; with respect to proceeding #81SP300, the cause is remanded to the Superior Court with directions that it remand proceeding #81SP300 to the Clerk of Superior Court for entry of an order dismissing the foreclosure proceeding.

Affirmed in part, reversed in part, and remanded.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. JERRY DEAN REID

No. 8327SC906

(Filed 21 February 1984)

1. Larceny § 7.8— asportation beyond confines of building not required

The trial court properly denied defendant's motion to dismiss the felonious larceny pursuant to a breaking or entering charge under G.S. 14-72(b)(2) since asportation beyond the confines of a building is not required and since

evidence as to the ownership, possession or occupancy of the building was established.

2. **Criminal Law § 134.4— youthful offender—failure to make "no benefit" finding**

Where the record showed that defendant was 20 years old on the date judgment was entered, the trial court erred in failing to make a "no benefit" finding as required by G.S. 148-49.15.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 21 April 1983 in Superior Court, GASTON County. Heard in the Court of Appeals 16 February 1984.

Defendant was charged in a proper bill of indictment with felonious breaking or entering "a building occupied by Linden Associate Reform Presbyterian Church used as a parsonage located at 205 N. Myrtle School Road, Gastonia, N.C. with the intent to commit a felony therein: larceny," and with felonious larceny of a Westinghouse built-in oven, "the personal property of the Board of Trustees/Linden Assoc. Reform Presbyterian Church . . . pursuant to the commission of felonious breaking and entering described in Count I above." Defendant was found guilty as charged, and from a judgment imposing a prison sentence of ten years he appealed.

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

Assistant Public Defender Malcolm B. McSpadden for defendant, appellant.

HEDRICK, Judge.

Defendant first contends that "a bill of indictment charging in two counts a felonious breaking or entering and a felonious larceny pursuant to a breaking or entering" is insufficient "to charge any crime where no allegations are contained therein of an entity capable of ownership of a property interest." We first note that the bill of indictment was not challenged by proper motion in the trial court or by proper motion in this Court. Nevertheless, we have examined the bill of indictment and hold that it sufficiently alleges a violation of N.C. Gen. Stat. Secs. 14-54 and 14-72.

[1] Defendant next contends that there was insufficient evidence "to withstand a motion to dismiss on a felonious larceny pursuant

to a breaking or entering charge under North Carolina General Statute Sec. 14-72(b)(2), where there is no evidence that any property was removed from the confines of a building and the value of the property in question was less than four hundred dollars." In his brief, defendant contends, "The question here presented appears at first glance to have been well settled in law, however, a close examination reveals that this particular question may be now first presented squarely before the court." The Attorney General, in his brief, responds as follows:

> This Court at *first* glance (*State v. Walker*, 6 N.C. App. 740 (1969)) and *second* glance (*State v. McCullough*, 40 N.C. App. 620 (1979)) and *third* glance (*State v. Norwood*, 44 N.C. App. 174 (1979)) having held that asportation beyond the confines of the building is not required, defendant's argument is submitted to border upon unreasonable harassment of a defunct equine.

We agree with the Attorney General.

Defendant next assigns error to the denial of his motions to dismiss. Defendant contends the evidence was insufficient to require submission of the case to the jury because it failed to establish the "ownership, possession, or occupancy" of the building in question. Suffice it to say that Leonard B. McAbee, Trustee of the Linden Associate Reform Presbyterian Church, testified as follows:

> Q. As Trustee of the Church, what, if any, responsibility do you have towards the real property owned by the Church?
>
> A. It is the responsibility of the Trustees at the Church to have oversight or care of the Church property in the interest of the Congregation.
>
> Q. What Church property did you own at 205 North Myrtle School Road on or about December 8, 1982?
>
> A. The Church manse, some refer to it as the Parsonage.
>
> Q. Describe that manse.
>
> A. That is a seven-room brick dwelling located at 205 North Myrtle School Road.
>
> . . .

Q. What was the condition of the manse on December 7, 1982, as far as being occupied at that time?

A. You mean prior to the break in or after the break in?

Q. On the day before and the day after?

A. Well, the day before the break in it was in excellent condition.

Q. Was it occupied by the Minister on that occasion?

A. No, it was vacant at that time.

. . .

Q. After the Minister had moved, Mr. McAbee, who, if anyone, had authority to enter the manse?

A. The Trustee or the Chairman of the Board of Deacons.

Q. Do you know Mr. Reid (indicating Defendant), Mr. Jerry Dean Reid?

A. No, I don't.

Q. State whether or not of your own knowledge he is a Trustee on the Board of Deacons of the Church, Linden Associate Reformed Presbyterian on South Myrtle School Road?

A. He is not.

Q. What authority, if any, would he have from you or the Board of Trustees to enter or be on the premise?

A. None.

The assignment of error has no merit.

[2] Finally, defendant contends that the court erred in "not sentencing the defendant as a committed youthful offender or in failing to make a no benefit finding as required by North Carolina General Statute Sec. 148-49.15." The record shows that defendant was twenty years old on 21 April 1983, the date judgment was entered. The State concedes, in its brief, that it is unable to distinguish the facts of the instant case from those of *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978), in which this

Court found error in the trial court's failure to make a "no benefit" finding as required by statute. We hold the trial court erred in sentencing defendant as an adult without first making a "no benefit" finding on the record.

The result is: in defendant's trial we find no error. The case is remanded for a *de novo* sentencing hearing and sentencing.

Remanded.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. THOMAS G. HART

No. 8312SC139

(Filed 21 February 1984)

1. **Narcotics § 3.1— uses of quinine and manitol—testimony by police officer**

A police officer was properly permitted to testify that quinine and manitol found in a search of defendant's home had uses in the illicit heroin trade where the testimony was based on the personal knowledge of the officer acquired while serving as assistant director of the city-county bureau of narcotics.

2. **Criminal Law § 42.6— articles seized from defendant—chain of custody**

Proof of a complete chain of custody with no missing links was not a prerequisite to the admissibility of drugs and other articles seized by the police where the articles were identified as being the same objects seized and in somewhat the same condition. Furthermore, the State's evidence with respect to the chain of custody and whereabouts of the seized articles was not incomplete because there was no testimony as to how custody of the articles was maintained between the time the district attorney received the articles at the beginning of the trial until they were admitted into evidence the next day.

3. **Constitutional Law § 74— right against self-incrimination—no waiver by written statement before trial**

A witness who was awaiting a separate trial for possessing heroin did not waive his right to refuse to answer incriminating questions in defendant's trial for possession of heroin when he gave defendant a written statement before trial that defendant had nothing to do with the heroin. Fifth Amendment to the U.S. Constitution.

APPEAL by defendant from *Britt, Samuel E., Judge.* Judgment entered 9 September 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 19 October 1983.

Defendant was convicted of possession with intent to sell and deliver heroin, a felony, and sentenced to eight years in prison. The State's evidence tended to show that: Narcotics officers, armed with a search warrant, went to defendant's residence where defendant and Lawrence Smith were and found several packets of heroin in a bag behind the refrigerator, some quinine and manitol elsewhere in the apartment, and some marijuana on Smith, who was also indicted. Defendant testified that the heroin did not belong to him and in support thereof presented Smith's written statement that the heroin was not defendant's, and the corroborating testimony of defendant's first attorney, who obtained the statement from Smith. Defendant also called Smith to the stand; but except for admitting that he signed and swore to the statement, he refused to answer various questions relating to the drugs, pleading his Constitutional rights against self incrimination, which the court upheld.

Other facts necessary for the disposition of the appeal are discussed in the opinion.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Charles H. Kirkman for defendant appellant.

PHILLIPS, Judge.

Defendant presents fifteen assignments of error for our consideration. None have merit, in our opinion, and only three of them require brief discussion.

[1] The assignment most strongly argued by defendant is based on the court permitting a police officer who had not been found by the court to be an expert to testify over objection that quinine and manitol, found in the search of defendant's home, had uses in the illicit heroin trade. But the record reveals that the testimony was based on the personal knowledge of the officer, acquired while serving as Assistant Director of the City-County Bureau of Narcotics, during the course of which he had had many occasions to learn about the uses of these substances by illegal narcotics traders; and, of course, there is no better basis for testimony of any kind than personal knowledge. Similar testimony was approved in *State v. Covington*, 22 N.C. App. 250, 206 S.E. 2d 361 (1974).

[2] Another of defendant's assignments of error is based upon the drugs and other articles taken from the defendant's residence being received into evidence. The contention is that the exhibits were inadmissible because the State's evidence did not establish the whereabouts and custody of the articles during the entire period from the time they were seized until they were received into evidence. But proving a complete chain of custody with no missing links is not always a prerequisite to the admissibility of articles seized by the police. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). Where the articles objected to have been identified as being the same objects seized and in somewhat the same condition, as happened here, proving a continuous chain of custody is unnecessary. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). Furthermore, the State's chain of evidence with respect to the custody and whereabouts of the seized articles was not incomplete. It traced the whereabouts and custody of the articles, step by step, from the time they were seized until they were delivered to the District Attorney upon the trial beginning, and the only period that defendant contends was not covered by testimony was the period between when the District Attorney received the articles at the beginning of the trial until they were received into evidence the next day. Under the circumstances, there being no claim or suggestion that the seized articles had been altered or replaced, testimony as to how custody of the articles was maintained by the District Attorney's office and by whom could not have benefited defendant and would have been a pointless waste of time. In this instance, therefore, because of the circumstances that existed, we believe that the chain of custody was completed when delivery was made to the District Attorney at the beginning of trial.

[3] Defendant also contends that the trial court erred in not requiring Smith to answer various questions that defendant put to him, notwithstanding Smith's claim that answering the questions involved would tend to incriminate him. But Smith was not a witness for the State, nor was he a co-defendant voluntarily testifying to defendant's detriment in the same trial; Smith, though also indicted for possessing heroin and awaiting a separate trial later, was subpoenaed and put on the stand by defendant. Thus, the danger of Smith incriminating himself and his Fifth Amendment privilege against being required to do so were beyond

question. The only question was whether Smith had waived the protection that the Constitution gave him by signing the written statement shortly after defendant was arrested; the statement was about the heroin that defendant was also charged with possessing and was to the effect that defendant had nothing to do with it and did not even know that it was there. The rule in this state and most others, however, is that a witness who testifies to incriminating matters in one proceeding does not thereby waive the right to refuse to answer questions concerning such matters at a subsequent hearing or trial. *State v. Pearsall*, 38 N.C. App. 600, 248 S.E. 2d 436 (1978). *A fortiori*, Smith's written statement to the defendant before trial was not a waiver of his right to refuse to answer incriminating questions in the trial. But the defendant does not appear to have been prejudiced by this ruling in any event. In testifying, Smith neither contradicted nor repudiated his written statement, but admitted that he signed and swore to it as the truth, and the statement was read into evidence. The statement, prepared by defendant's lawyer, was direct, unequivocal, and completely favorable to the defendant. That Smith could or would have said it as well from the witness stand is doubtful; but he could easily have said it worse.

The defendant's several other assignments of error are of even less weight and substance, and discussing them would serve no purpose.

No error.

Judges WEBB and EAGLES concur.

STATE OF NORTH CAROLINA v. RONALD LEWIS CUTHRELL

STATE OF NORTH CAROLINA v. WILLIAM ERNEST CUTHRELL

No. 832SC838

(Filed 21 February 1984)

Criminal Law § 26— new trial after prejudicial evidence admitted—no former jeopardy

The trial court properly denied defendants' motions to dismiss based on former jeopardy where in the first trial on the same offense, a witness gave prejudicial testimony which was unsolicited and the trial judge properly sustained defendants' objection and instructed the jury not to consider that portion of the answer, and where, in granting defendants' motion for a new trial, the trial judge found as a fact that the testimony was not intentional on the part of the State's witness.

APPEAL by defendants from *Allsbrook* and *Small, Judges.* Judgments entered 11 April and 9 May 1983 in Superior Court, TYRRELL County. Heard in the Court of Appeals 9 February 1984.

Both defendants were charged with attempting to take deer with the aid of an artificial light in violation of G.S. 113-294(e). Defendant Ronald Lewis Cuthrell was additionally charged with carrying a concealed weapon in violation of G.S. 14-269.

The cases were heard *de novo* on appeal from District Court. At trial in Superior Court on 11 April 1983, Homer Robbins, a sergeant with the Enforcement Division of the Wildlife Resources, testified for the State. On cross-examination the following colloquy took place:

> Q. You are acquainted, are you not, that both Ronald Cuthrell and Ernie Cuthrell are hunters?
>
> A. Yes, sir. Very well.
>
> Q. They . . . they spend a good part of deer hunting season hunting deer, do they not?
>
> A. Yes, sir. In fact, I receive more illegal hunting reports from them two than anybody else in the two counties I work.

Objection by defense counsel was sustained, and the jury directed not to consider the last response in any way. Thereafter

defendants moved for a mistrial. The trial judge then made the following order: "It appearing to the Court that testimony elicited on cross-examination by State's witness resulted in substantial and irreparable prejudice to the defendants' cases, and that said testimony, although not intentional on the part of the State's witness nevertheless in the Court's opinion was not elicited by the defendant's attorney." The court thereupon withdrew a juror, declared a mistrial, and returned the case for trial. When both cases were called for trial on 9 May 1983, defendants' motions to dismiss based on double jeopardy were denied. Defendants appeal.

Attorney General Rufus L. Edmisten by Associate Attorney General Barbara Peters Riley for the State.

Gaskins, McMullan & Gaskins, P.A., by Herman E. Gaskins, Jr. for defendant appellants.

HILL, Judge.

The sole question before the court is whether the trial court committed prejudicial and reversible error in overruling and denying the defendants' motions to dismiss based on former jeopardy. We conclude no error was committed and affirm the decision of the trial judge.

Defendants contend that the testimony of Officer Robbins was given in bad faith or undertaken to harass or prejudice the defendants, and as such constitutes an exception to the rule that a defendant's motion for or consent to a mistrial removes any double jeopardy bar to reprosecution. See *Lee v. United States*, 432 U.S. 23, 53 L.Ed. 2d 80, 97 S.Ct. 2141 (1977). We disagree. The record reveals no misconduct by the judge or the prosecutor to provoke defendants' motion for mistrial. Officer Robbins answered the question of defense counsel properly, but then proceeded to testify to an altogether immaterial and irrelevant matter. The trial judge promptly sustained defendants' objection and instructed the jury not to consider that portion of the answer. In granting defendants' motion for a new trial, the trial judge found as a fact that the testimony was not intentional on the part of the State's witness. The trial judge had an opportunity to observe the witness through the trial and found his demeanor free of bad faith. "[W]here circumstances develop not attributable to prosecu-

torial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *United States v. Jorn*, 400 U.S. 470, 485, 27 L.Ed. 2d 543, 556, 91 S.Ct. 547, 557 (1971).

As Justice Stevens pointed out in his concurring opinion in *Oregon v. Kennedy*, 456 U.S. 667, 690, 72 L.Ed. 2d 416, 434, 102 S.Ct. 2083, 2097 (1982), ". . . only in a rare and compelling case will a mistrial declared at the request of the defendant or with his consent bar a retrial." Such a case is not now before this court.

The decision of the trial judge is affirmed, and the cause is remanded for further proceedings.

Judges HEDRICK and EAGLES concur.

ROBERT RAY HILL AND JACK HILL v. ALICE WILLARD PACK AND HARRY GOINS

No. 8317SC123

(Filed 21 February 1984)

Automobiles and Other Vehicles § 76.1— hitting vehicle stopped in roadway—contributory negligence—jury question

In an action to recover damages arising out of a collision between plaintiff's pickup truck and defendants' vehicles stopped in the roadway, the evidence did not show contributory negligence by plaintiff as a matter of law but presented a jury question as to whether plaintiff was contributorily negligent in operating his vehicle in such a manner and at such a speed as to be unable to avoid a collision after seeing defendants' stopped vehicles.

APPEAL by plaintiffs from *Hairston, Judge.* Judgment entered 1 October 1982 in Superior Court, SURRY County. Heard in the Court of Appeals 12 January 1984.

White and Crumpler by David R. Crawford for plaintiff appellants.

Hutchins, Tyndall, Doughton & Moore by Richard D. Ramsey and H. Lee Davis, Jr., for defendant appellee Pack.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by Jackson N. Steele for defendant appellee Goins.

BRASWELL, Judge.

This is a negligence action for property damages arising out of a collision between plaintiff's pickup truck and defendants' vehicles stopped in the roadway. At the close of plaintiffs' evidence, the trial court allowed defendants' motion for a directed verdict against both plaintiffs on the grounds of contributory negligence. For the reasons that follow, we reverse. It is a question for the jury.

On the morning of 12 July 1981, plaintiff Robert Ray Hill was driving east in a pickup truck towing an outboard motorboat belonging to his father, plaintiff Jack Hill, on Highway 704 in Stokes County, when, as he rounded a sharp curve to his left going downhill, he encountered two vehicles, operated by defendants, approximately 380 feet ahead in the roadway. Defendant Pack was stopped headed east in plaintiff's lane of travel. Defendant Goins was stopped headed west in the opposite travel lane. Goins had stopped his truck in order to let out one of defendant Pack's sons so he could get into his mother's car.

As plaintiff-driver first was aware that the vehicles were present, his initial reaction was that "it just appeared to be two vehicles meeting each other." As he discerned the vehicles were stopped, he tried to stop. Fearing that locking his brakes would cause the boat/trailer to jackknife, plaintiff pumped his brakes. Faced with a deep ravine to his left, and a deep hole, trees, a brick wall and a driveway to his right, plaintiff Robert Hill attempted to drive his vehicle through a three and one-half foot gap between the two stopped vehicles. Plaintiff's vehicle collided with defendants' vehicles, moving the defendants' vehicles five to ten feet forward. No one was injured in the accident. Plaintiff Robert Hill, as he rounded the curve, was traveling 40 to 45 miles per hour, which was below the posted speed limit of 55 miles per hour.

A highway patrolman investigating the accident measured the distance between the point coming out of the curve at which the vehicles were visible to the point of impact as being 380 feet. Plaintiff Robert Hill agreed that this was a ball-park figure. No skid marks were found on the highway. The weather was clear that day, the asphalt pavement was dry, and plaintiff Robert Hill had nearly new radial tires on his four-wheel drive pickup. The time of collision was about 10:00 a.m.

In ruling upon a motion for a directed verdict on the grounds of contributory negligence, the trial court must determine whether the evidence, taken in the light most favorable to the plaintiff, establishes plaintiff's negligence so clearly that no other reasonable inference or conclusion may be drawn. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981). "We have determined," as did the Supreme Court in another instance of an improperly granted motion for directed verdict in *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978), "that the evidence of plaintiff's contributory negligence, *while strong*, is not so overpowering as to preclude all reasonable inferences to the contrary." [Emphasis added.] Whether plaintiff Robert Hill operated his vehicle in such a manner and at such speed as to be unable to avoid a collision after seeing defendants' stopped vehicles is for the jury to decide. Only the jury should answer whether the plaintiff had sufficient stopping distance so as to avoid any collision, given his own statement as to his speed and his position on the roadway when he saw, or ought to have seen, the stopped vehicles ahead of him. Adequate reaction time was here a factual question for the jury to resolve. Because the plaintiff was fully aware that he was towing a trailer with a motorboat and had pulled the same boat many times previously, the plaintiff, in the exercise of due care, was also required to so operate his vehicle at a speed so as to avoid a collision with other vehicles observed upon the highway in light of the reasonable safe stopping distances for such a tow.

