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SUPREME COURT OF NORTH CAROLINA

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1971

STATE OF NORTH CAROLINA v. MARCELLUS MURPHY

No. 18

(Filed 15 December 1971)

1. Kidnapping § 1— kidnapping by fraud — sufficiency of the evidence

The issue of defendant's guilt of kidnapping a thirteen-year-old boy by fraud was properly submitted to the jury, where the State's evidence permitted legitimate inferences (1) that the boy, who was walking to a school basketball court, went instead into the woods with the defendant as a result of the defendant's false representation that there were squirrels in the woods, (2) that there were no squirrels in the woods, and (3) that the defendant made the false representation with intent to deceive the boy so that he could commit an assault upon him in the woods.

2. Kidnapping § 1— kidnapping by fraud — elements of the offense

The common law definition of kidnapping encompasses not only the unlawful taking and carrying away of a person by force but also the unlawful taking and carrying away of a person by false and fraudulent representations amounting substantially to a coercion of the will.

3. Criminal Law § 104— motion for nonsuit — consideration of evidence

On motion for nonsuit the evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom.

4. Criminal Law § 104— motion for nonsuit — consideration of evidence — discrepancies and contradictions

On motion for nonsuit only the evidence favorable to the State is considered, and contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit.

5. Criminal Law § 158— case on appeal — omission of the charge

When the charge is not included in the case on appeal, it is presumed to be free from error.

Chief Justice BOBBITT dissenting.

State v. Murphy

DEFENDANT appeals from *Beal, S.J.*, 19 October 1970 Criminal Session, ROCKINGHAM Superior Court.

Defendant was tried upon two bills of indictment. One bill charged him with committing a felonious assault upon Steve Turner, a thirteen-year-old schoolboy. Defendant was convicted of this offense and sentenced to ten years in prison. He does not appeal this conviction and sentence.

The second bill charges that defendant "by the means of trickery, artifice and fraud, and by physical force did kidnap and carry away one Steve Turner, against the will of the said Steve Turner, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State." Defendant was convicted of this offense and sentenced to twenty-eight years in prison. He appeals from this conviction and sentence "strictly on the question of whether or not there was enough evidence to have the case submitted to the jury."

The State's evidence shows these facts: On 18 May 1970 Steve Turner was a student in the eighth grade at J. E. Holmes Junior High School in Eden. After school that day Steve went to play on the basketball court outside the Morehead High School which is located just across the street from his home and diagonally across the street from the school he attended. Steve had been shooting baskets alone for a few minutes when the defendant, Marcellus Murphy, approached. Steve threw the ball to him and he took a shot at the basket. Defendant then said he did not like that particular basketball court and said he wanted to go over to the Holmes School. While walking in the direction of the Holmes basketball court, they heard people playing basketball in the Morehead High School gymnasium and tried to enter there but found the doors locked. They then left the Morehead High School, crossed the parking lot, and intended to cross the street to the basketball court at the James E. Holmes Junior High School. At that time defendant said he would like to see some squirrels and knew where some were. Steve agreed to go look at the squirrels and defendant led the way. They walked approximately 150 feet down a path by a wooded area. There was a barbed wire fence with three strands of wire beside the path. Defendant stopped and went under the barbed wire fence. He then went down into the woods about 63 feet and was looking in the air "like he was seeing some squirrels." That particular area was covered with saplings, bushes, and large trees. De-

fendant "acted like he was seeing them jumping from tree to tree" while looking up into the trees. What then occurred is described in Steve's own words as follows:

> "As he was looking up in the trees he said 'come here' and I came along. I went under the fence and then he took me by the shoulders and kind of got me in the direction of where to look and I looked up. When he got me by the shoulders he was guiding me where to look, and I looked .... I did not see anything like a squirrel. All I saw was tall trees. He was right behind me all the time. While I was looking up at the trees, he put his hands over my nose and mouth and held me until I passed out, and he told me not to scream or he would beat me worse, and he told me he was going to kill me. I tried to pull his hands off of my mouth at first and then I gave up and passed out.
>
> "When I regained consciousness I was lying on the ground and he had his heels stomping me in the head. He had the heel of my shoe, his shoes were real hard and he was stomping me in the head with it and it hurt and knocked me out again. He stomped me about five times before it knocked me out. I lost consciousness again. The next time I woke up he hit me with something that felt like a bat. It was not his fist. It was real hard, like a rock, and he hit me in the back of the head. Later I found a wound in the back of my head and I had stitches back there. I believe there were eighteen (18) stitches. The best that I can say is that something hard hit me.
>
> "At the time that I was hit I was kind of up on one arm with the rest of my body on the ground. I could not see him because my eyes were swollen shut and I could not see at all. My eyes were swollen because they had been beaten real bad. When I first passed out it was from being smothered. When I woke up I could hardly see anything because my eyes were swollen shut and felt so beat up. I don't know what was going on really when I regained consciousness but I knew that I was being beaten real bad.
>
> "After I lost consciousness the second time I was on the ground when I regained consciousness. I did not know that I was burned but that was the next time that I woke up, and I walked out toward the road. I do not remember going back through the fence. When I regained conscious-

ness the third time, I was laying on the ground in about the same area as before but the defendant was not there. I have since learned that I was burned. I tried to get out to the road and I made it somehow and I got out to the road and somebody picked me up but I do not know who they were. I realized that I was being picked up and I had a string around my arm and was begging them to cut it off but they did not have anything to cut it off with.

" . . . I had not been burned or injured in any way before I went into the woods with the defendant. When I came out of the woods and while I was in the woods I did not see anyone else. While I was in the woods I was just beaten and burned but I didn't know that I was burned. I was burned down my sides and my arms, on my back and my sides and my hips and my arms and my face. . . . I was in the emergency room at the hospital for five hours and I was taken to Chapel Hill early the next morning to the North Carolina Memorial Hospital. I stayed there for sixty-five days. Since that time I have been back to the hospital a number of times for treatment. I am going to undergo another operation for plastic surgery."

Defendant's motion for judgment of nonsuit, interposed at the close of the State's evidence and renewed at the close of all the evidence, was denied. The jury convicted defendant of kidnapping as charged in the bill of indictment, and from judgment pronounced thereon he appealed to the Court of Appeals. The case was transferred to the Supreme Court for initial appellate review under our general order dated 31 July 1970.

Bethea, Robinson and Moore by Norwood E. Robinson, Attorney for defendant appellant.

Robert Morgan, Attorney General; William W. Melvin and T. Buie Costen, Assistant Attorneys General, for the State of North Carolina.

HUSKINS, Justice.

[1] Defendant's sole assignment of error is based on denial of his motion for judgment of nonsuit. He contends that the evidence, taken as true and considered in the light most favorable to the State, fails to make out a case of kidnapping. We now examine the validity of this contention.

G.S. 14-39 provides in pertinent part: "It shall be unlawful for any person . . . to kidnap . . . any human being. . . . Any person . . . violating . . . any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life." Since this statute does not define kidnapping, the common law definition of that crime is the law of this State. G.S. 4-1. The common law definition of kidnapping is "the unlawful taking and carrying away of a person by force and against his will." *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965). *Any* carrying away is sufficient. "The distance the victim is carried is immaterial." *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Lowry, supra.*

[2] Under the pristine law of kidnapping, actual physical force was contemplated to accomplish the crime—fraud was not considered. However, in the last century this and other courts have progressively recognized that one's will may be coerced as effectually by fraud as by force. Accordingly, this Court has interpreted the common law definition of kidnapping to encompass not only the unlawful taking and carrying away of a person by force but also the unlawful taking and carrying away of a person by false and fraudulent representations amounting substantially to a coercion of the will. In *State v. Harrison,* 145 N.C. 408, 59 S.E. 867 (1907), the Court approved the trial judge's instruction that, "By kidnapping is meant the taking and carrying away of a person, forcibly or fraudulently." Thus fraud has become synonymous with force in the common law definition of kidnapping, and the equation of fraud with force has been accepted in the legal encyclopedias and approved in numerous jurisdictions. *Kent v. Commonwealth,* 165 Va. 840, 183 S.E. 177 (1936); *People v. Siegal,* 362 Ill. 389, 200 N.E. 72 (1935); *People v. DeLeon,* 109 N.Y. 226, 16 N.E. 46 (1888); *United States v. McGrady* (C.A. 7, Ind. 1951), 191 F. 2d 829, cert. den., 342 U.S. 911, 96 L. Ed. 681, 72 S.Ct. 305 (1952); *State v. Brown,* 181 Kan. 375, 312 P. 2d 832 (1957); *Moody v. People,* 20 Ill. 315 (1858); *White v. State,* 244 Ind. 199, 191 N.E. 2d 486 (1963); *Sutton v. State,* 122 Ga. 158, 50 S.E. 60 (1905); *State v. Walker,* 139 Mont. 276, 362 P. 2d 548 (1961); *State v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497 (1946). *See* 1 Am. Jur. 2d, Abduction and Kidnapping, § 13; Annot., Kidnapping by fraud or false pretenses, 95 A.L.R. 2d 450.

The principle involved in kidnapping by fraud is fully and clearly expressed in the following quotation from 24 Cyc., 798,

799, contained in *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962):

> "To constitute the offense of kidnapping it is not necessary that actual physical force or violence should have been employed, and this was true even at common law. It is essential only that the taking or detention should be against the will of the person kidnapped. Falsely exciting the fears of the person who is the subject of the offense by threats, or enticement or inveiglement by false and fraudulent representations amounting substantially to a coercion of the will is sufficient. In determining whether the person was coerced by fraud and inveiglement, the nature of the artifice employed and the age, education, and condition of mind must be taken into consideration. The offense is not committed if the person taken away or detained, being capable in law of consenting, goes voluntarily without objection in the absence of fraud and deception. But a child of tender years is regarded as incapable of consenting."

Gough stands for the proposition that where false and fraudulent representations amounting substantially to a coercion of the will of the victim are used in lieu of force in effecting kidnapping, there is in law no consent at all on the part of the victim. Under those circumstances the law considers fraud the equivalent of force.

[1] In the present case no actual force was used by defendant. Steve Turner voluntarily accompanied him, ostensibly for a lawful and innocent purpose—to go look at some squirrels. But the State's evidence permits, almost compels, these legitimate inferences: (1) When defendant and Steve left Morehead High School and crossed the parking lot, Steve intended to cross the street and go to the basketball court at the James E. Holmes School; (2) meanwhile, defendant had decided to make the sadistic attack upon Steve and suggested looking at squirrels to entice Steve into the woods; (3) there were no squirrels in the woods; (4) Steve would not have gone into the woods at all except for defendant's false representations that squirrels were there and his deceptive, fraudulent conduct in "looking in the air like he was seeing some squirrels" and acting "like he was seeing them jumping from tree to tree"; (5) defendant's representations concerning squirrels were untrue and defendant knew they were untrue when he made them; (6) such false

representations were reasonably calculated to deceive Steve Turner, considering his age and education and the nature of the representations (what thirteen-year-old boy does not possess a tremendous interest in small wild creatures?); (7) defendant made these false representations with intent to deceive Steve and thereby inveigle him into the woods so he could commit the assault upon him; (8) defendant did in fact deceive Steve and cause him to leave the parking lot and go into the woods where the sadistic assault took place; and (9) Steve's apparent consent to journey into the woods, having been obtained by the fraud of the defendant, was in truth no consent at all but simply the fruit of defendant's fraud amounting substantially to a coercion of the victim's will.

[3, 4] On motion for nonsuit the evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). Only the evidence favorable to the State is considered, *State v. Gay,* 251 N.C. 78, 110 S.E. 2d 458 (1959), and contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967). When the evidence in this case is so considered, giving the State the benefit of every reasonable inference to be drawn therefrom, it was sufficient to carry the case to the jury on the kidnapping charge contained in the bill of indictment. Defendant's motion for judgment of nonsuit at the close of all the evidence was properly denied.

[5] The charge is not included in the case on appeal. "It is, therefore, presumed to be free from error and that the jury was properly instructed as to the law arising upon the evidence as required by G.S. 1-180." *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225 (1967).

The verdict and judgment of the court below will be upheld.

Affirmed.

Chief Justice BOBBITT dissenting.

The gruesome manner in which defendant assaulted, tortured and seriously injured Steve Turner is graphicly described

in the portion of Steve's testimony quoted in the Court's opinion. For this unprovoked and brutal attack defendant was indicted and convicted of felonious assault and sentenced to the maximum term of ten years. He does not appeal from his conviction and sentence for felonious assault.

Defendant was also tried and convicted of kidnapping and sentenced to serve 28 years, the sentences to run concurrently. His appeal is from this conviction and sentence; and the sole question is whether the evidence is sufficient to warrant submission of the kidnapping case to the jury.

The indictment for kidnapping charges that defendant "unlawfully, wilfully, feloniously, without lawful authority, by the means of trickery, artifice and fraud, and by physical force did kidnap and carry away one Steve Turner, against the will of the said Steve Turner," etc.

There was no evidence of the actual or threatened use of physical force prior to defendant's surprise assault on Steve.

Our statute, G.S. 14-39, does not define *kidnapping* but prescribes the punishment therefor. Kidnapping, as used in G.S. 14-39, is generally defined in our decisions as the unlawful taking and carrying away of a human being against his will by force or fraud. *State v. Ingland,* 278 N.C. 42, 50, 178 S.E. 2d 577, 582 (1971), and cases there cited. As interpreted in our decisions, this statute leaves the term of imprisonment for kidnapping in the discretion of the court, imprisonment for life being the maximum punishment. *State v. Kelly,* 206 N.C. 660, 663, 175 S.E. 294, 296 (1934); *State v. Barbour,* 278 N.C. 449, 457-58, 180 S.E. 2d 115, 120-21 (1971).

G.S. 14-39 draws no distinction in respect of the permissible punishment for kidnapping on account of such factors as (1) the duration of the victim's unlawful detention, (2) the distance the victim is unlawfully taken and carried away, (3) whether the victim's life is endangered or threatened while unlawfully taken, carried away or detained, and (4) whether the victim is physically or otherwise injured prior to release, escape or rescue.

Implicit in our general definition of kidnapping are these essentials, (1) an unlawful carrying away of the victim, and (2) an unlawful deprivation of the victim's liberty by force or intimidation. These essentials occur simultaneously when the

victim is deprived of his liberty by force or intimidation and is immediately carried away. Fraud may take the place of force in initiating a kidnapping. Thus, a person may be induced by fraudulent representations to go to a destination where the kidnapper changes from apparent friend to malefactor and there deprives him of his liberty by force or intimidation.

In prior decisions involving a conviction for kidnapping, other than *State v. Smith,* 210 N.C. 63, 185 S.E. 460 (1936), and *State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452 (1958), there was plenary evidence of the victim's unlawful confinement or imprisonment by force or intimidation. *State v. Harrison,* 145 N.C. 408, 59 S.E. 867 (1907); *State v. Kelly, supra; State v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497 (1946); *State v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649 (1949); *State v. Dorsett,* 245 N.C. 47, 95 S.E. 2d 90 (1956); *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118, 95 A.L.R. 2d 441 (1962); *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966); *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99 (1967); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407 (1971); *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971); *State v. Ingland, supra; State v. Barbour, supra; State v. Maynor,* 278 N.C. 697, 180 S.E. 2d 856 (1971); *State v. High,* 279 N.C. 487, 183 S.E. 2d 633 (1971). In *State v. Smith, supra,* and *State v. Knight, supra,* this Court held that there was insufficient evidence to constitute kidnapping.

Although not referred to in the majority opinion, I am aware that the opinion in *State v. Gough, supra,* contains the following statement: "In the present case there was no actual confinement or detention of Elaine Saunders, nor any actual force used by defendant." *Id.* at 357, 126 S.E. 2d at 124, 95 A.L.R. 2d at 448. In my opinion the facts in evidence did not justify this statement. According to the State's evidence, Gough, the defendant, went to the Saunders home about 9:00 p.m. Elaine, aged 15, and her younger sister, left with the defendant in the defendant's car. They did so because of the defendant's false and fraudulent representations that he wanted Elaine in his home as a babysitter, to enable the defendant and his wife to go out. After various stops and changes of direction, the defendant turned off onto a dirt road, slowed the car, told the

girls he was not "Dr. Watson," as he had told them and their parents, but was "Frank Jackson," and "if [they] would be nice to him and cooperate with him [they] wouldn't get hurt and he would pay [them] nice." *Id.* at 350, 126 S.E. 2d at 120, 95 A.L.R. 2d at 444. Elaine and her sister jumped out of the slowly moving car and ran back up the dirt road about a mile and aroused the occupants of a house. Although I concurred in the decision that the evidence was sufficient to support the verdict, I was of opinion that these girls from the time they became aware of the defendant's sinister purpose were substantially confined and imprisoned by the defendant while he had them in his car during travels over unknown ways in the nighttime. While a borderline case of kidnapping, I thought the evidence as to unlawful confinement or imprisonment was sufficient notwithstanding neither of the girls was physically harmed.

In *State v. Ingland, supra,* it was held that unlawful restraint or imprisonment *alone* did not constitute kidnapping, but that the asportation or carrying away of the victim was also an essential element of the crime. In *Ingland,* there was ample evidence of the victim's unlawful restraint or imprisonment. Conversely, in the present case, there is ample evidence of the asportation or carrying away of the victim, namely, that Steve was induced to go into the woods by defendant's fraudulent representations. Unlike *Ingland,* the crucial question here is whether there is evidence sufficient to support a finding that Steve was deprived of his liberty by force or intimidation. In my opinion, the answer is, "No."

All agree that defendant's conduct was despicable. Perhaps imprisonment for ten years under the judgment in the felonious assault case or such portion as he may serve is not sufficient punishment for conduct that may have caused Steve's death and certainly inflicted injury of a serious and probably a permanent nature. However, *the legal question* is whether defendant is guilty of the independent crime of kidnapping. Can a distinction be drawn between defendant's guilt under present circumstances and his guilt if he came upon Steve by chance in the woods and assaulted him in the same manner? Conversely, would he be guilty of kidnapping and subject to the possibility of a life sentence if instead of committing a cruel and barbarous assault he had committed a simple assault by slapping Steve, without injuring him?

In my opinion, the unlawful restraint or imprisonment necessary to constitute the unlawful deprivation of liberty essential to the crime of kidnapping involves more than a surprise attack. It involves the actual loss of liberty for a significant period under circumstances sufficient to cause the victim to be conscious of such restraint or imprisonment and to be apprehensive of injury on account thereof. Although Steve was brutally assaulted and tortured, in my opinion there is no evidence sufficient to support a finding that he was unlawfully restrained or imprisoned and deprived of his liberty within the meaning of this essential of the crime of kidnapping. Therefore, although mindful of the depraved conduct of defendant, I vote to reverse the verdict and judgment in the kidnapping case.

STATE OF NORTH CAROLINA v. LONNIE BLIZZARD

No. 28

(Filed 15 December 1971)

1. **Criminal Law § 92— consolidation of crimes occurring on different dates**

The trial court did not abuse its discretion in permitting the State to consolidate for trial charges against defendant for malicious burning of a dwelling house on one date and secret assault and malicious injury to personal property allegedly occurring on another date where, at the time the consolidation was ordered, the court accepted the State's theory that the defendant may have committed the several offenses in order to terrorize the family of his girl friend.

2. **Criminal Law § 106— sufficiency of circumstantial evidence**

To warrant a conviction on circumstantial evidence, the facts and circumstances must be sufficient to constitute substantial evidence of every essential element of the crime charged.

3. **Criminal Law § 104— motion for nonsuit — consideration of defendant's evidence**

On motion for nonsuit, the court may consider defendant's evidence which explains or makes clear the evidence of the State and defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence.

4. **Arson § 4— malicious burning of dwelling house — insufficiency of evidence**

The State's evidence was insufficient to be submitted to the jury in this prosecution for the malicious burning of a dwelling house where it tended to show only that the fire began on the outside of the house, that there was an odor of gasoline on the ground around the house, that shortly before the fire an automobile similar to the one driven

by defendant was seen parked one and one-quarter miles from the house which was burned, that defendant had bought a gallon jug of gasoline the week preceding the fire, that tracks made by defendant's combat boots were found beside the road about sixty feet from the burned house, and that a gallon jug was found in defendant's car, and defendant offered evidence to explain the presence of his automobile and the tracks made by his combat boots.

5. Assault and Battery § 14— assault with deadly weapon — shooting into and near occupied house

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of assault with a deadly weapon where it tended to show that defendant intentionally fired a high powered rifle into and near an occupied dwelling house, frightening the occupants and causing them to seek safety in the back of the house.

Chief Justice BOBBITT concurring in results.

Justice SHARP joins in concurring opinion.

APPEAL by defendant from *Copeland, S.J.* August 31, 1970 Session, LENOIR Superior Court.

The defendant, Lonnie Blizzard, was charged by grand jury indictment with the following criminal offenses: In No. 70 CR 2482 the indictment charged "That Lonnie Blizzard . . . on the 14th day of January 1970 . . . did unlawfully . . . maliciously and feloniously set fire to and burn a dwelling house owned by Julian Lee Jones . . . located on Rural North Carolina Highway No. 1117 . . . said dwelling house at the time was not actually occupied."

In No. 70 CR 2483 the indictment charged that on January 18, 1970, the defendant, Lonnie Blizzard " . . . (D)id, unlawfully . . . maliciously and feloniously in a secret manner assault, beat and wound one, Dorothy Jones (and seven others, naming them) by waylaying and otherwise, with a deadly weapon, to wit: a 30-30 rifle with intent to feloniously kill and murder (the said named persons)."

The record discloses a magistrate's warrant designated as No. 70 CR 2489 which charged that the defendant maliciously injured the personal property of Woodrow Smith by shooting and deflating the tires on two described tractors and one trailer.

On motion of the State in the superior court, the three charges were consolidated for trial. The defendant excepted to the consolidation. At the close of the evidence the court sustained

the motion to dismiss the charge of malicious injury to the tractor and trailer tires. The court also sustained the motion to dismiss the felony charge in Indictment No. 70 CR 2483, but submitted the lesser included offense of assault with a deadly weapon. The jury returned verdicts finding the defendant guilty of malicious burning of the dwelling house as charged in No. 70 CR 2482 and guilty of assault with a deadly weapon, the lesser included offense, charged in No. 70 CR 2483. From the judgments imposing prison sentences, to run concurrently, the defendant appealed. The evidence will be discussed in the opinion.

Robert Morgan, Attorney General and Myron C. Banks, Assistant Attorney General, by Ronald M. Price, Staff Attorney, for the State.

Grady Mercer, Jr., for defendant appellant.

HIGGINS, Justice.

[1] The defendant's exception to the consolidation of the three cases for trial presents a rather serious question. However, at the time the consolidation was ordered, the court accepted the State's theory that the defendant may have committed the several offenses in order to terrorize the family of his girl friend, Dorothy Jones. However, at the close of the evidence the court dismissed the malicious injury warrant and reduced the assault charge from a felony to a misdemeanor. We are inclined to hold, therefore, that the court did not abuse its discretion in permitting the State to paint its entire picture on a single canvas. G.S. 15-152; *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99; *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *State v. Combs,* 200 N.C. 671, 158 S.E. 252.

On the house burning charge, Julian Jones, a witness for the State, testified that in January, 1970, he lived in a house near Jonestown. " . . . I rented it from Bobby Heath. I did not lease the house; Heath just let me move there. . . . There was an attempt to burn . . . Thursday before it was burned the next Wednesday. It was burned on January 14, 1970." Mr. Jones further testified: "I left home on the 14th and went to my son's house about three miles away. . . . I was away from the house about five minutes. I heard the siren's whistle when I arrived at my son's house. The fire trucks were going towards my house and I went back home. When I got home I discovered

that the house was afire. . . . I do not know what time the siren went off, but I had not been left the house . . . five, six, or seven minutes. . . . I had not noticed anything unusual about my house before I left. . . . It was not over six minutes from the time I left home until I heard the fire whistle."

Chief of Police, Herman B. Dale, testified that he was at a V.F.W. meeting and at 7:05 p.m. the fire alarm sounded. He called the fire station and was advised that the Julian Jones house was burning. "I left immediately and overtook the fire truck at the scene of the fire. Mr. Smith (referring to Woodrow Smith), the owner of the house, went with me. I got there approximately five minutes from the time I started. . . . The center room was burning. Most of the blaze was on the outside. . . . I smelled the odor of some fuel, gasoline, around the burned area outside the house."

The State offered Mr. Lynn Williamson, Deputy Commissioner of Insurance, who testified in substance that he arrived at the scene of the fire between 8:00 and 8:30 p.m. He was permitted to testify that he made an examination and discovered "There was an inflammable odor of some type on the ground under the edge of the house. It had the odor of gasoline." Over objection, he was permitted to express this opinion: "I think it was a man-made fire beginning on the outside of the house."

Mr. Joseph Kornegay testified that during the week preceding the fire the defendant came to his filling station, had his car tank and a gallon vinegar jug filled with gasoline. Mr. Kornegay was shown the jug introduced in evidence which was similar to the jug he filled for the defendant. On cross-examination he testified that he knew the defendant and that he was of good character. "I have sold him gas in a jug several times."

State's witness, Edward Howard, testified that he left home at 7:00 o'clock on the date of the fire. "I saw a 1968 Plymouth parked about one-hundred and twenty-five yards North from my house. . . . I saw somebody walking around behind the car; I do not know if there was an occupant of the vehicle or not. . . . I asked him if I could help him. He said 'no'. I had never seen the person before. He was a white male person."

Mrs. Larry Howard testified that she lived about a mile and a quarter from the Julian Jones house and between 6:00

and 7:00 o'clock on January 14th she saw a 1968 blue and white Plymouth parked on the side of the road about one and one-quarter miles from Julian Jones' house.

On the morning following the fire the officers discovered that along the side of the road about sixty feet from the Julian Jones house were a number of shoe tracks which showed the indenture "X" on the sole of the shoe which made the tracks. The tracks showed a tread design the same as defendant's combat boots.

The State made no effort to disclose the identity of the person who discovered and reported the fire. It would seem to be of importance to know what the conditions were at the time of the discovery, especially whether the fire was on the outside or on the inside of the building.

S.B.I. Agent Warren Campbell testified that on January 24, 1970, he followed automobile tracks on an old road through the woods in Duplin County to a point about one mile from the highway. There he came upon the defendant's Plymouth automobile and a Cadillac. The defendant and Dorothy Jones were sitting together in the Cadillac. The officers arrested the defendant. With his permission they searched his automobile and found in the trunk a pair of combat boots with an "X" mark on the sole, a one gallon plastic jug and a 30-30 Marlin rifle. These articles were seized by the officers and introduced in evidence by the State at the trial.

The defendant testified that at the time of the fire alarm he was in the Deep Run Barber Shop five or six miles from the scene when the fire department's truck answered the call and passed on its way to the fire. He admitted he had been meeting Dorothy Jones frequently at night near her home and had parked his automobile and made tracks around it while he was waiting for her. He admitted that sometimes he wore combat boots. A large number of witnesses testified as to his good character.