We need not discuss plaintiffs' assignment of error concerning admission of evidence since the same questions are not likely to recur on retrial.

While defendant Goins in the alternative by cross assignment of error asks that this Court grant a directed verdict for him on

the ground that he was not negligent in any respect, we decline to do so. On this record the matter is for the jury.

Reversed and new trial.

Judges HEDRICK and EAGLES concur.

INGRID HANCOCK ASHER v. EDWARD HALL ASHER

No. 839DC304

(Filed 21 February 1984)

Divorce and Alimony § 24.5— modification of support order—changed circumstances not known at time of original order

In an action for modification of child support, summary judgment for defendant husband was improperly granted where there was a material fact in issue as to whether plaintiff's income was known at the time of the original consent order.

APPEAL by plaintiff from *Senter, Judge.* Judgment entered 1 December 1982 in District Court, VANCE County. Heard in the Court of Appeals 14 February 1984.

Plaintiff and defendant are parents of two minor children who reside with the plaintiff mother in North Carolina. Defendant father lives in Maryland and supports the children under a Uniform Reciprocal Enforcement of Support Act (hereinafter URESA) judgment entered in Montgomery County, Maryland, on 7 July 1981, paying $400.00 to the mother monthly. Plaintiff by instituting this action in North Carolina seeks an increase in the monthly support payment from defendant based on changed circumstances. The trial judge made findings of fact including the following:

10. Plaintiff alleges in her complaint the following alleged changes of circumstances occurring since entry of the order of support dated July 7, 1981.

(a) Decrease of plaintiff's income due to loss of a part time job.

(b) Need to have orthodonic [sic] work performed on one of the children.

(c) Medical expenses arising from an operation performed on one of the children.

The trial judge concluded there was no change of circumstances since the first judgment was entered in Maryland, and entered an order granting summary judgment to the defendant. Plaintiff appeals.

Michael B. Sosna for plaintiff appellant.

Perry, Kittrell, Blackburn & Blackburn by George T. Blackburn, II for defendant appellee.

HILL, Judge.

The sole issue is whether the trial court erred in granting defendant's motion for summary judgment. Plaintiff's contention that summary judgment was improperly granted is based on there being a material fact in issue: whether plaintiff's income was known at the time of the consent order in the URESA action. We agree and find that summary judgment was improperly granted.

The original judgment requiring support was entered in Maryland on 7 July 1981. The action for increased support was instituted in North Carolina on 1 December 1981. Plaintiff's action is grounded in a change of circumstances occurring since 7 July 1981. Defendant contends the changes relied upon by the plaintiff occurred prior to 7 July 1981, and by his affidavit seeks to show that the reduction in plaintiff's income occurred on 20 May 1981, and the need for orthodontic work for one of the children was known to the plaintiff or revealed in her URESA affidavit filed 9 March 1981. Both alleged changes of circumstances had taken place prior to 7 July 1981 and were set forth in plaintiff's answers to interrogatories and her affidavit. Only those changes which occur subsequent to the order of support can qualify for the change of circumstances necessary to amend the original award. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

On the other hand, plaintiff in her affidavit contends the loss of this income was not known to the Assistant State's Attorney

for Montgomery County, Maryland, at the time she approved the consent agreement on plaintiff's behalf, nor was this information available to the judge who entered the order on 7 July 1981. The answers to the interrogatories showing termination of plaintiff's employment in May 1981 are dated and sworn to 9 July 1981, the same day the consent order was being signed by the defendant and the Assistant State's Attorney on behalf of the plaintiff in Maryland. A further exhibit introduced into evidence revealed that the answers to the interrogatories were not sent to Maryland until 10 July 1981. Hence, it is possible that the information contained therein was not known to the Maryland authorities at the time the consent order was signed. It is probable the judge relied on the consent order in making his order on 7 July 1981. Therefore, a genuine issue of fact is raised as to whether plaintiff's income was available and known at the time the order was signed on 7 July 1981. It is elementary that a motion for summary judgment should not be granted where a genuine issue of material fact exists. G.S. 1A-1, Rule 56(c). For this reason the judgment of the trial judge is reversed, and the case remanded for trial.

Based on our decision herein, we need not address plaintiff's remaining assignment of error at this time.

The judgment of the trial judge is

Reversed and the case remanded for trial.

Judges HEDRICK and EAGLES concur.

JOHN W. STACKHOUSE v. JOHNNY PAYCHECK

No. 838SC218

(Filed 21 February 1984)

Execution § 16— bond by judgment debtor—failure to answer interrogatories not failure to "attend"

Defendant judgment debtor's failure to answer interrogatories to discover assets in violation of a court order did not constitute a failure to "attend" within the meaning of a bond given pursuant to G.S. 1-355 guaranteeing that defendant will, from time to time, attend before the court or judge as directed.

APPEAL by plaintiff from *Peel, Judge.* Order entered 20 December 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 7 February 1984.

This is an appeal by plaintiff from the denial of his motion for forfeiture of a bond given by defendant as a principal and secured by William A. Glenn pursuant to N.C. Gen. Stat. Sec. 1-355.

Poyner, Geraghty, Hartsfield & Townsend, by Mark C. Kirby, for plaintiff, appellant.

Purser, Cheshire, Manning & Parker, by Earle R. Purser and Barbara A. Smith, for surety, William A. Glenn, appellee.

HEDRICK, Judge.

The following facts are not controverted:

On 28 April 1981 plaintiff filed a complaint in Superior Court, Wayne County, in which he alleged that defendant breached his contract to appear and perform at a concert in Greensboro, North Carolina, and that such breach resulted in damages in the amount of $26,605.15. On 19 November 1981 the Clerk of Superior Court made an entry of default against the defendant, and on 7 December 1981 a default judgment was entered for the amount prayed for in plaintiff's complaint. An execution issued on plaintiff's request was returned unsatisfied in January 1982. Plaintiff then served on defendant written interrogatories to discover assets pursuant to N.C. Gen. Stat. Sec. 1-352.1. When defendant failed to respond to the interrogatories, plaintiff successfully sought a court order compelling defendant to answer. Defendant persisted in his refusal to respond and was arrested and brought before the court on 1 August 1982 pursuant to N.C. Gen. Stat. Sec. 1-355, which in pertinent part provides:

> [T]he court or judge may . . . issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will,

> from time to time, attend before the court or judge as directed. . . .

Pursuant to the order of the court on 1 August 1982 the defendant executed such a bond in the amount of $32,823.96, with William A. Glenn as surety. The bond contained the following language:

> [T]he undersigned Surety . . . does hereby unconditionally guarantee that the Defendant herein, Johnny Paycheck, will from time to time, attend before the Court or Judge as directed by written notice to the Defendant and to the Surety. . . . If the Defendant herein, Johnny Paycheck, fails . . . to appear from time to time as directed . . . then the Bond shall be automatically forfeited. . . .

On 26 August 1982 plaintiff filed a motion seeking to have the bond declared forfeited based on defendant's continued failure to respond to interrogatories. In an order entered 20 December 1982 the court denied plaintiff's motion. Plaintiff appealed.

The plaintiff's assignments of error raise the one question whether defendant's failure to answer interrogatories in violation of a court order constitutes a failure to "attend" or "appear" within the meaning of the bond. The critical conclusions reached by the trial judge in denying the motion are as follows:

> 1. There is no requirement in the Bond requiring the Surety to insure that the Defendant, Johnny Paycheck, answer interrogatories, but to the contrary the requirement of the Surety is to the effect that the Defendant, Johnny Paycheck, attend and appear before the Court upon proper notice;
>
> 2. The failure of the Defendant, Johnny Paycheck, to answer the Interrogatories in violation of the Order dated February 22, 1982 does not constitute a failure by the Defendant, Johnny Paycheck, to attend or appear before the Court or Judge within the meaning of the Bond;
>
> 3. By reason of the foregoing, the Surety has not forfeited the Bond dated August 1, 1982.

In his brief, plaintiff argues: "[I]t is manifest that 'attend' should be interpreted broadly to encompass appearance by plead-

ing, participating in pre- or post-judgment discovery, and, perhaps, corresponding by letter with the Court or Judge. Thus, 'attend' should not be limited to an appearance 'in the flesh.' "

When the language in the bond is considered in connection with N.C. Gen. Stat. Sec. 1-355 and the clear legislative intent underlying the statute, we think it quite clear that the bond could be forfeited only if the defendant failed to attend "in the flesh." Because defendant's failure to answer interrogatories did not amount to such a failure to attend, we hold the order entered by the trial court is

Affirmed.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. LARRY BRINDLE

No. 8319SC836

(Filed 21 February 1984)

1. **Constitutional Law § 48— failure to demonstrate ineffective assistance of counsel**

There was no merit to defendant's contentions that he was denied effective assistance of counsel when he failed to object to testimony from a witness which was admissible as a shorthand statement of fact and when his counsel failed to request an instruction on defense of accident since defendant was not entitled to such an instruction.

2. **Assault and Battery § 14.4— no prejudicial error in submission of issue to jury which was unsupported by evidence**

Defendant failed to show prejudice in the trial court's submission to the jury of the issue of assault with intent to kill inflicting serious injury under G.S. 14-32(a) in that there was no evidence of intent to kill since the jury convicted defendant of the lesser included offense described in G.S. 14-32(b), assault with a deadly weapon inflicting serious injury.

APPEAL by defendant from *Long, James M., Judge.* Judgment entered 24 March 1983 in Superior Court, ROWAN County. Heard in the Court of Appeals 8 February 1984.

Defendant was charged with assault with a deadly weapon with intent to kill, inflicting serious injury. The jury found him

guilty under G.S. 14-32(b) of assault with a deadly weapon inflicting serious injury.

The State's evidence tended to show:

On 19 September 1982, defendant, defendant's daughter, Wayne Anderson, his brother Ray Anderson, and some other friends went to watch the automobile races at the Concord Motor Speedway. Defendant's daughter was Ray Anderson's date. After the races, defendant drove the group to his house. Defendant appeared angry and drove recklessly.

Upon arriving at defendant's residence, Ray, who had parked in defendant's driveway, put the key into the ignition of his car and prepared to leave. Defendant followed Ray to his car, cursing him and telling him that he should have asked permission before dating his daughter. Wayne Anderson, who had been watching, jumped on the hood of Ray's car and told defendant to leave Ray alone and to fight him if defendant wanted to fight someone. Defendant, instead, swung at Ray, who blocked and hit defendant. Wayne then jumped on defendant's back and tried to separate them. Defendant stepped backward, and Ray, thinking that the fight was over, walked away.

The fight, however, was not over. Defendant pulled a pistol from his pocket and struck Wayne on the head. Defendant then turned and fired two or three shots in Ray's direction. One bullet struck Ray in his lower left leg. Defendant then punched Wayne in the nose and threatened to kill anyone who touched Ray.

Defendant's evidence tended to show:

When the group arrived at defendant's house after the races, defendant told Ray that he did not approve of his daughter meeting guys away from home and that if Ray wanted to date her, to come to his house and ask her for a date. Ray flew into a rage and began yelling and cursing. Wayne came over, sat on the hood of the car, kicked defendant in the head and grabbed him by the neck. Both Ray and Wayne began hitting defendant. Wayne was still holding defendant by the neck when defendant pulled out a pistol he had been carrying in his pocket and fired two shots at the ground. One shot accidentally hit Ray.

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

Dozier, Brackett, Miller, Pollard and Murphy, by Richard S. Gordon, for defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant contends that he was denied effective assistance of counsel and, thus, due process of law. Defendant alleges, first, that his counsel's failure to object to incompetent testimony from the witness, Sheila Christie, and second, that his failure to request the trial court to instruct the jury on the defense of accident were errors amounting to a denial of effective assistance of counsel. We find no merit in defendant's contentions.

Sheila Christie testified that defendant shot Ray Anderson. In response to the prosecutor's question whether defendant aimed the gun before shooting, Ms. Christie testified, "I'd say so." Defendant argues that this response was an opinion which should have been objected to by defense counsel. We disagree. Ms. Christie's testimony was admissible as a shorthand statement of fact. *See State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976), *reconsideration denied*, 293 N.C. 259, 243 S.E. 2d 143 (1978).

As to defendant's second allegation, the evidence indicates and defendant himself testified that although he did not intend to hurt anyone, he intentionally fired the pistol. When, as here, defendant intended to and did fire a shot resulting in injury to the victim, defendant is not entitled to an instruction on the defense of accident or misadventure. *State v. Efird*, 37 N.C. App. 66, 245 S.E. 2d 226 (1978), *cert. denied*, 301 N.C. 98 (1980).

Counsel's performance was well within the range of competence demanded of attorneys in criminal cases. *See State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970). Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979), *overruled on other grounds, State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983).

[2] Defendant next contends that the trial judge erred in submitting to the jury the issue of assault with intent to kill inflicting

serious injury under G.S. 14-32(a), since there was no evidence of intent to kill. Defendant, however, failed to prove any prejudice; the jury conviction of the lesser included offense described in G.S. 14-32(b) rendered harmless any errors in the charge with respect to the more serious offense, described in G.S. 14-32(a). *State v. Harris*, 23 N.C. App. 77, 208 S.E. 2d 266 (1974); *State v. Hearns*, 9 N.C. App. 42, 175 S.E. 2d 376 (1970). Nor did defendant prove that the jury verdict was affected by the judge's charge. *See State v. Hearns, supra.*

No error.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. RAYMOND LOUIS GREENHILL

No. 8314SC872

(Filed 21 February 1984)

1. **Criminal Law § 86.3— prior convictions—cross-examination of defendant**

Any witness, including the defendant in a criminal case, may be cross-examined for impeachment purposes as to previous convictions, and if the witness admits a conviction, the cross-examiner is permitted a limited inquiry into the time and place of conviction and the punishment imposed.

2. **Criminal Law § 86.3— prior convictions—improper cross-examination of defendant**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury in which defendant admitted prior convictions of assault, the trial court erred in permitting the State to cross-examine defendant about the nature of the weapons used in the prior assaults and about the gender of the victims.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 13 January 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 February 1984.

Defendant was charged in a proper bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury. Evidence introduced at trial tended to show the following:

Defendant and the victim, Martha Swain, have known each other for a number of years and began dating about 1977. The

couple lived together "part of that time," and were living together on 7 July 1982, the day of the incident in question. Both defendant and Ms. Swain suffer from an admitted "drinking problem." Each reports a relationship historically characterized by physical conflict.

On 7 July 1982 Ms. Swain returned to her apartment to find the defendant asleep. She testified that defendant awoke while she was attempting to leave the apartment and that he struck her in the head, causing her to lose consciousness. When she regained consciousness, the defendant "slammed" her into a cabinet and stabbed her repeatedly with a butcher knife. She testified that this attack on her continued for "two, maybe three hours," and that she at no time attempted to defend herself, except to attempt to escape. Ms. Swain also testified that defendant repeatedly threatened to kill her, and that he held a knife to her throat throughout the night. After defendant left the apartment the following morning, Ms. Swain went to a neighbor's house and called a cab which took her to a friend's house located near a hospital. Her injuries required a ten-day hospitalization and subsequent plastic surgery. The victim testified that she continued to receive threats from the defendant after she was hospitalized, necessitating several changes in room assignment and the placement of security guards near her room.

The defendant, on the other hand, offered evidence tending to show that upon returning home Ms. Swain struck defendant in the back. Defendant then observed that the victim's face was "all bruised up." An argument ensued, and the victim began hitting the defendant with a claw hammer. After unsuccessfully attempting to evade the blows, defendant seized a paring knife and stabbed Ms. Swain. Defendant testified that the victim then put down the hammer but refused to seek medical attention for her wounds. The following morning the defendant left the apartment to buy beer and on his return found the victim gone.

Following trial before a jury, defendant was found guilty as charged and sentenced to a ten year prison term. He appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

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

HEDRICK, Judge.

Defendant assigns error to the action of the trial court in permitting the State "to question the defendant about the details of prior convictions for similar assaults." He contends that the State's questions "tended to suggest that the defendant was predisposed to commit" offenses similar to that with which he was charged.

[1] The law is well-settled that any witness, including the defendant in a criminal case, may be cross-examined for impeachment purposes as to previous convictions. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). If the witness admits the conviction, the cross-examiner is permitted "a limited inquiry into the time and place of conviction and the punishment imposed." *State v. Finch*, 293 N.C. 132, 141, 235 S.E. 2d 819, 824 (1977). Inquiry into prior convictions that exceeds the bounds established in *Finch* has been held reversible error. *State v. Bryant*, 56 N.C. App. 734, 289 S.E. 2d 630 (1982).

[2] In the instant case, defendant was questioned about "approximately" thirteen prior convictions of assault. Over objection the State specifically inquired about the nature of the weapons used in these cases and about the gender of the victims. We think these questions clearly exceed the permissible scope of inquiry set forth in *Finch*, and hold that the trial court erred in overruling defendant's objections to these questions. Furthermore, we cannot say that this error was not prejudicial to the defendant. The evidence presented at trial was highly controverted, and the credibility of the witnesses crucial to a resolution of the issues. Because the improperly admitted evidence may have influenced the jury's determination, we hold that defendant is entitled to a new trial.

It is not necessary that we discuss other assignments of error brought forward and argued in defendant's brief, since any error that might have been committed is not likely to occur at the next trial.

New trial.

Judges HILL and EAGLES concur.

IN THE MATTER OF: THE LEGITIMATION OF STANLEY LOCKLEAR BY EARL JONES

No. 8316SC274

(Filed 21 February 1984)

Bastards § 11— jurisdiction of superior court to legitimate a child born to a married woman

The clerk of superior court does not have jurisdiction pursuant to G.S. 49-10 to enter an order legitimizing a child born to a married woman. G.S. 49-14.

APPEAL by petitioner from *Herring, Judge.* Order entered 10 January 1983 in Superior Court, ROBESON County. Heard in the Court of Appeals 9 February 1984.

This is a special proceeding instituted pursuant to the provisions of N.C. Gen. Stat. Sec. 49-10, by petitioner, Earl Jones, to legitimate Stanley Locklear. In his petition Mr. Jones alleges:

> 4. Burline Locklear, at the time of her death, was married to James O. Locklear and further that James O. Locklear is listed in the Certificate of Birth of the said minor child as the father.
>
> 6. Burline Locklear and her husband James O. Locklear had continuosly [sic] lived separate and apart from each other since the year of 1960, and had not resumed their marital relationship at the time of her death.
>
> 7. Earl Jones and Burline Locklear, the deceased mother of Stanley Locklear, have lived in cohabitation with each other since the year of 1960 and at the time of the conception and birth of Stanley Locklear, until her death.
>
> 8. Earl Jones is the natural father of the aforenamed minor child and acknowledges paternity of the said minor child which is further evidenced by affidavit which is attached hereto and incorporate herein by reference.
>
> . . .
>
> 10. Petitioner and Burline Locklear were not married to each other at the time of the said minor child's conception or birth, nor did they marry each other thereafter.

On 26 January 1982 the Clerk of Superior Court declared that the "Clerk of Superior Court is without jurisdiction to hear this matter . . ." and dismissed the petition. Petitioner appealed to Superior Court, which on 10 January 1983 entered an order affirming the Clerk of Superior Court's action in dismissing the petition.

Petitioner appealed to this Court.

Lumbee River Legal Services, Inc., by William L. Davis, for petitioner, appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

HEDRICK, Judge.

Petitioner's one assignment of error raises only the question whether the Clerk of Superior Court has jurisdiction pursuant to N.C. Gen. Stat. Sec. 49-10 to enter an order legitimating a child born to a married woman.

N.C. Gen. Stat. Sec. 49-10 in pertinent part provides:

> Legitimation.—The putative father of any child *born out of wedlock*, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides . . . praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding. . . . If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated. . . .

(Emphasis added.)

It is clear that the Clerk of Superior Court is without authority pursuant to N.C. Gen. Stat. Sec. 49-10 to enter an order legitimating an already-legitimate child.

We are cited by petitioner to *Wright v. Gann*, 27 N.C. App. 45, 217 S.E. 2d 761, *r ert. denied*, 288 N.C. 513, 219 S.E. 2d 348 (1975), wherein this Court construed the phrase "out of wedlock" as used in N.C. Gen. Stat. Sec. 49-14. Suffice it to say that neither case nor statute has application in the present case.

Affirmed.

Judges HILL and EAGLES concur.

CASTLE & ASSOCIATES, INC. v. CUSTOM MOLDERS, INC.

No. 8314SC259

(Filed 21 February 1984)

Brokers and Factors § 6.1— sales representative agreement—right to commissions

Under the provisions of a sales representative agreement, the solicitation of business terminating in a sale rather than the sale itself entitled plaintiff to a commission. Therefore, where the evidence in an action to recover commissions under the agreement disclosed that plaintiff solicited the sale in question, evidence that defendant made the actual sale was irrelevant and properly excluded by the trial court.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 30 September 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 February 1984.

This is a civil action wherein plaintiff seeks to recover a commission on sales made pursuant to a sales representative agreement entered into by plaintiff and defendant. After a trial before the judge without a jury, Judge Godwin made findings of fact that, except where quoted, are summarized as follows:

On 22 August 1977 plaintiff and defendant entered into a contract whereby plaintiff agreed to act as an independent sales representative for defendant in return for compensation in the form of a commission. The contract provided that defendant "was obligated to pay to plaintiff for all future orders of the products or services described for subsequent sales after termination of the agreement which business was obtained as a result of plaintiff's efforts for a period of one year from and after the effective date of termination." The agreement was terminated by defendant on 29 April 1978 to become effective sixty days later. During the period of the contract and for one year thereafter plaintiff represented the defendant in connection with sales amounting to $233,536.11, entitling plaintiff to total commissions of $11,676.81, which plaintiff has not received.

The trial court found and concluded that defendant is indebted to plaintiff in the sum of $11,676.81 plus interest. From a judgment that plaintiff have and recover this amount from the defendant, defendant appealed.

Haywood, Denny & Miller, by George W. Miller, Jr., for plaintiff, appellee.

Glenn and Bentley, by Charles A. Bentley, Jr., for defendant, appellant.

HEDRICK, Judge.

The sole question presented on appeal is whether the trial judge erred in not allowing defendant to offer evidence that it, rather than plaintiff, made the actual sale of a certain part to Pontiac Division. Defendant contends that "[t]he question of whether or not an exclusive agent can recover commissions for sales made by its principal depends on an interpretation of the contract . . .," and that, in the instant case, "the contract should be interpreted and construed against Castle to allow Custom Molders to sell its own products." Plaintiff, on the other hand, argues that the court acted correctly in excluding the evidence, citing 3 Am. Jur. 2d *Agency* Sec. 258, which provides:

> Unless the contract provides otherwise, however, any agent, even if merely a nonexclusive agent, who is the originating or procuring cause of a sale, is entitled to recover commissions thereon, notwithstanding the sale was actually made or consummated by the principal personally or through another agent.

The sales representation agreement in pertinent part provides:

> The termination of this Agreement, as provided by Paragraph (10) herein, shall not affect Manufacturers obligation to pay Castle its commission based on all sales of said products or services furnished to a customer company whose business with Manufacturer was obtained as a result of Castles efforts for a period of one (1) year from and after the effective date of termination.

Any construction of the contract terms leads to the conclusion that it was the solicitation of business terminating in a sale, not

the sale itself, that entitles plaintiff to a commission. Since the evidence discloses that plaintiff solicited the sale in question, and defendant does not contend otherwise, evidence as to who actually made the sale would be irrelevant and thus was correctly excluded by the trial court. We hold the findings support the conclusions, and the conclusions support the judgment.

Affirmed.

Judges HILL and EAGLES concur.

DUKE UNIVERSITY v. BRYANT-DURHAM ELECTRIC COMPANY, INC. AND RICHARDS & ASSOCIATES, INC., A JOINT VENTURE

No. 8314SC126

(Filed 21 February 1984)

Appeal and Error § 6.2— denial of motion to dismiss—interlocutory order

Defendant's attempted appeal from an order denying his motion to dismiss for lack of subject matter jurisdiction was interlocutory and therefore premature. G.S. 1-277(a) and G.S. 7A-27(d).

APPEAL by defendant from *Preston, Judge.* Order entered 2 December 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 January 1984.

On 9 January 1980, Bryant-Durham Electric Company, Inc. and Richards & Associates, Inc., a joint venture (hereinafter "BDR"), filed a complaint for breach of contract against Duke University (hereinafter Duke), 80CVS89. Duke thereafter filed its answer and counterclaim. On 1 September 1982, Duke filed a motion to amend its counterclaim in order to add a claim of misrepresentation against defendant, based on newly discovered information. Duke's motion to amend its counterclaim was denied on 27 September 1982.

On 2 November 1982, Duke instituted the present suit by filing a complaint against BDR which incorporated the allegations in Duke's answer, counterclaim, and proposed amended counterclaim in 80CVS89. Duke subsequently filed motions to consolidate

this action with 80CVS89. On 18 November 1982, defendant BDR filed a motion to dismiss and response in opposition to Duke's motion to consolidate. On 2 December 1982, a hearing was held on defendant BDR's motion to dismiss and plaintiff Duke's motion to consolidate. An order was entered denying the BDR motion to dismiss and reserving ruling on Duke's motion to consolidate the present action with 80CVS89.

From denial of defendant's motion to dismiss the complaint in this action, defendant appeals.

Dailey J. Derr and Thomas N. Frisby, for defendant-appellant.

Powe, Porter & Alphin, by E. K. Powe and William E. Freeman, for plaintiff-appellee.

EAGLES, Judge.

Defendant BDR here attempts to appeal from an order denying its motion to dismiss this action for lack of subject matter jurisdiction because, defendant contends, this action must be a compulsory counterclaim in 80CVS89. We find that the order denying the motion to dismiss is an interlocutory order, and therefore we dismiss defendant's appeal.

G.S. 1-277(a) provides that no appeal lies from an interlocutory order or ruling of a trial judge unless such ruling or order deprives appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); see also G.S. 7A-27(d). While G.S. 1-277(b) provides that appeal does lie from denial of a motion to dismiss for lack of *personal* jurisdiction, this does not apply to the denial of a motion challenging *subject matter* jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. *Shaver v. N.C. Monroe Construction Co.*, 54 N.C. App. 486, 283 S.E. 2d 526 (1981).

Although our Supreme Court has reviewed the denial of a motion to dismiss in certain cases, including *North Carolina Consumers Power, Inc. v. Duke Power, supra*, these cases "stand for

the proposition that the appellate courts will entertain an appeal from an order denying a motion to dismiss in some cases and *elect* to review some cases on their merits, but this does not mean that the appeal from such interlocutory orders is any less fragmentary." *Shaver v. N.C. Monroe Construction*, 54 N.C. App. at 487, 283 S.E. 2d at 527. We do not elect to entertain this interlocutory appeal. Defendant here may preserve its exception to the trial court's failure to dismiss for lack of subject matter jurisdiction and assign that as error upon appeal from a final judgment entered in the cause. See *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983).

On the facts before us, we are unable to find, as this court did in *Atkins v. Nash*, 61 N.C. App. 488, 300 S.E. 2d 880 (1983), that plaintiff's cause of action here was a compulsory counterclaim in the prior pending action. However, from the record now before us it appears that judicial economy would best be served by consolidating this action with 80CVS89.

Defendant's appeal is

Dismissed.

Judges HEDRICK and BRASWELL concur.

APPENDIX

WHEN THE NORTH CAROLINA SUPREME COURT SAT IN THE CAPITOL

WHEN THE NORTH CAROLINA SUPREME COURT SAT IN THE CAPITOL

CECIL J. HILL
JUDGE
NORTH CAROLINA COURT OF APPEALS
OCTOBER 1984

WHEN THE NORTH CAROLINA SUPREME COURT SAT IN THE CAPITOL

JUDGE CECIL J. HILL[1]

Good judicial systems, like good laws, are shaped by the needs and thinking of the times that give them birth. The early appellate courts of North Carolina were Courts of Conference composed of the circuit-riding trial judges who reviewed decisions made by their brethren wherever sessions of trial court were held. In time, the trial and appellate divisions became distinct, both in membership and function, and finally, a permanent home was created for the Supreme Court in Raleigh.

The Supreme Court was created formally by the Act of 1818,[2] but it actually began with organized government in North Carolina. Perhaps it is more accurate to say that the Court's origin lies in the order created by governments that have divided their functions into legislative, executive and judicial branches. English-speaking nations gave law to the world, based on standards that, while comparable, are superior to those embodied in the political philosophy of the ancient Greeks or form of governmental administration developed by the Romans.

The North Carolina Constitution of 1776, adopted by the "representatives of the Freemen of the State of North Carolina,"[3] provided that the General Assembly would elect judges of the Supreme Court of Law and Equity, judges of Admiralty, and an attorney general, who would hold their offices during good behavior. Later, the "Supreme Court of Law and Equity" became the "Superior Court of Law and Equity,"[4] indicating that the framers of the Constitution intended "Supreme" and "Superior" to be synonymous.

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1. Judge Hill is a member of the North Carolina Court of Appeals. Prior to this position he was engaged in the general practice of the law in Brevard, North Carolina and served in the North Carolina State Senate. His former law clerk, Ruth Norcia Morton, assisted him in editing this article. His faithful secretary, Mrs. Blanche Diuguid, deserves much appreciation for her work in copying this essay.

2. 1818 N.C. Session Laws, Ch. 1.

3. See *Wilson v. Jordan*, 124 N.C. 683, 711, 33 S.E. 130, 144 (1889), pointing out that, although the Constitution of 1776 was not submitted to a vote of the people for ratification, it met with general acceptance and remained unchanged until the amendment of 1835.

4. See Mallard, "Inherent Power of the Court of North Carolina," 10 Wake Forest Law Review 1, 10 (1974).

The Act of 1777 appeared to create an appellate court.[5] Within the framework of the Act, a full court consisted of three judges and the attorney general. While one judge was sufficient to preside over a session of trial court, two judges were required to hear and decide cases on appeal.

North Carolina had six judicial districts in 1777: Wilmington, New Bern, Edenton, Halifax, Hillsborough, and Salisbury. In 1790, the number of judges was increased to four, and two additional districts, Fayetteville and Morganton, were added. Incidentally, the principal streets abutting Union (Capitol) Square were given the same names in 1792 to coincide with the judicial districts.

The Court of Conference was organized in 1800.[6] A calendar of the Court of Conference dated December Term 1801 shows that appeals were heard in three of the eight districts.[7]

The judges and attorneys general moved throughout the State, and into what is now east Tennessee, dispensing justice. Frequently, the attorneys general and the lawyers in the courtroom were better educated and experienced than the judges who presided. In lawsuits involving the same or similar facts different opinions were rendered by different judges throughout the State, resulting in decisions with little or no precedential value.

Raleigh, founded in 1792, had no court until the early 1800's. A single case is responsible for the creation of a court in Raleigh. James Glasgow, a Revolutionary War patriot so popular that a county had been named in his honor, was elected Secretary of the State. To the horror and disbelief of his friends and neighbors, it was discovered that he had conspired with John and Martin Armstrong to cheat the State by issuing fraudulent land warrants.[8]

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5. The law was adopted 15 November 1777. The term "Superior Court" is used when manifestly it was intended to mean "Supreme Court."

6. See Battle, "History of the Supreme Court," 103 N.C. 341-376 (1889). Although not germane to the subject of this paper it is interesting to note that between 1777 and 1790 during which period the number of judges were three, the court consisted of Samuel Ashe, Samuel Spencer, James Iredell, and John Williams. Iredell resigned to become a member of the U.S. Supreme Court and was succeeded by John Williams. Between 1790 and 1806 when the court consisted of four judges, eleven judges served; and between 1801 and 1819 when the court consisted of six judges, a total of seventeen judges served. The names of the judges and their terms are mentioned in 103 N.C. Reports 377.

7. 1 N.C. Rep. 190 (1801).

8. See *State v. Glasgow*, 1 N.C. 264 (1800).

To try these men, the General Assembly created an extraordinary court in 1799,[9] so that the trial could be held where the pertinent records were stored. This court was to consist of at least two judges, who were to meet in Raleigh to hear the case. Both the attorney general and the solicitor-general were to prosecute the case against Glasgow, and a special agent was authorized to prepare and arrange the evidence at trial. Judge John Haywood, no doubt persuaded by the $1,000.00 fee, resigned from the judiciary to defend Glasgow. Glasgow was convicted, and the name of (Nathanael) Greene replaced that of Glasgow for the county that formerly honored him, and the black lines of expulsion were drawn around Glasgow's name in the minute books of the venerable order of Masons.[10]

The General Assembly was persuaded to continue the court for an additional three years to hear appeals, calling it also the "Court of Conference." By the Act of 1804,[11] the Court was made a court of record; the judges wrote their opinions and delivered them orally in open court. The following year the court became known as the "Supreme Court." The Court consisted of six judges; two judges constituted a quorum; and the Sheriff of Wake County became its marshal. In 1810,[12] the General Assembly directed the judges to write out their opinions "at full length," and the Governor to procure for the Court a suitable seal and motto.[13]

Finally, in 1818 the General Assembly reorganized the Supreme Court, mandated that it sit in Raleigh,[14] gave it strictly an appellate role, and appointed to it several excellent judges. The difficulty of transportation was a deterrent to a wide appellate practice by lawyers throughout the state, and so a body of attorneys specializing in appellate practice arose in Raleigh. A few, such as William Gaston, developed a large appellate practice, though residing chiefly elsewhere.

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9. 1798 N.C. Session Laws, Ch. VII, and 1801 N.C. Session Laws, Ch. XII.

10. See Battle, *supra* at p. 853, and *State v. James Glasgow*, 1 N.C. Reprint 264 (1800).

11. 1804 N.C. Session Laws, Ch. XVIII.

12. 1810 N.C. Session Laws, Ch. II.

13. For an in-depth summary of the formation of the Court, see Battle, *supra* at pp. 851-855. Battle also has included a list of the judges from 1777 to 1 January 1819 on page 872 of Vol. 1 (reprint) *supra*. In the pages following may be found references to lists of the Chief Justices and Associate Justices as well as Attorneys General, Reporters, and Clerks.

14. 1818 N.C. Session Laws, Ch. I and Ch. II.

For the first fifty years—1818 to 1868—the judges were elected by the General Assembly to serve for life. Thereafter, the Constitution provided that they be elected by the people for terms of eight years. The selection of Chief Justice was left to the Justices themselves until 1868 when selection of Chief Justice by popular vote first occurred. In 1818, the annual salary of judges was set at $2,500 and remained fixed at this amount as long as the Court sat in the State House and Capitol except during the Civil War when adjustments were made to compensate for depreciation in the Confederate currency.

The court initially sat on January 1, 1819, but soon began meeting in June and November. The Constitution of 1868 prescribed the first Monday in January and July for the beginning of terms. Thereafter, the Constitution of 1876 omitted this requirement, and the Legislature fixed the first Monday in February and October as the first day of each session.[15]

Pursuant to the mandate of the Legislature, the first Supreme Court met in the State House on Union (Capitol) Square on the morning of January 1, 1819. The frontispiece of volume 7 of the North Carolina Reports indicates the following:

Justices of the Supreme Court During the Year 1819

Chief Justice
John Louis Taylor

Associate Justices
John Hall
Leonard Henderson

Attorney General
William Drew

Clerk of the Supreme Court
Archibald D. Murphey

Marshal
Sheriff of Wake County (Ex Off.)

On the opening of court the marshal proclaimed aloud: "The law must be administered with an even and impartial hand without regard to social or other distinctions."

Apparently, the first term passed with little excitement. *The Raleigh Register* on Friday, January 15, 1819 contained the following news item:

15. Much of the information in these paragraphs is from an expanded version found in Battle's History of the Supreme Court, *supra.*

"The supreme court adjourned yesterday. The cases decided were:

1. *State v. Jernigan.* Exceptions to the indictment overruled.

2. *State v. Chay.* Arrest of judgment invalid.

3. *State v. J. A. Stone.* Indictment insufficient for judgment of death.

4. *State v. Dickinson, Scire Facias.* Judgment entered against the defendant.

Few of the Gentlemen of the Bar attended from a belief that much important business would not be acted upon."

Archibald D. Murphey, who later became a justice of the Supreme Court, became the Court Reporter at an authorized annual salary of $500.00, on condition that he furnish the State free of charge eighty copies of the Reports, and the counties, sixty-two copies.[16] Presumably, he paid the printing cost himself. The office of Reporter was sought by aspiring lawyers, which is readily understandable in light of the dearth of reference material existing in the state and the opportunity to sell the reports at a profit.

A review of the printed cases during those early years reveals the judges met regularly, made an effort to calendar cases for the convenience of lawyers, favoring out of town attorneys regarding times at which cases would be heard,[17] and wrote their opinions.[18] The Legislature was not always pleased with the length of the opinions or the methods of disposition as evidenced by statutes requiring that opinions be written in "full length"[19] and be without effect until rendered orally in open court with copies delivered to the Clerk.[20]

Many legal propositions now accepted without question molded the federal and state constitutions during those early years.

16. See footnote 12, *supra.*

17. Farmer, Fannie Memory, "Legal Practice and Ethics in North Carolina," 30 N.C. Historical Review, p. 343 (1950).

18. The Supreme Court required hard work for the judges as well as the lawyers. Frederick Nash wrote that he did not "rightly" appreciate the work of a Supreme Court justice when he accepted appointment on the bench. He had written until after 12:00 o'clock several nights and had had trouble with his eyes ever since. See Frederick Nash to Mary G. Nash, undated, Nash Papers, N.C. Department of Archives and History, Raleigh, North Carolina.

19. 1810 N.C. Session Laws, Ch. II.

20. 1811 N.C. Session Laws, Ch. V.