Mr. Bernell Kennedy testified as follows:

> "I own and operate Bernell's Barber Shop in Deep Run. I saw Lonnie Blizzard in my Barber Shop on January 14. I cut his hair, I don't recall what time it was when he came in. As to if it was before or after the fire whistle blew, it was while the whistle was blowing, the fire alarm

was going off. No sir, I did not notice anything unusual about his dress or the way he looked."

The defendant's explanation of the presence of his automobile and the tracks made by combat boots does not at all contradict the State's evidence, but his version does explain the manner in which they were made.

The evidence of the defendant's purchase of a gallon jug of gasoline earlier in the week does not permit an inference the gasoline from the jug started the fire. The defendant, according to the State's witness, was in the habit of making an occasional purchase of a jug full of gasoline. It is a matter of common knowledge that many persons own lawn mowers and different types of machine tools powered by small gasoline motors. The purchase of a gallon jug full of gasoline, therefore, is neither unlawful nor incriminating. The defendant's evidence does not contradict, but explains and rebuts inferences of guilt on the house burning count.

[2] To warrant a conviction on circumstantial evidence, the facts and circumstances must be sufficient to constitute substantial evidence of every essential element of the crime charged. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. Guilt must be a legitimate inference from facts established by the evidence. When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed.

[3] The applicable rules with citations of authority appear in this Court's opinion in *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169:

> "On a motion to nonsuit, the defendant's evidence which explains or makes clear the evidence of the State may be considered. (Citing authorities.)
>
> On a motion for nonsuit, the foregoing rule also permits the consideration of defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence."

This case fits the pattern described by Chief Justice Stacy in *State v. Cranford,* 231 N.C. 211, 56 S.E. 2d 423. "A careful scrutiny of the evidence leaves us with the impression that it falls short of the degree of proof required to convict a defendant in a criminal prosecution."

[4] The evidence against the defendant on the charge of malicious burning of the dwelling house was insufficient to survive the motion to dismiss.

In Case No. CR 70 2483 the charge is that on January 18, 1970, the defendant feloniously and in a secret manner assaulted Dorothy Jones and seven others (naming them) with a deadly weapon, to wit: a 30-30 rifle with intent to feloniously kill and murder the said named persons.

We note that the bill of indictment did not charge that the defendant intentionally discharged a firearm into an occupied building. Hence the trial judge limited the verdict to assault with a deadly weapon. It may be noted that at the time the indictment was drawn, the Session Laws of 1969 were not readily available. We assume the solicitor was not familiar with Section 7, Article 13, Chapter 869, Session Laws of 1969. The section is now codified as G.S. 14-34.1 and provides:

> "Any person who wilfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a felony punishable as provided in Section 14-2."

On the assault charge the State's evidence disclosed the following: During the early afternoon of January 18, 1970, Dorothy Jones, her mother-in-law Nora Jones, and others, were in the Leonard Jones dwelling house when a number of gun shots were fired from the nearby woods. Mrs. Nora Jones testified the occupants became frightened and sought refuge in a bedroom in the rear of the house. She further testified that she heard bullets "sizzling in the air over the house, I suppose, and around it. . . . I could hear the bullets whiz by. . . . I think Monday we got to looking around and we found a place . . . where a bullet struck. It was near the front door step." However, the officer who made the investigation testified he found no evidence that the house had been hit. The officer did find that one bullet hit a tree in the yard. Four or five others had hit hardwood trees down in the woods. In addition, a number of bullets had gone entirely through pine trees. The officer recovered the bullets which were embedded in the trees. From the bullet channels which looked fresh and bright, without any discoloration, he concluded the bullets had been recently fired.

The recovered bullets and the defendant's 30-30 rifle were sent to the S.B.I. Laboratory in Raleigh where the ballistics expert made tests and expressed the opinion that the bullets introduced in evidence had been fired from the defendant's 30-30 Marlin rifle. At the time the officer removed the rifle from the defendant's automobile the defendant stated that he bought the rifle new and had kept it in his possession since the purchase and no one else had used it. The officer repeated this admission to the jury.

A State's witness (Taylor) testified that on the Sunday "Leonard Jones' house was shot at" he saw a blue and white Plymouth parked by the side of the road about one-half mile from the Leonard Jones house. "I saw somebody there with the boot lid up. . . . He was a white man. . . . I did not know who the defendant was. It was after 12:00, early after that."

Soon after the shooting Deputy Sheriff Harper arrived at the scene and made an investigation. In the woods about three hundred yards from the house he found fresh tracks under a sweet gum tree. He radioed for bloodhounds. They were taken to the tree where they picked up a "hot scent" and trailed for a considerable distance to a wide ditch in an open field where the officers observed boot tracks with marks similar to the combat boot tracks discovered across the road from the Julian Jones house the day after the fire. The officer testified, "At this time it was getting late and the dogs gave out on us . . . . "

[5] The evidence is sufficient to permit the inference a rifle in the possession and custody of the defendant fired the shots, one of which struck the Leonard Jones house and others struck the garage, the automobile and a tree in the yard. Others struck trees near the sweet gum in the woods. If the shooter intended to injure the occupants of the house, he exhibited exceedingly poor marksmanship. The more probable and charitable view of the occurrence is that the purpose of the shooting was to notify Dorothy that her friend was in the vicinity. At any rate, the intentional firing of a high powered rifle into, or near, the home frightening the inmates causing them to seek safety in the back of the house would be sufficient evidence to make out a case of assault with a deadly weapon.

At the conclusion of the evidence Judge Copeland allowed the motion to dismiss the felony charge, but overruled the motion as to the lesser offense of assault with a deadly weapon. The

court did not commit error, therefore, in allowing the State to go to the jury.

In No. 70 CR 2482 the verdict of guilty is set aside, the judgment is arrested and the defendant is ordered discharged.

In No. 70 CR 2483 we find no error.

Chief Justice BOBBITT concurring in results.

I agree that the evidence offered by the State was insufficient to warrant submission of the malicious burning charge. I disagree with the portion of the opinion which, based on quotations from *State v. Bruton,* 264 N.C. 488, 499, 142 S.E. 2d 169, 176 (1965), holds that *evidence offered by defendant* tending to establish an alibi may be considered in resolving the nonsuit question. I refer specifically to the testimony of defendant and of Kennedy to the effect that defendant was in the Deep Run Barber Shop, five or six miles from the scene of the fire, when the fire whistle blew and the fire truck passed. To consider this type of defense evidence in resolving the nonsuit issue is to nullify the rule that the evidence must be considered in the light most favorable to the State.

The majority opinion stresses this paragraph from the opinion in *Bruton,* at 499, 142 S.E. 2d at 176: "On a motion for nonsuit, the foregoing rule also permits the consideration of defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. *S. v. Oldham,* 224 N.C. 415, 30 S.E. 2d 318 [1944]."

The following is an excerpt from the opinion in *Oldham:* "The general rule on a demurrer to the evidence is that only the State's evidence is to be considered, and the defendant's evidence is not to be taken into account, unless it tends to explain or make clear *that offered by the State.* [Citations.] However, *in vagrancy cases* where the evidence of guilt is purely negative in character, positive and uncontradicted evidence in explanation which clearly rebuts the inference of guilt and is not inconsistent with the State's evidence should be taken into consideration on motion to nonsuit. [Citations.]" (Our italics.)

In *Oldham,* the evidence offered by the State tended to show the defendant's frequent presence in and around the bus station and the nearby cafe and his association there with vari-

ous persons. The defendant's evidence simply explained why he was at the bus station and nearby cafe and what he was doing on these occasions when observed by the officers. The State's evidence was insufficient to establish guilt. Unexplained, it might have raised a suspicion or inference of guilt. The court simply held that in vagrancy cases the defendant's explanations as to what he was doing on the occasions when observed by the officers was for consideration with reference to dispelling any inference of guilt.

In my view, it was perfectly proper to consider defendant's explanation with reference to the boot tracks, automobile tracks and purchase of gasoline. These are matters referred to in the State's evidence. In my view, defendant's evidence to the effect that he was at a barber shop miles away when the fire broke out is evidence that would be proper for consideration only by a jury in determining the ultimate question of guilt or innocence.

With the exception noted, I concur in the results and in the majority opinion.

Justice SHARP concurs in this opinion.

NATIONWIDE MUTUAL INSURANCE COMPANY v. JOHN HENRY COTTEN, WILLIAM E. DIGGS, EVERLENA M. DIGGS, AND ALLSTATE INSURANCE COMPANY.

No. 145

(Filed 15 December 1971)

1. **Insurance § 95— automobile liability policy — termination — notice to Department of Motor Vehicles**

G.S. 20-309(e) requires notice to the Department of Motor Vehicles prior to the effective date of cancellation of an automobile liability insurance policy only where the policy has been terminated by the insurer.

2. **Insurance § 95— assigned risk policy — rejection of offer to renew — termination by insured**

When an automobile liability insurance policy terminates in consequence of the policyholder's rejection of the company's offer to renew the policy, contained in a premium notice given pursuant to the rules governing policies issued under the assigned risk plan, such termination is deemed a termination "by the insured" and not a termination "by the insurer" within the meaning of G.S. 20-309(e) and G.S. 20-310(a).

3. Insurance § 95— assigned risk policy — intent to renew — certification of insurance to Department of Motor Vehicles

Where insured had received notice from plaintiff insurer that his assigned risk policy would terminate on 8 March 1968, the insured's certification to the Department of Motor Vehicles on 19 February that he had financial responsibility as required by The Vehicle Responsibility Act and his giving the name of plaintiff as his insurer in that certification, for the purpose of getting a 1968 license plate for his automobile, did not show an intent by the insured to renew the policy with plaintiff so as to extend its coverage beyond 8 March.

4. Insurance § 95— assigned risk policy — termination by insured — ignoring offer to renew — notice to Department of Motor Vehicles

An assigned risk policy was terminated "by the insured," within the meaning of G.S. 20-309(e), by his complete ignoring of the offer of the insurer to renew the policy contained in the notice of premium sent by the insurer to the insured and received by him; consequently, termination of the policy was not contingent upon the insurer's giving notice thereof to the Department of Motor Vehicles 15 days prior to the effective date of the termination, the insurer being required only to give the Department notice "immediately" after the termination of the policy.

5. Insurance § 95— termination of assigned risk policy — "immediate" notice to Department of Motor Vehicles

Where the statutory requirement is that notice be given to the Department of Motor Vehicles "immediately" after the termination of the policy becomes effective, a delay in giving notice will not defeat the termination.

6. Insurance § 95— termination of automobile liability policy — purpose of notice to Department of Motor Vehicles

The purpose of notice to the Department of Motor Vehicles of the termination of an automobile liability policy is to enable the Department to recall the registration and license plate issued for the vehicle unless the owner makes other provision for compliance with The Vehicle Responsibility Act.

7. Insurance § 95— termination of assigned risk policy — notice to Department of Motor Vehicles after termination date — termination 15 days after notice

Even if an autombile liability insurer had been required to give the Department of Motor Vehicles notice of the termination of an assigned risk policy 15 days prior to the effective date of the termination, notice given by the insurer to the Department subsequent to the termination date stated in the notice of premium sent to the insured would have terminated the policy 15 days after the insurer notified the Department of Motor Vehicles.

ON *certiorari* to the Court of Appeals to review its decision, reported in 12 N.C. App. 212, 182 S.E. 2d 801, affirming the judgment by *Clark, J.*, at the January 1971 Regular Civil Session of WAKE in favor of the defendant.

This is a suit for a declaratory judgment. The plaintiff seeks an adjudication that a policy of automobile liability insurance, issued by it to John Henry Cotten, affords no coverage of his liability, if any, upon claims arising out of an automobile collision on 26 May 1968, and that a policy issued by Allstate Insurance Company affords coverage thereon, by reason of an Uninsured Motorist Insurance Clause contained therein.

The following facts, renumbered and summarized for brevity, are stipulated:

1. On 26 May 1968, a Buick automobile, owned and operated by John Henry Cotten, collided with an Oldsmobile automobile, owned and operated by William E. Diggs, in which Everlena M. Diggs was riding as a passenger. Separate suits were instituted by William E. Diggs and by Everlena M. Diggs against Cotten for damages on account of property and personal injuries alleged to have been sustained by them in the collision. These actions are still pending. Nationwide Insurance Company, having denied liability under its policy of automobile liability insurance issued to Cotten, is presently defending him in these actions pursuant to a reservation of its rights.

2. On 8 March 1966, Nationwide issued, under the Assigned Risk Plan, its policy of automobile liability insurance to Cotten. The term of the policy so issued was one year. The policy was renewed for a second period of one year, 8 March 1967 to 8 March 1968. If the policy was in effect on the date of the collision, the Buick owned and operated by Cotten was an insured vehicle under the policy.

3. Allstate Insurance Company issued to Mr. and Mrs. Diggs its policy of automobile liability insurance, containing an Uninsured Motorist Clause, which policy was in full force and effect at the time of the collision.

4. Forty-five days prior to 8 March 1968 (the last day of the term of the renewal of the policy above mentioned), Nationwide offered to renew the policy, for another period of one year, by mailing to Cotten a notice of the premium for such renewal. This notice showed the termination date of the policy (i.e., the policy then in existence) was 8 March 1968, the premium for its renewal for one year was $77.80 and the date for the payment of such premium was 14 February 1968. The notice stated: "PREMIUM NOTICE FOR ASSIGNED RISK POLICY. Your automobile

policy terminates on the date shown below. You may renew your policy for another year by paying the PREMIUM before the PAYMENT DATE." Cotten received this notice in the due course of mail. A copy thereof was mailed by Nationwide at the same time to the producer of record, who received it in the due course of mail.

5. Cotten did not pay the premium called for by the premium notice.

6. On 14 February 1968 (the due date of the premium as shown on the above premium notice), Nationwide mailed to Cotten a notice of termination of the policy, showing the termination would occur at 12:01 a.m., on 8 March 1968 and that the extension endorsement which had been mailed to Cotten with the premium notice above mentioned was null and void. This bore on its face the statements required by statute. Cotten received this termination notice in the due course of mail. A copy was mailed at the same time to the producer of record, who received his copy in the due course of mail.

7. On 19 February 1968 (after the mailing to him of the above mentioned notice of premium and the above mentioned termination notice), Cotten certified to the Department of Motor Vehicles that he had financial responsibility as required by the North Carolina Financial Responsibility Act, therein giving Nationwide as the name of his insurer and referring to its above mentioned policy by number. On the basis of this certification by Cotten, the Motor Vehicle Department issued to him a 1968 license plate for the Buick automobile involved in the collision.

8. On 13 March 1968, Nationwide prepared and delivered to the Department of Motor Vehicles a notice that its said policy issued to Cotten had been terminated, effective 8 March 1968, this notice being on the Department's Form FS-4. No other notice of termination of this policy was given by Nationwide to the Department of Motor Vehicles.

9. The policy issued by Nationwide to Cotten was not one required to be certified in compliance with the provisions of the Motor Vehicle Safety and Financial Responsibility Act of 1953, as distinguished from the Vehicle Financial Responsibility Act of 1957.

It was further stipulated by the parties that the question of whether Nationwide filed with the Commissioner of Insurance and with the plaintiff (sic) notices and statements of reasons for the same is not germane to the issues raised or intended to be raised by the parties and is not material to this controversy.

Upon the foregoing stipulations, the trial court concluded that Nationwide "failed to give the North Carolina Department of Motor Vehicles notice of the cancellation fifteen (15) days prior to the effective date of the cancellation, and did fail to effectively cancel its policy, so that John Henry Cotten was an insured motorist at the time of the occurrence of the accident of May 26, 1968." The court, accordingly, adjudged that the policy issued by Nationwide to Cotten was in full force and effect at the time of the collision on 26 May 1968 and that Cotten was not at that time an uninsured motorist.

On appeal by Nationwide, the Court of Appeals affirmed.

Smith, Anderson, Dorsett, Blount & Ragsdale by Willis Smith, Jr., and Robert R. Gardner for plaintiff.

Cockman, Alvis & Aldridge by Jerry S. Alvis for defendant.

LAKE, Justice.

G.S. 20-309(e), which is part of The Vehicle Financial Responsibility Act of 1957, prior to the amendment of 1971, which has no effect upon this action, provided:

> "(e) No insurance policy provided [sic] in subsection (d) [i.e., any policy providing liability insurance with regard to a motor vehicle] may be terminated by cancellation or otherwise *by the insurer* without having given the North Carolina Motor Vehicles Department notice of such cancellation fifteen (15) days prior to effective date of cancellation. Where the insurance policy is terminated by the insured the insurer shall immediately notify the Department of Motor Vehicles that such insurance policy has been terminated. The Department of Motor Vehicles upon receiving notice of cancellation or termination of an owner's financial responsibility as required by this Article, shall notify such owner of such cancellation or termination, and such owner shall, to retain the registration plate for the

vehicle registered or required to be registered, within 15 days from date of notice given by the Department, certify to the Department that he has financial responsibility effective on or prior to the date of such cancellation or termination. Failure by the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and, unless the owner's registration plate has been surrendered to the Department of Motor Vehicles by surrender to an agent or representative of the Department of Motor Vehicles and so designated by the Commissioner of Motor Vehicles or depositing the same in the United States mail, addressed to the Department of Motor Vehicles, Raleigh, North Carolina, the Department of Motor Vehicles shall revoke the owner's registration plate for 60 days. * * * ." (Emphasis added.)

Subsection (d) of G.S. 20-309 provides that when liability insurance with regard to any motor vehicle is terminated by cancellation or failure to renew, the owner shall forthwith surrender to the Department of Motor Vehicles the registration certificate and the plates issued for the vehicle, unless financial responsibility is maintained in some other manner in compliance with The Vehicle Financial Responsibility Act of 1957.

G.S. 20-310(a), prior to its amendment in 1971, which amendment has no effect upon this action, provided:

"(a) No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew *by the insurer* until at least fifteen (15) days after mailing a notice of termination by certificate of mailing to the named insured at the latest address filed with the insurer by or on behalf of the policyholder. The face of the envelope containing such notice shall be prominently marked with the words 'Important Insurance Notice.' Time of the effective date and hour of termination stated in the notice shall become the end of the policy period. Every such notice of termination for any cause whatsoever sent to the insured shall include on the face of the notice a statement that financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such financial responsi-

bility is a misdemeanor, the penalties for which are loss of registration plate for sixty days; and a fine or imprisonment in the discretion of the court." (Emphasis added.)

Whether or not it was required by G.S. 20-310 under the circumstances of this case, the notice of termination mailed by Nationwide to Cotten, and received by him, was mailed prior to the date specified in G.S. 20-310(a) and bore on its face the statement required by the statute. However, a notice of termination of the policy was not given by Nationwide to the Motor Vehicles Department prior to the date stated in the notice to Cotten as the date of termination. The determinative questions upon this appeal are, therefore: (1) Does G.S. 20-309(e), under the circumstances of this case, as a condition precedent to the termination of Nationwide's risk under the policy, require Nationwide to give to the Department of Motor Vehicles notice of such termination 15 days prior to its effective date? (2) If so, did the notice given by Nationwide to the Department of Motor Vehicles, subsequent to the termination date stated in the notice to Cotten, terminate Nationwide's risk under the policy 15 days after it so notified the Department?

Apart from statute, the policy issued by Nationwide to Cotten would have terminated, by its own terms, at 12:01 a.m., on 8 March 1968. Forty-five days prior to that date, Nationwide mailed to Cotten, and he received, a notice of the premium necessary for renewal, showing the date by which such payment must be made by Cotten in order to renew the policy. By its express terms, this notice was an offer by Nationwide to renew the policy. Cotten made no response whatever to this offer. Though it was followed on 14 February by a notice of termination, showing that would occur at 12:01 a.m., on 8 March 1968, and bearing upon its face the statutory warning as to the consequence of operating a vehicle without the requisite financial responsibility, Cotten did not communicate with Nationwide prior to the accident on 26 May.

[1] G.S. 20-309(e) expressly distinguishes between a policy terminated by the insurer and a policy terminated by the insured, with reference to when the insurer is required to notify the Department of Motor Vehicles that the policy has been terminated. It is only where the policy has been terminated by the insurer that the statute requires notice to the Department of Motor Vehicles prior to the effective date of cancellation.

[2] In *Faizan v. Insurance Company,* 254 N.C. 47, 118 S.E. 2d 303, this Court concluded that the insured had rejected the insurer's offer to renew his policy. Consequently, this Court held there was no failure by the insurer to renew and the insurer was under no obligation to give to the insured the notice of termination, required by G.S. 20-310 when termination is "by the insurer." Thus, when a policy terminates in consequence of the policyholder's rejection of the company's offer to renew the policy, contained in a premium notice given, as in the present case, pursuant to the rules governing policies issued under the Assigned Risk Plan, such termination is deemed a termination "by the insured" and not a termination "by the insurer," within the meaning of the above quoted statutes.

[3] Cotten's certification to the Department of Motor Vehicles on 19 February 1968 that he had financial responsibility as required by The Vehicle Financial Responsibility Act and his giving Nationwide as the name of his insurer in that certification was for the purpose of getting a 1968 license plate for his automobile. That certification by him to the Motor Vehicles Department did not misstate any fact, for the policy was then still in effect, notwithstanding his having received the company's notice that its termination would occur on 8 March. Thus, this certification by Cotten to the Department of Motor Vehicles does not show his intent to renew the policy so as to extend its coverage beyond 8 March. Furthermore, there is nothing in the record to indicate that his certification to the Motor Vehicles Department was brought to the attention of Nationwide. In *Faizan v. Insurance Company, supra,* the policyholder, having received the premium notice, instead of communicating with the company, applied to the Assigned Risk Plan for other insurance, but there is nothing in that case to indicate that such action by him was brought to the attention of the defendant company. These are the only differences in the facts of the two cases, relative to who terminated the policy, which we have discovered. Neither of these circumstances justifies a different conclusion upon the question of whether the policyholder rejected the company's offer to renew the policy.

Perkins v. Insurance Company, 274 N.C. 134, 161 S.E. 2d 536, distinguished *Faizan v. Insurance Company, supra,* on the ground that in the *Perkins* case there was no evidence or finding that the policyholder had rejected the company's offer to renew

the policy upon payment of the renewal premium. As the Court there noted, a substantial part of the renewal premium was sent by, or on behalf of, Perkins to the company, and there was uncertainty on the part of the insured as to whether the amount so sent was the full amount properly due the company for such renewal. This Court said these circumstances, known to the company, indicated a definite desire on the part of Perkins to renew the policy. Thus, we held that there had been no rejection of the offer by Perkins, so *Faizan v. Insurance Company, supra,* was not controlling, and the termination of the Perkins policy was "by the insurer," necessitating the giving to Perkins by the company of the notice of termination required by G.S. 20-310(a). The notice sent by the company to Perkins not being in compliance with the statutory requirement, this Court held that the Perkins policy was not terminated. In the present case, there was no such effort by Cotten to renew his policy. There was no communication whatever by him with the company concerning renewal. This case, therefore, falls within the rule of *Faizan v. Insurance Company, supra,* not within that of *Perkins v. Insurance Company, supra.*

In *Insurance Company v. Hale,* 270 N.C. 195, 154 S.E. 2d 79, we said that the policyholder, prior to the alleged termination of the policy, had made full payment of the renewal premium to the agent of the company for its collection. For this reason we held that the company could not lawfully terminate the policy for nonpayment of the renewal premium and, consequently, the alleged termination was ineffective. We there observed that, subsequent to the decision in *Faizan v. Insurance Company, supra,* G.S. 20-309(e) was amended so as to require the company to give to the Department of Motor Vehicles notice of a termination "by the insurer" prior to the effective date thereof, whereas, at the time of the Faizan decision, such notice to the Department was to be given after the termination became effective. This amendment of the statute has no bearing upon the authority of the Faizan case on the question of what constitutes a termination "by the insured." Consequently, *Insurance Company v. Hale, supra,* is not determinative of the present case.

In *Harrelson v. Insurance Company,* 272 N.C. 603, 158 S.E. 2d 812, also relied upon by the defendants in this case, we held that the defendant company did not have the right to terminate

the policy on account of the policyholder's failure to pay its charge for making a certification to the Motor Vehicles Department pursuant to The Financial Responsibility Act of 1957 and, consequently, its purported cancellation of the policy was not effective. The *Harrelson* case is, therefore, not controlling in the present case.

[4] We hold, therefore, that the policy issued by Nationwide to Cotten was terminated "by the insured," within the meaning of G.S. 20-309(e), by his complete ignoring of the offer by the company to renew the policy contained in the notice of premium sent by it to Cotten and received by him. That being true, termination of the policy was not contingent upon the company's giving notice thereof to the Department of Motor Vehicles prior to the effective date of the termination.

Under these circumstances, G.S. 20-309(e) required the company to notify the Department of Motor Vehicles of the termination of the policy "immediately." This provision of the statute contemplates such notice to the Department after the termination. Thus, the requirement of notice to the Department of Motor Vehicles was the same, under the circumstances of the present case, as in *Faizan v. Insurance Company, supra,* except insofar as immediate notice may differ from a notice given within 15 days after the effective date of the termination.

[5] At the time of the decision in *Nixon v. Insurance Company,* 258 N.C. 41, 127 S.E. 2d 892, the statute, there applicable, required that notice of termination be given to the Department of Motor Vehicles not later than 15 days following the effective date of the termination. This Court said that, since the notice to the Department of Motor Vehicles was to be given after the effective date of the termination, neither a defective notice nor a failure to give notice to the Department would affect the validity or binding effect of the termination of the policy. It follows that where, as here, the statutory requirement is that notice be given to the Department of Motor Vehicles "immediately" after the termination of the policy becomes effective, a delay will not defeat the termination.

[6] The purpose of the notice to the Department of Motor Vehicles is not the same as the purpose of the notice of termination given to the policyholder. The purpose of the notice to the Department is to enable it to recall the registration and license

plate issued for the vehicle unless the owner makes other provision for compliance with The Vehicle Financial Responsibility Act. See, *Nixon v. Insurance Company, supra.*

[4] We, therefore, hold that the first question, above stated, should be answered in the negative. That is, under the circumstances of this case, the giving by Nationwide to the Department of Motor Vehicles of notice of termination of Cotten's policy 15 days prior to its effective date was not a condition precedent to the termination of the policy.

[7] This being true, an answer to the second question is not essential to the determination of this appeal. If it were, it should be answered affirmatively. The purpose sought to be accomplished by the Legislature in requiring notice to be given to the Department of Motor Vehicles is fully accomplished if the life of the policy be deemed extended 15 days after the giving to it by the company of the delayed notice. The purpose of the requirement of notice to the Department of Motor Vehicles is not to provide free insurance to the policyholder who has, by his disregard of the premium notice, demonstrated that he does not intend to pay the renewal premium. There is nothing which prevents the Department of Motor Vehicles, upon receipt of the delayed notice, from acting immediately as the statute contemplates it will act upon the receipt of timely notice. Therefore, the procedures followed by Nationwide would, in any event, be sufficient to effect a termination of this policy 15 days after it gave notice to the Department of Motor Vehicles, which was substantially prior to the collision between Cotten's vehicle and that driven by Mr. Diggs.