We accept readily the proposition that a state court has the power and duty to declare an act of the legislature unconstitutional, but few know that the Supreme Court of North Carolina shares with the Supreme Court of Rhode Island the distinction of being the first state court to do so.[21] On the other hand every high school student is aware of *Marbury v. Madison*,[22] the United States Supreme Court decision that deals with separation of powers within the federal government. The impact of the two decisions stand on equal planes within our judicial systems.

The Court and its member justices were dedicated to building a court of great reputation. In addition to the hearing of cases, it examined applicants to the bar,[23] and participated in the building and maintenance of the law library.[24] Individual justices performed other functions of government, e.g., Chief Justice Ruffin was an active member of the State Literary Fund.[25]

The State House, first occupied the last day of 1794, housed all branches of state government initially, except the Governor whose office was at his residence. In 1820-1824 the State House was enlarged, and four courtrooms were located in the south wing of the first floor. On June 21, 1831, the building was destroyed by fire. The Session Records of the First Presbyterian Church describe in explicit detail the terrible loss to our state. An examination by the governor revealed that a worker who was soldering on the zinc roof carried hot coals between two wooden shingles, and a spark was discharged to the dry wood of the attic ceiling. In two short hours the building was totally destroyed.[26]

On the day of the fire, members of the Presbyterian Church adopted a resolution offering the use of its Session House to the justices and bar of the Supreme Court, an offer which the Court accepted. This Session House was a small frame building which fronted on Salisbury Street, on which a part of the present church building stands. All sessions of Court were held in this

21. *Bayard v. Singleton*, 1 N.C. 5 (1787).

22. 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803).

23. Farmer, Fannie, "The Bar Examination," 29 Historical Review 160 (1952).

24. *See* generally York, Maury, "A History of the North Carolina State Library, 1812-1888," a research report submitted to the State Capital Foundation, Inc.

25. Coon, Chas. L., *The Beginning of Public Education in North Carolina*, Vol. 2, 727.

26. Jones, H. G., *For History's Sake*, Vicissitudes of the Records, 1794, 1903, p. 83-85.

building until mid-1840, when the new State Capitol was dedicated.[27]

Some of the papers of State Government, including those of the Supreme Court and the State Library, were in the State House when it burned. Apparently, however, the papers of the Clerk of the Supreme Court were saved. Nevertheless, fire consumed almost all the books in the State Library including the law books. A catalog of the library showed it included, among other books: statutes, 117 volumes; State papers, 69 volumes; general law, 23 volumes; digests, etc., 18 volumes; and reports, 71 volumes. Of the whole, only 117 volumes had been saved. Approximately 20 had been borrowed by Archibald D. Murphey, the court reporter, but none of the books was of any consequence.

During construction of the State Capitol efforts were begun to rebuild the Supreme Court library. The legislature appointed Joseph Gales, editor of the *Raleigh Register*, to this responsibility. He was somewhat successful, but a collection of old laws and legislative journals was hardly an adequate library. Simultaneously the Literary Fund Board, of which Chief Justice Thomas Ruffin was a member, began to rebuild the State Library, which included the law library. Governor David L. Swain solicited lawyer Gavin Hogg's aid in purchasing a library for the Supreme Court. Swain suggested that Hogg direct Henry D. Turner "to fill a catalog of English Reporters" previously submitted to Necklen and Johnson of Philadelphia. The effort was unsuccessful, and Judge William Gaston purchased library materials from a New York firm at a cost of $1,361.75. Collections of statutes from other states were assembled, and a few federal documents graced the shelves.

The State Capitol was dedicated in the spring of 1840. One of the first resolutions considered by the legislature at that time was the assignment of rooms within the building.[28] The Resolution stated "[t]hat the room in the western projection on the third floor be assigned and set apart to the use of the Supreme Court." This room, although designated, was not completed and furnished until July 1841.

David Paton, the Scottish designer, intended to finish this room in the Gothic style, and this was partly achieved with the installation of the distinctive ribbed ceiling with its poppy head

27. The Raleigh Register, Thursday, June 23, 1831. Session Recorder, First Presbyterian Church, Vol. 1, p. 24.

28. 1840-41 N.C. Session Law, Resolution II. See Battle, *supra*.

pendants executed by William H. French of Philadelphia. The only other Gothic motifs to be found in the room were in the two mantels purchased from another Philadelphia merchant, John Struthers and Son. The overall room layout was similar to that of the State Library Room in the eastern projection. Three windows in the long west wall faced the wide, unpaved expanse of Hillsborough Street, and one window was positioned in the north end and one in the south end of the room. Two fireplaces, opposite each other on the north and south walls, contained the only exposed brick in the entire building and were faced with Black and Gold Gothic mantels. The positioning of these fireplaces was for the even distribution of heat throughout the courtroom. An apparent concern with another devastating fire prompted the installation of cast iron linings in many of the Capitol's fireplaces. The cast iron firebacks protected the bricks from damage from direct contact with fire which caused them to crack.

Access to the room was through a double-leafed door near the north end of the east wall. In keeping with the room's symmetrical arrangement a false door of similar design was constructed at the south end of the same wall. Its purpose was strictly visual and served to balance the chamber's design. The only other ornamental woodwork in the room was the high baseboarding and wainscotting beneath each of the windows. The flooring of the chamber was of native pine and seems to have been finished.[29]

Furnishings within the court chamber were sparse. The justices' bench, tables, chairs and other necessities were obtained from William Thompson, the Raleigh cabinetmaker who crafted the desks and chairs of the two legislative chambers.[30]

Raymond Beck, Capitol Researcher, conjectures in his research paper entitled, "The Cabinet of Minerals Room," ". . . that since the effect of the double doors can only be obtained by viewing them from the west wall, the justices' bench was centered on the east wall between the two sets of doors. Thus the room was bisected east to west, with the opposing counsel seated on the north and south sides of the room. The court reporter sat to the rear of the room and near one of the windows for adequate lighting, since the room was usually not well lighted until early

29. Beck, Raymond L., "The Cabinet of Minerals Room (1840-1977)," Ch. II, pp. 17-18.

30. Sanders, John, "Preliminary Report on the North Carolina State Capitol," unpublished manuscript, 1971, p. 97. Hereinafter cited as Sanders, "Preliminary Report."

afternoon. Records are not clear regarding whether candles or oil lamps were used to light the chamber, but it is certain that over the years both were used to some degree."[31]

The law library used by the justices was also located in the east wing on the third floor of the Capitol in the state library room.[32]

When the room on the third floor was first used by the Supreme Court Thomas Ruffin was Chief Justice, and Joseph J. Daniel and William Gaston were Associate Justices. The Attorneys General were John R. Daniel and Hugh McQueen. William H. Battle was reporter, but upon his election as a judge of the Superior Court he was succeeded by James Iredell. The clerks were John L. Henderson and Edmund B. Freeman. The Sheriff of Wake County continued to act as marshal until 1841 when the Court was authorized to appoint its own marshal.[33]

The Court did not occupy this room on the third floor long. During the 1842-43 session, the Legislature moved the Supreme Court and the library from its third floor quarters to the northeast suite on the first floor, the offices currently occupied by the Secretary of State. While no reason is stated for the move, we can assume that it arose at least partly from a desire to spare the three justices, all in their sixties, as well as the attorneys and other attendants, the long daily climb up two flights of stairs to reach the third floor courtroom.

No record has been found regarding the arrangement of furnishings in the new Courtroom located in the northeast corner of the Capitol. Old records of E. B. Freeman, the Clerk of Court, indicate the bench used by the justices on the third floor was lowered from the second floor gallery of the Capitol rotunda to the first floor for use in the Court's new location. The floor in the new room was carpeted. New shelving was installed; doors were rehung. Cloth was placed on tables and bookcases built. Supplies were purchased. Altogether the "exorbitant" sum of $400.00 was spent for the suite's renovation and supplies.[34] Among the records of the Clerk of Court are receipts for sums expended. These re-

31. *Supra*, pp. 18-19.

32. 1842-43 N.C. Public Laws, Ch. XIV, Sec. 1, pp. 82-83.

33. Battle, *supra*, p. 861. (We note the Sheriff of Wake County continued to serve as Marshal ex officio for some time afterward.)

34. Edmund B. Freeman served as Clerk for a third of a century. See page 746 herein for a poem concerning his last years.

ceipts occasionally include personal items charged to the Clerk such as "2 papers turnip seeds at 25 cents, or 1 pt. peas for mother at 17 cents." Such personal items probably were paid for by the Clerk from his own money and simply listed on the official receipts issued by the supplier to avoid writing separate receipts.[35]

Whether the justices conferred in the courtroom or in the adjoining office is not clear. Nor has a record been found at this time showing whether each had so much as a desk of his own. Of course they had no clerks or copyists—only the Clerk of Court and possibly a messenger who may have also been the marshal.

The adjoining office, nearest the rotunda, appears to have been used by lawyers and staff. Perhaps the best description of the office is one written by Joseph Lacy Seawell:

> "Incomparable, if one exists, is the ingleside in any public office today with that in the office of the Clerk of the Supreme Court of North Carolina . . . years ago. The Clerk's office was then the out-of-town lawyers' loafing place, and there they lingered sometimes the entire afternoon, especially in winter. Good fellowship, stories, personal experiences—droll and dramatic—and rare repartee prevailed over professional controversies, as these congenial brethren of the bar incessantly smoked and chewed tobacco.
>
> "The embryous tyranny of the telephone was the fascinating novelty of a toy; the process of transcription had quickened only from quill to Spencerian pen, and masculine officialdom was still unimpaired. Hence, a habitat dearth of telephones, typewriters, women, electric lights and heating-pipes. In lieu of utilities of a busier but less happy day—large gas chandeliers, a big fireplace with a blazing fire and comfortable seats all around. Tenfold court business, science, and the suffrage amendment have long since rendered such environments and social conviviality impossible and intolerable. But anyway and alas! Such charming loiterers are now no more; they have all dispersed and wandered from the fireside's ruddy glow and some have reached a fairer region far away."[36]

35. E. B. Freeman, Accounts and Receipts, Sup. Ct., 1839-1965.

36. Seawell, Joseph Lacy, Law Tales for Laymen, p. 9, "Old Yesterdays in Court."

In 1846 the lawyers from the western part of the State induced the General Assembly to order a term of the Supreme Court held in Morganton on the first Monday in August for the convenience of people residing west of Stokes, Davidson, Union, Stanly and Montgomery counties—with the consent of all parties involved. The judges, attorney general, and reporter attended. James R. Dodge, Esquire, of Surry County, was appointed by the judges as clerk of that court in May 1847. Six Morganton cases were reported in volume 39 of the North Carolina Reports. Although the cases were well-written, they were regarded as less sound legally, the Court having no law library to consult.[37] The practice of holding court in Morganton seems to have continued until 1860, after which no cases are reported from that city.

In 1855 the legislature enacted an income tax on surgeons, practicing physicians, practicing lawyers, and all other persons, ministers of the gospel excepted, whose practice, salaries or fees, when added together yielded an annual gross income of five hundred dollars. The tax charged was three dollars on the first five hundred dollars of income and two dollars for every additional five hundred up to fifteen hundred dollars. For every additional five hundred above fifteen hundred dollars a tax of five dollars was assessed.[38]

Chief Justice Frederick Nash asked Attorney General Joseph B. Batchelor for an opinion as to whether the words "all other persons" to whom the income tax statute directed itself embraced all persons holding office under state government. If so, did the legislation cover officers whose salaries were protected by the Constitution? Again, if so, was the act constitutional? The Chief Justice noted: "You will at once perceive the delicacy of the position in which the Act places the judges of the state." The Attorney General opined that the power to tax the salaries of judges would be tantamount to a power to diminish their salaries during term, which was forbidden by the constitution. The power to levy taxes on all other salaries was not questioned. The Attorney General further noted: "[W]hile it was, therefore, the purpose of the convention to place the salaries of these officers . . . beyond the control of the Legislature by direct legislation, it would be to attribute to them a degree of utter folly opposed to the reputation for wisdom which they have long enjoyed, to con-

37. 39 N.C. 456 (1847).

38. 1856 N.C. Session Laws, Ch. 37, § 39 (Revenue Laws).

clude that they have left open this indirect way to accomplish the same purpose . . . that body [the convention] desired to secure it [the judiciary] against all influences which might sway it from the fearless, faithful, impartial and independent discharge of its duties.

"The Judiciary is the weakest branch of the government; it has neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise of this faculty. The legislature is the most powerful branch, and has a constant tendency to the accumulation of power. The judicial can never make encroachments on the other branches, but requires all the prohibition which it can be given to defend itself from encroachments by them."[39]

The Attorney General's comments indicate the high esteem in which the judiciary was held by members of the bar at that time. His comments also reveal how the people of that period viewed the judiciary's position in government.

By authority granted under an Act of 1810 any party dissatisfied with a ruling of the Superior Court could remove the case to the Supreme Court. The Act of 1818 gave Justices of the Supreme Court all the powers of the Superior Court Judges except the power to convene. Any party could appeal from the first sentence or decree of the Superior Court on giving security to abide by the judgment or decree of the Supreme Court, which was authorized to render judgment upon review of the whole record. Equity cases could be removed to the Supreme Court for hearing by motion and affidavit, showing that removal was required for purposes of justice. No parol evidence was received by the Supreme Court, nor was a jury impaneled to try issues. Nevertheless, witnesses were allowed to authenticate exhibits or other documents.[40] Under this provision virtually all important equity cases were removed, so that the Superior Court Judge escaped the responsibility of giving an opinion in the matter. The Constitutions of 1868 and 1876 put a stop to such practices by confining the jurisdiction of the Supreme Court to appeals on matters of law or legal inference.[41] At long last North Carolina truly had a Supreme Court with solely appellate duties and jurisdiction.

39. 48 N.C., Reprint Appendix, p. 4.

40. 1810 N.C. Session Laws, Ch. II and 1818 N.C. Session Laws, Ch. I.

41. 1 N.C. Rep. (Reprint) 861, *supra.*

Between 1818 and 1888, the character of the judiciary's work changed greatly. The Civil War and Reconstruction, the Constitution of 1868, and the adoption of the Code of Civil Procedure transplanted from New York to North Carolina wrought profound changes in the character of human rights, the treatment of debt, and the method of practice in the courts. Our State Constitution originally was based on the premise that legislators would be so honest and have so great a stake in the land that they could be entrusted with unlimited powers. They controlled the state departments and had full discretion in matters of legislation, taxation, borrowing, and spending.

The composition of the legislature changed immediately after the Civil War, due mainly to the disenfranchisement of ex-confederates and the enfranchisement of blacks. In drafting the Constitutions of 1868 and 1876 the Conventions placed distrust in the legislature as a body, obviously as a reaction toward "Radical" Reconstruction officials and their policies enacted into laws in this state during the interim years. As a result the judicial and executive branches were made independent of the legislature.

The Civil War was an ordeal in the history of the Court. Our Supreme Court neither arrested improperly the laws passed to aid the war power, nor embarrassed the military authorities by unreasonable interference. As a result, defying unpopularity and threats, the judges issued writs of habeas corpus that were executed in the camps within the sound of enemy cannon. Decisions of the Court that favored the military powers of the Confederate government have been ratified by the Federal judicial authorities.[42]

When the Civil War began, the Court continued to meet in Raleigh, but abandoned the August sessions at Morganton. Throughout the period Chief Justice Richmond Pearson, and Justices William H. Battle and Matthias E. Manly were on the bench, and Sion H. Rogers served as Attorney General. All served the judiciary and North Carolina well. The types of cases on the calendar broadened to include questions involving conscription into the Confederate Army and state militia, eligibility for public office, and the State's relationship with the Confederacy. Writs of Habeas Corpus increased in number as did appeals involving them.

The Government of North Carolina collapsed early in 1865 under military pressure. General John M. Scofield took command

42. Battle, *supra*, p. 367.

of the state and proceeded to restore peace, order and loyalty to the United States.[43] The State remained under military rule from the date of Federal occupation until the end of 1865. Military rule was imposed again from March 1867 through July 1868, and Federal troops remained in North Carolina until 1877. In spite of these unwanted conditions, the State made some progress. President Andrew Johnson, having been a resident of Raleigh as a boy, issued first a general amnesty proclamation and immediately followed this with a proclamation ordering a provisional government for North Carolina.[44] By this proclamation the President appointed William W. Holden as provisional governor. Holden immediately assumed the duties of office, and, among other things, appointed the former members of the Supreme Court to their former positions. Judge Matthias Manley was the only secession Democrat appointed to an office.[45] Judge Manley appears not to have assumed the duties of associate justice, however, probably because he could not take the required oath, and Edwin G. Reade joined Battle and Pearson on the Supreme Court for the June 1866 term. The number of justices continued to be three until the Constitution of 1868 increased it to five. The Convention of 1875 once again reduced the Court's membership to three, but in 1888 it was returned to five.

Edmund B. Freeman was appointed Deputy Clerk of the Supreme Court in 1831 and served under two Clerks, William Roberts (Robards) and John L. Henderson. In 1843, he became the Clerk. Freeman died June 20, 1868. The following lines penned by Mrs. Mary Bayard Clarke, though not perfectly accurate historically, indicate the warmth with which he was regarded:

43. Lefler and Newsome, *The History of a Southern State, North Carolina*, p. 461.

44. Zuber, *N. C. During Reconstruction*, p. 2-3.

45. Ashe, *History of North Carolina*, Vol. II, p. 1020.

"The old clerk sits in his office chair,
And his head is white as snow;
His sight is dim and his hearing dull,
And his step is weak and slow;
But his heart is stout and his mind is clear
As he copies each decree,
And he smiles and says as the judges pass,
'Tis the last court I shall see.'
But he lingers on till his work is done,
To pass with the old regime,
When he lays his pen with a smile aside,
To stand at the Bar Supreme;
For the Old Clerk dies with the Court he served
For forty years save three;
And breathes his last as the judges meet
To sign their last decree."

Just prior to 1869, the legislature passed a resolution directing the committee on public buildings to furnish a convenient room in the Capitol Building for the use of the Superintendent of Public Instruction. On the first Monday in January, 1869, the Court attempted to convene, only to find the courtroom occupied by a Rev. Samuel Stanford Ashley, the Superintendent of Public Instruction. The books of the Supreme Court library had been removed and new fixtures erected on which were piled school books. The office of the Clerk was occupied by a Mr. Henderson Adams, State Auditor, and all the Court records had been placed in the rotunda of the Capitol. The Court peremptorily ordered the Superintendent of Public Instruction and the Auditor to vacate the offices, but they refused to obey the Court's order. However, Ashley, under protest, and not waiving any of his rights, permitted the Court to enter the room and open court; and the Clerk of Court was allowed to use a table in the room. The justices undertook to hear arguments from day to day in the courtroom, restricted by the presence and pretentions of Ashley, who continued to conduct the business of his office without regard to the court. Evening sessions by the Court for consultation were held in another room. A few days after this collision of officialdom, the General Assembly repealed the resolution providing rooms for the Superintendent, and he vacated the courtroom.

On February 5, 1869, Adams, the auditor, was called before the Court and ordered to vacate his office. He replied that he would do so when he was given another convenient room. On the 8th of February Adams was threatened with a contempt of court

attachment if he failed to surrender the office by the following day. He still refused and was attached for contempt and placed in the custody of the Court Marshal, D. A. Wicker.

As Adams, in the custody of the Marshal, passed the Office of the Governor, he asked and was permitted to see the Governor. The Marshal described the event in a subsequent affidavit written in response to a contempt of court citation: "[T]he Governor said that the prisoner should not go to jail; that a number of persons were present who aided and encouraged the Governor and your affiant being alone and unassisted was unable to take the prisoner to jail by reason of resistance and superior force."

The Court sent a letter of protest to the Governor, who replied that he claimed no other power to interfere with the execution process of the Court than by the pardoning power. He expressed his desire to maintain the comity "so happily existing between the departments." The Marshal amended his affidavit, eliminating all references to any hostility between the Governor and the Court. Mr. Adams submitted a letter announcing he had vacated the Clerk's office and pledging his respect for the Court. Thereafter the Court, although divided, ruled that the Auditor had purged himself of contempt by vacating the office.[46]

Another clash occurred between the Executive and the Judiciary in July 1870. By executive proclamation, the Governor declared that Alamance, Caswell, and several other counties were in "a state of insurrection" and placed them under military rule. Several citizens in the various counties were imprisoned. They petitioned Chief Justice Pearson for a writ of habeas corpus, alleging they were injustly and illegally detained by the military commander, a Col. Kirk. The Chief Justice issued a Writ directing Col. Kirk to deliver the petitioners to the Marshal of the Court so that the Chief Justice might inquire into the lawfulness of their imprisonment. Kirk refused to obey the writ and was upheld by the Governor who claimed to hold the prisoners under military discipline. After a lengthy hearing, the Chief Justice wrote:

> [I] declare my opinion to be that the privilege of the writ of habeas corpus has not been suspended by the action of His Excellency; that the Governor has power, under the Constitution and the laws, to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the

46. Seawell, Joseph Lacy, *Law Tales for Laymen*, p. 187.

> writ of habeas corpus, or to order the trial of any citizen otherwise than by jury. According to the law of the land, such action would be in excess of his power.
>
> The judiciary has power to declare the action of the Executive, as well as the Acts of the General Assembly, when in violation of the Constitution, void and of no effect. Having ceded full faith and credit to the action of His Excellency, within the scope of the power conferred upon him, I feel assured he will in like manner give due observance to the law as announced by the judiciary . . .

Chief Justice Richmond Pearson concluded: "[I] have discharged my duty; the power of the Judiciary is exhausted, and the responsibility must rest on the Executive."

In a letter of reply, the Governor explained reasons why he found it necessary to declare the Counties of Alamance and Caswell in a state of insurrection, pointing out these counties were controlled by the Ku Klux Klan. The Governor repeated that, under the circumstances, he could not surrender the prisoners taken by Kirk under his orders until civil authority was restored. On the 15th of August 1870 the Governor notified the Chief Justice that the time for release had arrived.

Subsequently, a petition for a Writ of Habeas Corpus issued by Federal District Court Judge Brooks of Elizabeth City required appearance of the prisoners in Court. No evidence was presented by the state, and the prisoners were discharged.[47] Thus ended quietly a challenge to the authority of both the executive and judiciary with mutual respect for both branches of government.

It is not the purpose of this essay to review the lives and achievements of judges and justices who served the Supreme Court between 1830 and 1888. This has been done in two excellent treatises: one prepared by Kemp Battle and published in 103 N.C. Rep. 474 entitled "History of the Supreme Court" and reprinted in Vol. 1 of the N. C. Reports; the second by Justice Walter Clark entitled "History of the Supreme Court of North Carolina" and printed in 177 N.C. 617 (1919). However, it is fitting that Thomas Ruffin be singled out for mention as the greatest jurist of this turbulent period.

47. Seawell, *supra*, p. 191, et seq. *See* 64 N.C. 802-832 for a complete record of this famous trial.

Ruffin was a Virginian by birth, but after his formal education elsewhere came to North Carolina and continued his studies under Archibald D. Murphey. The breadth of his interests—as an agriculturist, a banker, a churchman, a trustee of the University of North Carolina, a legislator, a presidential elector, a representative at the pre-Civil War Peace Conference—is evidence of his stature in this period.

Nevertheless, it is as a judge that Ruffin is chiefly known and remembered. In the quarter-century of his service he established a reputation that spread wherever English law was followed. Authorities on constitutional law rank him a pioneer on the order of a John Marshall or a Lemuel Shaw. He was noted for his decisions on both the common law and equity. His 1460 opinions embrace a wide range of the substantial issues of civil and criminal law. They are noted for their breadth of view, form of reasoning, strength and simplicity of language, and the character of their conclusions. Though respecting precedent, he was not hampered by it in administering justice, and his opinions are notable for their lack of cited authority.

His career afforded him an opportunity to view the law from many angles. He was a practicing attorney, a reporter to the Supreme Court, a superior court judge, and Chief Justice of the Supreme Court. It is fitting that a building later occupied by the Supreme Court was named in his honor.[48]

During the half century following the gold rush in California a rapid expansion westward resulted in the addition of new states to the Union. Simultaneously, industrialization spread across North Carolina, resulting in growth in all branches of government. With the increase in the number of counties in the State came a leap in the number of trial courts and consequently of appeals to the Supreme Court.

During this period the law library continued to grow and recover from the fire of 1831. As new states were added to the Union, so were volumes of their new statutes and their new state court reports, in addition to the continued expansion of statutes from the North Carolina Legislature and opinions from our State Supreme Court. Exchanges were made by the law librarian with other states for statutes and reports. Textbooks and treatises became more common and were added to the library. Codes and statutes were assembled in the executive office, and reports from the various states were transferred to the law library.

48. Dictionary of American Biography, Vol. VIII, pp. 216-217 (1935).

In 1866 a catalog of the Supreme Court Library was published. Although the law library was in the Courtroom, the state librarian managed it at the time. Circulation was restricted to the governor, judges, reporters of the Supreme Court, and members of the General Assembly. It was not until 1871 that the law library was placed under the superintendence of the Clerk of the Court.[49] A law librarian later supervised the collection.

The state library contained 16,395 volumes in 1879. By March of 1885 the number of books had increased to 32,000 volumes, including the law library, and by 1887 the total number had increased to 40,000 volumes.[50] Pleas for a new library in the annual messages of the librarian to the legislature met with unenthusiastic response. Finally, in 1877 Governor Curtis H. Brogden endorsed the request of the librarian, and in his message to the Legislature suggested that a new building for the supreme court and the state library would be appropriate.[51]

In 1885, the General Assembly passed legislation authorizing the Governor and Council of State to add to and alter the Agriculture Building to provide suitable rooms for the Supreme Court and all its needs.[52] In response, the Legislature appropriated $10,000 and authorized the use of prison labor for the project. The warden of the penitentiary inspected the Agriculture Building (formerly a hotel) and concluded it would be difficult to accomplish the purpose of the legislature, but advised that a new building which would be more suitable for the purpose could be erected on the adjoining lot for the money appropriated. Thus, the building was constructed. On March 5, 1888 the building known as the Supreme Court/State Library Building was assigned to the Supreme Court by Governor Scales and accepted by Chief Justice William N. H. Smith.[53] There were set aside rooms for the argument of cases, judicial chambers, a clerk's office, and a library.[54]

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49. History of the North Carolina State Library 1812-1888, Maury York, September 1977.

50. *See* "Librarian's Report," Document No. 11, Public Documents, 1883, and Library Board Minutes, p. 345.

51. *See* "Librarian's Report," Public Document No. 7; "Public Documents," 1876-77, and "Governor's Message," Public Document No. 1, Public Documents, 1876-77.

52. Acts of 1885, Ch. 121, p. 188.

53. Raleigh News and Observer, Vol. XXV, p. 2.

54. Laws of 1888, Ch. 121 and 398.

For the first sixty-nine years (1819-1888) the Supreme Court held its sessions in the State House and Capitol, except for the period when the Capitol was being rebuilt following the destruction of the State House by fire in 1831. For the next twenty-six years (1888-1914) the Court was housed in the Supreme Court /State Library Building, known as the State Department Building after 1913, now the Labor Building on Edenton Street. Then for the next twenty-six years it sat in the State Administration Building, now known as the Court of Appeals Building and previously as the Ruffin Building. On September 4, 1940, it was moved to the Justice Building, where it now sits.

SPECIALIZED AREAS OF THE SUPREME COURT ON WHICH HISTORIES HAVE BEEN WRITTEN

Clark, Walter, "History of the Supreme Court Reports of North Carolina and the Annotated Reprints," 22 N.C. Reprint 9 (1922).

Battle, Kemp P., "An Address on the History of the Supreme Court," 1 N.C. Reprint 835, 103 N.C. 474 (1888). In the appendix of this famous speech may be found a list of the judges, justices, reporters, clerks, and attorneys general from 1777 to 1935.

List of Early Attorneys—35 N.C. Reprint 345 (1852). In addition to the names of practicing attorneys the annotator adds the following footnote:

"Note—Beginning with 63 N.C., January Term, 1867, the list of those to whom license to practice law was issued at each term has been printed in the Reports, but there is no record of those to whom license was granted prior to that date, except in 1843-45, in Vol. 46 of the reports. Thinking it may be of interest to the profession a list of all the lawyers practicing in North Carolina in 1952 is inserted therein. Annotator."

Clark, Walter, "History of the Supreme Court of North Carolina," 177 N.C. 617 (1919). Chief Justice Clark gives an interesting thumbnail sketch of each member of the Court through 1918, as well as various historical facts.

Denny, Emery B., "History of the Supreme Court of North Carolina from January 1, 1919, until January 1, 1969." 274 N.C. 611. The article gives brief biographies of the justices during the period, together with the names and terms of office for the Chief Justices and Associate Justices to 1968.

Also, see 271 N.C. 750, Appendix for a list of the Judges from 1777 to 1 January 1818, a list of the members of the Supreme Court since 1818, together with lists of Reporters, Clerks of Court, Marshals, Librarians, and Attorneys General to 1967.

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

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

A panel of the Court of Appeals had no jurisdiction to consider defendant's argument which could be presented only upon a writ of certiorari since he had entered a plea of guilty where defendant's petition for certiorari was rejected by another panel of the Court of Appeals. *S. v. Winnex*, 280.

§ 6.2. Finality as Bearing on Appealability

The trial court's order allowing summary judgment for fewer than all defendants affected a substantial right of plaintiff and was immediately appealable. *Patterson v. DAC Corp.*, 110.

In an action for trespass in which plaintiffs sought removal of a home partially built on their land, even though defendant's trespass is considered a continuing trespass the appeal was not interlocutory since damages were awarded for only past acts of trespass. *Bishop v. Reinhold*, 379.

Defendant's attempted appeal from an order denying his motion to dismiss for lack of subject matter jurisdiction was interlocutory and therefore premature. *Duke University v. Bryant-Durham Electric Co.*, 726.

§ 49. Harmless Error in Exclusion of Evidence

Any error committed by the trial judge in excluding testimony which tended to show that defendant was negligent when she drove a van through a stop sign into an intersection and blocked plaintiff's lane of travel could not have been prejudicial to the plaintiff since the jury concluded that defendant was negligent and that her negligence was a proximate cause of plaintiff's injury. *Thomasson v. Brown*, 683.

§ 68. Law of the Case and Subsequent Proceedings

Testimony which another panel of the Court of Appeals had held to be admissible in this case was competent under the doctrine of law of the case. *Vance Trucking Co. v. Phillips*, 269.

ARREST AND BAIL

§ 3.2. Legality of Vehicle Registration and License Checks and Resulting Arrests

An officer had probable cause to arrest defendant for operating a vehicle without a license upon the basis of information obtained from a computer check with the Department of Motor Vehicles; even if the stop was based solely on information received from two unnamed informants, such information was sufficiently reliable under the totality of the circumstances to provide support for a lawful detention of defendant. *S. v. Davis*, 98.

§ 6. Resisting Arrest

A sentence of two years for obstructing an officer in violation of G.S. 14-223 was beyond the maximum term allowed by the statute. *S. v. Downing*, 686.

§ 6.2. Sufficiency of Evidence of Resisting Arrest

The evidence was sufficient to support defendant's conviction for obstructing an officer in the performance of his duties. *S. v. Downing*, 686.

§ 9.2. Bail After Trial

Conditions of defendant's release pending appeal which restricted his right to leave the county and to possess firearms unless he posted a $20,000.00 secured bond were within the trial court's discretion. *S. v. Crabtree*, 662.

ARREST AND BAIL — Continued

§ 11.3. Requirements for Forfeiture of Bail Bond

The county in which defendants committed the crimes charged and were indicted rather than the county to which their cases were transferred for trial was entitled to bail bond forfeitures when defendants failed to appear for trial. *In re Dunlap*, 152.

ASSAULT AND BATTERY

§ 14.4. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill

Defendant failed to show prejudice in the trial court's submission to the jury of the issue of assault with intent to kill inflicting serious injury in that there was no evidence of intent to kill since the jury convicted defendant of the lesser included offense of assault with a deadly weapon inflicting serious injury. *S. v. Brindle*, 716.

§ 14.5. Sufficiency of Evidence of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury where Weapon is a Knife

The evidence was sufficient to support a verdict of assault with a deadly weapon with intent to kill. *S. v. Bunn*, 187.

The evidence was sufficient in a prosecution for assault with a deadly weapon inflicting serious injury to withstand defendant's motion to dismiss. *S. v. Gilliland*, 372.

§ 15.6. Instructions on Defense of Others from Felonious Assault

The trial judge properly submitted the issue of self-defense to the jury. *S. v. Bunn*, 187.

Defendant was not entitled to a new trial in a felonious assault case because the trial court charged the jury as to the victim's right of self-defense when his wife was assaulted and the "wife" testified after the verdict that she was not divorced from her first husband when she went through a marriage ceremony with the victim. *S. v. Gilliland*, 372.

AUTOMOBILES AND OTHER VEHICLES

§ 3.4. Sufficiency of Evidence of Driving Without Valid License

Defendant could properly be convicted of driving while his license was permanently revoked rather than merely driving without a proper license where defendant was entitled to request a hearing for restoration of his license but the license had not been restored on the date of the offense. *S. v. Beasley*, 288.

§ 62.2. Striking Pedestrians Other Than at Intersections

In an action to recover for injuries received by plaintiff when she was struck by defendant's automobile while crossing the road, the forecast of evidence on motion for summary judgment was sufficient to permit a finding that defendant was negligent in failing to keep a proper lookout, failing to slow down and failing to sound her horn and was insufficient to show contributory negligence as a matter of law by plaintiff. *Carter v. Poole*, 143.

§ 76.1. Contributory Negligence; Hitting Stopped Vehicles

The evidence presented a jury question as to whether plaintiff was contributorily negligent in operating his vehicle in such a manner and speed as to be unable to avoid a collision after seeing defendants' stopped vehicles. *Hill v. Pack*, 708.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 89.4. Last Clear Chance; Pedestrians

The forecast of evidence was sufficient to permit a finding that, even if plaintiff pedestrian was contributorily negligent in failing to see defendant's approaching car, defendant had the last clear chance to avoid the accident. *Carter v. Poole*, 143.

§ 90.1. Failure of Instructions to Apply Law to Facts on Violation of Safety Statutes

The trial court's instructions concerning negligence did not set forth a rebuttable presumption that a person with a .10% or greater blood alcohol level is intoxicated. *Vance Trucking Co. v. Phillips*, 269.

§ 113.1. Sufficiency of Evidence of Involuntary Manslaughter

The State's evidence was sufficient for the jury to find that defendant was guilty of involuntary manslaughter in passing four cars at one time and in causing an on-coming driver to lose control and crash into a car occupied by deceased. *S. v. Nugent*, 310.

§ 131.1. Failing to Stop after Accident; Sufficiency of Evidence

The State's evidence supported the inference that defendant knew he had hit and caused injury to another person so as to support his conviction for hit and run driving. *S. v. Cobbins*, 616.

BASTARDS

§ 11. Civil Action by Father of Illegitimate Child to Establish Paternity

The clerk of superior court does not have jurisdiction pursuant to G.S. 49-10 to enter an order legitimizing a child born to a married woman. *In re Legitimation of Locklear*, 722.

BROKERS AND FACTORS

§ 4.1. Rights and Liabilities of Real Estate Brokers to Principals

Defendant real estate brokers committed an unfair or deceptive act in violation of G.S. 75-1.1 by failing to disclose, prior to their purchase of property which had been listed with them for sale by the vendors, that they had an offer from a third party to purchase the property. *Starling v. Sproles*, 653.

§ 6.1. Commissions; Procuring Cause of Purchase

Where evidence in an action to recover commissions under a sales representative agreement disclosed that plaintiff solicited the sale in question, evidence that defendant made the actual sale was irrelevant and properly excluded. *Castle & Associates v. Custom Molders*, 724.

COMPROMISE AND SETTLEMENT

§ 6. Admissibility of Evidence

In an action instituted by plaintiff to recover on two promissory notes where defendant raised the defense of settlement, the trial court erred in finding a settlement agreement ambiguous and in admitting parol evidence. *Stevens v. Dorenda*, 322.

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy

The trial court was not precluded from sentencing defendant on his plea of guilty to a charge of conspiracy to sell and deliver cocaine because his two codefendants were not charged with and had not been convicted of conspiracy at the time of sentencing. *S. v. Blandford*, 348.

CONSTITUTIONAL LAW

§ 20.3. Equal Protection in Public Health and Welfare Programs

Defendant failed to establish a prima facie case of selective enforcement or prosecution for welfare fraud. *S. v. Ward*, 352.

§ 23. Scope of Protection of Due Process

The statute requiring an illegitimate's father to establish his paternity by one of the statutorily prescribed methods before he is permitted to inherit from the illegitimate does not violate equal protection. *In re Estate of Stern v. Stern*, 507.

§ 24.7. Service of Process and Jurisdiction Over Nonresident Individuals

In an action in which plaintiffs, who reside in North Carolina, sued defendant, a resident of Texas, for the balance allegedly due them under the terms of a note executed by defendant incident to purchasing various articles of medical equipment, the trial court properly found our court could exercise *in personam* jurisdiction over defendant. *Wohlfahrt v. Schneider*, 691.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in denying defendant's motion for fees for a second expert psychiatric witness to examine defendant and testify at trial. *S. v. Cauthen*, 630.

§ 48. Effective Assistance of Counsel

Defendant failed to show that his attorney was incompetent in that he did not prepare a defense before trial, he did not submit proposed instructions to the trial judge, and he filed a motion for a continuance. *S. v. Davis*, 137.

There was no merit to defendant's contentions that he was denied effective assistance of counsel when he failed to object to testimony from a witness which was admissible as a shorthand statement of fact and when his counsel failed to request an instruction on defense of accident since defendant was not entitled to such an instruction. *S. v. Brindle*, 716.

§ 51. Speedy Trial; Delay in Arrest

Defendant was not entitled to have a robbery charge against him dismissed because of a delay of 207 days from the date of the offense to the date of his arrest. *S. v. Parker*, 293.