The decision of the Court of Appeals is, therefore, reversed and the matter is remanded to it for the entry of a judgment in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ROBERT MUSE

No. 88

(Filed 15 December 1971)

1. **Criminal Law § 75— admissibility of incriminating statements — S.B.I. agent's statement that he "would let it be known"**

Incriminating statements made by an incarcerated defendant to an S.B.I. agent were not rendered inadmissible by the agent's statement that he "would let it be known" if the defendant gave him any information, where (1) the defendant requested the agent's presence and volunteered the incriminating statements, (2) the agent did not solicit information from the defendant and he told him that he could make no promises, and (3) the agent's statement to "let it be known" was made with reference to other crimes than the one for which defendant was incarcerated.

2. **Criminal Law § 74— nature of inculpatory statements**

The statements of a defendant which admit an essential part of the offense charged are inculpatory.

3. **Criminal Law § 75— admissibility of inculpatory statements — defendant in custody**

The fact that a defendant was in custody when he made inculpatory statements does not of itself render the statements inadmissible.

4. **Criminal Law § 75— Miranda rights — custodial interrogation**

A police officer is not required to warn a defendant of his *Miranda* rights where there is no custodial interrogation.

5. **Criminal Law § 146— Supreme Court review of decision by Court of Appeals — State's petition for certiorari**

In a criminal case in which the State petitioned for certiorari to review a decision of the Court of Appeals, the Supreme Court elected to consider assignments of error that were not considered by the Court of Appeals. G.S. 7A-31.

6. **Criminal Law § 50; Receiving Stolen Goods § 4— opinion testimony — value of stolen goods**

In a prosecution charging defendant with receiving stolen goods, it was proper to allow the owner of the stolen goods to give his opinion as to the value of the goods.

7. **Criminal Law § 50— opinion testimony — admissibility**

Where the answer of the witness clearly indicated that he had an opinion as to the value of stolen articles, his failure to state first that he had such opinion was not prejudicial error.

8. **Receiving Stolen Goods §§ 3, 6— instructions on identity of goods stolen — recent possession doctrine**

Where the State in a prosecution for receiving stolen goods did not rely upon the presumption arising from the possession of recently

stolen goods, the trial court was not required to charge that the jury must find that the goods allegedly received by defendant were the same goods that were stolen.

9. Larceny § 5— recent possession doctrine — presumption — evidentiary facts

The doctrine of recent possession of stolen goods allows the raising of an inference that the possessor is guilty of breaking and entering and larceny; it is an evidentiary circumstance to be considered by the jury along with all other circumstances.

10. Criminal Law § 42; Receiving Stolen Goods § 4— exhibits — admissibility of allegedly stolen goods

In a prosecution for receiving tools that were stolen from an automobile parts shop, the following exhibits were relevant and properly identified for admission in evidence: an inventory made by the chief of police of the tools that were purchased from the defendant, and the various tools that were identified as the tools purchased from the defendant.

ON *certiorari* to review decision of the Court of Appeals reported in 11 N.C. App. 389, which ordered a new trial for error found in the trial before *Rouse, J.*, at 22 September 1970 Session of Superior Court of CAMDEN.

We allowed the State's petition for certiorari pursuant to G.S. 7A-31 on 30 July 1971.

Defendant was charged in a bill of indictment by the Grand Jury of Pasquotank County with breaking and entering and larceny, and with receiving stolen goods, knowing them to be stolen. On 25 February 1970 defendant appeared in the Superior Court of Pasquotank County with counsel J. Ball of the Virginia Bar, and Mr. J. W. Jennette of the Pasquotank Bar. His counsel tendered a plea of guilty to receiving stolen property; however, defendant stated that he would plead guilty to receiving stolen property, but not knowing that it was stolen. The court refused to accept this plea, and set the trial for the next day. Defendant failed to appear, and the trial judge set his appearance bond in the amount of $20,000. Defendant was later apprehended in Virginia and was returned to Pasquotank County jail. He escaped from that jail and was again apprehended, and upon return to North Carolina was sent to Central Prison in Raleigh to await his trial. Upon defendant's motion, Judge Walter Cohoon ordered a change of venue to Camden County, set defendant's appearance bond in the amount of $10,000, and set the date of trial for the 21 September 1970 Session of Camden. The case was called for trial on 22 September 1970, and

the solicitor announced that he elected to try defendant on the charge of receiving stolen property. Defendant, through his counsel, Messrs. J. M. Ball and Herbert Mullen, entered a plea of not guilty.

The State's evidence may be summarized as follows:

Thomas L. McDaniels, part-owner of City Motor Parts, Inc., testified that on the morning of 3 May 1969 he discovered that his building had been forcibly entered during the previous night and that a number of tools and automobile parts had been removed. At the request of the police he had hastily prepared a list of missing tools which he valued at approximately $1,000 to $1,200. He later identified a number of missing tool sets by description and stock number. These tool sets had not appeared on the original list. He stated, over objection, that in his opinion these tool sets had a fair market value of $200 to $250.

Calvin Hudson, who operated an automobile repair garage in Pasquotank County, testified that sometime after 3 May 1969 defendant offered to sell him a box of tools for $130. Defendant stated that the tools were not stolen. Hudson told defendant that he did not have that kind of money and would need two or three days to get the money. On the next day he contacted Thomas McDaniels, who told him to go ahead and buy the tools. He bought the tools two or three days later for the agreed price of $130, notified McDaniels, and later delivered the tools to McDaniels and local police officers. He did not get any serial numbers from the tools, but he stated that a number of the tools exhibited to him in court were similar to those which he had delivered to McDaniels and the police officers.

W. C. Owens, Chief of Police of Elizabeth City, stated that he accompanied McDaniels and SBI Agent O. L. Wise to Hudson's garage where Hudson exhibited and delivered a number of tools to them. Owens identified a number of the tools as being a portion of the tools seen at the garage. He identified a paperwriting made by him on 22 May 1969 which purported to be a list of items recovered from Hudson's garage which Hudson had purchased from Robert Muse on Wednesday, 21 May 1969. The first item on this list was an "Ingersol Rand Impactool, size 405, Serial No. 128125, Model A." The list which he identified was marked State's Exhibit 15, and was introduced into evidence over defendant's objection.

T. L. McDaniels was recalled and identified and placed values totalling $685 on tools which he said were the same as described on the itemized lists. He could identify only the air wrench by serial number. Other items were identified by inventory and stock number. He stated his business was the only one in the Elizabeth City area which sold some of the items recovered from Hudson.

SBI Agent O. L. Wise, *inter alia,* testified as to conversations he had with defendant while defendant was confined in jail. This witness' testimony will be considered in the opinion.

The State's other evidence was cumulative and need not be recounted.

The defendant offered no evidence.

The jury returned a verdict of guilty of receiving stolen goods, knowing them to be stolen, as charged in the bill of indictment. Defendant appealed from judgment imposing a prison sentence for a term of not less than five nor more than seven years.

Attorney General Morgan, Assistant Attorney General Briley for the State.

Grafton G. Beaman, Worth & Beaman, for defendant.

BRANCH, Justice.

[1] Defendant's principal assignment of error is that the trial court erred in its voir dire findings and in allowing into evidence incriminating statements made by defendant.

When the State called SBI Agent O. L. Wise as a witness, he testified that he had had a conversation with defendant. Upon objection, the trial judge excused the jury and held a voir dire hearing.

Agent Wise testified on voir dire that he made several visits to defendant's jail cell during the period from 12 June 1969 to 15 July 1969. Each visit was made pursuant to a request by defendant. Defendant asked his help towards getting a smaller appearance bond. Defendant told him that he had information that would be helpful in solving other crimes. Wise told defendant that if he gave him any information he would appreciate it

and that he "would let it be known." He told defendant that he could make no promises. He never cautioned defendant as to his constitutional rights since he did not go to the jail for the purpose of questioning defendant. Wise stated that all statements made by defendant were made without prompting from him and that he did not initiate any of the questions or at any time interrogate defendant. Defendant gave him information concerning other crimes and also told him that he (defendant) had bought certain tools for $90 which he later sold to Mr. Hudson. Defendant further stated that he did not break into the City Motor Parts building. Wise was the only witness to testify on voir dire and he was not cross-examined by defendant's attorney.

At the close of the voir dire hearing, the trial judge, *inter alia,* found:

(7) No "Miranda warning" was given to the defendant by Mr. Wise. At the time of the alleged conversation the defendant was under arrest and was in custody. C Mr. Wise did not request the defendant to make a statement concerning the alleged breaking and entering of City Motor Parts, Inc., and larceny of tools therefrom. The information and above statements of the defendant were volunteered on the occasions when he called for Mr. Wise and when Mr. Wise talked to him at his request in the Pasquotank County Jail. D

E (8) Mr. Wise did not solicit information from the defendant concerning the City Motor Parts, Inc. case. F

G (9) This was not a custodial interrogation, wherein the questioning was initiated by a law enforcement officer after the person had been taken into custody, or otherwise deprived of his freedom of action. H

The Court then concluded:

M (a) The statements made by the defendant on the occasions in question concerning the tools taken from City Motor Parts, Inc., were voluntarily and understandingly made and are admissible as evidence in this case. N

O (b) The statements made by the defendant on the

occasion in question do not fall within the prohibition of *Miranda v. Arizona.* P

Defendant's objection was overruled and Agent Wise then testified before the jury to substantially the same facts which he related on voir dire.

There was plenary evidence to support the findings of fact made by the trial judge, and such findings will not be disturbed on appeal. *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216.

We therefore need only decide whether the circumstances of this case, as a matter of law, rendered the statements inadmissible.

[2, 3] The statements made by defendant to SBI Agent Wise were inculpatory since they admitted an essential part of the offense charged. *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193. However, the fact that defendant was in custody when he made the statements does not of itself render the confession inadmissible. *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363.

In *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, we find the following:

> "(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> . . . .
>
> "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but *whether he can be interrogated.* There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility

is not affected by our holding today." Id. at 478, 16 L. Ed. 2d at 726, 86 S. Ct. at 1630. (Emphasis added.)

Accord: *State v. Chance,* filed this day; *State v. Fletcher* and *St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405; *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245; *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541; *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802.

It should be noted that the statement made by the SBI Agent that he would "let it be known" was made in conversation concerning other crimes and was accompanied by a statement from the officer that he could make no promises.

[4] The circumstances of this case do not show that defendant's statements were "obtained by hope or fear," *State v. Roberts,* 12 N.C. 259, or that they resulted from any sort of pressure, *State v. Perry, supra.* This record clearly shows that there was no custodial interrogation. Thus, it was not necessary for Agent Wise to warn defendant of his rights as required by *Miranda v. Arizona, supra.*

There was no error in the voir dire proceedings, and the trial judge properly admitted defendant's statements into evidence.

[5] When this Court grants certiorari pursuant to 7A-31, our review is ordinarily restricted to the rulings of the Court of Appeals which are assigned as error in the petition for certiorari and brought forward in petitioner's brief. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. However, this case is unusual in that it is a criminal case in which the State petitioned for certiorari. The Court of Appeals ruled on only one of defendant's assignments of error in granting a new trial. We therefore elect to depart from the general rule and consider the remaining assignments of error.

[6] Defendant contends that the trial judge committed prejudicial error by allowing certain opinion evidence as to value. During the solicitor's direct examination of State's witness Thomas L. McDaniels, the part-owner and operator of City Motor Parts, Inc., the following occurred:

Q. Did you place a value on these items that were missing?

A. No, sir.

Q. Do you have an opinion now satisfactory to yourself as to the reasonable market value of them?

A. Well—

OBJECTION by defendant OVERRULED. EXCEPTION NO. 1.

A. Well I would estimate between Two and Two Fifty.

Q. $200 and $250?

A. Yes, sir.

A witness who has knowledge of value gained from experience, information and observation, may give his opinion of the value of personal property. Stansbury, N. C. Evidence 2d, § 128, p. 300.

In this jurisdiction when a witness is offered for the purpose of giving opinion evidence, the approved procedure requires that he first be qualified to give the evidence. After qualification, he is asked if he has an opinion and, upon giving an affirmative answer, is then asked to state his opinion.

[7] The witness McDaniels obviously had such experience and knowledge as would qualify him to give opinion evidence concerning the value of this property. Since his answer clearly indicated that he had an opinion, his failure to first state that he had such opinion does not constitute prejudicial error.

Even had the admission of this evidence been prejudicial error, it was later rendered harmless by the admission, without objection, of similar evidence from the same witness. *Carver v. Lykes,* 262 N.C. 345, 137 S.E. 2d 139. This assignment of error is overruled.

[8] Defendant contends that the trial judge's failure to instruct the jury that they must find from the evidence and beyond a reasonable doubt that the tools allegedly received by defendant were the same tools stolen from City Motor Parts, Inc., resulted in prejudicial error.

In support of this contention he cites and relies on *State v. Frazier,* 9 N.C. App. 44, 175 S.E. 2d 377 and *State v. Jackson,* 4 N.C. App. 459, 167 S.E. 2d 20, which require such a charge. In these cases the defendants were charged with breaking and entering and larceny, and the State relied on the doctrine of recent possession of stolen goods.

[9] The doctrine of recent possession of stolen goods as recognized by this Court allows the raising of an inference that the possessor is guilty of breaking and entering and larceny. It is an evidentiary circumstance to be considered by the jury along with all other circumstances. *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578; *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62. The trial judge in such cases must require the jury to find from the evidence and beyond a reasonable doubt that the goods found in possession of the accused are the same goods that were lost as the result of the breaking and entering or the larceny with which he stands charged. *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369. This requirement is understandable since the allowed inference would lose all its probative value if the goods possessed by the defendant were not the same goods lost as a result of the larceny or the breaking and entering with which he stood charged.

The essential elements of the crime of receiving stolen goods are: "(a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose." *State v. Neill,* 244 N.C. 252, 93 S.E. 2d 155. Wharton's Criminal Evidence, 10th Edition, Volume 1, § 325b, p. 643.

The crime of receiving stolen goods is a "sort of secondary crime based upon a prior commission of the primary crime of larceny" and "(t)he inference or presumption arising from the recent possession of stolen property, without more, does not extend to the statutory charge (G.S. 14-71) of receiving stolen property knowing it to have been stolen or taken." *State v. Neill, supra.*

In his final mandate to the jury, the trial judge charged:

> So I charge you, Ladies and Gentlemen, that if you find from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you, that the defendant, Robert Muse, at the time and place in question, that is, subsequent to May 3, 1969 and before May 21, 1969, did receive certain goods, which had been stolen by some person other than the defendant, and that the goods so stolen and so received by the defendant, were of a value in excess of $200, and that at the time he received the goods the defend-

ant knew that they had been theretofore feloniously stolen, and that the property was received by the defendant with a felonious intent, that is, the intent to deprive the owner of its property permanently and to convert it to the use of the person so receiving the same, that is, the defendant, it will be your duty to render a verdict against the defendant of guilty, as charged in the bill of indictment. If you fail to so find it will be your duty to give a verdict of not guilty, or if upon a fair and impartial consideration of all the evidence and circumstances in the case you have a reasonable doubt as to his guilt, it will be your duty to give him the benefit of such doubt and acquit him.

If under the circumstances of this case you find from the evidence and beyond a reasonable doubt that the defendant received stolen goods, knowing them to be stolen, as the court has explained these terms to you, and the goods in question were of a value of $200 or less, then it would be your duty to return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200.00 or less, a misdemeanor. If you fail to so find it will be your duty to give a verdict of not guilty, or if upon a fair and impartial consideration of all the evidence and circumstances in the case you have a reasonable doubt as to his guilt, it will be your duty to give him the benefit of such doubt and acquit him.

In instant case the State does not rely on inferences or presumptions, and the charge placed upon the State the burden of proving beyond a reasonable doubt each individual element of the crime of receiving stolen property. This charge was adequate and this assignment of error is overruled.

[10] Defendant contends that the trial judge committed prejudicial error by admitting into evidence State's Exhibits 8, 9, 10, 11 and 15 without sufficient identification by the State's witnesses.

State's Exhibit 15 was an inventory or list made by Chief of Police Owens of tools that he received from the witness Hudson. He testified that he made the inventory immediately after the tools were received from Hudson.

State's Exhibit 10, consisting of nineteen Husky socket wrenches; State's Exhibit 11, consisting of a ratchet wrench and

extension; and State's Exhibit 9, a box of tools, were all admitted into evidence after witness Hudson stated that they appeared to be the same items that he had purchased from defendant and after the Chief of Police had, without objection, identified State's Exhibits 8, 9, 10, and 11 as the items he had received from Hudson. State's Exhibit 8 was identified by Cliff Jones, a part-owner of City Motor Parts, Inc., by the number and his handwriting that appeared thereon.

Any object which has a relevant connection with the case is admissible into evidence. *State v. Stroud,* 254 N.C. 765, 119 S.E. 2d 907. Such object must be identified by the witness. *State v. Burno,* 158 N.C. 632 74 S.E. 462.

In the case of *State v. Macklin,* 210 N.C. 496, 187 S.E. 785, the defendant was charged with murder. It was there stated:

> "The only other exception was to the admission of the shotgun as an exhibit in the case. It was competent to show the possession of a shotgun by defendant about the time of the homicide, and it was testified that the one found in his room was like the one with which he had been seen on the night the deceased was shot. This exception cannot be sustained. *S. v. Burno,* 158 N.C. 632; *S. v. Vann,* 162 N.C. 534. The charge of the court was free from error."

See also: *State v. Fikes,* 270 N.C. 780, 155 S.E. 2d 277; *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4; *State v. Tilley,* 272 N.C. 408, 158 S.E. 2d 573.

We hold that State's Exhibits 8, 9, 10, 11 and 15 were relevant and were sufficiently identified before their introduction. The trial judge properly admitted them into evidence.

A careful examination of the entire record fails to reveal prejudicial error. The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. JOHNNY JAMES BLACKMON

No. 87

(Filed 15 December 1971)

1. **Criminal Law § 15— change of venue — pretrial publicity**

The trial court in a homicide prosecution properly acted within its discretion when it denied defendant's motion for a change in venue or for a special venire on the ground that he had been prejudiced by pretrial publicity, since (1) the newspaper articles offered in support of the motion did not discuss the details of any evidence against the defendant and (2) there was no evidence to show that any of the jurors had been unduly influenced by the articles.

2. **Criminal Law § 91— motion for continuance — defendant's request for certain reports**

A motion for continuance on the ground that defense counsel had not seen certain reports which he had requested from the State *is held* properly denied by the trial court in a homicide prosecution, where (1) the solicitor stated that he had furnished defense counsel all the reports and photographs of which he had knowledge and (2) the defense counsel had one month and four days in which to prepare his defense.

3. **Criminal Law § 75— admissibility of confession — waiver of counsel during in-custody interrogation**

The trial court in a homicide prosecution erred in holding that, since the defendant had been correctly informed of his right to counsel at an in-custody interrogation and did not request an attorney, defendant's making of incriminating statements during the interrogation was a waiver of the right to the presence of counsel; the *Miranda* decision requires that the wavier of the right to counsel be knowingly and intelligently made.

4. **Criminal Law § 76— confession — determination of admissibility — voir dire — conflict in testimony**

The conflict in the testimony on the voir dire raises a question of the credibility of the witnesses, which is for the determination of the trial court, and its findings of fact, supported by competent evidence, are conclusive.

5. **Criminal Law § 169— erroneous admission of confession — prejudicial error**

In a first-degree murder prosecution, the erroneous admission in evidence of defendant's incriminating statements to an S.B.I. agent required a new trial, notwithstanding there was other evidence sufficient to support a conviction.

APPEAL by defendant from *Long, J.*, at the 29 March 1971 Session of STANLY Superior Court.

Defendant, Johnny James Blackmon, was tried and convicted on an indictment proper in form of murder in the first degree of James Alexander Howell, the jury making no recommendation that he be sentenced to life imprisonment. Defendant appeals from a judgment imposing the sentence of death by asphyxiation pursuant to the verdict.

The State's evidence tended to show that on 5 January 1971 James Alexander Howell and his wife awoke at approximately 5:30 a.m., and after having breakfast, Mr. Howell left to drive to work. When his wife did not hear the door to their truck slam, she looked out a window and saw the empty truck. After calling to her husband and receiving no answer, she became worried and called a neighbor, Mr. Gene Almond. When Mr. Almond arrived, Mrs. Howell came out of the house and they discovered the body of Mr. Howell lying face down alongside his truck. Mr. Howell died shortly thereafter, and an autopsy revealed that the death resulted from a shotgun wound in the left chest. Later that day, police investigators discovered shoe tracks at the Howell residence in the vicinity of the shooting, and casts were made of the impressions. A Halloween mask was also found near a path about 140 feet from the house.

On 19 February 1971 about 5:40 a.m. Sheriff Ralph McSwain and two other officers went to defendant's home and placed him under arrest on a capias which had been issued on 21 January 1971 for him on a worthless check charge. Defendant when arrested was wearing a pair of Army fatigue pants, an undershirt, and a pair of Converse All-Stars tennis shoes. He was allowed to change clothes, including his shoes, and the tennis shoes which he had been wearing were taken by Sheriff McSwain along with the defendant to the Stanly County jail. On arriving at the jail, a warrant which had been issued on 18 February 1971 charging defendant with the murder of James Alexander Howell was served on him.

Defendant was taken to an interrogation room about 6 a.m. and questioned about the murder. The three officers involved in the questioning stated that defendant was orally advised of his rights, and that he stated that he understood these rights. (At the trial on *voir dire,* defendant denied that he was so advised.) At 10 a.m., about four hours after the initial questioning began, one Craven Turner was brought into the interview room with the defendant. Turner said that he and the defendant had gone

to Howell's house earlier that morning to rob him, and that the defendant shot Howell during the robbery. Defendant denied this and retorted that it was Turner who had shot the deceased. Turner was then taken from the room and the defendant made a full statement in the presence of Sheriff McSwain, and Jack B. Richardson and Jack Coppley, both agents of the State Bureau of Investigation. Defendant stated that about a month prior to the date of the robbery (January 5, 1971) Craven Turner had contacted him about the robbery stating that Howell was known to carry large sums of money on his person. Defendant further stated that the day before the robbery Turner drove the defendant out to look over the house in which Howell lived. On the day of the robbery, Turner picked up the defendant about 4:45 a.m., and they drove to a point near the Howell home, where they parked the car. Turner put on a Halloween mask, and the defendant covered his face with a paper bag. They then crossed a field to the edge of some woods where the defendant waited while Turner walked around the house and hid near some shrubbery. Defendant stated that he heard a shot and soon thereafter Turner came running back to the woods. Turner told the defendant that as he was attempting to rob the deceased, Howell reached for his pocket and that Turner, thinking that Howell had a gun, shot him in the leg. They then ran back to the car, falling on the way and losing the Halloween mask and paper bag.

After the defendant completed his statement, the police showed him a 12-gauge single-barrel sawed-off shotgun and a Halloween mask. Defendant stated that he owned the gun at the time it was used in the robbery, and that the mask he was shown was the one used in the robbery. The defendant then signed a written waiver form giving his consent for the police to search his home. The search produced one unspent 12-gauge shotgun shell, which was shown at the trial to fit the shotgun used to shoot Howell.

The defendant subsequently accompanied Sheriff McSwain and the two State Bureau of Investigation agents to the Howell home where he re-enacted the crime for these officers, showing them the place where the car was parked, the path he and Turner followed to the woods near the house, the place where he was standing, the shrubbery where Turner was hiding when

he shot Mr. Howell, and the places where he and Turner fell while fleeing the scene after the shooting.

The defendant offered no evidence.

Attorney General Robert Morgan and Deputy Attorney General Ralph Moody for the State.

Elton S. Hudson for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the trial court's failure to allow defendant's motion for a change in venue or in the alternative for a special venire. In support of this motion defendant and his counsel filed affidavits. The affidavit of defendant's counsel stated that he had asked 47 individuals if they had seen or heard pre-trial publicity concerning the case. Of those interviewed 89.4% had seen or heard the publicity. Of the 42 persons who had seen or heard the publicity, 34 expressed the opinion that the defendant was guilty and stated that they thought it was the general feeling in Stanly County that the defendant was guilty. The names of those interviewed were not disclosed and none of them filed affidavits. The affidavit of defendant stated that the Stanly News and Press is the only newspaper published in Stanly County and is widely read and circulated in the County. Attached to the motion were various articles concerning the crime in question which had been published in this newspaper. The newspaper articles did not discuss the details of any evidence against the defendant but only that Mr. Howell was killed and that a shotgun was used in the killing, and the fact that defendant and Craven Turner had been arrested and charged with the crime. The State examined seven witnesses—two law-enforcement officers and five who had been in various businesses in Stanly County for many years—all of whom expressed the opinion that the defendant could get a fair trial in that County.

Prospective jurors were examined concerning whether or not they had been influenced by any articles in the newspaper. This examination showed that several jurors had not read about the case at all and that some had read about it when it first happened. There was no evidence to show that any juror had been unduly influenced by these articles or that there had been

any inflammatory press reports. A motion for change of venue or a special venire is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. Here, no such abuse is shown. *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Brown,* 271 N.C. 250, 156 S.E. 2d 272 (1967); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967); *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967); *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967).

[2] Defendant next assigns as error the trial court's denial of defendant's motion for a continuance. Defendant was arrested and a warrant charging him with the murder of James Alexander Howell was served on him on 19 February 1971. Defendant was indicted at the 22 February 1971 Session of the Superior Court of Stanly County, and Elton S. Hudson was appointed as attorney for defendant on 24 February 1971. Defendant's trial began on 29 March 1971. Counsel for defendant had one month and four days in which to prepare for the defense of his client. Defendant's motion for continuance is based on allegations that counsel had not seen certain reports which he requested in a motion for a bill of particulars. In an answer to the motion for the bill of particulars, the solicitor stated that defendant's counsel had been furnished 32 photographs, four reports made by agents of the State Bureau of Investigation, and a list of 20 prospective witnesses for the State, and that he had no knowledge of other evidence. A motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling thereon is not subject to review on appeal absent an abuse of discretion. No abuse is shown in this case. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666 (1966); *State v. Kirkman,* 252 N.C. 781, 114 S.E. 2d 633 (1960); *State v. Flowers,* 244 N.C. 77, 92 S.E. 2d 447 (1956); 6 N. C. Digest, Criminal Law § 586.

[3] Defendant next assigns as error the admission of defendant's statement in the nature of a confession in evidence against him. This assignment presents a serious question. A warrant charging defendant with the first degree murder of Howell was issued on 18 February 1971. On the morning of 19 February 1971 about 6:05 a.m., this warrant was served on defendant who was then in custody in the Stanly County jail. Defendant was advised of his constitutional rights as required under

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and was then questioned by Sheriff Ralph McSwain about the murder. Defendant stated that he knew nothing about it. The sheriff then left, but defendant was kept in custody for some four hours thereafter during which time other officers questioned him. Sheriff McSwain returned about 10 a.m. and again questioned defendant who, after being confronted with his accomplice Craven Turner, made a detailed statement concerning his participation in planning the robbery and in the shooting of Mr. Howell, and later that same day accompanied the officers to the Howell home where he re-enacted the crime for the officers.

Agent Richardson took notes on the statement made by defendant and was called to testify as to this statement. On objection by defendant, a *voir dire* was held.