§ 74. Self-Incrimination

A witness did not waive his right against self-incrimination when he gave defendant a written statement before trial that defendant had nothing to do with the heroin in question. *S. v. Hart*, 702.

CONSUMER CREDIT

§ 1. Generally

Plaintiff's claim based on alleged violations of the North Carolina Consumer Finance Act, G.S. 53-164 et seq., was barred by the statute of limitations of G.S. 1-52(2). *Patterson v. DAC Corp.*, 110.

CONTEMPT OF COURT

§ 6.2. Burden of Proof; Sufficiency of Evidence

The superior court erred in failing to grant defendant's motion to dismiss a contempt charge at the close of all the evidence where the magistrate's order of contempt was the only evidence offered at the de novo trial. *S. v. McGee*, 369.

CONTRACTS

§ 6. Contracts Against Public Policy

A note and deed of trust executed by plaintiff in exchange for defendant's implicit agreement not to initiate criminal proceedings against the male plaintiff for embezzlement were void as against public policy. *Gillikin v. Whitley*, 694.

§ 6.1. Contracts by Unlicensed Contractors or Businesses

Plaintiff was a general contractor in performing clearing and grading work required for agricultural purposes on a farm and was not entitled to recover for such work where it was not licensed. *Walker Grading & Hauling v. S.R.F. Management Corp.*, 170.

Plaintiff, who had a limited license as a general contractor for a single project "of a value [not to exceed] one hundred twenty-five thousand dollars" could not collect more than that amount on his contract with defendant. *Sample v. Morgan*, 338.

§ 25.1. Sufficiency of Allegations

In an action in which plaintiff alleged that defendant university had contracted with plaintiff to permit her to change her status in defendant's Divinity School from special student to regular degree candidate in the Masters of Religious Education degree program, plaintiff's forecast of evidence was insufficient to survive defendant's motion for summary judgment. *Elliott v. Duke University*, 590.

§ 25.4. Burden of Proof

In an action in which plaintiff alleged that defendant, through its agent, the director of admissions at the Duke Divinity School, had contracted with plaintiff to permit her to change her status in defendant's Divinity School from special student to regular degree candidate in the Masters of Religious Education degree program, plaintiff's contract claim was deficient in that she failed to allege and prove that the director of admissions was an agent of defendant. *Elliott v. Duke University*, 590.

§ 26.1. Parol Evidence of Negotiations

In an action instituted by plaintiff to recover on two promissory notes the trial court erred in finding a settlement agreement ambiguous and in admitting parol evidence. *Stevens v. Dorenda*, 322.

§ 27.2. Sufficiency of Evidence of Breach of Contract

The trial court erred in finding that defendant employer breached a contract employing plaintiff as an anesthesiologist when the employer lost its contract to provide anesthesia services to a hospital and should have found that plaintiff breached the contract when he entered into a new employment agreement with the hospital. *Menzel v. Metrolina Anesthesia Assoc.*, 53.

Plaintiff's evidence was sufficient to be submitted to the jury for breach of a contract implied in fact to pay for certain splay base work performed in installing tile flooring in a hospital. *Ellis Jones, Inc. v. Western Waterproofing Co.*, 641.

§ 28.2. Instructions as to Damages

The trial court's failure to instruct on the measure of damages under a contract implied in law was not prejudicial error where the court properly instructed

CRIMINAL LAW — Continued

judge's opportunity to exercise his discretion in determining an appropriate sentence, and the trial judge was required to make proper findings in aggravation and mitigation to support the sentence. *S. v. Jones*, 274.

§ 23.1. Acceptance of Plea

It will be presumed that the trial court determined that there was a factual basis for defendant's plea of guilty where the record on appeal does not contain a transcript of the proceedings at which the plea was accepted. *S. v. Blandford*, 348.

§ 26. Plea of Former Jeopardy

The trial court properly denied defendants' motions to dismiss based on former jeopardy where, in the first trial on the same offense, the trial judge found as a fact that a witness's unsolicited prejudicial testimony was not intentional. *S. v. Cuthrell and S. v. Cuthrell*, 706.

§ 26.5. Same Acts or Transactions Violating Different Statutes

Defendant could properly be convicted for both felonious breaking or entering and felonious larceny pursuant to a breaking or entering. *S. v. Downing*, 686; *S. v. Smith*, 570.

§ 33.2. Relevancy of Evidence as to Motive, Knowledge, or Intent

Pawn shop tickets signed by defendant on dates prior to a breaking or entering and larceny were not admissible to show a motive for such crimes. *S. v. Higgins*, 1.

§ 34.4. Admissibility of Evidence of Other Offenses

Testimony by the prosecutrix that defendant told her that if she left she would end up like his "last white girl" who was found dead in the woods at Camp Lejeune was competent in a kidnapping prosecution. *S. v. Partridge*, 427.

§ 34.7. Admissibility of Other Offenses to Show Intent or Motive

In a prosecution for a second degree sexual offense, the trial court did not err in allowing evidence of at least 50 other occasions of similar sexual activity which defendant had conducted with his stepson since the evidence was limited to the purpose of determining defendant's intent or motive at the time he was alleged to have committed the act for which he was being tried. *S. v. Patterson*, 657.

§ 34.8. Admissibility of Other Offenses to Show Common Plan or Scheme

The trial court properly admitted evidence of offenses committed by defendant other than those charged where the evidence tended to show a common plan or scheme. *S. v. Smith*, 570.

§ 35. Evidence that Offense Was Committed by Another

The trial court correctly excluded evidence that the State's witness had ready money and that defendant did not since such testimony was irrelevant. *S. v. Smith*, 570.

§ 39. Evidence in Rebuttal

The trial court did not err in admitting a tape recording into evidence in the rebuttal phase of the trial although a transcript of the tape had been admitted during the State's case in chief. *S. v. Stafford*, 440.

§ 42.2. Sufficiency of Foundation for Admission of Articles and Clothing Connected with the Crime

A pistol barrel was sufficiently identified for its admission into evidence without a showing of a chain of custody. *S. v. Cobbins*, 616.

CRIMINAL LAW — Continued

§ 66.7. Identification from Photographs

There was no error in the trial judge's allowing a photographic identification into evidence. *S. v. Davis*, 137.

§ 66.9. Photographic Identification; Suggestiveness of Procedure

A robbery victim's pretrial photographic identification of defendant was not unnecessarily suggestive. *S. v. Parker*, 293.

On the basis of the record, there was nothing to indicate that a pretrial photographic identification procedure was improper, and, if through his brief, defendant tried to challenge the admission of in-court eyewitness identification by the prosecuting witness, defendant failed to properly raise the issue by failing to object or except in the record to the prosecuting witness's in-court identification. *S. v. Anderson*, 666.

§ 69. Telephone Conversations

A proper foundation was laid for the admission of defendant's telephone conversations with two State's witnesses. *S. v. Cobbins*, 616.

§ 70. Tape Recordings

A tape recording of a conversation between defendant and the investigating officer was sufficiently authenticated for its admission into evidence. *S. v. Nugent*, 310.

§ 71. "Shorthand" Statements of Fact

A witness's testimony that a towel "was wet like someone had used it to dry . . . themselves off after a shower or a bath," was a shorthand statement of fact, and was not an impermissible expression of opinion. *S. v. Carter*, 21.

§ 73.2. Statements Not Within Hearsay Rule

A detective's testimony that, after talking to shop owners where defendant allegedly sold stolen property, he determined that the shop owners' descriptions of the seller fit the defendant was not inadmissible hearsay. *S. v. Smith*, 570.

Testimony that defendant informed his brother that a pistol barrel pulled out by a witness was not a gun was not inadmissible hearsay. *S. v. Cobbins*, 616.

§ 75.7. Requirement That Defendant Be Warned of Constitutional Rights

Statements volunteered by defendant which were not responsive to questions were not subject to limitations of *Miranda v. Arizona*. *S. v. Beasley*, 288.

§ 77.1. Admissions and Declarations of Defendant

There was sufficient evidence and testimony in support of the trial court's findings of fact and subsequent conclusion that defendant was not under arrest, that he was not threatened, coerced or intimidated in any manner, and no promises or threats were made, that defendant was free to leave at any time, and that it was not necessary or required that *Miranda* warnings be given him when he stated his date of birth, sex, race, age, height, weight, color of eyes, color of hair and nickname. *S. v. Riddle*, 60.

A conversation in which defendant threatened to kill the witness when the witness accused defendant of breaking into his girlfriend's apartment was competent as an admission by defendant. *S. v. Cobbins*, 616.

§ 77.2. Self-Serving Declarations of Defendant

Cross-examination of an officer as to whether defendant had told her what happened was properly excluded as a self-serving declaration at a time when defendant had not yet testified. *S. v. Cobbins*, 616.

CRIMINAL LAW — Continued

§ 80. Books, Records, and Other Writings

The trial court properly admitted into evidence a magistrate's order finding defendant in contempt of court. *S. v. McGee*, 369.

§ 81. Best and Secondary Evidence

The best evidence rule did not apply to an officer's use of her investigation report to refresh her recollection. *S. v. Cobbins*, 616.

§ 85.2. Character Evidence Relating to Defendant; State's Evidence Generally

The trial court did not err in permitting the State's rebuttal character witnesses to state that defendant had the reputation of dealing in drugs without first requiring the witnesses to state whether defendant's character was good or bad. *S. v. Turner*, 203.

§ 86. Credibility of Defendant and Interested Parties

The trial court erred in refusing to allow defendant's counsel to ask defendant on direct examination about his prior criminal convictions. *S. v. Hedgepeth*, 390.

§ 86.2. Impeachment of Defendant; Prior Convictions

The State could not ask the defendant about a plea of *nolo contendere* for the purposes of impeachment by prior convictions. *S. v. Hedgepeth*, 390.

The trial court did not err in permitting the prosecutor to cross-examine defendant by asking a general question as to what he had been tried and convicted of in a court of law. *S. v. Cobbins*, 616.

§ 86.3. Impeachment of Defendant with Prior Convictions; Effect of Defendant's Answer; Further Cross-Examination

In a prosecution in which defendant testified on direct examination that he had been convicted on two counts of contributing to the delinquency of a minor, the trial court erred in permitting the prosecutor to cross-examine defendant concerning the details of the prior crimes. *S. v. Phillips*, 453.

When defendant admitted several prior convictions and stated he couldn't say what else he had been convicted of because it had been a while, the prosecutor's question as to whether defendant had so many that he couldn't remember constituted a proper "sifting" of the witness by further cross-examination. *S. v. Cobbins*, 616.

In an assault prosecution in which defendant admitted prior convictions of assault, the trial court erred in permitting the State to cross-examine defendant about the nature of the weapons used in the prior assaults and about the gender of the victims. *S. v. Greenhill*, 719.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

The prosecutor properly cross-examined defendant for impeachment purposes concerning threatening remarks defendant had made to two of the State's witnesses. *S. v. Cobbins*, 616.

§ 86.8. Credibility of State's Witnesses

Although the trial court erred in excluding evidence of prior convictions which the State's witness had committed as a juvenile, defendant failed to show that the error was prejudicial. *S. v. Smith*, 570.

CRIMINAL LAW — Continued

§ 87. What Witnesses May Be Called; List of Witnesses

The trial court had the discretion to permit testimony by a witness whose name was omitted from the list of potential witnesses furnished to defendant prior to trial. *S. v. Turner*, 203.

§ 89.4. Credibility of Witnesses; Prior Inconsistent Statements

Prior inconsistent statements made by the prosecutrix concerning an alleged sexual assault upon her two years earlier were not rendered inadmissible in a rape and sexual offense trial by the rape victim shield statute and were relevant to the issues of the prosecutrix's credibility and consent. *S. v. Johnson*, 444.

§ 91. Speedy Trial

The speedy trial time limit begins to run after appellate review on the date the opinion of the appellate division is certified to the superior court. *S. v. Bean*, 86.

The trial judge properly excluded from the speedy trial period a delay resulting from defendant's action in indicating to the district attorney that he would accept a plea arrangement and a delay caused by the unavailability of the State's essential witness. *Ibid.*

Defendant's contention that the judge's order excluding a period of time for speedy trial purposes was void for lack of jurisdiction was without merit. *S. v. Davis*, 137.

Defendant's "motion and request for dismissal of charge" was not equivalent to a "motion for prompt trial." *Ibid.*

The date of defendant's indictment rather than the date that defendant was originally arrested was the correct date to begin tolling the period for speedy trial purposes. *S. v. Gross*, 364.

Although defendant was not tried until 218 days after he was indicted, most of the time between the time he was indicted and the time of trial was excludable under G.S. 15A-701. *S. v. Smith*, 570.

§ 96. Withdrawal of Evidence

Where, during the course of direct examination, an officer gave an unresponsive answer and stated defendant refused to sign a "waiver of rights," the trial court's immediate allowance of defendant's motion to strike the answer and immediate instruction to the jury to disregard the officer's statement sufficed to remove any possible prejudice to the defendant. *S. v. Patterson*, 657.

§ 99.1. Conduct of the Court; Expression of Opinion on the Evidence During Trial

The trial judge did not express an opinion as to defendant's guilt in stating during his opening remarks to the jury that defendant is presumed to be innocent "at this stage of the proceedings" and that "I think that the State will show that it occurred at the Maplewood Cemetery." *S. v. Parker*, 293.

§ 99.2. Conduct of the Court; Questions, Remarks, and Other Conduct During Trial

Although the trial court's correction of an undercover agent's testimony that he had "collected" bags of marijuana in his possession by asking whether the agent meant "bought" was improper, it was not prejudicial to defendant in context. *S. v. Turner*, 203.

In a prosecution for possession and sale of marijuana in which defendant testified that he did not get into an undercover agent's car when he sold marijuana

on a certain date, the trial court's improper comment, "I thought he said he did," was not prejudicial to defendant in context. *Ibid.*

§ 99.3. Conduct of the Court; Remarks and Other Conduct in Connection with Admission of Evidence

The court's action in ordering the district attorney who prosecuted the case to distribute the exhibits to the jury rather than ordering the courtroom personnel to perform the task was in no way an expression of opinion as to the defendant's guilt or innocence. *S. v. Massenburg*, 127.

§ 99.4. Conduct of the Court; Interposition of Objections by Court

The defendant was not prejudiced when the trial court objected to a line of questioning and sustained his own objection where the line of questioning was irrelevant in this particular case. *S. v. Turner*, 203.

§ 99.5. Conduct of Court; Admonition of Counsel

Admonitions to defense counsel to "move on" did not constitute an expression of opinion. *S. v. Turner*, 203.

§ 101.1. Statements and Misconduct of Prospective Jurors

A prospective juror's statement during voir dire that defendant was the driver of a vehicle in a collision in which two of the juror's relatives were killed did not constitute misconduct warranting a mistrial in an assault case. *S. v. Bruton*, 449.

§ 102. Argument and Conduct of Counsel and Solicitor; Who is Entitled to Conclude Argument

There is no merit in defendant's contention that the trial court erred in requiring defendant to offer a supplemental police report into evidence in order to use the report in cross-examining an officer, thereby depriving defendant of his right to the final jury argument. *S. v. Parker*, 293.

§ 102.5. Argument and Conduct of Counsel and Solicitor; Improper Questions

The prosecutor's question to a psychiatrist as to whether he had stated in his recommendations that defendant wouldn't meet the qualifications for involuntary commitment did not improperly convey to the jury that defendant would be released if found insane. *S. v. Cauthen*, 630.

§ 102.6. Argument and Conduct of Counsel and Solicitor; Particular Conduct and Comments in Argument to Jury

A statement in a prosecutor's closing argument was not a comment on defendant's failure to take the stand. *S. v. Farrow*, 147.

§ 102.7. Argument and Conduct of Counsel and Solicitor; Comment on Character and Credibility of Witnesses

A prosecutor's comments in his closing argument which, in essence, constituted an argument to the jury that they should not believe defendant's evidence of alibi represented a reasonable comment on the evidence and was not prejudicial error. *S. v. Riddle*, 60.

§ 111. Form and Sufficiency of Instruction in General

Although the trial judge's recitation of a proverb in his charge to the jury on the legal implications of defendant's flight was inappropriate, the judge's charge, as a whole, was fair and clear, and defendant failed to meet his burden of showing prejudice. *S. v. Lofton*, 79.

CRIMINAL LAW — Continued

§ 112.1. Instructions on Reasonable Doubt

Without a request to instruct on reasonable doubt, the trial court is not required to define it. *S. v. Davis*, 137.

§ 112.6. Charge Concerning Burden of Proof; Insanity

Any confusion about the burden of proof on the issue of insanity caused by an instruction that "if you are in doubt as to the insanity of the defendant, then the defendant is presumed to be sane and you would find the defendant guilty of the charges, if the State has satisfied you as to the other issues" was cured by the court's other instructions. *S. v. Cauthen*, 630.

§ 114.1. Expression in the Charge of Opinion by Court; Disparity in Time Consumed in Stating Evidence for Parties

The trial judge did not give more weight to the State's evidence than to defendant's evidence. *S. v. Cauthen*, 630.

§ 117. Charge on Character Evidence and Credibility of Witnesses

The trial court did not err in limiting defendant's examination of his own witness concerning prior inconsistent statements and prior convictions. *S. v. Carter*, 21.

§ 118.2. Charge on Contentions of the Parties

The trial court's attribution of contentions to a defendant who offered no evidence that it was not uncommon for persons in the service to keep unreasonable hours and that a State's witness testified against him for vindictiveness did not constitute an expression of opinion. *S. v. Bean*, 86.

Any error in the court's failure to restate defense counsel's jury argument that the State's chief witness had arranged for defendant to be set up and wrongfully implicated was cured by the court's supplementary instruction that argued contentions supported by the evidence should be considered by the jury in arriving at its verdict. *Ibid.*

§ 122. Additional Instructions After Initial Retirement of Jury

Although it would have been the better practice for the trial court to give an additional instruction requested by defendant that in the event that the jurors were unable to reach a unanimous decision, they should communicate it to the court and the court would take appropriate action, the trial court's failure to give such instruction did not constitute prejudicial error. *S. v. Atkins*, 67.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

A judicial inquiry into the numerical division of the deliberating jury after the jury had been deliberating only 37 minutes was not coercive and did not affect the jury's verdict. *S. v. Atkins*, 67.

§ 131.2. New Trial for Newly Discovered Evidence; Showing Required; Sufficiency of Showing

There was no abuse of discretion in the denial of defendant's motion for appropriate relief which alleged that, since the trial, a defense witness made three separate confessions admitting that he alone committed the murder and that he gave false testimony because the statements were made to cellmates who were "getting on him about being a snitch." *S. v. Carter*, 21.

CRIMINAL LAW — Continued

Where, pursuant to a plea arrangement, three charges against defendant were consolidated for sentencing purposes, and where only one of the crimes occurred after the date the Fair Sentencing Act became applicable, and where there was no evidence that a deadly weapon was used in the commission of that crime, the trial court erred in finding as a statutory aggravating factor that "the defendant was armed with or used a deadly weapon at the time of the crime." *Ibid.*

Where the trial judge accepted a plea bargain arrangement in which it agreed to consolidate three cases for sentencing under one judgment and not treat the offenses separately, the trial court could not find as a factor in aggravation that defendant "could be given consecutive sentences, but is given a concurrent sentence." *Ibid.*

The trial court's finding as a factor in aggravation that defendant inflicted serious bodily injury upon a robbery victim was supported by a preponderance of the evidence. *S. v. Nichols*, 318.

An unsworn statement by defendant's attorney in his final argument on sentencing that defendant did not have a criminal record was insufficient to require the court to find defendant's lack of a prior criminal conviction as a mitigating factor. *Ibid.*

The trial judge erred in finding as an aggravating factor that the sentences imposed were necessary as a deterrent to others and were necessary to protect society. *S. v. Tyler*, 285.

The trial court erred when it considered a defendant's lesser role in a crime but failed to specifically list this consideration as a factor in mitigation. *Ibid.*

The discretion and balance struck by the trial judge imposing a sentence does not depend on the precise number of aggravating and mitigating factors; two factors in mitigation do not automatically outweigh one factor in aggravation. *Ibid.*

Where five charges against defendant for rape and kidnapping were joinable, the trial court could not properly consider defendant's conviction of one of the offenses as an aggravating factor in any of the other four cases. *S. v. Winnex*, 280.

The trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing to a law officer at an early stage in the criminal process. *Ibid.*

Defendant produced insufficient, inherently credible evidence of good character or reputation in the community in which he lives to require the trial court to find this factor in mitigation. *Ibid.*

The trial court erred in finding as aggravating factors in sentencing that defendant had knowingly devoted himself to criminal activity and that the sentence imposed was necessary to deter others from committing the same crime. *S. v. Partridge*, 427.

A finding that defendant was dangerous to himself was improperly considered as an aggravating factor. *S. v. Cauthen*, 630.

The trial court incorrectly found as an aggravating factor in imposing a sentence for assault on an adult that "the victims were young." *Ibid.*

Prior convictions may be proved by defendant's own statement under oath. *S. v. Downing*, 686.

The trial court erred in using the same evidence in finding as aggravating factors that defendant had engaged in violent conduct which is a threat to society and that defendant is a dangerous mentally abnormal person. *S. v. Puckett*, 600.

CRIMINAL LAW — Continued

Evidence of defendant's attempts to get psychiatric treatment did not require the trial court to find as a factor in mitigation of a felonious assault that defendant "exercised caution to avoid such consequences." *Ibid.*

The trial court did not err in failing to find as a factor in mitigation of a felonious assault that the relationship between defendant and the victim was otherwise extenuating. *Ibid.*

The trial court could not properly consider as an aggravating factor for felonious assault that defendant killed another person in the course of the assault or that the offense was committed while "lying in wait." *Ibid.*

The trial court should have found as a factor in mitigation that defendant acknowledged wrongdoing at an early stage of the criminal process. *Ibid.*

In a prosecution for felonious breaking or entering and felonious larceny, the trial court erred in considering at the sentencing phase as an aggravating factor that the offenses were committed for hire or pecuniary gain. *S. v. Smith*, 570.

In a prosecution for felonious breaking or entering and felonious larceny, the trial court properly found as an aggravating factor that defendant had a record of prior convictions. *Ibid.*

In imposing a sentence for armed robbery, the trial court erred in finding as aggravating factors that defendant occupied a position of leadership in carrying it out, that the offense involved a taking of property of great monetary value, and that the offense was committed in an effort to escape or prevent lawful arrest for the robbery. *S. v. Thompson*, 679.

The evidence did not support the court's finding as an aggravating factor that an assault with a deadly weapon with intent to kill was "especially atrocious." *Ibid.*

§ 138.4. Severity of Sentence; Where There Are Several Charges

The trial court did not abuse its discretion in failing to place defendant on probation for at least one of the two judgments entered against him for possession of marijuana with intent to sell and sale of marijuana. *S. v. Turner*, 203.

§ 138.7. Severity of Sentence; Particular Matters and Evidence Considered

The trial court's comments concerning defendant's guilt of second degree murder did not show that the court was improperly influenced by personal feelings in imposing a sentence for voluntary manslaughter. *S. v. Smith*, 326.

§ 142.3. Probation and Suspended Sentences and Judgments; Particular Conditions Held Proper

Ample evidence supported the court's recommendations that defendant be available for work release and that defendant pay restitution of medical expenses. *S. v. Bunn*, 187.

§ 161. Necessity For, and Form and Requisites of, Exceptions and Assignments of Error

Defendant's "broadside" assignment of error and "shotgunning" approach to questions were both ineffectual and without merit. *S. v. Bunn*, 187.

§ 163. Exceptions and Assignments of Error to Charge; Necessity of, and Time for Making

An instruction by the trial court that Old Thomasville Highway and Bethel Road in Randolph County were highways did not constitute "plain error" such as to require a new trial even though defendant failed to object thereto at the trial. *S. v. Beasley*, 288.

CRIMINAL LAW — Continued

Instructions concerning the burden of proof on the issue of insanity were not "plain error." *S. v. Cauthen*, 630.

§ 166. The Brief

In any criminal case where the defendant is found to be indigent and receives the services of court-appointed counsel, it is only the specifically named counsel (and not the law firm or associates) that has the delegated right and duty to appear and participate in the case. *S. v. Carter*, 21.

§ 168.2. Particular Errors in Instructions as Harmless or Prejudicial

Any error in the court's instruction referring to defendant's statement as a "confession" was harmless beyond a reasonable doubt. *S. v. Smith*, 326.

DESCENT AND DISTRIBUTION

§ 8. Bastards

Paternal heirs of an illegitimate who died intestate were not entitled to share with the maternal heirs in the illegitimate's estate where the putative father was never judicially adjudged to be the illegitimate's father and he never properly acknowledged his paternity. *In re Estate of Stern v. Stern*, 507.

The statute requiring an illegitimate's father to establish his paternity by one of the statutorily prescribed methods before he is permitted to inherit from the illegitimate does not violate equal protection. *Ibid.*

DIVORCE AND ALIMONY

§ 13.5. Separation for Statutory Period

Defendant-husband's motion to set aside a judgment by confession and a separation agreement and property settlement concerning monthly alimony payments was properly denied where defendant failed to meet his burden of proof that the parties intended to resume the marital relation. *Williamson v. Williamson*, 315.

§ 24.5. Modification of Support Order; Changed Circumstances

In an action for modification of child support, summary judgment for defendant husband was improperly granted where there was a material fact in issue as to whether plaintiff's income was known at the time of the original consent order. *Asher v. Asher*, 711.

§ 24.6. Child Support; Sufficiency of Evidence

There was ample evidence to support a trial court's decision to order defendant to pay child support although defendant was unemployed and made a living by illegal means. *Darden v. Darden*, 432.

§ 24.9. Child Support; Findings

In a proceeding for child support, the trial court properly omitted a finding regarding the amount of defendant's living expenses since defendant failed to present any evidence of such expenses. *Darden v. Darden*, 432.

§ 26. Child Custody; Modification of Foreign Orders

The district court was without authority to exercise its jurisdiction to modify a Pennsylvania child custody order. *Bryan v. Bryan*, 461.

DIVORCE AND ALIMONY — Continued

§ 27. Child Custody; Attorney's Fees

In light of the evidence regarding the legal services provided to plaintiff, the skill of counsel and defendant's income, there was no abuse of discretion in the trial court awarding attorney fees to plaintiff in a child custody action. *Darden v. Darden*, 432.

§ 28. Validity of Foreign Decrees

For both jurisdictional and public policy reasons, the trial court properly refused to accord legal force and effect to a Dominican divorce decree. *Mayer v. Mayer*, 522.

ELECTRICITY

§ 3. Rates

The Utilities Commission erred in determining the base fuel cost of an electric utility in a general rate case by using the fuel cost previously set in an expedited fuel cost adjustment proceeding. *State ex rel. Utilities Commission v. Conservation Council*, 456.

§ 5. Position or Condition of Wires in General

The proximity of defendant company's poles to a highway had no causal relationship to the falling down of wires supported by such poles when the poles or the wires were broken by lightning and therefore could not have been the proximate cause of plaintiff's injury. *Bender v. Duke Power Co.*, 239.

§ 9. Intervening Negligence

Defendant power company's knowledge that its wires on utility poles at a highway crossing had been previously knocked down by lightning did not lead to the conclusion that the power company could foresee when or where lightning might strike any particular object and that the overhead wires should have been removed and placed under the highway. *Bender v. Duke Power Co.*, 239.

EMINENT DOMAIN

§ 2.3. "Taking" Through Interference with Access to Highway or Street

Where the evidence supported a finding that the expansion of a highway replaced plaintiffs' former direct access to the main highway with a gravel drive to what is now a dead-end street, there was a taking of plaintiffs' property which required compensation. *Frander v. Board of Transportation*, 344.

EVIDENCE

§ 14. Communications Between Physician and Patient

In an action for divorce and alimony, the trial court erred in allowing into evidence testimony by a psychiatrist concerning treatment of defendant since defendant did not waive the privilege and since there was no finding that the interest of justice required that the privilege be withheld. *McGinnis v. McGinnis*, 676.

§ 18. Experimental Evidence

Test runs made by patrol cars from existing municipal fire stations to points within an area to be annexed were competent to establish a basis for estimating

EVIDENCE — Continued

future response times although the test runs were not conducted under substantially similar conditions of an alarm response by a fire engine. *In re Durham Annexation Ordinance*, 472.

§ 50.2. Testimony by Medical Experts on Cause of Injury or Disease

A physician's "educated guess" that plaintiff would have deteriorated from his degenerative nerve disease at about the same time regardless of his work-related injury was incompetent as expert evidence on causation. *Ballenger v. Burris Industries*, 556.

EXECUTION

§ 16. Supplementary Proceedings

Defendant judgment debtor's failure to answer interrogatories to discover assets in violation of a court order did not constitute a failure to "attend" within the meaning of a bond given pursuant to G.S. 1-355. *Stackhouse v. Paycheck*, 713.

FRAUD

§ 9. Pleadings

Plaintiff's complaint was sufficient to state a claim to set aside three deeds from plaintiff's ward to defendant on the ground of constructive fraud. *Fisher v. Lamm*, 249.

GUARANTY

§ 1. Generally

In an action based on a guaranty agreement, the trial court properly granted a directed verdict in defendant-guarantors' favor where there was no evidence of consideration supporting the guaranty agreement. *Carolina Eastern, Inc. v. Benson Agri Supply*, 180.

HOMICIDE

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The evidence was sufficient to withstand defendant's motion to dismiss a charge of second degree murder. *S. v. McConnaughey*, 92.

The conviction of defendant for second degree murder constituted "plain error" as there was no evidence of malice on the part of defendant. *S. v. Snyder*, 358.

The State's evidence was sufficient for the jury in a prosecution for second degree murder although there was also evidence tending to show self-defense. *S. v. Stafford*, 440.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

The trial court properly submitted the issue of voluntary manslaughter to the jury under any of three separate theories. *S. v. Haight*, 104.

§ 28.3. Self-Defense; Aggression or Provocation by Defendant; Use of Excessive Force

The trial court's instructions to the jury to consider whether the defendant was the aggressor and to consider whether the victim was in fact armed were not "plain error" since the evidence supported the charge. *S. v. Haight*, 104.

HOMICIDE — Continued

§ 28.8. Defense of Accidental Death

Defendant's testimony that he did not stab deceased did not require the trial court to instruct the jury on the defense of homicide by accident where all of the evidence tended to show that defendant was not engaged in lawful conduct at the time of the killing. *S. v. Davis*, 334.

§ 30.3. Submission of Question of Guilt of Lesser Degrees of the Crime; Manslaughter, Involuntary Manslaughter

The trial judge erred in failing to instuct on voluntary manslaughter and involuntary manslaughter. *S. v. McConnaughey*, 92.

The evidence in a second degree murder case did not require the trial court to instruct on involuntary manslaughter since defendant's conduct in intentionally grabbing a knife and moving it toward the deceased during a fight initiated and aggressively pursued by defendant constituted an act naturally dangerous to human life. *S. v. Davis*, 334.

HUSBAND AND WIFE

§ 1.1. Liability for Debts

Defendant wife was not liable for hospital services rendered to her husband where she neither requested nor contracted for the services. *Presbyterian Hospital v. McCartha*, 177.

§ 13. Separation Agreements; Bonds and Enforcement

Defendant's obligation under a separation agreement to have $100.00 a month drafted from his retirement check for 39 months to pay part of a debt was enforceable by specific performance. *Rose v. Rose*, 161.

INDICTMENT AND WARRANT

§ 17.2. Variance Between Averment and Proof; Time

The trial court in a kidnapping case did not err in charging the jury that time was not of the essence in the case. *S. v. Partridge*, 427.

INFANTS

§ 20. Juvenile Courts and Delinquent and Dependent Children; Judgments and Orders

The trial court erred in ordering a juvenile to pay restitution of $500.00 for damages to a car where the court found as a fact that the car damage amounted only to $232.17. *In re Phillips*, 468.

INJUNCTIONS

§ 16. Liabilities on Bonds

The trial court properly allowed the intervenor to recover damages of $15,000.00 from plaintiff pursuant to plaintiff's bond posted for a temporary restraining order prohibiting the national distributor of Datsun automobiles from establishing the intervenor or anyone else as a dealer in plaintiff's alleged sales area. *Warner, Inc. v. Nissan Motor Corp.*, 73.

An intervenor was not ineligible for recovery on plaintiff's bond posted for a temporary restraining order because the motion to intervene was not granted until after the temporary restraining order had expired. *Ibid.*

INSURANCE

§ 142. Actions on Burglary and Theft Policies

Defendant insurer waived timely filing of a proof of loss as required by a policy insuring against employee theft or embezzlement. *B & H Supply Co. v. Insur. Co. of North America*, 580.

Provisions of an embezzlement insurance policy barred insured's recovery for an employee's second series of embezzlements after the first series had been discovered by the employer and the employer had agreed to continue to employ the embezzler so that he could pay back the embezzled amounts. *Ibid.*

An insurer against embezzlement was entitled to a set-off for an amount collected by insured from an embezzler but was not entitled to a set-off for the insured's profit on the sale of the embezzler's house after purchasing it at a foreclosure sale. *Ibid.*

INTEREST

§ 1. Items Drawing Interest in General

The Teachers' and State Employees' Retirement System of North Carolina is an agency of the State so that the System was not required to pay interest on death benefits for a deceased teacher absent statutory or contractual authorization for such interest. *Stanley v. Retirement and Health Benefits Division*, 122.

JUDGES

§ 5. Disqualification of Judges

The trial judge did not err in failing to conduct a hearing on defendant's motion to recuse. *S. v. Crabtree*, 662.

JUDGMENTS

§ 36.2. Parties Concluded; Persons Regarded as Privies

There was no identity of interest required to create a privy relationship between plaintiff and a county board of education so as to make the trial court's judgment binding upon the county board of education. *Cauble v. City of Asheville*, 537.

JURY

§ 6.3. Propriety and Scope of Voir Dire Examination

The trial court erred in refusing to allow defendant's attorney to question prospective jurors regarding their willingness and ability to follow the judge's instructions that they were to consider defendant's prior criminal record only for purposes of determining his credibility as a witness. *S. v. Hedgepeth*, 390.

KIDNAPPING

§ 1.3. Instructions

The trial court in a kidnapping case did not err in instructing the jury in the disjunctive concerning defendant's actions toward the victim over a three-day period. *S. v. Partridge*, 427.

LARCENY

§ 7. Weight and Sufficiency of Evidence

The trial court properly denied defendant's motion to dismiss the charge of felonious larceny of a tractor. *S. v. Carter*, 330.

MASTER AND SERVANT — Continued

§ 67.3. Workers' Compensation; Preexisting Condition

The evidence was insufficient to support a determination by the Industrial Commission that plaintiff's preexisting hereditary degenerative nerve disease was not aggravated or accelerated by a work-related fracture of his leg and the resulting inactivity while his leg healed. *Ballenger v. Burris Industries*, 556.

§ 68. Occupational Diseases

In a workers' compensation case in which plaintiff established the existence of COPD with chronic bronchitis as the only element thereof, in order to conclude that plaintiff did not have an occupational disease the Commission would have had to make findings, supported by competent record evidence, that plaintiff's exposure to cotton dust was neither a significant contribution to nor a significant causal factor in the development of her disease. *Clark v. American & Efird Mills*, 624.

§ 77.1. Workers' Compensation; Modification and Review of Award; Change of Conditions

Plaintiff failed to show a change of condition after an award for permanent partial disability so as to entitle her to additional compensation where the only evidence of a change in condition was an increase in her depression and fear of surgery. *Burrow v. Hanes Hosiery, Inc.*, 418.

§ 87. Claim Under Workers' Compensation Act as Precluding Common-Law Action

A plaintiff who has received workers' compensation benefits for an injury is precluded from maintaining a separate tort action against the employer based upon allegations of gross negligence and intentional acts by the employer. *Freeman v. SCM Corporation*, 341.

§ 93.2. Proceedings Before the Industrial Commission; Admissibility of Evidence

A hearing commissioner sufficiently ruled on plaintiff's objections to additional deposition testimony by a note stapled to the deposition. *Ballenger v. Burris Industries*, 556.

§ 93.3. Proceedings Before the Industrial Commission; Expert Evidence

A doctor's deposition was of record in a workers' compensation case although it was not formally introduced into evidence. *Ballenger v. Burris Industries*, 556.

A physician's "educated guess" that plaintiff would have deteriorated from his degenerative nerve disease at about the same time regardless of his work-related injury was incompetent as expert evidence on causation. *Ibid.*

§ 108. Right to Unemployment Compensation Generally

Where claimant left work two weeks before her announced layoff, claimant was unemployed with good cause attributable to her employer after the layoff date and would be eligible for unemployment benefits after that date. *Eason v. Gould, Inc.*, 260.

MORTGAGES AND DEEDS OF TRUST

§ 39. Actions for Damages for Wrongful Foreclosure

Plaintiff's claim for wrongful foreclosure was barred by the statute of limitations. *Patterson v. DAC Corp.*, 110.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation; Legislative Power Generally

The time limitations specified in the statute establishing the procedure for annexation did not violate petitioners' due process rights. *In re Durham Annexation Ordinance*, 472.

§ 2.2. Annexation; Requirements of Use and Size of Tracts

A city's estimate of population density of an area to be annexed based on preliminary rather than final census data substantially complied with G.S. 160A-54. *In re Durham Annexation Ordinance*, 472.

A city properly considered a densely populated apartment complex with the surrounding area in determining whether an area to be annexed met the population density test. *Ibid.*

The language of G.S. 160A-48(a)(2) which requires "every part" of an area to be annexed to meet the requirement of subsection (c) that "part of all" of the area must be developed for urban purposes is not unconstitutionally vague. *Ibid.*

§ 2.4. Remedies to Attack Annexation on Annexation Proceedings

The statutory time limitation for appeals from an annexation ordinance did not violate petitioners' due process rights. *In re Durham Annexation Ordinance*, 472.

§ 2.6. Extension of Utilities to Annexed Territory

A city's plan for the extension of fire protection services into an area to be annexed met statutory requirements although most of the annexation area is further away from existing fire stations than is most of the pre-annexation city. *In re Durham Annexation Ordinance*, 472.