Each of the three officers present at the interrogation testified on voir dire that after the defendant was taken into custody upon another charge, a warrant charging him with this murder was served upon him, and thereafter, prior to his making any statement, he was twice given the full *Miranda* warning. Each officer testified that the defendant "did not request that an attorney be present," that no threats were made to the defendant, that no promise or inducement was made to get him to make any statement, and that the defendant did not appear to be confused and stated that he understood his rights.

The defendant testified upon the *voir dire* that he was not advised by any law enforcement officer that he had the right to have an attorney present during the interrogation, that he told the officers he wanted to talk to a lawyer and that they replied that it was too early in the morning to get a lawyer.

At the conclusion of the *voir dire,* the court found as facts that the defendant was taken into custody on a worthless check charge, that within a few moments thereafter the sheriff read to the defendant a warrant charging him with this murder and advised the defendant of his rights by giving him the full *Miranda* warning, including his right to have an attorney present during the interrogation and his right to have such attorney appointed before any questioning if he could not afford to employ one. The court further found that the defendant "did not request . . . the presence of an attorney," that he "stated that

he understood his rights," that in the course of the interrogation he made certain statements which were reduced to writing by Agent Richardson, and that such statements were made "freely and voluntarily by him, understandably, and without promise of reward, without duress, without coercion, and without pressure."

Upon these findings of fact the court concluded that the statements by the defendant were made freely, voluntarily and understandably, without promise or hope of reward and without duress, pressure or coercion, and that they "were made understandably, with full knowledge of his right to remain silent, of his right to talk to an attorney, and to have an attorney present at the time; and his right to have a State appointed attorney, if he could not afford one of his own." The court further concluded that the defendant "made such statements in waiver of said rights." The court then denied defendant's motion to suppress evidence of any such statements made by him.

[4] The conflict in the testimony on the *voir dire* raised a question of credibility of the witnesses, which was for the determination of the trial court. His findings of fact, supported by competent evidence, are conclusive. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). Consequently, we must take it to be established that the defendant was given the full *Miranda* warning, that he understood his right to counsel and that he did not request the presence of an attorney at the interrogation. This, however, is not sufficient to make the defendant's in-custody statements admissible in evidence. In *Miranda v. Arizona, supra,* the Supreme Court of the United States said:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge

of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. . . .

* * *

"An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. . . .

* * *

"An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . .

* * *

"After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

This decision of the Supreme Court of the United States as to the right of the defendant, under the Federal Constitution, to have counsel present at his in-custody interrogation and as to the prerequisites for a waiver of that right is, of course, binding upon the courts of this State. *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171 (1968); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968).

The trial judge erred in holding that, since this defendant had been correctly informed of his right to the presence of counsel at the interrogation and did not request it, the making of the statements by the defendant during the interrogation was a waiver of his right to have counsel present. Although the evidence at the *voir dire* is ample to support a finding that the defendant made the statements in question freely and voluntarily, having been fully advised of and having full understand-

ing of his right to have an attorney present, the plain language of the *Miranda* decision above quoted in addition requires a waiver of right to counsel knowingly and intelligently made by defendant. ". . . [F]ailure to ask for a lawyer does not constitute a waiver."

[5] The testimony of Agent Richardson of the State Bureau of Investigation concerning statements made by defendant in the course of the in-custody interrogation by Sheriff McSwain was clearly incriminating, and its admission was error which cannot be considered harmless.

The United States Supreme Court in *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), stated: ". . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Court also stated that while "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," not all "trial errors which violate the Constitution automatically call for reversal."

Where, as in the present case, a confession made by the defendant is erroneously admitted into evidence, no one can say what weight and credibility the jury gave the confession. Even though there is other evidence sufficient to support a conviction, we cannot say beyond a reasonable doubt that the error in admitting the confession did not materially affect the result of the trial to the prejudice of the defendant or that it was "harmless error." Error in the admission of this evidence requires a new trial.

Since the defendant is entitled to a new trial under *Miranda,* we do not consider the effect of G.S. 7A-457, which was amended by the 1971 Adjourned Session of the General Assembly, on the admission of defendant's statement.

For the reasons indicated, there must be a new trial.

New trial.

STATE OF NORTH CAROLINA v. WINFRED ALLEN RUMMAGE

No. 66

(Filed 15 December 1971)

1. **Homicide § 28— self-defense — instructions — reputation of deceased as violent man**

In this homicide prosecution in which there was plenary evidence that deceased was a dangerous and violent man when he was intoxicated and that he was intoxicated at the time he was fatally shot, the trial court erred in failing to charge as to the bearing the reputation of deceased as a violent man might have had on defendant's reasonable apprehension of death or great bodily harm at the time deceased allegedly attacked or threatened to attack defendant.

2. **Homicide § 6— involuntary manslaughter**

Involuntary manslaughter is the unintentional killing of a human being without malice, premeditation or deliberation which results from the performance of an unlawful act not amounting to a felony, or not dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from the culpable omission to perform some legal duty.

3. **Homicide § 6— voluntary manslaughter**

Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation.

4. **Homicide § 27— instructions on manslaughter — intentional killing**

The trial court did not err in charging the jury that "Generally speaking, manslaughter is the *intentional* unlawful killing of a human being without malice, either express or implied, and without deliberation or premeditation."

5. **Homicide § 27— instructions on manslaughter — heat of passion**

In its instructions on manslaughter, question posed by the court as to whether defendant killed deceased in the heat of passion was inappropriate where there was no evidence that defendant killed deceased in the heat of passion.

6. **Homicide § 27— instructions — excessive force in self-defense — manslaughter**

In this homicide prosecution, the court's instructions did not give defendant the benefit of the possibility that second degree murder might be mitigated to manslaughter by reason of the use of excessive force while acting in self-defense.

7. **Homicide § 14— intentional killing with a deadly weapon — presumptions**

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot a human being with a deadly weapon and thereby proximately caused his death, the presumptions arise that the killing was (1) unlawful and (2) with

malice; nothing else appearing, such person would be guilty of murder in the second degree.

8. **Homicide § 27— instructions on manslaughter — use of words "intentional killing"**

Where all the evidence in a homicide prosecution showed that deceased's death was proximately caused by defendant's intentional use of a deadly weapon, and defendant relied on the defense of self-defense, the court's frequent interchangeable use in the charge on manslaughter of the words "intentional killing" and "intentional shooting" bore too heavily against defendant by pointing to a finding of malice.

9. **Homicide § 23— instructions — failure to distinguish between second degree murder and manslaughter**

In this homicide prosecution, the trial court did not apply the law to the facts so as to distinguish clearly between second degree murder and manslaughter by questions which the court instructed the jury to consider in determining defendant's guilt or innocence of second degree murder or of manslaughter.

APPEAL by defendant from *Bowman, S.J.*, 1 March 1971 Session of STANLY Superior Court.

The evidence offered by the State and defendant tends to show that defendant operated an establishment known as "Snipes Place" which consisted of one room adjoining his living quarters in a four-room concrete block building. An outside door opened into the front room occupied by "Snipes Place," which room was approximately 11 feet wide. The room was divided by a concrete block bar some 3½ feet high and 7 feet long. There were benches lining the front portion of the room, and behind the bar were a drink box and cabinet. Defendant slept in a bedroom that opened into the area behind the bar.

On 19 January 1970, between 2:30 and 3:00 o'clock p.m., Noah Mabry (the deceased), Junior Almond and Jake Coley were in Snipes Place. Mabry and Coley were arguing, and Mabry was cursing Coley. Defendant came from his bedroom into the passage area between the end of the bar and the wall, and told Mabry that he was "not going to have this mess going on in here." He ordered Mabry to sit down and took a wooden stick and pushed Mabry in the abdomen. Defendant reached into a cabinet, obtained a pistol, and put it in his hip pocket. Mabry sat down on the bench by the wall, but immediately arose and moved towards defendant, stating that he would knock hell of defendant. Mabry had his right hand in his pocket, and when

he was within four or five feet of defendant, who was still standing at the end of the bar, defendant shot Mabry one time in the upper chest with a .25 caliber pistol. Mabry died instantly.

Defendant testified that he had sent Mabry away from his place earlier in the day and at that time Mabry had stated, "Well, I'm going. I'm coming back and I will have a gun." Defendant further testified that he had known Mabry for ten or twelve years and that when he was drinking he was a dangerous man. He stated that on 19 January 1971 Mabry had been drinking. He also related that three days earlier Mabry had shot a .22 caliber pistol at defendant's feet and had on another occasion pulled a knife on defendant at his place of business. He thought that Mabry had a gun at the time he was shot. Defendant stated that before he shot he had backed up as far as he could go and had warned Mabry to stop. He stated: "At the time I shot Noah, he was standing with his right hand in my face—just like he was going to grab me at any minute. His hand was within a foot of my face. Noah said, 'You are the god-damned son of a bitch that I am going to get.' He was mad, and I was scared of him . . . ."

Junior Pierce Almond, testifying for the State as to the events immediately before the shooting, stated: "After Noah sat down, he sprang back up. He jumped up real fast. Noah was saying something at this time, I don't recall what he was saying. I couldn't understand it. . . . Noah Mabry was in the process of walking at the time when he was shot. He got within three or four feet from Wink at the time he was shot. He was walking toward Winfred Rummage when he was shot. At the time he was shot, he had stopped. He was reaching out for Wink Rummage with his left arm. He pulled his right hand out of his pocket and pulled back his right hand. At the time Noah Mabry was shot, Noah Mabry had his left hand out just in front of Wink Rummage's face and he had his right hand pulled back behind his body."

The deputy sheriff who investigated the killing found two penknives and some 35 rounds of .22 caliber ammunition on Noah Mabry's body. Neither of the knives was open.

The jury returned a verdict of guilty of murder in the second degree, and the trial judge imposed a prison sentence of not less than twenty years nor more than twenty-five years. Defendant appealed.

This case is transferred for initial appellate review by the Supreme Court under an order entered pursuant to G.S. 7A-31(b)(4).

Attorney General Morgan and Assistant Attorney General Chalmers for the State.

Coble, Morton & Grigg, by Ernest H. Morton, Jr., for defendant.

BRANCH, Justice.

Defendant contends that the trial judge erred by failing to apply evidence offered as to deceased's violent character to the question of defendant's reasonable apprehension of death or great bodily harm from the alleged attack by deceased.

This question was considered by the Court in the case of *State v. Riddle,* 228 N.C. 251, 45 S.E. 2d 366. There defendant introduced evidence that deceased was a man of violent character, and the trial judge, in his charge, failed to explain the effect that such reputation might have upon defendant's reasonable apprehension of death from the attack, to which his evidence pointed. Before the formal charge to the jury and during the trial, the trial judge stated:

> "Gentlemen of the jury, yesterday the defendants in this case offered evidence tending to show that the deceased man, Andrew Hoyle, was a man of dangerous and violent character. Where defense interposed is that of self-defense, such evidence is competent. Evidence of the general reputation of the deceased is not competent or material in the case, but as the Court has stated, where the defendant interposed his self-defense, then it is proper to show that the deceased was a man of dangerous and violent character."

This Court held that the failure to charge on the violent character of deceased resulted in prejudicial error notwithstanding the absence of a request for special instructions.

[1] In instant case there was plenary evidence that deceased was a dangerous and violent man when he was intoxicated. There was also evidence that he was intoxicated at the time he was fatally shot. The trial judge failed to charge as to the bearing the reputation of deceased as a violent man might have had on

defendant's reasonable apprehension of death or great bodily harm at the time deceased allegedly attacked or threatened to attack defendant. This was error.

Nevertheless, we are reluctant to hold that this error, standing alone, constituted reversible error, since the trial judge had otherwise fully charged on self-defense. We therefore consider other portions of the charge which defendant assigns as error.

Defendant's Assignment of Error No. 4 is that "The court erred in charging the jury that voluntary manslaughter was an intentional killing . . . ."

[2] Involuntary manslaughter is the unintentional killing of a human being without malice, premeditation or deliberation, which results from the performance of an unlawful act not amounting to a felony, or not naturally dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from the culpable omission to perform some legal duty. *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485; *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155.

[3] Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. *State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Street,* 241 N.C. 689, 86 S.E. 2d 277.

Some confusion has arisen in this jurisdiction as to the definition of manslaughter because the court on occasion defines manslaughter without indicating whether it be voluntary manslaughter or involuntary manslaughter.

Defendant argues that voluntary manslaughter must be an unintentional killing. In support of this contention he cites and relies on *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886. There the Court, *inter alia,* stated:

> "Evidence of manslaughter is lacking. The crime is defined as the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation, *and without the intention to kill or to inflict serious bodily injury. State v. Kea,* 256 N.C. 492, 124 S.E. 2d 174; *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889; *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70." (Emphasis ours.)

The quotation from *Roseboro* appears to define involuntary manslaughter. The authorities there cited do not purport to define voluntary manslaughter.

In *State v. Baldwin,* 152 N.C. 822, 68 S.E. 148, Hoke, J., speaking for the Court, stated:

> ". . . Manslaughter is the unlawful killing of another without malice, and, under given conditions, this crime may be established, though the killing has been both unlawful *and intentional.* Thus, if two men fight upon a sudden quarrel and on equal terms, at least at the outset, and in the progress of the fight one kills the other—kills in the anger naturally aroused by the combat—this ordinarily will be but manslaughter. In such case, though the killing may have been both unlawful and intentional, the passion, if aroused by provocation which the law deems adequate, is said to displace malice and is regarded as a mitigating circumstance reducing the degree of the crime." (Emphasis ours.)

[4] This Court has also recognized that under given circumstances a person may be justified in intentionally killing when he acts in self-defense. *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24. Yet, such person may be guilty of voluntary manslaughter when an intentional killing results from excessive use of force while he is acting in self-defense. *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305; *State v. Wynn, supra.* It follows that under the circumstances of this case it was not error for the trial judge to charge that "Generally speaking, manslaughter is the intentional unlawful killing of a human being without malice, either express or implied, and without deliberation or premeditation."

[9] However, further examination of the charge reveals that the trial judge did not apply the law to the facts so as to clearly distinguish between manslaughter and second degree murder. In his final mandate to the jury the judge chose to use the vehicle of apparently standardized questions to meet the requirements of G.S. 1-180. In this connection the record shows that the judge charged:

> "Now, when you come to consider whether the defendant is quilty or innocent of the charge of murder in the second degree, I instruct you that you should ask these questions:

1. Did the deceased die as a result of any wound inflicted upon him by the defendant on or about the 19th day of January, 1971?

2. Did the defendant intentionally shoot and kill the deceased, Noah Mabry?

3. Did the defendant kill him intentionally and with malice?

4. Did he kill the deceased with a deadly weapon?

If you so find and are satisfied from the evidence and beyond a reasonable doubt, the burden being upon the State to so satisfy you, that the truth requires an affirmative answer to each, all, and every one of these four questions; that is, that all of these questions should be answered 'Yes,' then it would be your duty to convict the defendant of murder in the second degree and return that as your verdict, unless the defendant has established to your satisfaction from the evidence in this case—that is all the evidence in this case—either that offered by the State or that offered by the defendant, and has established to your satisfaction not beyond a reasonable doubt, not by the greater weight of the evidence, but only to your satisfaction the legal provocation which will take from the crime the element of malice and thus reduce it to manslaughter, or which will excuse it altogether on the grounds of self-defense, in which latter event, you will return a verdict of not guilty of second degree murder.

. . . .

If and when you come to consider his guilt—that is, the defendant's guilt—or innocence to the charge of manslaughter, I instruct you that you should ask yourselves these questions:

1. Did the deceased die as a result of wounds inflicted upon him by the defendant on this occasion?

2. Did the defendant unlawfully and intentionally shoot and kill the deceased?

3. Did the defendant kill the deceased intentionally?

4. Did the defendant kill the deceased unlawfully in the heat of passion by reason of anger suddenly aroused and

before sufficient time had elapsed for passion to subside and reason to resume its control?

If you find and are satisfied from the evidence and beyond a reasonable doubt, the burden being upon the State of North Carolina to so satisfy you, that the truth requires an affirmative answer to each, all, and every one of these four questions; that is to say that each of these questions should be answered 'Yes'—then it would be your duty to convict the defendant of manslaughter, unless he has established merely to the satisfaction of the jury the truth of the facts upon which he relies to make good his plea of self-defense, in which latter event, it would be your duty to acquit the defendant; or if you are not so satisfied of the defendant's guilt, it would be your duty to return a verdict of not guilty; or if you have a reasonable doubt as to the defendant's guilt, it would be your duty to give him the benefit of that reasonable doubt and to acquit him."

The judge had previously charged the jury:

"When an intentional killing is admitted or established, the law presumes malice from the intentional use of a deadly weapon as such, and the defendant is guilty of murder in the second degree unless he can satisfy the jury of the truth of the facts which justify his acts or mitigate it to manslaughter."

The content of the questions posed as to second degree murder was identical with the first three questions presented as to manslaughter except for the words "without malice."

[5, 6] The fourth question stated concerning the charge of manslaughter was inappropriate, since there was no evidence that defendant killed deceased in "the heat of passion." Nor did the charge at this point give defendant the benefit of the possibility that the charge on second degree murder might be mitigated to manslaughter by reason of the use of excessive force while acting in self-defense.

[7] It is a well settled principle of law in this jurisdiction that when the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot a human being with a deadly weapon and thereby proximately caused his death, two presumptions arise: (1) that the killing was unlaw-

ful, and (2) that it was done with malice. Nothing else appearing, such person would be guilty of murder in the second degree. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

> ". . . When the presumption from the intentional use of a deadly weapon obtains, the burden is upon defendant to show to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the grounds of self-defense." *State v. Cooper, supra.*

[8] All the evidence in this case shows that deceased's death was proximately caused by defendant's intentional use of a deadly weapon. Thus, the frequent interchangeable use in the charge on manslaughter of the words "intentional killing" and "intentional shooting" bore too heavily against defendant by pointing to a finding of malice.

[9] The content and form of the questions did not clearly apply the law to the facts, and the charge left the jury with no clear choice between second degree murder and manslaughter. This defect was not remedied by other portions of the charge.

The confusion of the jury as to the difference between manslaughter and second degree murder was evidenced by the fact that after 35 minutes of deliberation, the jury returned to the courtroom and the foreman of the jury stated to the court: "We'd like to know the difference between manslaughter and second degree murder again." Whereupon, the trial judge repeated the general definitions of manslaughter and second degree murder which he had previously given, without any further application of the law to the facts of the case.

The errors in the charge require a

New trial.

STATE OF NORTH CAROLINA v. FREDDY RAY JONES

No. 63

(Filed 15 December 1971)

1. **Criminal Law § 104— motion for nonsuit — consideration of defendant's evidence**

On motion for nonsuit in a criminal case, defendant's evidence, unless favorable to the State, is not to be taken into consideration; however, when not in conflict with the State's evidence, it may be used to explain or clarify that offered by the State.

2. **Homicide § 14— burden of proof**

In any prosecution for a homicide the State must prove two things: (1) that the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant.

3. **Homicide § 21— insufficiency of evidence of defendant's guilt**

In this prosecution of defendant for the murder of his wife, the State's evidence, while raising a strong suspicion of defendant's guilt, was insufficient for submission to the jury where it tended to show only that defendant's wife was murdered by an assassin who shot her in the back and in the head, that defendant had the opportunity to commit the crime, and that at the time his wife was killed defendant was drunk and intermittently violent.

APPEAL by defendant from *Ervin, J.*, 16 November 1970 Criminal Session of DURHAM, transferred from the Court of Appeals for initial appellate review by the Supreme Court under the general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant, indicted under G.S. 15-144, for the murder of his 32-year-old wife, Peggy Chestnut Jones, on 20 December 1969, was convicted of murder in the second degree. He appeals a sentence of 15-18 years.

Attorney General Morgan; Staff Attorney Lloyd for the State.

Arthur Vann for defendant appellant.

SHARP, Justice.

All the evidence tends to show that Peggy Jones (Peggy) was murdered on the night of 20 December 1969 by an assassin who fired three .22-caliber bullets into her back and three into her head back of the left ear. The nature of the wounds and the powder burns on the flesh indicated to the pathologist who

autopsied the body that the weapon was discharged not more than six inches from her head.

The only question presented by this appeal is whether the State offered substantial evidence that defendant, Peggy's 36-year-old husband, was the murderer. The State's evidence is entirely circumstantial. There were no eyewitnesses to the crime, and the murder weapon was not produced. Defendant made no out-of-court statements with reference to the homicide. At the trial he offered evidence but did not testify. The testimony of his witnesses did not aid the State's case or suggest the perpetrator of the crime.

On 20 December 1969 defendant operated the business known as J. P. Jones & Son, a general store, on Angier Avenue in Durham. His residence was located on the same side of the street, 50 to 75 yards west of the store. The two lots were separated by an unpaved street, Jones Circle. Defendant and Peggy worked regularly in the store with three full-time employees. The store was in good financial condition and, on the evening of December 20th, it was open for the pre-Christmas business.

The State's evidence, and that of defendant which supplements and explains it, tends to show the following course of events involving Peggy and defendant on the evening of 20 December 1969:

About 8:05 p.m., Mrs. Marjorie Taylor and her 12-year-old daughter went to the Jones store to look for a piece of furniture. Defendant did not have it, but he produced a furniture catalog and told her that he could "get it for her." His face was flushed; he had "the odor," and she could tell that he had been drinking. She did not care to do business with him in that condition; so she terminated the discussion by buying a small item for her daughter. While she was paying for it, Peggy came in the front door. As she passed the cash register she said to defendant, "What in the hell is the register drawer doing open, Freddy?" It was Mrs. Taylor's impression, however, that defendant did not hear what she said.

Peggy walked toward the back of the store, and moments thereafter Mrs. Taylor heard something fall and break. It sounded like glass. At that time it was between 8:25 p.m. and 8:35 p.m.

Between 8:40 and 8:45 p.m. defendant arrived in his green pickup truck at the Durham County ABC store on Miami Boulevard, about one and a half miles from J. P. Jones & Son. Defendant was so drunk that he fell to the ground when he got out of the vehicle. However, he got up, entered the store, put five or six dollars on the counter, and demanded "a pint." Defendant was wearing a light tan windbreaker (State's Exhibit 11) and dark pants. He appeared neat and had no abrasions or scratches on him. J. H. Bailey, a salesman, who had known defendant for years, refused to sell him any liquor because he was drunk. This refusal angered defendant, and he "acted like a wild man." Bailey was about to call the sheriff when J. O. Strayhorn came in and said he would take defendant home.

Strayhorn got defendant out of the ABC store, but when he tried to take him home he "couldn't reason with him." Defendant got into his truck, "backed up and took off." He narrowly missed colliding with a tractor-trailer unit as he entered the highway.

Between 9:05 and 9:15 p.m. defendant drove his pickup truck into the yard of Graham Lovitte, approximately two and a half miles from the Miami Boulevard ABC store. Earlier in the day defendant had agreed to deliver a TV set which Lovitte had purchased from him. Hearing a noise, Lovitte went outside to find defendant lying on the ground. He had driven his truck into the back of a parked car. Defendant was not hurt at all. He was drunk, incoherent, and determined to drive the truck away. Lovitte took possession of his keys and tried to telephone defendant's brother, Michael. Being unable to reach him he called defendant's mother who arrived about 9:25 or 9:30. She persuaded defendant to get into her automobile and drove him to her home, located three or four doors from the Jones store on Angier Avenue. Lovitte followed them in his car.

About 9:40 p.m., I. P. Breedlove and his family stopped at the Jones store. It was unlocked and well lighted; the TVs were playing loudly. Finding no attendant upstairs and getting no answer when he called downstairs, Breedlove "got an uneasy feeling." Leaving his family in the car, he walked across Jones Circle to the Jones residence looking for defendant. The house was well lighted; the TV was playing. However, no one answered his knock and call. As he was leaving, a car, traveling at a high rate of speed, drove between the house and the store and disappeared behind the store. Breedlove immediately went to

the back of the store but found no car. He then drove to the home of defendant's mother. She was not at home, but he informed the young girl who came to the door (defendant's niece, Pam) that the store was unlocked and deserted. He told her that he would return to the store and wait in front until somebody came. In a few minutes defendant's brother, Michael Jones, came to the store, and Pam arrived shortly thereafter. Michael expressed his appreciation to Breedlove, who then departed.

In the meantime defendant and his mother had arrived at her home and Lovitte had gone in search of Michael. He went to the store and observed Michael coming from defendant's house. After Breedlove's departure, Michael had gone across the street to defendant's home, leaving Pam at the store. After he had "rung the door bell, knocked and hollered," and received no answer, Michael turned the knob and went in. All the lights were on, including those on the Christmas tree; the television was playing. The kitchen stove was on. The pressure cooker was vibrating and a ham was cooking in the oven. In the living room a pile of snap beans were partially strung and snapped. He cut off the stove and returned to the store to be met by Lovitte, who told him defendant was at his mother's in a drunken condition, and she had great need for his assistance. Lovitte helped him cut off the televisions at the store. Neither one went down into the basement. Michael then locked the door and, about 10:00 p.m., he and Pam went to his mother's home. He found defendant very intoxicated and having difficulty breathing.

Michael (as defendant's witness) testified that his mother summoned a neighbor, Wayne Fowler, to help him handle defendant; that between 10:15 and 10:30 his sister, Mrs. Hight, arrived, and the two women left to go to defendant's home. (Apparently they went in search of Peggy after having tried unsuccessfully to reach her.)

Sometime between 10:30 and 11:00 p.m. Peggy's mother, Mrs. B. T. Stephens, who had last talked to her daughter about 7:30 p.m. on the telephone, went to the Jones residence with her husband "to find out what was wrong with Peggy." They too found the house deserted—presumably just as Michael had left it. Mrs. Hight and defendant's mother arrived at the house shortly after they did. Mr. Stephens and Mrs. Hight then went to the store. Mrs. Hight unlocked the door with Peggy's key, which Mrs. Stephens had found and given her. Mrs. Hight dis-

covered Peggy's body downstairs in the storage room at the back and cried out for Mr. Stephens. Peggy was lying on her right side, somewhat on her face, in a pool of partially dried blood. The blood on her face and hair was dried. Mr. Stephens did not step in the blood. Mrs. Hight first called an ambulance and then telephoned Michael. He left defendant with Wayne Fowler and came immediately. As soon as he viewed the body he called the sheriff.

The sheriff's office received the call to come to Jones' store at 11:12 p.m. Deputy Wilkerson arrived there at 11:19 and immediately called the medical examiner and Deputy Allen. Deputy Gray and Dr. D. R. Perry, Durham County medical examiner, arrived at the Jones store about 11:30 p.m.

Dr. Perry examined the body, which he found in a pool of blood in the storage room. The body was cold; the blood on it dry and crusty. The blood on the floor was also dry. It had been stepped in and smeared. Footprints were visible on the floor. In Dr. Perry's opinion, Peggy had been dead a minimum of three hours and a maximum of five. Deputy Sheriff W. A. Allen, who arrived shortly after Dr. Perry, inspected the office space in the rear of the store on the street floor. He found desk drawers all closed. In one he discovered a money bag containing currency. In plain view on top of a desk was a twenty dollar bill with a note attached to it. The drawer of the cash register was open; it had money in it. In a desk drawer he observed some pistols. One was a semi-automatic military-type gun; one a blank pistol; and one a Spanish-made pistol. In the storage room he saw six .22-caliber revolver-type pistols in a pasteboard box. It was stipulated that the records of Brown-Rogers-Dixon Sporting Goods of Winston-Salem showed a sale of six .22-caliber revolvers to J. P. Jones & Son on 2 December 1969.

(Michael testified that when he and Pam went to the store to meet Mr. Breedlove, they had found a considerable amount of change "scattered helter-skelter" on the floor by the cash register and no currency in the register then. While he went to defendant's house looking for him and Peggy, Pam had picked up the money and put it in the cash register.)

After the body was removed, Michael and Mrs. Hight went with Officers Wilkerson and Gray to arrest defendant at the home of his mother. It took Michael, the two officers, and anoth-

er man to get defendant into the patrol car and take him to jail. There, in his right-hand pocket, Wilkerson found five empty .22-caliber cartridges and three live rounds. On the arm of his jacket (State's Exhibit 11) they saw several spots, which were later determined to be type O blood. He found no cuts or signs of bleeding about his person. Defendant has blood type "O" and so did deceased.

As soon as defendant was placed in the cell block he began to vomit, dig at his chest, complain of chest pains, and say he could not breathe. The four men who had brought him to jail took him to the emergency room at Watts Hospital. There he began screaming and "carrying on" to such an extent that he had to be restrained. Dr. Thakur examined him at 1:10 a.m. on December 21st. He made a blood test, pumped his stomach, x-rayed his chest and gave him shots of paraldehyde in the hip to calm him down. Defendant had no external injuries of any kind. Dr. Thakur's diagnosis was "overdose of alcohol and possibly of stimulant drugs." (Michael testified that defendant kept asking him and others to call Peggy and Jeff, his son, "to come to his comfort" and that defendant told Dr. Thakur his wife hit him in the chest and he should mash it and hit him also.) Defendant was returned to jail sometime around 3:00 a.m., and Michael remained with him the rest of the night.

Defendant's shoes were not examined for blood on the soles and no paraffin or Harrison test was made on his hands to determine whether he had recently fired a gun.

The following morning, around 7:00 to 7:30, Deputy Allen made a further investigation at the Jones store. In the storeroom where Peggy's body had been found he saw a broken whiskey bottle on top of a crate of soft drinks. There was no sign of liquid on the floor or surrounding area. He also observed that one of the quarter panes was broken in one of the windows in the basement door. The glass was on the inside of the building on the floor.

Defendant's evidence tended to show that Peggy was seen alive between 8:45 and 8:50 p.m.; that in the opinion of the ambulance attendant, who removed her body, she had been dead only one and a half to one and three-fourths hours; that on 17 December 1969 defendant had taken a .22-caliber pistol to the gunshop for repairs and had pulled some .22 bullets

from the pocket of his jacket (S-11) saying that he had "fired five rounds out of here"; that this gun remained in the shop until January 1, 1970, when Michael retrieved it; that the blood specks on the jacket were the blood of a customer who had had a nosebleed while loading a chair he had purchased at the Jones store on the morning of December 20th; and that defendant's character was good "except for drinking."

[1] In considering a motion for nonsuit in a crimnial case the evidence must be considered in the aspect most favorable to the State. *State v. Pope,* 252 N.C. 356, 113 S.E. 2d 584. The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, when not in conflict with the State's evidence, it may be used to explain or clarify that offered by the State. *State v. Sears,* 235 N.C. 623, 70 S.E. 2d 907.

[2] In any prosecution for a homicide the State must prove two things: (1) that the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant. *State v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908. "When a motion is made for a judgment of nonsuit or for a directed verdict of not guilty, the trial judge must determine whether there is substantial evidence of every essential element of the offense. . . . It is immaterial whether the substantial evidence is circumstantial, or direct, or both." *State v. Davis,* 246 N.C. 73, 76, 97 S.E. 2d 444, 446. *Accord, State v. Burton,* 272 N.C. 687, 158 S.E. 2d 883; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

[3] The State's evidence in this case establishes a brutal murder. It shows that defendant had the opportunity to commit it and "beget[s] suspicion in imaginative minds." *State v. Palmer, supra* at 214, 52 S.E. 2d at 914. All the evidence engenders the question, if defendant didn't kill his wife, who did? To raise such a question, however, will not suffice to sustain a conviction.

The statement of Merrimon, Chief Justice, in *State v. Goodson,* 107 N.C. 798, 801, 12 S.E. 329, is pertinent here: "The full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excites suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party."

The circumstances raise a strong suspicion of defendant's guilt, but we are obliged to hold that the State failed to offer substantial evidence that defendant was the one who shot his wife in the back. The evidence proves only that at the time his wife was killed defendant was degradedly drunk and intermittently violent.

The motion for nonsuit must be sustained. *State v. Pope, supra; State v. Carter,* 204 N.C. 304, 168 S.E. 204, and cases cited therein.

Reversed.

STATE OF NORTH CAROLINA v. CLAUDE ELBERT SANDERS

No. 76

(Filed 15 December 1971)

1. **Criminal Law §§ 53, 99; Homicide § 15— cause of death — pathologist's testimony — court's rephrasing of question by solicitor**

In this homicide prosecution, the trial court did not err in reframing for clarification purposes the solicitor's question to the pathologist who autopsied the body as to what he found to be the cause of death and in allowing the pathologist to testify as to the cause of death.

2. **Homicide § 19— requiring defendant to show scars to jury**

In this homicide prosecution in which defendant testified that the deceased was cutting him with a razor and that he shot deceased in self-defense, the trial court did not err in directing defendant to comply with the solicitor's request on cross-examination that he remove his shirt and undershirt and show the jury any scars left as a result of the cuts.

3. **Criminal Law § 154— unavailability of transcript of defendant's testimony and court's charge**

Defendant is not entitled to a new trial by reason of the unavailability of the transcript of defendant's direct testimony and the court's charge, which had disappeared from the court reporter's records, where defendant has failed to allege any error in the exclusion of any material evidence or in the charge, and the two defense attorneys and the trial judge are alive and available so that the case on appeal could have been prepared from the attorneys' recollections of defendant's testimony and the charge, and if the solicitor objected thereto, the trial judge could have settled the case on appeal.

4. Criminal Law § 167— presumption of regularity in the trial

There is a presumption of regularity in a criminal trial, and in order to overcome that presumption matters constituting material and reversible error must be made to appear in the case on appeal.

5. Criminal Law § 154— case on appeal — settlement by court

There is no duty on the court to settle a case on appeal unless there is a disagreement between the solicitor and counsel.

6. Criminal Law § 161— necessity for assignments of error

Error otherwise than upon the face of the record proper must be made to appear and must be the subject of an assignment.

APPEAL by defendant from *Falls, J.,* November 30, 1970 Session, GASTON Superior Court. The appeal was docketed in the Court of Appeals and transferred here for initial review under our order dated July 31, 1970.

This is a criminal prosecution in which the defendant, Claude Elbert Sanders, was indicted for first degree murder in the killing of Isaac James Adams. The indictment, proper in form, fixes October 3, 1970, as the date of the killing. At the time of the arraignment, the solicitor announced the State would not seek a conviction of the capital felony, but for murder in the second degree or manslaughter as the evidence might warrant. The defendant through court-appointed counsel, L. B. Hollowell, Jr. and Robert E. Gaines, entered a plea of not guilty.

The State's evidence disclosed that on October 3, 1970, Doris Adams, wife of the deceased, Isaac James Adams (I. J.); Cora Mills, the defendant's girl friend; and the defendant were in the home of Leroy Leach. The evidence indicated they were drinking. An altercation developed in which the defendant struck both Doris and Cora with his fists. Leroy seems to have objected and the visitors left the house. At the road nearby, Doris and the defendant continued their combat. She ripped his shirt and scratched him with her fingernails. Contact with his fist brought blood to her face.

It appears by inference that someone notified the deceased. At any rate, he soon appeared on the scene accompanied by Charles Currence and Robert Smith. Doris Adams and the defendant, at the time, were "arguing, jawing at each other." The Currence vehicle stopped and all its occupants got out. The picture is hazy as to how the altercation developed. One eyewitness said that he saw the deceased and the defendant close

together. "I heard two gunshots first and then I heard three or four more. . . . I. J. . . . was walking away from Claude. He fell on the ground. . . . I didn't see nothing in I. J.'s hand." Another witness (Currence) said that the deceased was running away when the last four shots were fired. "I took I. J. to the hospital and he was dead when we got there."

Dr. Edward Kelman, a pathologist, performed an autopsy. He testified that he found four bullet wounds on the deceased. One bullet had passed entirely through the body. Three others had entered from the back and had lodged under the skin covering the chest. These bullets were .38 caliber. Two had penetrated the lungs causing massive hemorrhage and death.

The defendant objected to the testimony of the pathologist as to the cause of death. On cross-examination the pathologist testified blood analysis disclosed a high alcoholic content.

The defendant testified as a witness. The transcript of his direct examination is not available for the reason hereinafter explained. However, his cross-examination is in the record. The cross-examination disclosed that at the time he shot the deceased, the deceased was trying to cut him with "the shaving kind of razor, with a white handle." He admitted he and Doris had a difficulty at Leroy's and that they continued to the road. While they were in a scuffle both of them fell. She said: "Go get I. J. so he can kill the son-of-a-bitch. That was supposed to have been me. . . . I pushed her down the bank and we both fell down there." At this juncture the Currence car stopped, the deceased, Currence, and Robert Smith got out. "I heard Doris say three times, 'Cut him! Cut him! Cut him!' . . . All right, I first shot. . . . I shot up in the air twice. After the shooting, . . . I throwed my gun away and went to the police station."

The jury returned a verdict finding the defendant guilty of manslaughter. From the judgment that he serve a prison sentence of not less than twelve nor more than fifteen years, he gave notice of appeal. The court appointed defendant's trial attorneys to prosecute his appeal. On defendant's application, the court extended the time for filing the case on appeal and directed the court reporter to furnish defense counsel with a transcript of the court proceedings. At the time the court reporter began preparing the transcript, she discovered the defendant's direct testimony and the court's charge had mys-

teriously disappeared from her records. She notified the court. Part of her affidavit is here recorded.

> " . . . After being notified that the defendant wished to appeal to the North Carolina Court of Appeals, I discovered that my complete Stenographic record had disappeared in spite of my normal procedures of filing my records. This is the only record that has ever disappeared during my reporting career of approximately thirty years.
>
> The partial tape recording of the trial included all trial proceedings except the direct testimony of Claude E. Sanders and the Judge's Charge and motions made at the conclusion of the trial.
>
> Due to the disappearance of my record, I have not been able to deliver to the defendant's attorneys and the Solicitor a transcript of the direct testimony of the defendant, Claude E. Sanders, and the Judge's Charge, and motions made at the conclusion of the trial."

The court found facts as follows:

> " . . . (T)hat Opal W. Blair reported the trial by means of a stenographic machine and also by means of a tape recording of a portion of the trial proceedings; that Claude Elbert Sanders, the defendant, testified in his own behalf at his trial, and that the defendant's attorneys made motions at the conclusion of the trial; that after being notified that the defendant wished to appeal the jury's verdict of guilty for the crime of manslaughter, Opal W. Blair discovered that her complete stenographic record had disappeared in spite of normal procedures of filing her records; that this is the only record of Opal W. Blair that has ever disappeared during her reporting career of approximately thirty years; that the partial tape recording of the trial reported by Opal W. Blair included all trial procedures except the direct testimony of Claude Elbert Sanders, the Judge's Charge, and motions made at the conclusion of the trial; that due to the disappearance of her records, Opal W. Blair has been unable to deliver to the defendant's attorneys and to the Solicitor a transcript of the direct testimony of the defendant, Claude Elbert Sanders, the Judge's Charge, and motions made at the conclusion of the trial; that the defendant's attorneys and

the Solicitor have therefore been unable to secure a transcript of the direct testimony of the defendant, Claude Elbert Sanders, the Judge's Charge, and the motions made at the conclusion of the trial."

Robert Morgan, Attorney General by Millard R. Rich, Jr., Assistant Attorney General, for the State.

Robert E. Gaines, L. B. Hollowell, Jr., and Mark Galloway for defendant appellant.

HIGGINS, Justice.

[1] The defendant assigns as error the failure of the court to sustain his objection to the evidence of Dr. Kelman who performed the autopsy. The court found Dr. Kelman to be a medical expert and a qualified pathologist. When the solicitor asked Dr. Kelman what he found to have been the cause of death, the defendant objected. Without ruling on the objection, the court reframed the question and the doctor answered that he found four bullet wounds in the body of I. J. Adams, one of which had passed entirely through the body. Three other bullets had penetrated from the back and lodged under the skin of the chest. Two of these bullets passed through his lungs causing massive hemorrhage and death.

Charles Currence, a witness to the shooting, testified the deceased was running away when the defendant fired the last four shots. He took I. J. to the hospital. He was dead on arrival.

The defendant objected to the court's question and to the testimony as to the cause of death. The court's question was clarifying. The answer of the doctor was material and competent. The objection is not sustained.

[2] During the defendant's cross-examination, he testified the deceased was cutting him with a razor and he began shooting in self-defense. The solicitor on cross-examination asked him to remove his shirt and undershirt and show the jury any scars left as a result of the cuts. Defense counsel objected. The court overruled the objection and directed the defendant to comply with the solicitor's request. The State had offered evidence the deceased was unarmed. The defendant claims he was being cut with a razor-like instrument. The absence or presence of scars would be material on the defendant's plea of self-defense. The exception is not sustained.

[3] The plaintiff placed his main reliance for a new trial on the defective condition of the stenographic report of the trial proceedings. The reporter's affidavit and the court's findings of fact disclose the reasons for the absence of the defendant's direct testimony and the court's charge. To be entitled to a new trial, surely the defendant and his counsel should suggest more than the failure of the record to show the exact words of his direct testimony. The defendant is alive and available. He is now represented by the two trial attorneys who placed him on the stand and conducted his direct examination. They should know whether the court excluded from the jury any of the defendant's material testimony. If so, they should be able to recall its substance and note it in the case on appeal. The erroneous exclusion of material evidence is, however, not even suggested. All that is claimed is that it is absent.

It is worthy of note in this connection that the defendant's cross-examination is reported in full. The admissions on cross-examination tend to show that the essentials of the State's evidence are not challenged by defense testimony. The defendant's own admissions would appear to be sufficient to take the case to the jury. The defendant has failed to show, or even allege, any error in the admission of evidence. While his direct testimony is not in the record, the jury heard all he said.

The only objection with respect to the charge is that the record of it is not in the hands of defense counsel. They heard the charge the judge gave. Both they and the judge are alive and available. Before a new trial should be ordered, certainly enough ought to be alleged to show that error was probably committed. If defense counsel even suspect error in the charge, they should set out in the record what the error is. If the solicitor does not object, their's becomes the case on appeal. If he does object, the court could then settle the dispute. The appellate court would then have something tangible upon which to predicate a judgment. The material parts of a record proper do not include either the testimony of the witnesses or the charge of the court. *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669.

[4, 5] After all, there is a presumption of regularity in the trial. In order to overcome that presumption it is necessary for matters constituting material and reversible error to be made to appear in the case on appeal. Not even a suggestion of error appears in this record. The failure to include the court's charge

is by no means fatal. *State v. Tinsley, supra.* There was no duty on the court to settle a case on appeal until a disagreement. *Hall v. Hall,* 235 N.C. 711, 71 S.E. 2d 471.

The authorities cited by defendant are not applicable here. In *State v. Huggins,* 126 N.C. 1055, 35 S.E. 606, the defendants were convicted of murder in the second degree. The only question involved in the appeal was the sufficiency of the evidence to survive the State's motion to dismiss. In settling the case on appeal, the trial judge ordered that the entire testimony be made a part of the record. Thereafter the record containing all the testimony was lost and, of course, could not be included in the case on appeal. This Court ordered a new trial. There was no record at all before the Court. In *State v. Parks,* 107 N.C. 821, 12 S.E. 572, the case on appeal, exceptions were sent to the judge for settlement. However, the judge died and the record was lost. On certiorari this Court ordered a new trial. In *State v. Powers,* 10 N.C. 376, this Court said:

> "The defendant has appealed from the judgment rendered against him, but no case is made up to enable this Court to judge whether the law has been duly administered; and we must, therefore, have inspected the record to decide on the legality of the judgment. But it appears from the certificate of the judge that a case presenting the points was intended to have been made up, but was prevented from his having lost the notes of the trial. Under these circumstances there is no other mode by which the justice of the case can be attained but by awarding a
>
> New trial."

There was no record at all before the Court.

[6] In the instant case all parts of the record proper are before us. Hence it is our duty to examine it, and to take notice *ex mero motu* of any disclosed error or defect. Error otherwise than upon the face of the record must be made to appear and must be the subject of an assignment. The absence of the defendant's testimony and the court's charge is accounted for. Absent, also, are any claims or suggestions of error prejudicial to the defendant.

The State's evidence makes out a strong case. The defendant's admissions on cross-examination and the number of shots

fired, three in the back, tend to rebut any claim of self-defense. While we do not have the record of defendant's direct testimony, the jury did hear and consider every word the defendant said on both direct and cross-examination.

In the trial, verdict and judgment, we find

No error.

STATE OF NORTH CAROLINA v. FLOYD LINDSEY HUDSON

No. 99

(Filed 15 December 1971)

1. **Rape § 18— assault with intent to commit rape — evidence of intent — failure to show attempted coition**

In a prosecution for assault with intent to commit rape, the State's evidence showing that the defendant continually and brutally assaulted the prosecutrix, a 14-year-old girl, was sufficient to support a jury inference that the defendant intended at some time during his assaults to rape the prosecutrix, even though the prosecutrix did not testify that the defendant ever attempted coition.

2. **Rape § 7— assault with intent to commit rape — elements of proof**

To convict a defendant on the charge of an assault with intent to commit rape, the State must prove not only an assault but also that the defendant intended to gratify his passion on the person of the woman, at all events notwithstanding any resistance on her part.

3. **Rape § 17— assault with intent to commit rape — element of intent**

It is not necessary that defendant retain an intent to commit rape throughout the assault on the female; the defendant would be guilty of the offense if he, at any time during the assault, had an intent to gratify his passion upon the female, notwithstanding any resistance on her part.

4. **Jury § 3; Constitutional Law § 29— guilty verdict by eleven jurors — award of new trial**

The return of a guilty verdict by eleven jurors — one juror having become ill during the trial — was a nullity, and the defendant is entitled to a new trial.

5. **Criminal Law § 146— nature of Supreme Court jurisdiction — notice ex mero motu of fatal defect**

The Supreme Court *ex mero motu* takes notice of the fact that a verdict was returned by eleven jurors only, a fatal defect appearing on the face of the record, and awards the defendant a new trial.

State v. Hudson

6. Jury § 3; Constitutional Law § 29— criminal trial — number of jurors

No person can be finally convicted of any crime except by the unanimous consent of twelve jurors who have been duly impaneled to try his case.

APPEAL by defendant from *Gambill, J.*, 4 January 1971 Session of CABARRUS, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant was tried upon a bill of indictment which charged that on 25 September 1970 he, a male person over the age of eighteen years, did feloniously assault Clemmie Hacker, a female, with intent to ravish, carnally know, and abuse her.

The evidence for the State tended to show: Clemmie (aged 14) lives with her mother and sister in Concord. Her father is dead. On 25 September 1970, about 10:00 p.m., Clemmie was alone at home when defendant, who had once washed and cleaned her mother's car, came to the door. He asked to use the telephone and she admitted him. Instead of telephoning, he "walked" Clemmie to his car and told her not to scream. She went with him because she was afraid. He said he'd bring her back in five minutes. Instead, he drove her to his trailer on a dirt road.

In the trailer, after taking off all his clothes, he produced a knife and said he would kill her if she did not disrobe; she did as he told her. She was menstruating. He "socked" her across the face, hit her nostril and crushed a bone. Her nose bled profusely. He hit her with his fist and knocked out four teeth. At some point she "accidentally got some blood on the sheets, and he got mad." At the trailer he did not attempt sexual intercourse with her, but he inserted his finger and, in addition, used her genitalia in a manner too revolting to relate. Thereafter he put on some different clothes, removed the sheets from the bed, and took her, naked, back to the car. She could hardly walk and fell on the gravel, but he made her get up and get into the car. He then "drove off from that place."

At some spot, where they were on the ground, he "took some kind of a bottle and jammed it into [her] vagina." She was still conscious and naked when they stopped at a bridge. He placed her on the sheets in some grass, choked her, and closed her left eye with a blow from his first. (Clemmie's testimony was

not elicited so as to give a chronological account of events, and from the transcript it is difficult to piece the story together. Whether this confusion results from the manner in which the solicitor conducted his direct examination, her injuries, or her natural timidity and embarrrassment, we cannot tell.)

Sometime before 2:00 a.m., a passing motorist saw a naked girl "down a bank at Rocky River Bridge" and notified the sheriff's office. Deputy Sheriff Eggers found Clemmie beneath the bridge, approximately twenty-five feet down a bank. She was nude; her face was swollen; and she was bleeding from the mouth and nose.

Clemmie was taken to the Cabarrus Hospital where, between 2:00 and 4:00 a.m., she was examined by a neurosurgeon. He found her in a state of shock, unable to give an adequate history. She was bleeding from the mouth and the back of her head; the upper teeth on the left side had been knocked out. Her whole face and neck were markedly swollen with multiple contusions and abrasions. She had multiple abrasions and scratches on the upper and lower extremities. A gynecologist repaired a laceration of the perineum.

About 2:00 on the morning of 26 September 1971, officers found defendant at his trailer-home, about two miles from Concord, with his "common-law wife," Mrs. Martha Christy. In the trailer the officers found Clemmie's eyeglasses and a torn accessory. Defendant had the odor of alcohol about him, but he did not appear to be drunk. He told the officers that earlier in the night Clemmie had let him in her house to use the telephone; that she was alone and he had taken her to his apartment where he removed her clothing; that he did not remember exactly what took place thereafter except that she had gotten blood on the bed sheets; that he had put the girl and the sheets into the car and left them at the Rocky River Bridge.

Defendant offered no evidence. His motion for nonsuit was denied. The jury's verdict was guilty as charged. From a sentence of 12-15 years, defendant appealed.

Attorney General Morgan; Assistant Attorney General Hudson for the State.

Johnson, Davis & Horton for defendant appellant.

SHARP, Justice.

[1] Defendant brings forward only one assignment of error, the failure of the court to allow his motion for nonsuit. He asserts that all the evidence tends to show that the purpose of his assaults upon Clemmie was not to rape her but to engage in perverted and unnatural sex acts.

Considering the grievous injuries which defendant inflicted upon Clemmie—especially the head injury—we may doubt whether she was able to remember and recount all that defendant did to her. Yet, upon the assumption that she told all, we hold her testimony sufficient to withstand the motion for nonsuit.

[2, 3] The requisites of the crime with which defendant is charged have been stated many times: To convict a defendant on the charge of an assault with an intent to commit rape the State must prove not only an assault but that the defendant intended to gratify his passion on the person of the woman, at all events and notwithstanding any resistance on her part. It is not necessary that defendant retain that intent throughout the assault; if he, at any time during the assault, had an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, *i.e.*, by facts and circumstances from which it may be inferred." *State v. Gammons,* 260 N.C. 753, 756, 133 S.E. 2d 649, 651. To convict a defendant of an assault with intent to commit rape "an actual physical attempt forcibly to have carnal knowledge need not be shown." 75 C.J.S. Rape § 77, p. 557 (1952).

Although Clemmie did not testify that defendant ever attempted coition, his attack upon her was indisputably sexually motivated, and we think the jury could reasonably infer from his treatment of her that defendant intended at some time during his continuous assaults to rape Clemmie if he could, notwithstanding any resistance on her part; that she, a girl of fourteen, confronted by a mature man, armed with a knife with which he threatened to kill her, resisted all she could. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112.

In *State v. Mehaffey,* 132 N.C. 1062, 44 S.E. 107, the defendant, aged fifty-four, appealed a conviction of assault with the intent to rape a fourteen-year-old girl whom he had employed to work on his farm. The State's evidence tended to show that in the course of an indecent assault upon her, the defendant twice inserted his finger into her person but then, for some unknown reason—perhaps because of her screams—he finally desisted. In sustaining the conviction, Chief Justice Clark said: "Whether he desisted for that reason, or because at his age he could not accomplish his purpose after so vigorous an opposition, or because he was physically unable to overcome her opposition, or because he did not intend to have intercourse with her by force, was a matter for the jury alone, and was properly left to them in connection with all the other evidence in the case. It is true, he desisted, that is to say, he did not succeed in having sexual intercourse with the girl. . . . [b]ut his failure is not conclusive of the absence of intent. . . . " (Citations omitted.) *Id.* at 1065, 44 S.E. at 108.

"Impossibility of having carnal knowledge of the girl does not, as a matter of law, prevent a man from feloniously so trying." *Huggins v. State,* 41 Ala. App. 548, 551, 142 So. 2d 915, 918.

Defendant was living with his common-law wife who, although absent from his trailer earlier in the evening, was there at 2:00 a.m. when the officers went for him. It may be inferred from this illicit arrangement and his anger when Clemmie bled on the sheets, that defendant was not impotent.

We hold that the evidence, when viewed in the light most favorable to the State, was sufficient to be submitted to the jury upon the issue of defendant's guilt of the crime charged.

[4, 5] Although defendant has not assigned it as error, and the Attorney General has ignored it, we must, *ex mero motu,* take notice of a fatal defect appearing upon the face of the record. Between the conclusion of the evidence and the judge's charge to the jury, a juror became ill and had to be excused. Whereupon, defendant and his trial counsel, Mr. Bedford W. Black (now deceased) "waived trial by twelve." They agreed that the eleven remaining jurors might pass upon defendant's guilt or innocence and that defendant would be bound by their verdict. The trial then proceeded with eleven jurors who "returned a verdict of guilty as charged."

It is a fundamental principle of the common law, declared in Magna Charta and incorporated in our Declaration of Rights, that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N. C. Const., art. I, § 24 (1971). *See* N. C. Const., art. I, § 13 (1868); *State v. Moss,* 47 N.C. 66 (1854); *State v. Stewart,* 89 N.C. 563 (1883). In this State, the only exception to the rule that "nothing can be a conviction but the verdict of a jury"*(State v. Alexander,* 76 N.C. 231, 233) is the constitutional authority granted the General Assembly to provide for the *initial* trial of misdemeanors in inferior courts without a jury, with trial *de novo* by a jury upon appeal. N. C. Const., art. I, § 24 (1971).