A city is not required to show in an annexation report that fire protection services will be at a level that is substantially equal to the "average service" received by citizens of the pre-annexation city. *Ibid.*

§ 30.20. Procedure for Enactment or Amendment of Zoning Ordinances

Under the Charlotte Zoning Ordinance, a landowner is barred from petitioning the Charlotte City Council a second time for the same or a higher zoning classification within two years from the first denial absent a showing of substantial changes in conditions. *Clark v. City of Charlotte*, 437.

NARCOTICS

§ 3. Presumptions and Burden of Proof

Testimony by defendant that, prior to the time an undercover agent came to his home, he had planned to work that day was not relevant on the issue of whether the criminal intent to sell marijuana originated in defendant's mind. *S. v. Turner*, 203.

§ 3.1. Competency and Relevancy of Evidence

The trial court properly allowed a witness to explain that a code was used by the witness and defendant in discussing cocaine over the telephone. *S. v. Siler*, 165.

Photographs found in an apartment in which marijuana was found were properly admitted as substantive evidence to establish defendant's connection with the premises and to establish his state of mind with regard to possession and consumption of marijuana. *S. v. Snyder*, 191.

References by prosecution witnesses to defendant as a "drug dealer" were not prejudicial error. *S. v. Turner*, 203.

NARCOTICS — Continued

A police officer was properly permitted to testify that quinine and manitol found in a search of defendant's home had uses in the illicit heroin trade. *S. v. Hart*, 702.

§ 3.3. Opinion Testimony

An expert witness in forensic chemistry was sufficiently qualified to testify as to how many nickel bags could be produced from a quarter pound of marijuana, how many marijuana cigarettes could be rolled from this quantity, and how much this quantity of marijuana would be worth on the street. *S. v. Turner*, 203.

The trial court properly admitted testimony by a police officer that marijuana he observed in an upstairs room of defendant's residence weighed "approximately 200 pounds." *S. v. Simmons*, 402.

There was no error in the court's denial of a motion to strike testimony of a witness who was properly qualified as an expert in the identification of controlled substances that marijuana stalks he examined were not mature. *Ibid.*

§ 4. Sufficiency of Evidence; Cases Where Evidence was Sufficient

In a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine in violation of G.S. 90-95(h)(3)(b), the evidence was sufficient to be sent to the jury. *S. v. Siler*, 165.

In a prosecution for trafficking in marijuana by possession of marijuana in excess of 10,000 pounds and with trafficking in marijuana by manufacturing marijuana in excess of 10,000 pounds, the State introduced sufficient evidence on the essential element of weight to permit the case to go to the jury. *S. v. Simmons*, 402.

§ 4.1. Sufficiency of Evidence; Cases Where Evidence was Insufficient

The State's evidence was insufficient for the jury in a prosecution for various narcotics offenses where there was no evidence that pills, rolling papers and vegetable matter analyzed by the State's expert witness were the same materials seized from defendant and his residence. *S. v. Childers*, 464.

§ 4.2. Sufficiency of Evidence; Defense of Entrapment

In a prosecution for possession with intent to sell cocaine, sale of cocaine, and conspiracy to sell and deliver cocaine, the trial court erred in failing to instruct on the defense of entrapement. *S. v. Walker*, 367.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence was sufficient to permit the jury to find that defendant was in constructive possession of marijuana found in an apartment, although defendant was not present when the marijuana was discovered in a search by the police. *S. v. Snyder*, 191.

§ 4.7. Instructions as to Lesser Offenses

In a prosecution for possession of four grams or more but less than 14 grams of heroin, the trial court properly failed to instruct on the lesser included offense of simple possession of heroin. *S. v. Massenburg*, 127.

In a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine in violation of G.S. 90-95(h)(3)(b), the trial court properly failed to instruct the jury with reference to possession of cocaine in violation of G.S. 90-95(b)(2). *S. v. Siler*, 165.

NARCOTICS — Continued

§ 5. Verdict and Punishment

The trial court erred in failing to consider defendant's aid to law enforcement officers as an ameliorating circumstance under the leniency provisions of the Drug Trafficking law. *S. v. Baldwin*, 156.

Where the trial court sentenced defendant to a lesser term for trafficking in marijuana based on his "substantial assistance" pursuant to G.S. 90-95(h)(6), defendant was exempted from the requirement of the statute that defendant serve the applicable minimum prison term before either unconditional release or parole, and defendant was entitled to receive credit for good time or gain time under the appropriate regulations of the Department of Correction. *S. v. Crabtree*, 662.

NEGLIGENCE

§ 2. Negligence Arising From the Performance of a Contract

The traditional implied warranty that a dwelling is free from major structural defects and meets a standard of workmanlike quality is available only to the initial vendee-grantee against the vendor-builder. *Oates v. JAG, Inc.*, 244.

§ 8.1. Proximate Cause; Natural and Probable Consequences

The proximity of defendant company's poles to a highway had no causal relationship to the falling down of wires supported by such poles when the poles or the wires were broken by lightning and therefore could not have been the proximate cause of plaintiff's injury. *Bender v. Duke Power Co.*, 239.

§ 9. Foreseeability

Defendant power company's knowledge that its wires on utility poles at a highway crossing had been previously knocked down by lightning did not lead to the conclusion that the power company could foresee when or where lightning might strike any particular object and that the overhead wires should have been removed and placed under the highway. *Bender v. Duke Power Co.*, 239.

PENALTIES

§ 1. Generally

Items bearing a reasonable relationship to the cost of collecting overtime parking fines may be deducted by a municipality in determining the "clear proceeds" of such fines which must be paid to the county finance officer for maintaining free public schools. *Cauble v. City of Asheville*, 537.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

In an action in which plaintiff alleged that defendant, through its agent, the director of admissions at the Duke Divinity School, had contracted with plaintiff to permit her to change her status in defendant's Divinity School from special student to regular degree candidate in the Masters of Religious Education degree program, plaintiff's contract claim was deficient in that she failed to allege and prove that the director of admissions was an agent of defendant with either the authority or apparent authority to alter the recognized procedure by which an individual becomes a regular degree candidate. *Elliott v. Duke University*, 590.

PROCESS

§ 9.1. Minimum Contacts Test

In an action in which plaintiffs, who reside in North Carolina, sued defendant, a resident of Texas, for the balance allegedly due them under the terms of a note executed by defendant incident to purchasing various articles of medical equipment, the trial court properly found our courts could exercise in personam jurisdiction over defendant since defendant promised in the note to make payments to plaintiff in Wilmington, North Carolina. *Wohlfahrt v. Schneider*, 691.

QUASI CONTRACTS AND RESTITUTION

§ 2.1. Implied Contracts; Sufficiency of Evidence

Plaintiff's evidence was sufficient for the jury under a theory of a contract implied in law based on unjust enrichment for splay base work performed in installing tile flooring in a hospital. *Ellis Jones, Inc. v. Western Waterproofing Co.*, 641.

§ 2.2. Implied Contracts; Measure and Items of Recovery

The measure of recovery under a contract implied in law is the reasonable value of materials and services rendered by the plaintiff which are accepted and appropriated by defendant. *Ellis Jones, Inc. v. Western Waterproofing Co.*, 641.

The trial court's failure to instruct on the measure of damages under a contract implied in law was not prejudicial error where the court properly instructed on the measure of damages for a contract implied in fact, and the jury's verdict in this case would have been the same under either theory of recovery. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 4.3. Character or Reputation of Prosecutrix; Unchastity

Prior inconsistent statements made by the prosecutrix concerning an alleged sexual assault upon her two years earlier were not rendered inadmissible in a rape and sexual offense trial by the rape victim shield statute and were relevant to the issues of the prosecutrix's credibility and consent. *S. v. Johnson*, 444.

§ 6.1. Instructions; Lesser Degrees of the Crime

In a prosecution for second degree sexual offense, the trial court properly failed to instruct on lesser included offenses since the defendant denied his conduct, and there was no evidence raised which even supported an inference that the sexual assault was consensual. *S. v. Patterson*, 657.

RECEIVING STOLEN GOODS

§ 5.1. Evidence Sufficient

The evidence was sufficient to convict defendant of possession of stolen property or possession of a stolen vehicle. *S. v. Lofton*, 79.

RETIREMENT SYSTEMS

§ 5. Claims of Members

The Teachers' and State Employees' Retirement System of North Carolina is an agency of the State so that the System was not required to pay interest on death benefits for a deceased teacher absent statutory or contractual authorization for such interest. *Stanley v. Retirement and Health Benefits Division*, 122.

ROBBERY

§ 4.7. Cases Where Evidence Was Insufficient

In a prosecution for attempted armed robbery, the trial court erred in failing to allow defendant's motion to dismiss where the evidence failed to show that defendant actually attempted to take property from a market. *S. v. Parker*, 355.

RULES OF CIVIL PROCEDURE

§ 13. Counterclaim and Crossclaim

In an action instituted by plaintiff to recover from defendant guarantors overdue financial obligations of a car dealership, the trial court properly dismissed the counterclaim of defendant against third party defendant since the allegations set forth in the counterclaim did not arise under the guaranty contract. *Chrysler Credit Corp. v. Rebhan*, 255.

§ 15.2. Amendments to Conform Pleadings to the Evidence

The trial court did not err in permitting defendant to amend her answer to include an affirmative defense which had been raised for the first time in a hearing on a motion for summary judgment. *Walker Grading & Hauling v. S.R.F. Management Corp.*, 170.

The trial court did not err in permitting plaintiff to amend his complaint to conform to evidence at the trial that title to a car was held by defendant on a resulting trust for plaintiff's testator. *Taylor v. Gillespie*, 302.

§ 32. Use of Depositions in Court Proceedings

Where petitioners had previously read into the record answers to their interrogatories concerning distances from municipal fire stations to certain points in an area to be annexed, the trial court did not err in permitting the city to offer answers to petitioners' interrogatories concerning how this distance related to response time. G.S. 1A-1, Rule 32. *In re Durham Annexation Ordinance*, 472.

§ 41. Dismissal of Actions

The superior court erred in dismissing plaintiff's complaint with prejudice for failure to prosecute when plaintiff's counsel was trying a non-jury case in the district court at the time plaintiff's superior court trial was to begin. *Butler Service Co. v. Butler Service Group*, 132.

§ 41.1. Voluntary Dismissal Without Prejudice

Where plaintiff voluntarily dismissed his original action against defendant without prejudice, a second action filed by plaintiff was properly dismissed for failure of plaintiff to pay the costs of the first action within 30 days after an order directing plaintiff to pay such costs. *Sanford v. Starlite Disco*, 470.

§ 41.2. Dismissal in Particular Cases

When plaintiff filed a voluntary dismissal against one defendant, he did not in effect dismiss the other defendant as well. *Pryse v. Stickland Lumber and Bldg. Supply*, 361.

§ 42. Separate Trials

The trial court has the discretion to bifurcate the trial as to the issues of liablity and damages. *Vance Trucking Co. v. Phillips*, 269.

RULES OF CIVIL PROCEDURE — Continued

§ 55. Default

In an action against two defendants, there was no abuse of discretion in the trial court's finding that defendant Strickland's neglect in failing to employ counsel constituted inexcusable neglect. *Pryse v. Stickland Lumber and Bldg. Supply,* 361.

§ 65. Injunctions

The trial court properly allowed the intervenor to recover damages of $15,000.00 from plaintiff pursuant to plaintiff's bond posted for a temporary restraining order prohibiting the national distributor of Datsun automobiles from establishing the intervenor or anyone else as a dealer in plaintiff's alleged sales area. *Warner, Inc. v. Nissan Motor Corp.,* 73.

An intervenor was not ineligible for recovery on plaintiff's bond posted for a temporary restraining order because the motion to intervene was not granted until after the temporary restraining order had expired. *Ibid.*

SCHOOLS

§ 1. Establishment, Maintenance, and Supervision

Items bearing a reasonable relationship to the cost of collecting overtime parking fines may be deducted by a municipality in determining the "clear proceeds" of such fines which must be paid to the county finance officer for maintaining free public schools. *Cauble v. City of Asheville,* 537.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

In a prosecution for trafficking in marijuana, the trial court correctly denied defendant's motion to suppress evidence of marijuana found in the warrantless search of leased farmland since the protections of the Fourth Amendment are not applicable to open fields. *S. v. Simmons,* 402.

Although an officer made a proper warrantless entry into defendant's home in response to a call for aid, the officer's warrantless search for a bullet exit hole after defendant and his wife left for the hospital and his discovery of marijuana when he opened a closed closet door were illegal absent proof that the search came within an exception to the requirements for a warrant. *S. v. Crews,* 671.

§ 6. Particular Methods of Search; Plain View Rule; Particular Cases

Officers did not discover and seize a tractor in violation of defendant's Fourth Amendment rights where the evidence established that the officers entered the property for the purposes of general inquiry and that the tractor was in "plain view." *S. v. Carter,* 330.

§ 9. Search and Seizure Incident to Arrest for Traffic Violations

An officer had probable cause to stop the vehicle operated by defendant and to arrest defendant for operating the vehicle without a license, and the officer lawfully seized without a warrant a sawed-off shotgun which he observed in plain view protruding from underneath the front seat of defendant's car when he asked defendant to exit the car. *S. v. Davis,* 98.

§ 11. Search and Seizure of Vehicles

After the lawful arrest of the occupants of an automobile, the police properly made a contemporaneous warrantless search of a locked passenger compartment of the automobile. *S. v. Massenburg,* 127.

SEARCHES AND SEIZURES — Continued

§ 12. "Stop and Frisk" Procedures

The detention of defendant and his airplane until a dog trained in the detection of narcotics signified the presence of controlled substances in the airplane was not an unreasonable seizure, and a subsequent search of the airplane under a warrant and the seizure of marijuana found therein were lawful. *S. v. Darack*, 608.

§ 14. Voluntary, Free, and Intelligent Consent

There was no error in the denial of defendant's motion to suppress marijuana uncovered as the result of a search of his home. *S. v. Simmons*, 402.

§ 26. Application for Warrant; Cases Where Evidence is Insufficient

The trial court properly entered an order suppressing the evidence used in a search conducted pursuant to a search warrant where the affidavit was deficient. *S. v. Arrington*, 215.

§ 28. Issuance of Warrant

Although a deputy clerk of superior court was clearly authorized to issue a search warrant, the trial judge erred in failing to admit evidence concerning the "neutrality" of the issuing official. *S. v. Holloway*, 491.

In a prosecution for trafficking in methaqualone, defendant failed to carry its burden of showing by a preponderance of the evidence that there were false statements knowingly included in an affidavit supporting a search warrant. *Ibid.*

§ 33. Items Which May Be Searched for and Seized; Plain View Rule

Consent for officers to enter defendant's home was given voluntarily when the officers went to the home with a warrant for the arrest of another person, and the officers lawfully seized marijuana which they saw in plain view when defendant opened the door to his room. *S. v. Bogin*, 184.

§ 34. Items Which May Be Searched for and Seized; Search of Vehicle

An officer's discovery of a shotgun in defendant's car was inadvertent within the meaning of the plain view doctrine even though the officer had received information from a radio broadcast that the person driving the car was considered to be armed and dangerous. *S. v. Davis*, 98.

After the lawful arrest of the occupants of an automobile, the police properly made a contemporaneous warrantless search of a locked passenger compartment of the automobile. *S. v. Massenburg*, 127.

§ 39. Execution of Search Warrant; Places Which May Be Searched

There was no error in the trial court's denial of defendant's motion to suppress evidence seized from the basement portion of the premises. *S. v. Holloway*, 491.

§ 40. Execution of Search Warrant; Items Which May Be Seized

There was no error in allowing evidence of marijuana which was properly seized when it was found during a search for methaqualone. *S. v. Holloway*, 491.

§ 44. Voir Dire Hearing; Findings of Facts

Case is remanded for findings as to whether defendant's wife consented to an officer's warrantless search of defendant's home after defendant and his wife had left for a hospital. *S. v. Crews*, 671.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 2. Recovery of Amount Paid to Recipient

Defendant failed to establish a prima facie case of selective enforcement or prosecution for welfare fraud. *S. v. Ward*, 352.

STATUTES

§ 1. Enactment of Statutes

The trial court properly granted summary judgment in favor of defendants in an action brought by plaintiffs seeking to declare unlawful any expenditures in excess of $1 million for abortions during fiscal year 1982-83 and an injunction against such expenditures. *Stam v. Hunt*, 116.

TAXATION

§ 18. Intangible Taxes

In determining whether a trust held for the benefit of a nonresident is exempt from intangibles tax by G.S. 105-212, it does not matter whether any income was actually distributed from the trust if trust assets were distributable to the nonresident beneficiary. *Dickson v. Lynch*, 195.

§ 31. Sales and Use Taxes

The trial court properly found that *The Village Advocate* was not a newspaper exempt under G.S. 105-164.13(28) from the use tax. *In re Assessment of Taxes Against Village Publishing Corp.*, 423.

The trial court properly found that *The Village Advocate* was not a newspaper exempt from the use tax where the *Advocate* was devoted almost entirely to advertising with some announcements of special events. *Ibid.*

TENANTS IN COMMON

§ 3. Mutual Rights and Liabilities

Where, upon divorce, plaintiff, as a tenant in common, owned a one-half undivided interest in drugstore property, plaintiff was entitled to recover from the lessee one-half the fair rental value of the property. *Rogers v. Kelly*, 264.

TRESPASS

§ 3. Continuing and Recurring Trespass and Limitation of Actions

In an action for trespass in which plaintiffs sought removal of a home partially built on their land, G.S. 1-52(3) operated to bar the recovery of money damages for any acts committed in the initial trespass of 1973 or acts which continued to cause the plaintiffs money damages up to the three years prior to the institution of the action. *Bishop v. Reinhold*, 379.

§ 6. Competency and Relevancy of Evidence

There was no merit to defendants' assignment of error that the trial court erred by refusing to determine as a matter of law the sufficiency of the beginning point in the plaintiffs' deed. *Bishop v. Reinhold*, 379.

§ 7. Sufficiency of Evidence and Nonsuit

There was no abuse of discretion by the trial judge on his denial of a new trial on either the first issue in which the jury found that the defendants had wrongfully

WILLS

§ 19. Caveat; Evidence in General

The evidence presented by the propounder of a will was sufficient to support the jury's verdict finding a paper writing to be the valid last will and testament of Madeline S. Cooley. *In re Cooley,* 411.

§ 21.4. Undue Influence; Sufficiency of Evidence

The caveator's evidence was insufficient to be submitted to the jury on the issue of undue influence in the execution of a will. *In re Estate of Forrest,* 222.

§ 22. Mental Capacity; Evidence of Mental Condition of Testator

The caveator's evidence was insufficient to be submitted to the jury on the issue of mental incapacity of the testatrix to execute a will. *In re Estate of Forrest,* 222.

§ 23. Instructions in Caveat Proceedings

In a caveat proceeding, the trial court was not required to charge on the application of evidence which was totally lacking in probative value and would not support a reasonable inference as to any finding as to whether the will had been "changed" after its execution. *In re Cooley,* 411.

WORD AND PHRASE INDEX

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