[6] It is elementary that the jury provided by law for the trial of indictments is composed of twelve persons; a less number is not a jury. It is equally rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains "not guilty." *State v. Stewart, supra; State v. Scruggs,* 115 N.C. 805, 20 S.E. 720 (1894); *State v. Rogers,* 162 N.C. 656, 78 S.E. 293 (1913); *State v. Rouse,* 194 N.C. 318, 139 S.E. 433 (1927); *State v. Camby,* 209 N.C. 50, 182 S.E. 715 (1935); *State v. Hill,* 209 N.C. 53, 182 S.E. 716 (1935); *State v. Norman,* 276 N.C. 75, 170 S.E. 2d 923 (1969). As noted in *State v. Norman, supra,* both the Judicial Council and the Constitutional Study Commission recommended to the 1969 General Assembly that the Constitution be modified so as to empower that body, if it so desired, to give a defendant the option of having his guilt passed upon by a judge rather than a jury. The General Assembly rejected the proposal; so it remains the law of North Carolina that no person can be finally convicted of any crime except by the unanimous consent of twelve jurors who have been duly impaneled to try his case.

In *State v. Rogers, supra,* during the defendant's trial for murder a juror became ill. The State was willing to call in another juror or to make a mistrial or to get an entirely new panel. Counsel for the defendant, however, insisted on proceeding with eleven jurors. Thereupon, in open court it was agreed by the defendant, his counsel, and the solicitor for the State that the trial would proceed with eleven jurors. The defendant expressly waived his right to have a full panel and agreed that the clerk should make no record of the fact that one of the

jury had been excused by consent. Upon his conviction of manslaughter, however, the defendant moved in arrest of judgment because he had not been convicted by a jury of twelve. The trial judge ruled that the defendant had estopped himself to assign this error and denied the motion. Upon appeal, Justice Brown, speaking for the Court, said: "The defendant may plead guilty, or *nolo contendere,* or *autrefois convict,* and of course the impaneling of a jury is unnecessary; but when he pleads not guilty in cases, such as this, where a trial by jury is guaranteed by the organic law, he must be tried by a jury of twelve men, and he cannot waive it." *Id.* at 660, 78 S.E. at 294. A new trial was ordered.

In *State v. Berry,* 190 N.C. 363, 130 S.E. 12, the defendant appealed his conviction of an assault with a deadly weapon. This Court said: "It appearing by the record that the defendant was tried and convicted by ten men, the conviction was improper and no judgment could be rendered. For the reason given, there must be a New trial." Id. at 364, 130 S.E. at 12.

In *State v. Rouse, supra,* a juror was taken very ill during the trial. By agreement of defendant, who was charged with a felony, his counsel and the solicitor, the juror was excused and the case concluded with eleven jurors. Upon conviction defendant appealed. In holding that defendant was not precluded by his agreement from assigning as error that the judgment against him was based upon the verdict of eleven jurors, Justice Connor said: "The decisions of this Court in support of the assignment of error are unanimous. . . . The verdict is a nullity. The defendant is entitled to a New trial." *Id.* at 318-19, 139 S.E. at 433.

The verdict in this case is likewise a nullity despite defendant's failure to assign his conviction by eleven jurors as error. If imprisoned under the sentence imposed defendant would be entitled to his release upon a writ of habeas corpus—for which he would, no doubt, apply in due time. There must be a

New Trial.

State v. Sanders

STATE OF NORTH CAROLINA v. HAYWOOD JAMES SANDERS

No. 123

(Filed 15 December 1971)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7; Safecracking — entering premises without permission — sufficiency of the evidence**

In a prosecution charging defendant with felonious breaking and entering, felonious theft, and safecracking and attempted safecracking, the State's evidence was sufficient to show that the defendant entered the premises described in the indictments without the permission of the owners.

2. **Criminal Law § 168; Burglary and Unlawful Breakings § 6— instructions — lapsus linguae — harmless error**

In a breaking and entering prosecution, the trial court's instruction that the defendant entered the building "with the consent of the owner," rather than "without the consent of the owner," was a *lapsus linguae* and did not warrant a new trial.

3. **Safecracking— verdict of "attempted safecracking"— sufficiency of verdict**

In a prosecution on indictment charging, in the statutory language, that the defendant "did unlawfully force open and attempt to force open a safe," a jury verdict finding the defendant guilty of "attempted safecracking" was sufficient to authorize judgment on the verdict. G.S. 14-89.1.

4. **Criminal Law § 124— the verdict — requisites and sufficiency**

A verdict should answer the issue raised by the State's charge of guilt contained in the indictment and the defendant's denial raised by his plea of not guilty.

5. **Safecracking— use of expressions "safecracking" and "attempted safecracking"**

Trial court's instruction which used the expressions "safecracking" and "attempted safecracking" as synonymous with the statutory language "force open" and "attempt to force open" a safe or vault was not erroneous. G.S. 14-89.1.

6. **Safecracking— attempted safecracking — sufficiency of the evidence**

Removing the dial of a safe, sawing off its hinges, chiseling out a part of the concrete bottom of another safe and "smudging" it with a blowtorch constituted in law an "attempted safecracking."

7. **Criminal Law § 126— unanimity of verdict — polling of jury — acceptance of second poll**

The foreman announced that the jury found defendant guilty of safecracking, but one of the jurors who was polled announced his verdict as "guilty of attempted safecracking." The trial judge repeated his instruction that the jury could find defendant guilty of

safecracking, guilty of attempted safecracking, or not guilty. The second poll of the jury resulted in the unanimous verdict of guilty of attempted safecracking. *Held:* The verdict of guilty of attempted safecracking was properly accepted by the trial judge.

APPEAL by defendant from *Brewer, J.*, March 1, 1971 Session, WAKE Superior Court.

The defendant, Haywood James Sanders, was tried in the superior court on two bills of indictment. In Case #71 CR 5308 the indictment, containing three counts, charged that on January 25, 1971, the defendant feloniously broke and entered a certain building occupied by Morris & Associates, Inc., located at 801 Fayetteville Street in Raleigh, where merchandise, chattels, money and other valuables were being kept, with intent on the part of the defendant to steal, take and carry away the foregoing described articles of personal property. Count No. 2 charged the felonious theft of certain listed property. A third count charged the defendant received the property knowing that it had been stolen.

In Case #71 CR 5309 the indictment charged that on January 25, 1971, the defendant unlawfully, wilfully and feloniously, by use of a hammer, an acetylene torch, prying bars, chisel and hacksaw did unlawfully force open and attempt to force open a safe and vault, the property of Morris & Associates, a corporation, said safe and vault being used for storing money and other valuables. The defendant was arraigned and through counsel entered pleas of not guilty. The two cases were consolidated for trial.

The State's evidence disclosed the building occupied by Morris & Associates, Inc., located at 801 Fayetteville Street in Raleigh, was forcibly broken into on the night of January 25, 1971, and some of the articles listed in Indictment #71 CR 5308 were stolen. The evidence disclosed that a small safe was kept in a first floor office and a large safe or vault was kept on the second floor; that at the time of the break-in the safes were closed, containing, as they usually did, money and other valuables.

The secretary of the corporation testified he closed the building at 5:30 p.m. on the date named in the indictment. He was called back to the building that night at 12:30 a.m. Two large glass windows had been broken. The two safes in the

building had been damaged. The larger safe or vault on the second floor had been opened, papers removed, and money had been taken from it. The small safe on the first floor had been turned upside down. The lock knob had been broken off, the bottom had been damaged, the metal had been torn, and part of the concrete bottom had been chiseled out. The dial had been removed and the hinges had been sawed off. The smaller safe had been blackened and burned by a blowtorch.

The State's witness, Felix Grissom, testified that he was employed by Raleigh Maintenance Company which was under contract to clean up the building. He entered at 11:30 p.m. "Upon entering the doorway, I turned left, went along a walkway, went down a series of steps . . . and entered this door from the first floor." He saw two men over the small safe which was upside down. The room lights were on. The witness got a good look at the one facing him. He returned the way he had entered, ran to an upstairs room from which he called the police. The two men apparently became alarmed and left the building before the police arrived. At the trial the witness positively identified the defendant as the one who was facing him over the small safe.

The defendant testified he lived with his father and two small nieces near 801 Fayetteville Street in Raleigh. On January 25, 1971, he was out with named companions on a drinking party. He returned to his home, went upstairs and went to bed at 10:30 p.m. and did not leave the house that night. His father testified the defendant came in between 10:30 and 11:00 o'clock and he did not leave again that night. The father admitted he did not have a watch, did not see a clock, and that his testimony about the time his son came in was "an estimate."

The court charged the jury:

"Now members of the jury, on the charge of safecracking I instruct you that if you are satisfied from the evidence beyond a reasonable doubt that this defendant did, by the use of tools, unlawfully force open a safe or attempt to force open a safe belonging to Morris Associates, Inc., which was used for storing money or valuables, it would be your duty to return a verdict of guilty of safecracking as charged.

If you are not so satisfied beyond a reasonable doubt as to each of those essentials, it would be your duty to

return a verdict of not guilty to the charge of safecracking."

* * * *

" . . . (Y)ou will say by your verdict whether you find the defendant guilty of safecracking, or attempted safecracking, as charged in the bill of indictment; or not guilty; . . . "

When the jury returned to the courtroom the foreman announced the jury found the defendant guilty of housebreaking, not guilty of larceny, and guilty of safecracking. At the defendant's request the court ordered the jury polled. The jury verified its verdict as to housebreaking, but one juror announced his verdict was guilty of "attempted safecracking." After considerable discussion and instruction from the judge as to the permissible verdicts, the poll of the jury declared the verdict in #71 CR 5309 was guilty of attempted safecracking. Each member on the poll announced "attempted safecracking" was the verdict. The verdict was accepted by the court and recorded in its minutes. The defendant excepted.

The court imposed a prison sentence of 8 to 10 years on the housebreaking charge and 10 to 15 years on the attempted safecracking charge, the latter to begin at the expiration of the former. The defendant excepted, assigning errors.

Robert Morgan, Attorney General by Millard R. Rich, Jr., Assistant Attorney General, for the State.

Carl C. Churchill, Jr., and Roger W. Smith for defendant appellant.

HIGGINS, Justice.

We discuss here the defendant's assignments of error in the order of their chronology rather than the order in which they are discussed in the briefs.

[1] The defendant excepted to the court's refusal to dismiss all charges in the indictments on the ground the evidence did not support them. He contended the evidence failed to show the owners of the building did not give the defendant permission for the entrance. The evidence disclosed the building was occupied by a corporation. The secretary of the corporation testified: " . . . (W)e closed at regular hours, about 5:30 P.M. I next returned . . . that night about 12:15 A.M. when I was called

to come down to the shop and informed that we had had a break in. . . . Two of our large shop windows had been broken out, in the shop door . . . all the desks had been riffled or gone into and the safe had been damaged. . . . I was able to determine that a tape recorder was missing. . . . We lost two cameras. . . . (O)ne camera was worth about $200.00." Other property, including money, was also missing.

In addition to the foregoing evidence, the clean-up boy testified he discovered the defendant and a companion working on the small safe. They fled before the police arrived. He identified the defendant as the one who was facing him at the time both were working on the upturned safe on the first floor.

The defendant denied he was in the building. He testified he was at home in bed from about 10:30 p.m. until 9:00 the next morning. There is no evidence he had permission to be in the building. All the evidence shows a breaking. Two men, one of whom was the defendant, were discovered by Grissom working on the small safe. They fled before the officers arrived. " . . . (W)hen defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the onus of proof as to such matter is upon the defendant. . . . In such circumstances, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same." *State v. Johnson,* 229 N.C. 701, 51 S.E. 2d 186. Nothing in the evidence warrants a finding defendant had permission to enter the building.

The court charged:

> "As to the charge of felonious breaking and entering, before the State is entitled to a conviction upon that charge, it must prove to your satisfaction beyond a reasonable doubt, first, that there was either a breaking and entering or an unlawful entry by the defendant; second, that it must be the breaking or unlawful entry of some building wherein merchandise or money or property was kept; third, that the owner of the premises did not consent to the breaking or entering; and fourth, that at the time of such breaking or entering the defendant intended to steal some merchandise or property therefrom."
>
> * * * *
>
> "So, if the State has proved beyond a reasonable doubt

that the defendant did break or did unlawfully enter a building occupied by Morris and Associates, Inc., *with* the consent of the owner, against its will and that at the time of doing so he intended to steal anything therefrom; then it would be your duty to find him guilty of felonious breaking or entering, as charged."

[2] The court, either by oversight, or inadvertance, is recorded as having said "with the consent . . . against its will" which clearly indicates the court said, or intended to say "without the consent . . . against its will." In view of the charge as a whole and the total absence of any evidence the owner consented to the entry, it is apparent the jury could not have misunderstood the court's language. The use of the words "with the consent" rather than "without the consent" was not prejudicial. "This was a *lapsus linguae,* but it is not perceived wherein it was hurtful. We regard it as a harmless inadvertence." *In re Will of Wallace,* 227 N.C. 459, 42 S.E. 2d 520. See also *State v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460. Neither the defendant nor the State presented any evidence the defendant had the owner's consent to break into the building, steal personal property, and attempt to open the safe. The defendant's exception to the court's failure to dismiss the charge of felonious housebreaking is not sustained.

The indictment in #71 CR 5309 charged the offense defined in G.S. 14-89.1 which provides:

> "*Safecracking and safe robbery.*—Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary."

[3] When the jury returned to the courtroom and announced it had agreed on a verdict, the foreman first announced the jury found the defendant guilty of safecracking. At the request of defense counsel, the jury was polled. During the poll one of the jurors stated he understood the verdict to be guilty of "attempted safecracking." The court again explained to the jury that it could find the defendant guilty of safecracking, or guilty of attempted safecracking, or not guilty. The court ordered the

jury to be polled after the explanation as to possible verdicts and each individual juror stated the verdict to be "guilty of attempted safecracking" and each said he still assented thereto. The court accepted the verdict as disclosed by the poll and ordered it recorded in the minutes of the court.

[4] The defendant sought to challenge the verdict on the ground it was neither authorized by the indictment nor by the statute, the latter being G.S. 14-89.1. A verdict should answer the issue raised by the State's charge of guilt contained in the indictment and the defendant's denial raised by his plea of not guilty. "A verdict is not bad for informality . . . in the language . . . if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment and is to receive a reasonable construction and must not be voided except from necessity." *State v. Perry,* 225 N.C. 174, 33 S.E. 2d 869. See also *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651. The indictment charged that the defendant by the use of a hammer, torch, chisel, hacksaw, etc. did unlawfully and feloniously force open and attempt to force open the safe and vault being used for the storage of money and other valuables, the property of the named corporation. With respect to the issues to be answered by the jury, the court gave this instruction:

> " . . . (Y)ou will say by your verdict whether you find the defendant guilty of safecracking, or attempted safecracking, as charged in the bill of indictment; or not guilty; . . . "

[5] The charge clearly disclosed the court used the expression "safecracking" and "attempted safecracking" as synonymous with "force open" and "attempt to force open" a safe or vault. The court was using the short title of the statute. This Court in at least three opinions has used "safecracking" and "attempted safecracking" as equivalent in words to "force open" and "attempt to force open" a safe or vault. *State v. Whaley,* 262 N.C. 536, 138 S.E. 2d 138; *State v. Bullock,* 268 N.C. 560, 151 S.E. 2d 9; *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596.

Inasmuch as the statute made an attempt to force open a safe or vault a crime of equal dignity with the completed offense and the indictment charged the attempt, the verdict of guilty of the latter authorized the court to enter judgment on the verdict. The court's use of the word "safecracking" was in no wise mis-

leading and could not have misled the jury. The assignment of error based on the charge is not sustained.

[6] The statute made the completed act of safecracking and the attempted safecracking offenses of equal dignity. In so providing, the Legislature followed the pattern with respect to safecracking or attempted safecracking that it had followed in the case of robbery or attempted robbery with firearms. G.S. 14-87. Each made the attempt to commit the offense, an offense of equal gravity with the completed act. In *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496, this Court in passing on the charge of attempt to commit armed robbery said: "So great is the offense when life is endangered and threatened by the use of firearms . . . that it is not of controlling consequence whether the assailants profit much or little, or nothing, from their felonious undertaking." In passing the act codified as G.S. 14-89.1, the Legislature acted within its authority in providing punishment for attempt to force open a safe or vault where valuables are kept. "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond the mere preparation to commit, but falling short of its actual commission." *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880. The foregoing is approved in *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525. Certainly removing the dial, sawing off the hinges, chiseling out a part of the concrete bottom of the small safe and "smudging" it with a blowtorch go beyond mere preparation for safecracking, and in law constitute "attempted safecracking."

[7] Finally, the defendant contends the verdict was so incomplete and indefinite as to render it insufficient to support the court's judgment. Notwithstanding the foreman's announcement that the jury found the defendant guilty of safecracking, the first poll indicated such was not the unanimous agreement. The court repeated its instruction that the jury could render a verdict of guilty of safecracking, or guilty of attempted safecracking, or not guilty. The second poll of the jury disclosed without question the unanimous agreement of the jury on a verdict of guilty of attempted safecracking and each juror answered that he still assented thereto. The verdict was then accepted by the court and recorded in its proceedings. In *Davis v. State of North Carolina,* 273 N.C. 533, 160 S.E. 2d 697, Chief Justice Parker used this language: "If there was any uncertainty in the verdict, that uncertainty was

completely removed by the polling of the jury and their answers to the court upon the polling." See also *State v. Dow,* 246 N.C. 644, 99 S.E. 2d 860; *State v. Hemphill,* 273 N.C. 388, 160 S.E. 2d 53; *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70.

After full review, this Court has been unable to discover any error of law committed in the trial.

No error.

ROBERT SUTTON AND SUE SUTTON v. J. B. FIGGATT, INDIVIDUALLY AND AS REPRESENTATIVE OF THE CLASS OF MAGISTRATES FROM TIME TO TIME OF MECKLENBURG COUNTY, NORTH CAROLINA

No. 70

(Filed 15 December 1971)

1. Injunctions § 3; Mandamus § 1— mandatory injunction — mandamus

In a suit against a public official or board, there is no practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction.

2. Mandamus § 1— nature of the writ

The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.

3. Mandamus § 1— personal action

The writ of mandamus is a personal action based upon allegation and proof that the defendant has neglected or refused to perform a personal duty which the plaintiff has a clear legal right to have him perform.

4. Mandamus § 2— discretionary duties

In a case involving the exercise of discretion, mandamus lies to compel action by a public official but not to dictate his decision unless there has been a clear abuse of discretion.

5. Mandamus § 1— nature of the writ — willingness of defendant to perform duty — past or future wrong

The courts of this State have no discretion to refuse the writ of mandamus when it is sought to enforce a clear legal right to which it is appropriate, but the writ will not issue to compel the performance of an act which a defendant shows a willingness to perform without coercion or to redress a past wrong or to prevent a future legal injury.

6. **Mandamus § 2— application for warrant — refusal of magistrate to examine plaintiffs — magistrate's present readiness to examine plaintiffs**

Plaintiffs were not entitled to a writ of mandamus compelling defendant magistrate to examine plaintiffs as required by G.S. 15-19 upon their application for a warrant against two deputy sheriffs, where defendant had on one occasion refused to examine plaintiffs but announced in open court that if plaintiffs would reapply to him for a warrant he would examine them upon oath, and, while the trial judge held his decision in abeyance, defendant waited from three to five hours, ready, able and willing to examine plaintiffs pursuant to G.S. 15-19.

7. **Mandamus § 1— nature of the writ**

The court will not issue the extraordinary writ of mandamus merely to enable a party to prove a point or to excoriate a public official for a mistake he stands ready to correct.

APPEAL by plaintiffs from *Blount, S. J.*, 20 April 1971 Schedule "A" Session of MECKLENBURG, transferred from the Court of Appeals for initial appellate review by the Supreme Court under general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Action for mandamus.

Defendant is a magistrate of Mecklenburg County, appointed under the provisions of G.S. 7A-170 to -176 (1969). Plaintiffs, husband and wife and adult citizens of Mecklenburg County, allege:

On 2 April 1971 there were pending against plaintiffs in the District Court criminal charges preferred by Messrs. Arrington and Metcalf, deputy sheriffs of Mecklenburg County. These charges grew out of incidents occurring on 29 March 1971, and the cases were set for trial on 13 April 1971. Plaintiffs went to defendant's office on 2 April 1971, and, under the provisions of G.S. 15-18 to -20 (1965) as amended (Supp. 1969) applied to him for warrants charging Messrs. Arrington and Metcalf with assaulting plaintiffs on 29 March 1971. Upon inquiry defendant ascertained that "the incidents of which plaintiffs then sought to complain" grew out of the occurrences on 29 March 1971 for which the two deputies had caused plaintiffs to be arrested. Defendant declined to examine plaintiffs on oath as required by G.S. 15-19. He said that he had been instructed by Chief District Court Judge Abernathy not to issue "cross warrants," and ad-

vised plaintiffs to see the judge if they wanted a warrant against the officers.

Plaintiffs further allege, upon information and belief, that all magistrates in Mecklenburg County "routinely disclaim authority to examine under oath and issue warrants in cases wherein private citizens wish to charge law enforcement officials with criminal offenses." Plaintiffs pray that "defendant be mandatorily enjoined" to exercise the duties imposed upon him by law and that the court enter judgment declaring illegal the "pattern, policy and practice of which complaint is made."

Based on these allegations plaintiffs filed a motion for a preliminary injunction. This motion was heard on 20 April 1971, at which time plaintiffs examined defendant as an adverse witness. Defendant testified that when plaintiffs applied to him for a warrant for the arrest of Deputies Arrington and Metcalf, he knew that the two officers had charged the male plaintiff with resisting arrest and the *femme* plaintiff with assaulting the officers; that he told plaintiffs he would not issue a cross warrant without first talking with Judge Abernathy; that he suggested they themselves talk with the judge and thought they intended to do so. The *femme* plaintiff testified that she did not check with Judge Abernathy nor with any other magistrate. Plaintiffs' counsel, George S. Daly, Jr., gave testimony in substantial accord with that of defendant. No other evidence was offered by the parties.

At the conclusion of the evidence Judge Blount examined defendant, who informed the court that his refusal to examine plaintiffs on 2 April 1971 was "a temporary refusal" until he could get "a little more knowledge and information." He stated that if plaintiffs would reapply to him for a warrant he would comply with his statutory duty and examine them upon oath. Whereupon Judge Blount held his decision in abeyance for three hours and directed parties and counsel to imparl during the interim and attempt "to clear the matter up." Defendant remained available, ready to examine plaintiffs upon their application for a warrant. They, however, left the courthouse.

At 5:00 p.m. plaintiffs' counsel advised the court that their clients had made no attempt to obtain a warrant from defendant, or any other magistrate, and tendered to Judge Blount a proposed order "allowing the preliminary injunctive relief previ-

ously requested." Counsel argued that because defendant had once refused to examine plaintiffs they were entitled to have the court issue a writ of mandamus coercing defendant to conduct the examination specified in G.S. 15-19. Judge Blount declined to sign the tendered order. Instead, he found, *inter alia*, that defendant's failure to examine plaintiffs on 2 April 1971 "was the result of a mistaken idea as to the procedures to be followed by defendant"; that, so far as the evidence disclosed, the episode involving plaintiffs was an isolated event and there existed no illegal policy, pattern or practice which would prevent defendant or any other magistrate in Mecklenburg County from examining plaintiffs upon their application for a warrant; and that "there exists no willful or continuing refusal" by defendant to examine plaintiffs. Whereupon, he entered judgment denying plaintiffs' motion for "a preliminary injunction." The denial was without prejudice to plaintiffs' right to move the court "for reconsideration in the event they shall not be seasonably examined upon their application for the same to defendant or another magistrate of Mecklenburg County."

From this order plaintiffs appealed.

W. Thomas Ray for plaintiff-appellants.

Attorney General Morgan and Staff Attorney League for defendant-appellee.

SHARP, Justice.

[1] Although plaintiffs ask the court for a mandatory injunction directed to defendant Figgatt, and for a declaratory judgment designed for the enlightenment of the twenty-one magistrates of Mecklenburg County, they have alleged a cause of action for a writ of mandamus. However, in this State, where the court exercises both legal and equitable jurisdiction, in a suit against a public official or board there is no practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction. *Safrit v. Costlow*, 270 N.C. 680, 155 S.E. 2d 252; *St. George v. Hanson*, 239 N.C. 259, 78 S.E. 2d 885; *Williamston v. R. R.*, 236 N.C. 271, 72 S.E. 2d 609; *Hospital v. Wilmington*, 235 N.C. 597, 70 S.E. 2d 833; *Telephone Co. v. Telephone Co.*, 159 N.C. 9, 74 S.E. 636.

[2-4] The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law. *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 876; *Hospital v. Joint Committee,* 234 N.C. 673, 68 S.E. 2d 862; *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620; *Hickory v. Catawba County* and *School District v. Catawba County,* 206 N.C. 165, 173 S.E. 56. It is an extraordinary remedy which the court will grant only in case of necessity. *Edgerton v. Kirby,* 156 N.C. 347, 72 S.E. 365. The writ is employed as a remedy for inaction on the part of the particular official to whom it is directed. It is, therefore, a personal action based upon allegation and proof that the defendant has neglected or refused to perform a personal duty which the plaintiff has a clear legal right to have him perform. 52 Am. Jur. 2d *Mandamus* § 8, 9 (1970); 55 C.J.S. *Mandamus* § 2a (1948). In a case involving the exercise of discretion, mandamus lies to compel action by a public official but not to dictate his decision unless there has been a clear abuse of discretion. *Hospital v. Joint Committee, supra; Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328; *Edgerton v. Kirby, supra.*

[5] The courts of this State have no discretion to refuse the writ when it is sought to enforce a clear legal right to which it is appropriate, but it is well settled that the writ will not issue to compel the performance of an act which a defendant shows a willingness to perform without coercion. *White v. Board of Appeals,* 45 Ill. 2d 378, 259 N.E. 2d 51 (1970); *Hutson v. Lovett,* 305 S.W. 2d 524 (1957); *Lane v. Ross,* 151 Tex. 268, 249 S.W. 2d 591 (1952); *State v. O'Brien,* 170 Tenn. 435, 95 S.W. 2d 921 (1936); *State v. Sewer Dist.,* 332 Mo. 965, 61 S.W. 2d 724 (1933); 52 Am. Jur. 2d *Mandamus* § 89 (1970); 55 C.J.S. *Mandamus* § 10b (1948). Furthermore, it is not the office of mandamus to redress a past wrong or to prevent a future legal injury. *Steele v. Cotton Mills, supra; Dry v. Drainage Commissioners,* 218 N.C. 356, 11 S.E. 2d 143; *Casualty Company v. Comrs. of Saluda,* 214 N.C. 235, 199 S.E. 7.

The following statement by the Supreme Court of Illinois in *People v. Dunne,* 258 Ill. 441, 447, 101 N.E. 560, 562, is applicable here: "If it is the duty of the defendants to do the acts sought to be coerced by the writ, such acts would not be any more valid or legal if done under the command of the court. The office of the writ is to compel action by the unwilling. . . .

The writ will not issue to compel the doing of an act which the person sought to be coerced admits on the record he is willing to do without coercion."

[6] Applying the foregoing principle to the facts of this case, it is quite clear that plaintiffs are not entitled to the writ of mandamus. On 20 April 1971 Magistrate Figgatt waited from three to five hours, ready, able, and willing to accord plaintiffs their legal rights under G.S. 15-19. In open court he had announced his readiness to examine plaintiffs under oath with reference to their complaints against Messrs. Arrington and Metcalf. Had plaintiffs desired to pursue their alleged purpose to obtain warrants for the arrest of these two deputies for assaulting them on 29 March 1971, the opportunity was available. A warrant would issue, however, only if it appeared to the magistrate from his examination of plaintiffs that the officers had committed a criminal offense. G.S. 15-20.

[7] Plaintiffs contend (1) that "[t]his is a classic case of justice delayed, justice denied"; and (2) that if the writ of mandamus is not issued plaintiffs will suffer "irreparable loss and injury" by the denial of "clear legal rights." However, plaintiffs' election to appeal Judge Blount's order rather than to apply to defendant, or make complaint to some other magistrate, impugns and defeats the contentions they have stated. In April they could have had for the asking the only relief to be obtained by appeal. It suffices to say that the court will not issue the extraordinary writ of mandamus merely to enable a party to prove a point or to excoriate a public official for a mistake he stands ready to correct.

As recited in Judge Blount's findings of fact, plaintiffs offered no evidence to sustain their allegation that defendant Figgatt's initial refusal to examine plaintiffs was the result of "an illegal policy, pattern and practice" adopted by all magistrates in Mecklenburg County. Judge Blount acted correctly in treating this action as one against defendant alone and in refusing to declare a right about which there was no real existing controversy. *Angell v. Raleigh,* 267 N.C. 387, 148 S.E. 2d 233.

In the hearing below we find no error. The judgment of Judge Blount is in all respects

Affirmed.

STATE OF NORTH CAROLINA v. MARK FERGUSON

No. 155

(Filed 15 December 1971)

1. **Criminal Law § 169; Homicide § 15— admission of testimony not responsive to the solicitor's question — test of relevancy**

Testimony by State's witness that on the night of the homicide she saw the defendant sharpening his knife and heard him say, "That'll do the work," which testimony was given in response to the solicitor's question, "Where did you see him," *held* properly admitted in evidence although not responsive to the solicitor's question, since the answer was relevant to the homicide prosecution.

2. **Criminal Law §§ 162, 169— motion to strike — admission of unresponsive testimony — test of relevancy**

If an unresponsive answer produces irrelevant facts, they should be stricken and withdrawn from the jury; however, if the answers bring forth relevant facts, they are nonetheless admissible because they are not specifically asked for or go beyond the scope of the question.

3. **Homicide §§ 15, 17— admissibility of evidence — defendant's criminal intent**

Although the solicitor had withdrawn the charge of first degree murder from the jury, it was permissible to introduce testimony tending to show that defendant was sharpening his knife on the night of the homicide and saying, "That'll do the work," such testimony being relevant to show defendant's criminal intent and to refute his claim of self-defense.

4. **Criminal Law § 138— amount of sentence — credit for psychiatric evaluation in State hospital**

A defendant is not entitled to credit for time spent undergoing psychiatric evaluation in the State hospital to determine his competency to plead and stand trial.

ON *certiorari* in lieu of appeal by defendant from *Martin (Harry C.) J.*, March 22, 1971 Session BUNCOMBE Superior Court. In this criminal prosecution the defendant, Mark Ferguson, by grand jury indictment, was charged with the first degree murder of Tony Sluder.

The killing occurred in Buncombe County on July 11, 1970. On July 29, 1970, the defendant's privately employed counsel filed a motion in the superior court requesting the commitment of the defendant to Dorothea Dix Hospital for psychiatric evaluation. On July 30, 1970, Judge Beal of the superior court ordered the commitment. On September 5, 1970, Dr. Laczko filed a report

certifying he found, " . . . (N)o evidence of insanity or any other mental disturbance which might interfere with this patient's ability to plead to the Bill of Indictment."

At the time of the defendant's arraignment in the superior court on March 22, 1971, the solicitor announced the State would not ask for a verdict on the capital felony charged in the indictment, but would ask for a guilty verdict of murder in the second degree or manslaughter as the evidence may warrant.

The State's evidence disclosed the deceased (Tony Sluder), the defendant, Gene Garren, Champ Rice, Jr. and three girls met at the Casa Loma in Asheville. There was evidence of both liquor and beer drinking. An argument developed between Rice and the deceased on one side and the defendant and Garren on the other. After the argument, the deceased, Rice, Molly Montez and Sheila Allison left in the latter's automobile to go to the Land-of-the-Sky Restaurant. On the way they passed the defendant and Gene Garren hitchhiking. Sheila stopped her car, but the deceased and Rice prevented the defendant and Garren from entering the automobile. Either the deceased or Rice kicked the defendant. The automobile party, after driving to the restaurant, went to the Montez apartment. The defendant and Garren were waiting at or near the apartment.

The defendant and Rice had some words with reference to the occurrence when Sheila stopped the car on the road. Rice testified that the defendant inquired who had "busted his mouth." Rice said he did. The defendant then assaulted him with a knife. "I stepped back and he (defendant) went on and cut Tony. . . . Tony had not struck, hit at or made any pass at Mark Ferguson at all at the time he was cut. After Tony said, I am cut, he (the deceased) got his knife out of his pocket. He handed me the knife. . . . Tony had not gotten his knife out prior to that time. . . . I think the knife was closed." Tony was taken to the hospital and pronounced dead on arrival. The pathologist testified that death resulted from the stab wound.

The State's witness, Mrs. Tinsley who lived next door to the Montez apartment, testified as a witness for the State. She said she had seen the defendant at the apartment several times. She was asked these questions by the solicitor:

Q. "Did you see him on the 11th of July?"

A. "Yes."

Q. "Where did you see him?"

A. " . . . (I)t was pretty late in the afternoon was when I saw him out there sharpening his knife, he came out the door with a paring knife in his hand and he went out to the third step he did, you know, right in front of my door on my sidewalk and sharpened it. He said, 'That'll do the work.' "

The defendant objected. The objection was overruled. Defendant's Exception No. 1.

Q. "Then after he went out there, where did he go?"

A. "Well, he come down to my door and sharpened it and said 'That'll do the work,' and that is all I know."

The defendant objected, moved to strike, the motion was denied and that is defendant's Exception No. 2.

Later in her testimony Mrs. Tinsley testified without objection: "I didn't see him leave after I saw him sharpening his knife. . . . On the same night I heard the disturbance I saw Mark sharpening the knife and that was the night the man was killed."

The defendant and his witness, Garren, testified that the deceased and his companion, Rice, were responsible for all the difficulties of the evening; that they were the aggressors at all times and that they assaulted and inflicted serious injuries on both the defendant and Garren. At the time the deceased received his wounds he was assaulting the defendant with a knife. The defendant attempted to run. He stated there was a paring knife lying by the chair where he had been sitting. He picked up the knife and started running from the deceased. " . . . I broke away from him, he sorta went backwards and I took off running . . . . " He later heard that "one of the boys was cut bad." The defendant offered evidence of his good character.

The jury found the defendant guilty of voluntary manslaughter. The court imposed a prison sentence of 15 to 18 years from which the defendant appealed.

Robert Morgan, Attorney General by Russell G. Walker, Jr., Assistant Attorney General for the State.

Riddle and Shackelford, Attorneys by Robert E. Riddle for defendant appellant.

HIGGINS, Justice.

The State's evidence was sufficient to make out a case of murder. The defendant's evidence tended to support his plea of self-defense. The jury, finding the truth to lie in the middle ground, convicted the defendant of vountary manslaughter. The court imposed a sentence which approached the maximum provided by law for manslaughter. G.S. 14-18.

[1] The defendant's Assignments of Error Nos. 1 and 2 involve the court's failure to exclude the testimony of Mrs. Tinsley with reference to the defendant's action in sharpening his knife and his statement, "That'll do the work." The defendant's objection to the testimony is twofold. First, the witness' statement was not responsive to the solicitor's question; and second, the evidence tended to show premeditation which was eliminated as an element of the charge by the solicitor's announcement that the State would prosecute for second degree or manslaughter only.

It is true that Mrs. Tinsley's testimony was not responsive to the solicitor's question. No doubt she and the solicitor had conferred and both she and the solicitor knew the State's purpose in having her as a witness was to show the defendant sharpened a knife and made the statement that it would do the work prior to his using it with the fatal result. The solicitor's first question was intended to place the defendant on the scene. Obviously the next question would involve the sharpening of the knife and the statement that it would do the work. Mrs. Tinsley, not being familiar with court techniques and niceties, did not wait for the second question. Should the court have stricken the answer and waited for the next question which would produce the identical answer?

[2] Whether an answer is responsive to a question is not the ultimate test on a motion to strike. If an unresponsive answer produces irrelevant facts, they may and should be stricken and withdrawn from the jury. However, if the answers bring forth relevant facts, they are nonetheless admissible because they are not specifically asked for or go beyond the scope of the question. *In re Tatum*, 233 N.C. 723, 65 S.E. 2d 351; *State v. Staten*, 271 N.C. 600, 157 S.E. 2d 225; Wigmore on Evidence, Third Edition, Vol. III, Sec. 785, p. 160; Stansbury, N. C. Evidence, 2d § 77. The Assignments of Error based on Exceptions Nos. 1 and 2 are not sustained.

[3] The defendant by Assignment No. 3 challenges the admission of Mrs. Tinsley's testimony with regard to the knife on the ground it tended to support the charge of murder in the first degree which the solicitor by his announcement had removed from the case. The solicitor's announcement the State would not prosecute for the capital felony, but for a lesser included offense would not render incompetent any pertinent evidence bearing on the defendant's guilt. The evidence the defendant sharpened his knife, making it ready to "do the work" at a time before the fatal encounter, had bearing on the defendant's criminal intent and it refuted his evidence that he picked up the knife from beside his chair at a time the deceased was assaulting him. The solicitor's announcement the State would not prosecute for the capital felony did no more than preclude the State thereafter from submitting to the jury the issue of murder in the first degree. *State v. Allen,* 279 N.C. 115, 181 S.E. 2d 453; *State v. Peeden,* 272 N.C. 494, 158 S.E. 2d 615; *State v. Miller,* 272 N.C. 243; 158 S.E. 2d 47; *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918.

[4] The defendant's final contention is the court should have, but failed to give him credit for the time he spent in the hospital for psychiatric evaluation under the court's order. Our cases hold the defendant is entitled to credit for time served on a prior sentence for the same offense. We find no authority where credit is allowed for time in the hospital to determine legal competence to plead to the indictment and to conduct the defense. *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633; *State v. Foster,* 271 N.C. 727, 157 S.E. 2d 542; *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28; *State v. Walker,* 277 N.C. 403, 177 S.E. 2d 868.

The examination of the record fails to disclose any reasonable ground upon which to base a new trial. In the trial, verdict, and judgment there is in law

No error.

JAMES M. PLEASANT, ADMINISTRATOR OF THE ESTATE OF E. L. PLEASANT v. MOTORS INSURANCE COMPANY

No. 111

(Filed 15 December 1971)

1. **Insurance §§ 73, 76— automobile insurance — loss of automobile by intentional setting on fire — accidental loss**

The intentional setting on fire of an automobile by the son of the insured under an automobile liability policy is held a "direct and accidental loss" within the terms of the policy.

2. **Insurance § 73— automobile insurance — meaning of "accidental"**

The use of the word "accidental" to limit the losses in automobile insurance policies is subject to more than one reasonable meaning.

3. **Insurance § 73— automobile insurance — meaning of "accidental" — resolution of ambiguity**

When words such as "accidental" become ambiguous as applied to the various causes of loss set forth in an insurance policy, the ambiguity will be construed against the insurer.

4. **Insurance § 73— automobile insurance — accidental loss — loss caused by intentional act of another**

An automobile insurance policy providing for payment of accidental loss or damage to the automobile includes loss caused by the intentional act of another when in the line of causation the act, from the standpoint of the policyholder or named insured, is unintended, unexpected, unusual, or unknown.

5. **Actions § 5; Insurance § 76— automobile fire insurance — intentional burning of automobile by insured's son — administrator's recovery under the policy**

The administrator of a named insured may recover under an automobile insurance policy for the loss of an automobile intentionally set on fire by the insured's son.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from the decision of the North Carolina Court of Appeals (12 N.C. App. 236), affirming decision of *Lyon, J.*, at the 30 November 1970 Civil Session of HARNETT District Court.

This action was instituted in 1962 by E. L. Pleasant. He died in 1963 and James M. Pleasant, his duly qualified administrator, was substituted as plaintiff in this action.

The stipulated facts show that defendant issued to E. L. Pleasant, as named insured, a policy of insurance numbered 96-75209 covering a 1960 Corvair automobile owned by him.

The policy obligated defendant insurance company to pay for loss caused, among other things, by fire or lightning. The period of coverage of the policy was from 30 August 1960 to 30 February 1962.

The policy contained these definitions:

> "Loss" means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured property;
>
> "Named insured" means the individual named in Item 3 of the declarations and also includes his spouse, if a resident of the same household;

E. L. Pleasant, the named insured, and other members of his household occasionally drove the automobile. Bobby Pleasant, the son of plaintiff's intestate, lived in the home of his father and was the primary operator of the Corvair automobile.

Bobby Pleasant and three of his associates conspired to burn the insured automobile for the purpose of collecting insurance proceeds which they hoped to use to purchase a convertible automobile. On or about 17 February 1961 they intentionally burned and destroyed the Corvair automobile insured by defendant. The resulting damages amounted to $1,900. Bobby Pleasant was thereafter convicted in the criminal court of the burning of the automobile.

The trial judge found facts and concluded as a matter of law that paintiff was not entitled to recover any amount of defendant as a result of the destruction of the Corvair automobile. Plaintiff appealed.

Bryan, Jones, Johnson, Hunter & Greene, by K. Edward Greene, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by Grady S. Patterson, Jr., and Paul L. Cranfill for defendant appellee.

BRANCH, Justice.

[1] Appellant contends that the intentional destruction of the automobile by the son of the named insured in the policy was not a "direct and accidental loss" as required by the terms of the policy.

This Court defined the word "accident" in connection with a suit seeking recovery under an accidental death policy which provided for "direct and accidental loss" in the case of *Clay v. Insurance Co.*, 174 N.C. 642, 94 S.E. 289, as follows:

> " . . . (I)n case of accident insurance, as expressed in the general terms of this policy, the word 'accident' should receive its ordinary and popular definition as an unusual and unexpected occurrence — one that takes place without the foresight or expectation of the person affected — and that in a given case the question is to be determined by reference to the facts as they may affect the holder of the policy, or rather the person insured. 'An event, which, under the circumstances, is unusual and unexpected by the person to whom it happens.' Bomvier, 1883, as cited in *Lovelace v. Travelers' Protective Association*, 126 Mo. 104, and the cases, hold further that the intentional killing of the insured by a third person does not of itself, and without more, withdraw the claim from the protection of the policy. . . . "

In *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214, the court considered an accidental death policy, and stated:

> "An injury is 'effected by accidental means' if in the line of proximate causation the act, event, or condition from the standpoint of the insured person is unintended, unexpected, unusual, or unknown. The unintended acts of the insured are deemed accidental. Injuries caused to the insured by the acts of another person, without the consent of the insured, are held due to accidental means unless the injurious acts are provoked and should have been expected by the insured. . . . "

These cases effectively point out that whatever is unexpected or unforeseen is determined from the standpoint of the named insured in the policy.

[2, 3] The use of the word "accidental" to limit the losses in automobile insurance policies is subject to more than one reasonable meaning. It is well settled that when such words become ambiguous as applied to the various causes of loss set forth in the policy, the ambiguity will be construed against the insurer.

"The words used in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their

meaning must be resolved in favor of the policyholder or the beneficiary and against the company." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518.

[4] We therefore conclude that an automobile insurance policy providing for payment for accidental loss or damage to the automobile includes loss caused by the intentional act of another when in the line of causation the act, from the standpoint of the policyholder or named insured, is unintended, unexpected, unusual, or unknown. Of course the insurance company may, by use of specific words, exclude losses covered by intentional acts of another.

Here the policy contained no specific provision excluding recovery for loss caused by the intentional act of another. Nor does the record show that the named insured had knowledge of, or complicity of any kind in, the intentional burning of the insured automobile.

Defendant argues that the tortious destruction of the automobile by Bobby Pleasant should be imputed to his father, the named insured, so as to preclude recovery.

In support of this argument defendant cites *Sparrow v. Casualty Co.*, 243 N.C. 60, 89 S.E. 2d 800, which holds that an employer could not recover on an insurance policy for the loss of an automobile which was tortiously converted to his use by an employee. Defendant also cites cases from other jurisdictions, including *Bellman v. Ins. Co.*, 178 Wis. 349, 189 N.W. 1028, where the Wisconsin Court denied recovery by an innocent partner on an insurance policy when the property covered by the policy was wilfully burned by his co-partner. These cases are distinguishable from instant case since all of the cases cited by defendant are based on relationships which allow tortious conduct to be imputed. This Court does not place tort liability on a parent simply because of the parent-child relationship.

The North Carolina rule in this respect is stated in the case of *Smith v. Simpson*, 260 N.C. 601, 133 S.E. 2d 474, as follows:

> " 'The mere fact of the relationship does not render a parent liable for the torts of his child. Liability of the parent must be predicated upon evidence that the child was in some way acting in a representative capacity such as would make the master responsible for the servant's tort,

> or on the ground that the parent procured, commanded, advised, instigated or encouraged the commission of the tort by his child, or that the parent was independently negligent as in permitting the child to have access to some dangerous instrumentality.'" (Quoting from 3 Strong: N. C. Index, Parent and Child, § 7.)

The Virginia case of *Aetna Ins. Co. v. Carpenter,* 170 Va. 312, 196 S.E. 641, is a case factually similar to instant case. There a mother sued to collect under a fire insurance policy which covered her home from loss by fire. The fire started in the mother's absence and while her minor children were in the house. The insurance company sought to escape liability under the policy on the ground that the policyholder's children intentionally set fire to the house. There the Court stated:

> "It seems to be the general rule that no fraudulent acts of an agent or of a third person, even though the incendiary be a relative, will void the policy unless the insured is implicated in the fraud. . . .
>
> "It has been held that mere agency, in the absence of proof of privity, consent, or ratification on the part of the insured will not defeat recovery in the event that an agent is shown to have burned the property. . . . "

In 44 Am. Jur., 2d, Insurance, § 1365, at p. 210, it is stated:

> "The fact that the property was intentionally burned by the insured's relative or agent does not defeat a recovery where the insured was not implicated in the act."

Accord: *Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co.* (CA5 Miss.), 149 F. 2d 359; *Mechanics' Ins. Co. v. Inter-Southern L. Ins. Co.,* 184 Ark. 625, 43 S.W. 2d 81; *Henderson v. Western M. & F. Ins. Co.,* (La.) 10 Rob 164 (agent); *Williams v. Fire Asso. of Philadelphia* (La. App.) 193 So. 202; *Aetna Ins. Co. v. Carpenter,* 170 Va. 312, 196 S.E. 641; *Hawkins v. Glens Falls Ins. Co.,* 115 W. Va. 618; 177 S.E. 442.

The insured (policyholder) under a contract of insurance is the person who will receive a certain sum upon the happening of a specified contingency or event. 43 Am. Jur. 2d, Insurance, § 251. Such insured in the policy before us was the named insured, E. L. Pleasant.

Defendant avers that the parties to the policy never intended to provide for a loss resulting from an intentional burning by an insured. In support of this contention defendant relies on the definition of "insured" contained in the policy, viz:

> "Insured" means (a) with respect to the owned automobile (1) the named insured and (2) any person or organization, other than a person or organization engaged in the automobile business or as a carrier or other bailee for hire, maintaining, using or having custody of said automobile with the permission of the named insured.

It is obvious that the above quoted definition described persons who may operate the insured vehicle under the policy coverage. It does not purport to create the obligations or provide the benefits which are vested in the named insured or policyholder. Thus, we agree that an intentional destruction of the automobile by the named insured would preclude recovery by him, but that the intentional act of his son would not defeat recovery where the named insured is in no way implicated in the act.

[5] The Court of Appeals affirmed the trial court on the theory that in this jurisdiction public policy precludes a person from profiting by his own wrong. We agree that this is the law. *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807. However, we do not agree with the Court of Appeals' application of this principle of law to the facts of this case. The Court of Appeals in its majority opinion stated that Bobby Pleasant "would be a substantial beneficiary of the attempted recovery." The record indicates that E. L. Pleasant died intestate. Ordinarily Bobby Pleasant would be one of his heirs; however, it is well settled in this jurisdiction that only an administrator may collect debts due his decedent, *Spivey v. Godfrey,* 258 N.C. 676, 129 S.E. 2d 253, and that a cause of action which accrues during the lifetime of a decedent survives to his executor or administrator. *Mast v. Sapp,* 140 N.C. 533, 53 S.E. 350. The personal representative must first pay the debts of the decedent, and this record does not show that the assets of the estate will exceed its liabilities. There is no legally enforceable right to the proceeds of the insurance policy vested in Bobby Pleasant. Thus the right of action which vested in the administrator of E. L. Pleasant cannot be defeated because of the intentional destruction of the automobile by Bobby Pleasant.

The question of whether Bobby Pleasant, as a distributee of his father's estate, may share in the proceeds if there be a recovery in this action is not before us.

The decision of the Court of Appeals is

Reversed.

EMMETT H. WIGGINS, PLAINTIFF v. MILES E. BUNCH AND WIFE, FANNY B. BUNCH; WILLIE T. BUNCH, WIDOWER; MELVIN BUNCH AND WIFE, DORIS W. BUNCH; EDWARD Z. EVANS AND WIFE, LENA H. EVANS; LUCY NIXON, WIDOW OF H. M. NIXON; MYRTLE L. PEELE, WIDOW OF J. R. PEELE; LLOYD M. PEELE AND WIFE, DORIS B. PEELE; J. D. PEELE AND WIFE, JENNIE RUTH PEELE; WALLACE R. PEELE AND WIFE, CLARA D. PEELE; HENDERSON RAY PEELE AND WIFE, RUTH P. PEELE; EDITH PEELE BUNCH AND HUSBAND, ALBERT BUNCH; EVA J. MORRIS, WIDOW OF R. P. MORRIS; PRESTON MORRIS AND WIFE, DOROTHY LOWE MORRIS; LOUVENNIA MORRIS STEWART AND HUSBAND, COLON E. STEWART; RUTH MORRIS WORRELL AND HUSBAND, KENNETH WORRELL; JOSIE MORRIS SCHUTTLE, WIDOW; FLORENCE M. MOSLEY AND HUSBAND, REYNOLD L. MOSLEY; SARAH E. WORRELL AND HUSBAND, MARVIN WORRELL; MARY L. GREENE AND HUSBAND, NORMAN C. GREENE; MARJORIE A. ATHERTON AND HUSBAND, EARL ATHERTON; SAM E. MORRIS AND WIFE, MARY ANN MORRIS; MARTHA PEELE, WIDOW OF J. M. PEELE; NORA P. FOREHAND AND HUSBAND, W. G. FOREHAND; JOHN E. PEELE AND WIFE, BESSIE D. PEELE; HENRY LANE AND WIFE, CASIE N. LANE; WILLIE P. BUNCH AND HUSBAND, J. B. BUNCH; MARY W. ASHLEY AND HUSBAND, EARL ASHLEY; KERMIT E. JORDAN AND WIFE, HELEN JORDAN, DEFENDANTS AND STATE OF NORTH CAROLINA, ADDITIONAL DEFENDANT

No. 7

(Filed 15 December 1971)

1. Appeal and Error § 16— jurisdiction of trial court after appeal

As a general rule an appeal takes the case out of the jurisdiction of the trial court.

2. Rules of Civil Procedure § 59— motion for new trial for newly discovered evidence

Rule 59 was inapplicable where plaintiff's motion for a new trial on the ground of newly discovered evidence was not served within 10 days after entry of the judgment. G.S. 1A-1, Rule 59.

3. Appeal and Error § 16; Rules of Civil Procedure §§ 59, 60— jurisdiction of trial court after appeal — motion for new trial on ground of newly discovered evidence

When an appeal was taken, the trial court was divested of jurisdiction, except to aid in certifying a correct record, and was without authority to consider plaintiff's motion under Rules of Civil Procedure 59 and 60 for a new trial on the ground of newly discovered evidence. G.S. 1A-1, Rules 59 and 60.

APPEAL by defendant, State of North Carolina, from *Parker, J.*, 27 April 1970 Civil Session of CHOWAN Superior Court.

Plaintiff instituted this action in the nature of a processioning proceeding, against Miles C. Bunch and others, to establish boundary lines to certain lands allegedly owned by him known as the "Gallberry Tract." Original defendants filed an answer denying plaintiff's title to the land. The Clerk of Superior Court transferred the case to the Civil Issue Docket of Chowan Superior Court. On 24 March 1969 the State of North Carolina moved that it be made an additional party defendant. This motion was allowed on 31 March 1969, and the State by its answer filed on 28 April 1969 alleged that it was the owner of the land described in the petition as the "Gallberry Tract."

At trial of the cause, before Judge Joseph W. Parker, who heard the case without a jury by agreement of the parties, plaintiff sought to establish his title to the "Gallberry Tract" by chain of title emanating from deed from the State or, in the alternative, by adverse possession. Judge Parker allowed defendants' motion to dismiss at the close of plaintiff's evidence, and signed a judgment dismissing the case on 28 April 1970. Plaintiff gave notice of appeal in open court on that date. On 19 June 1970 Judge Parker signed an order allowing plaintiff an extension of 30 days to serve his case on appeal and a period of 60 days to docket his appeal in the North Carolina Court of Appeals.

On 23 June 1970 plaintiff gave defendants notice of his intention to move that the judgment be set aside, on the grounds of newly discovered evidence, pursuant to Rules 59 and 60 of the New Rules of Civil Procedure. The newly discovered evidence upon which plaintiff relied consisted of certain tax receipts and tax records. Hearing on the motion was held, and on 1 July 1970 Judge Parker entered an order setting aside the judgment of dismissal dated 26 April 1970 and granting plaintiff a new trial.

Defendant State of North Carolina appealed from the order of 1 July 1970. This case is transferred for initial appellate review under an order made pursuant to G.S. 7A-31(b)(4).

Attorney General Morgan and Staff Attorney Rafford E. Jones for the State of North Carolina, appellant.

Twiford and Abbott, by Russell E. Twiford, for plaintiff appellee.

BRANCH, Justice.

The parties to this appeal do not present the question of whether the Superior Court had jurisdiction to enter the order of 1 July 1970.

[1] For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial Court. In *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659, it was stated:

> "As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio.* '. . . (A) motion in the cause can only be entertained by the court where the cause is.' Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal.
>
> . . . .
>
> " . . . The appeal removed the case to the Superior Court for all purposes, except the certification of a correct record. . . . "

Accord: *Pelaez v. Carland,* 268 N.C. 192, 150 S.E. 2d 201; *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407; *Bank v. Twitty,* 13 N.C. 386.

Plaintiff made his motion to set aside the judgment pursuant to Rules 59 and 60 of the New Rules of Civil Procedure. We must therefore determine the effect of Rules 59 and 60 upon the above stated general rule as applied to the facts of this case. This presents a problem of first impression in this jurisdiction.

Rule 59 provides:

(a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds: . . . .

(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(b) Time for motion.—A motion for a new trial shall be served not later than 10 days after entry of the judgment.

[2] Clearly Rule 59 does not apply to the facts of this case since the motion for new trial was not made within the period of time specified by that rule.

Thus, if plaintiff is entitled to any relief, it must be found in the provisions of Rule 60.

Rule 60(b) in part provides:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(6) . . . The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. . . .

Pertinent parts of Federal Rule 60(b) provide:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . .

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

> . . . The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.
>
> A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

The nearly identical provisions of our Rule 60(b) and Federal Rule 60(b) point to the Federal decisions for interpretation and enlightenment.

In the case of *Switzer v. Marzall,* 95 F. Supp. 721 (1951) the defendant filed a motion for a new trial and later gave notice of appeal. The appellate court, in holding that the defendant removed the case from the jurisdiction of the trial court when he appealed, stated:

> The basic rule is that two courts cannot have jurisdiction of the same case at the same time, and that on perfecting of appeal the lower court is ousted of its jurisdiction. *Draper v. Davis,* 102 U.S. 370, 26 L. Ed. 121; *Keyser v. Farr,* 105 U.S. 265, 26 L. Ed. 1025; *Goldsmith v. Valentine,* 35 App. D.C. 299; *Lasier v. Lasier,* 47 App. D.C. 80.
>
> . . . .
>
> The question therefore narrows down to whether the principle has been modified by the 1948 amendments to the Federal Rules, particularly Rule 60(b).
>
> Rule 60(b), as amended, provides that the court may relieve a party from a final judgment on the ground (among others) of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), that the motion shall be made not more than one year after the judgment was entered, and that such motion shall not affect the finality of a judgment or suspend its operation.
>
> In *Daniels v. Goldberg,* D.C. 8 F.R.D. 580, 581, it is stated: "The amendments to the Rules specifically give to the district court power to act in certain instances after an appeal has been filed, Rules 60(a) and 73(a), *but none of these confer on a district court the power to vacate a judgment after an appeal has been filed.*" (Emphasis ours.)

This question was considered and summarily treated in the case of *Norman v. Young*, 422 F. 2d 470 (1970). There the Court stated:

> " . . . The record reflects that on April 11, 1969, all parties stipulated at defendants' request that the supplemental proceedings be continued over and set for hearing at the Court's convenience. April 18 was the date set and on that day, before arguing his 60(b) motion, defendants' lawyer filed a notice of appeal, taking the case out of the trial court's jurisdiction. There was no fault here with the trial judge."

In 7 J. Moore, FEDERAL PRACTICE, Par. 60:30(2), (2 ed., 1970), we find the following:

> But the general rule is that when an appeal is taken from the district court the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court. Hence during the pendency of an appeal it is generally held that the district court is without power to grant relief under Rule 59; or to vacate, alter or amend the judgment under Rule 60(b), whether the 60(b) motion is made prior to or after the appeal is taken, except with permission of the appellate court.

Moore also points out that "(a) motion for relief under Rule 60(b) does not affect the finality of a judgment and hence does not toll the time for appeal from the final judgment. Correlatively, an appeal from the final judgment does not enlarge the time within which to move for relief under 60(b)." *Id.* Par. 60:30(1).

[3] The general rule set forth in *Machine Company v. Dixon, supra,* and *Pelaez v. Carland, supra,* is not changed by Rules 59 and 60 of the New Rules of Civil Procedure. Here, when the appeal was taken the trial court was divested of jurisdiction except to aid in certifying a correct record. Plaintiffs failed to move for a new trial in the appellate division within the time allowed by Rule 60(b).

The order of the trial court vacating the judgment of 28 April 1970 and granting a new trial on ground of newly discovered evidence is of no effect since it was entered after the trial court was divested of jurisdiction. The order is vacated.

Order vacated.

STATE OF NORTH CAROLINA v. STEVEN MICHAEL BURLESON

No. 141

(Filed 15 December 1971)

1. **Rape § 6— rape prosecution — submission of issue of lesser offense**

Where all the evidence tends to show an accomplished rape, and neither the State nor defendant offered any evidence to support a guilty verdict of assault with intent to commit rape, the trial judge is not required to submit to the jury the issue of guilt of the lesser offense.

2. **Criminal Law § 112— instruction on affirmative defense — burden of proof**

Defendant's contention in a rape case that the trial court erroneously failed to charge the jury "that an affirmative defense must be proved to the satisfaction of the jury instead of beyond a reasonable doubt," *held* without merit.

3. **Rape § 4— evidence of res gestae — assaults on victim's relatives**

Testimony by a rape victim's mother and grandmother as to the events that occurred in the home from the time of defendant's violent entry until the consummation of the rape was competent and relevant as part of the *res gestae*, including their testimony that they had been assaulted by the defendant.

APPEAL by defendant under G.S. 7A-27(a) from *Johnston, J.*, June 7, 1971 Criminal Session of GUILFORD Superior Court (High Point Division).

Defendant was indicted for the rape of Marguerite Patterson.

The evidence offered by the State tends to show the facts narrated below.

On the night of November 27, 1970, about eleven o'clock, defendant, aged 15, knocked on the front door of the Patterson residence. The three occupants, Marguerite Patterson, aged 18, and Mrs. Ruby Patterson, Marguerite's mother, and Mrs. Kate Bryant, Ruby's mother, had gone to bed. Mrs. Bryant, who occupied one of the bedrooms, was asleep. Marguerite and her mother were in twin beds in another bedroom watching television when they heard the knock on the front door. Mrs. Patterson got out of bed and went to the front door.

Upon opening the front door, Mrs. Patterson noticed that the person at her door was the boy she had previously seen walking across the yard. Although they did not know defendant, the Pattersons understood he had been living next door with his grandmother. Defendant asked if Mrs. Patterson knew who he was. She observed that he acted like he was frightened and could not talk, and she saw "red blotches" on his neck. Apprehensive that something was wrong at the neighbor's house, Mrs. Patterson opened the screen door to find out "what had happened" next door. Thereupon, defendant jumped into the house, holding his knife on Mrs. Patterson, and said, "Let's get back inside."

Defendant backed Mrs. Patterson at knife point through the living room to the hall door and then backed Mrs. Patterson and Mrs. Bryant, who had been aroused, into the room where Marguerite was in bed. There defendant took off his clothes and at knife point demanded that the three women take off their clothes. The only light then in this room was provided by the television. Mrs. Bryant managed to pull the television cord from the socket and extinguish this light. When this occurred Mrs. Patterson moved toward a window and jerked the drapes apart, intending to try to raise the window and jump. However, defendant quickly found the switch to the room light, turned on the light and threatened to kill Mrs. Bryant if Mrs. Patterson did not move away from the window—grabbing the knife and putting it on Mrs. Bryant. When Mrs. Bryant opened the door, defendant "lunged for her and knocked her down in the hall and hit her back on the molding." Defendant dragged Mrs. Bryant across the floor and got her on her bed. Soon thereafter Mrs. Bryant got up, slammed the door to her room, knocked the screen out of the window and jumped from the window to the ground six feet below. Mrs. Patterson and Marguerite tried to close the door to Marguerite's bedroom but could not close it completely on account of defendant's shoes and clothes. Mrs. Patterson fled from the house and went to the home of a neighbor.

While defendant was involved with Mrs. Patterson and Mrs. Bryant, Marguerite had gotten out of bed. She went to the phone and called the police. When defendant returned to Marguerite's room, pushing his way through the door, he "turned around and picked up the phone and listened for a minute and then put it down." Defendant then gave his un-

divided attention to Marguerite. He stuck the knife at her throat, took her clothes off, backed her onto the bed and there had complete sexual intercourse with her, without her consent and against her will, notwithstanding her protests and pleading. (The words spoken by defendant and the details of the rape and unnatural indignities to which Marguerite was subjected are not germane to decision and therefore are omitted.)

When Police Sergeant Wood arrived, he found Marguerite and defendant, both naked. Defendant had a knife at her throat. She broke loose, ran behind the officer to her mother, saying, "Don't let him get at me anymore." When defendant started toward the officer, he took out his revolver and said: "Son, don't come any closer or I will have to kill you." Thereupon, defendant dropped the knife. The knife was offered in evidence.

Officers Whitaker and Wood testified in detail as to statements by Marguerite made shortly after their arrival at the Patterson residence. These statements were in accord with and corroborative of Marguerite's testimony.

Evidence offered by defendant consisted of his testimony and that of Mrs. Anita Green, defendant's mother.

Defendant testified that he and some friends had been at his grandmother's house next door to the Patterson house; that during that day he had consumed "between fifteen and twenty-four beers, sniffed two or three tubes of glue," and had taken one of his grandmother's nerve pills; that "the last thing he remember[ed] on this night was that he left for Five Points walking to get some paper bags to sniff glue in"; and that he remembered nothing else until he was in the Juvenile Detention Home of Guilford County.

Mrs. Green testified that defendant had been living with his grandmother; that she saw defendant in the early morning of November 28, 1970, at the police station; that he was in a "stupor state" and "had some white substance around his mouth which she assumed was glue"; and that "[s]he felt that he was not himself and did not know where he was that night or what he was doing."

The court instructed the jury they could return one of three verdicts: (1) Guilty of rape as charged in the bill of indictment; (2) guilty of rape with recommendation that the punishment be imprisonment for life; and (3) not guilty.

The jury returned a verdict of guilty of rape as charged with recommendation that defendant's punishment be imprisonment for life. In accordance with the mandate of G.S. 14-21, a judgment of life imprisonment was pronounced. Defendant excepted and appealed.

Attorney General Morgan and Assistant Attorneys General Eatman and League for the State.

Morgan, Byerly, Post & Herring, by James F. Morgan, for defendant appellant.

BOBBITT, Chief Justice.

No question is presented as to the sufficiency of the evidence to support the verdict. The State's evidence that defendant was guilty as charged in the bill of indictment was positive and plenary.

Under the heading, "Assignments of Error," defendant asserts the court erroneously failed to charge the jury in the three respects discussed below.

Since no exception appears in the case on appeal, there is no basis in the record for consideration of the assertions denominated "Assignments of Error." "An assignment of error not supported by an exception is ineffectual and will not be considered on appeal." *State v. Jones,* 278 N.C. 259, 264, 179 S.E. 2d 433, 437 (1971), and cases cited. Notwithstanding his failure to comply with established procedural requirements, the seriousness of the crime and the age of the defendant impel us to examine and consider defendant's purported "Assignments of Error."

[1] There is no merit in defendant's first assertion, that the court erroneously failed to submit "the lesser included offense of assault with intent to commit rape." The following statement from *State v. Rhodes,* 275 N.C. 584, 592, 169 S.E. 2d 846, 851 (1969), applies with equal force to the present case: "All the evidence tended to show an accomplished rape and to prove defendant's guilt beyond a reasonable doubt. Neither the State nor defendant offered any evidence upon which a verdict of guilty of the lesser and included offense of assault with intent to commit rape could have been based. The judge was not required to submit that issue to the jury, and a request to do so would have been properly refused."

[2] There is no merit in defendant's second assertion, that the court erroneously failed to charge the jury "that an affirmative defense must be proved to the satisfaction of the jury instead of beyond a reasonable doubt." We find no basis in the record for this assertion. On the contrary, it appears that the court placed no burden of proof on defendant in respect of an affirmative defense. The following excerpt from the charge indicates the court's instructions pertinent to that aspect of the case: "[T]he court . . . instructs you that if you should find that on the occasion of which the State complains that the defendant, by reason of sniffing glue or drinking beer, or both, did not have the mental capacity sufficient to form a criminal intent, and that he had not previously formed a criminal intent to rape Marguerite Patterson, and had thereafter participated in sniffing glue or drinking beer, that it would be your duty to return a verdict of not guilty." Obviously, this instruction was not prejudicial to defendant.

[3] There is no merit in defendant's third assertion, that the court had erroneously failed to charge the jury "that they should disregard the testimony of the mother and grandmother in regard to their being assaulted, except in that it shows force used in the alleged rape, the assault charges being a matter for another court." Nothing in the record suggests that defendant was on trial for assaults on Mrs. Patterson and Mrs. Bryant. The evidence as to what defendant did to them was incidental and preliminary to his rape of Marguerite. All that occurred in the Patterson residence from the time of defendant's violent entry until the consummation of the rape was competent and relevant as part of the *res gestae*. Testimony as to defendant's assaults upon Mrs. Patterson and upon Mrs. Bryant was competent *inter alia* to explain their removal from the scene and consequent inability to interfere when Marguerite was raped.

Finding no error of law, the verdict and judgment will not be disturbed.

No error.

WARREN FORRESTER AND JOSEPH W. FORRESTER, PETITIONERS v. JOE W. GARRETT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA, RESPONDENT

No. 53

(Filed 15 December 1971)

1. **Rules of Civil Procedure § 12— defense of failure to state claim for relief**

When a pleader has failed to state a claim upon which relief can be granted, his adversary is now permitted by Rule 12(b)(6) to assert this defense either in a responsive pleading or by motion to dismiss, and this motion performs substantially the same function as the old common law general demurrer.

2. **Automobiles § 2— uninsured vehicle involved in collision — suspension of licenses until security posted — petition to postpone posting of security**

The Commissioner of Motor Vehicles, pursuant to G.S. 20-279.5, suspended the drivers' licenses of both the owner and the driver of an uninsured vehicle involved in a collision until they posted security of $20,900 to satisfy any judgments against them. The owner and driver of the uninsured vehicle filed a petition under G.S. 20-279.2 in which they sought to have the court postpone the posting of security required by the Commissioner until such time as judgment be rendered against them. *Held:* The petition was insufficient to state a claim upon which relief could be granted where petitioners failed to allege that they were probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, and failed to allege that the amount of the security required was excessive or not required by the terms of the statute.

APPEAL by petitioners, Warren Forrester and Joseph W. Forrester, from *Godwin, S.J.*, 18 June 1971 Session of ORANGE Superior Court, transferred for initial appellate review by the Supreme Court under general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Warren Forrester purchased a 1960 Ford Falcon automobile and had it registered in his name although in fact it was used exclusively by his minor son, Joseph W. Forrester, who was married and lived separate and apart from his parents. On 26 May 1970 Joseph W. Forrester was operating this Ford along Interstate 85 in Durham, North Carolina. Forrester stopped to let a passenger out, and while stopped his car was struck in the rear by a 1964 Oldsmobile operated by Katherine Cobb Hooks. As a result of the collision, Danny Leon Simmons, a passenger in the Forrester vehicle was killed. Forrester and

Mrs. Hooks were injured, and both vehicles were damaged. Warren Forrester and Joseph W. Forrester mistakenly thought the Ford automobile was covered by a liability insurance policy issued by Indiana Lumbermens Mutual Insurance Company to Warren Forrester and wife, Mary M. Forrester, on two other automobiles owned by them. However, at the time of the collision the Ford was uninsured. The Commissioner of Motor Vehicles, acting under the provisions of G.S. 20-279.5, issued an order effective 30 October 1970 suspending the driver's license of both Warren Forrester and Joseph W. Forrester. One condition for rescinding the order of suspension and reinstating the licenses was that the sum of $20,900 be posted as security to satisfy any judgments which might be rendered against Warren Forrester or Joseph W. Forrester, or both, for injuries and damages arising out of this collision. Warren Forrester and Joseph W. Forrester on 20 October 1970 filed a petition under G.S. 20-279.2 praying that the order of the Commissioner requiring the posting of security be postponed until after judgments, if any, be rendered against them on such claims.

At the hearing before Judge Godwin, the Commissioner of Motor Vehicles moved to dismiss the petition under G.S. 1A-1, Rule 12(b)(6), North Carolina Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. After examining the pleadings and hearing oral argument of counsel, the court allowed the motion. Petitioners appealed.

Bryant, Lipton, Bryant & Battle by Alfred S. Bryant for petitioner appellants.

Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and T. Buie Costen for respondent appellee.

MOORE, Justice.

Only one question is presented by this appeal: Did the court err in granting respondent's motion to dismiss the petition under Rule 12(b)(6) for failure to state a claim upon which relief could be granted?

Rule 8(a), North Carolina Rules of Civil Procedure, provides that a pleading which sets forth a claim for relief shall contain (1) a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the trans-

actions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.

[1] When a pleader has failed to state a claim upon which relief can be granted, his adversary is now permitted by Rule 12(b)(6) to assert this defense either in a responsive pleading or by motion to dismiss, and this motion performs substantially the same function as the old common law general demurrer. 2A Moore, Federal Practice § 12.08 (2d Ed., 1968).

In discussing Rule 12(b)(6), Justice Sharp, in *Sutton v. Duke,* 277 N.C. 94, 105, 176 S.E. 2d 161, 168 (1970), stated:

> "At the beginning of this opinion we noted that the motion to dismiss, which tested 'the legal sufficiency of the complaint,' performed a function of the demurrer under the former practice. The motion to dismiss, however, will be allowed *only* when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant. *Bagwell v. Brevard,* 256 N.C. 465, 124 S.E. 2d 129; *Gillikin v. Springle,* 254 N.C. 240, 118 S.E. 2d 611; *Turner v. Board of Education,* 250 N.C. 456, 109 S.E. 2d 211. If the complaint disclosed, 'a defective cause of action' no amendment could supply the deficiency, and the action was dismissed. *Skipper v. Cheatham, supra* [249 N.C. 706, 709, 107 S.E. 2d 625, 628]; *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860. If, on the contrary, the complaint contained 'a defective statement of a good cause of action,' that is, if it was deficient in factual allegations which presumably could be supplied, the demurrer was sustained but plaintiff was allowed to amend. *Murray v. Aircraft Corporation,* 259 N.C. 638, 131 S.E. 2d 367.
>
> "When Rule 7(c) abolished demurrers and decreed that pleas 'for insufficiency shall not be used,' it also abolished the concept of 'a defective statement of a good cause of action.' Thus, generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a 'defective

statement of a good cause of action.' For such complaint, as we have already noted, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. *See* the paper delivered by Dean Dickson Phillips, *The Sufficiency of a Pleading as Tested by the Motion to Dismiss for Failure to State a Claim upon Which Relief Can be Granted,* reported in the proceedings at the North Carolina Bar Association's Institute on the New Rules of Civil Procedure, October 1968, VI 16-19. *See also* Comment upon Rule 12, Vol. 1A, N.C. Gen. Stats., § 1A-1, p. 610."

Applying these principles to the present case: Are the petitioners entitled to any relief under any of the allegations in the petition? We think not.

G.S. 20-166.1(b) imposes a duty on the operator of a motor vehicle to notify the Department of Motor Vehicles of a collision in which he is involved which results in personal injuries, death or property damage in excess of $100. The operator is required by G.S. 20-279.4 to inform the Department when he notifies it of the accident whether he carried liability insurance or was exempt from the statutory provision.

In the absence of an automobile liability policy or other exceptions in the statute not pertinent to this case, G.S. 20-279.5 provides that "the Commissioner shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each operator or owner," and shall within sixty days after report of such motor vehicle accident, "suspend the license of each operator and each owner of a motor vehicle in any manner involved in such accident . . . unless such operator or owner, or both, shall deposit security in the sum so determined by the Commissioner."

G.S. 20-279.7 in part provides:

"Duration of suspension.—The license and nonresident's operating privilege suspended as provided in § 20-279.5 shall remain so suspended and shall not be renewed nor shall any such license be issued to such person until:

"(1) Such person shall deposit or there shall be deposited on his behalf the security required under § 20-279.5; . . . "

Under the express provisions of G.S. 20-279.5, the Commissioner of Motor Vehicles was required to suspend the driver's license of Joseph Wade Forrester, the operator of the uninsured motor vehicle involved in the collision, until the security as fixed by the Commissioner was given. The Commissioner was also required to suspend the driver's license of Warren Forrester as owner, since he held title to the automobile in question and G. S. 20-279.1(9) defines "owner" as the person who holds the legal title to a motor vehicle. See *Insurance Co. v. Insurance Co.*, 279 N.C. 240, 182 S.E. 2d 571 (1971).

When the Forresters failed to give the security as ordered by the Commissioner, and the Commissioner suspended their licenses as he was required to do by G.S. 20-279.5, the petitioners appealed to the Superior Court from this order as authorized by G.S. 20-279.2, which provides that on appeal:

" . . . Except as otherwise provided in this section, upon the filing of the petition herein provided for, the procedure shall be the same as in civil actions.

"The matter shall be heard de novo and the judge shall enter his order affirming the act or order of the Commissioner, or modifying same, including the amount of bond or security to be given by the petitioner. If the court is of the opinion that the petitioner was probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, the judge shall reverse the act or order of the Commissioner. Either party may appeal from such order to the Supreme Court in the same manner as in other appeals from the superior court and the appeal shall have the effect of further staying the act or order of the Commissioner requiring a suspension or revocation of the petitioner's license."

[2] The petitioners did not allege that they were probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, nor did they allege that the amount of the security required was excessive or that such security was not required by the

terms of the statute. There were no allegations which if proved would entitle the petitioners to any relief, and the only relief requested by the petitioners was that the court postpone the posting of the security required by the Commissioner until such time as judgment had been obtained against them by Mrs. Hooks or the estate of Danny Leon Simmons. Neither the Commissioner nor the court had the authority to grant this relief. To so postpone the posting of the required security would be to disregard the express language of G.S. 20-279.5 and G.S. 20-279.7, which provide that on failure to post the security as ordered, the Commissioner *shall* suspend their licenses and that such suspension *shall* continue until the security is given.

Since the petition in this case requested relief not authorized by statute, the petition stated a defective claim in that it requested relief the court was powerless to grant regardless of what facts could be proved.

In granting respondent's motion to dismiss the petitioners' petition, we find no error.

No error.

STATE OF NORTH CAROLINA v. HELEN DELORES JACKSON, ALIAS PATTIE JACKSON

No. 93

(Filed 15 December 1971)

1. **Arrest and Bail § 3; Criminal Law § 84; Searches and Seizures § 1— when arrest occurred**

Although it is not clear whether officers stated to defendant that she was under arrest when they took her into custody, defendant was deprived of her liberty, and her arrest was complete, when officers detained her at a grill and thereafter took her to jail; consequently, there is no merit to defendant's contention that a search of her at the jail took place before she had been arrested.

2. **Arrest and Bail § 3; Criminal Law § 84; Searches and Seizures § 1— arrest without warrant — search incident to arrest**

Arrest of defendant without a warrant was justified, and a search of defendant incident to the arrest was proper, where the arresting officers had reasonable grounds to believe that defendant had committed a felony by possessing heroin for the purpose of sale and that unless defendant was apprehended she might escape and destroy any narcotic drugs she had on her person.

3. Criminal Law § 84; Searches and Seizures § 1— search of defendant at the jail — incident to arrest

Where the arresting officers had information that defendant had narcotic drugs concealed inside her brassiere when they took her into custody at a grill, neither the removal of defendant to the jail nor a delay of 30 to 45 minutes waiting for a police matron to search her made the search at the jail too remote in time or place to be considered as a search incident to a lawful arrest.

APPEAL by defendant under G.S. 7A-30(1) from the decision of the Court of Appeals, reported in 11 N.C. App. 682, 182 S.E. 2d 271 (1971).

The defendant was tried before *Bickett, J.*, at the 30 November 1970 Session of DURHAM Superior Court, and was convicted of the felonious possession of heroin for the purpose of sale (G.S. 90-88). From a sentence of three to five years, she appealed to the Court of Appeals, which found no error in the trial.

Upon the call of the case for trial, counsel for the defendant made a motion to "suppress all evidence as to the narcotic drugs, on the grounds that the defendant's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution were violated in that the evidence obtained by the agents, detectives, and officers was without the authorization of a valid search warrant or as an incident to a lawful arrest, and that evidence obtained in such a manner is incompetent under G.S. 15-27.1 [now G.S. 15-27]."

Before passing upon this motion, the trial judge conducted an extensive voir dire hearing, at which time the State offered testimony tending to show: On 15 February 1970 Durham Police Officer T. O. Joyner was sent to Lincoln Hospital's emergency room to investigate a reported drug-overdose case involving Christiana Thompson. Miss Thompson told Officer Joyner that defendant Helen Delores Jackson, alias Pattie Jackson, had injected something into her arm that night, that defendant had been selling drugs, and that defendant had drugs concealed in her brassiere. Officer Joyner further testified that an unnamed informer had also told him that defendant had injected some drug into Miss Thompson and that defendant had drugs concealed in her brassiere. Later that night Officer Joyner observed defendant in the Biltmore Grill. He called his superior, Lieutenant Evans, who joined him and together they entered

the Grill and told defendant they wanted to talk to her concerning her having drugs in her possession and having administered drugs to Miss Thompson. The defendant denied administering drugs to Miss Thompson or having drugs in her possession. Defendant was then taken to the county jail by Officer Joyner, and Mrs. McFarland, a matron at the jail, was called to search her. Mrs. McFarland arrived some 30 minutes later, took defendant to a private room, and told her she would have to search her. Defendant said she did not have anything but she would let her search. Mrs. McFarland then searched defendant and found 13 bindles of white powder wrapped in a kleenex in her brassiere (a bindle in this case was a small glassine envelope containing about one-tenth of a gram of powder). This white powder was later determined to be heroin. Defendant offered no testimony on the voir dire.

Upon the State's testimony, the trial judge found that Officer Joyner "had reasonable grounds to believe that a felony had been committed, and that unless an apprehension of the defendant were made she might escape and destroy any narcotic drugs she had on her person; that the officer took her into custody and carried her to the Durham County jail where she remained about thirty minutes in the presence of at least two officers at all times, and at all times she was in custody for investigation; that thereafter a matron of the jail, Mrs. McFarland, came to the jail and stated to Helen Delores Jackson, alias Pattie Jackson, that she had to search her, and that the defendant replied, 'Go ahead and search me, but I don't have anything.' The officer had reasonable grounds to believe a felony had been committed and was being committed, and that the defendant, Helen Delores Jackson, alias Pattie Jackson, had committed the felony of possession and administering narcotic drugs, and that said police officers had reasonable grounds to believe unless an arrest was made immediately that the defendant would escape, and that said search was legal both at the incident of taking the defendant in custody and by her consent to search."

The court then overruled defendant's motion to suppress all evidence as to the narcotic drugs found in the possession of defendant, and the trial proceeded before a jury upon the State's evidence which was substantially the same as offered on the voir dire.

Defendant offered no testimony.

Attorney General Robert Morgan, Staff Attorneys William Lewis Sauls and Richard B. Conely, and Associate Attorney Thomas E. Kane for the State.

Joe C. Weatherspoon and Jerry B. Clayton for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the search in question took place before she had been arrested. This contention is clearly without merit. While it is not clear whether the arresting officers stated to the defendant that she was under arrest when they took her into custody, it is clear that defendant was deprived of her liberty when she was detained at the Biltmore Grill and later taken to jail. For the purposes of this case, her arrest was then complete. *Henry v. United States,* 361 U.S. 98, 4 L. Ed. 2d 134, 80 S.Ct. 168 (1959); *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967).

[2] The facts which Judge Bickett found on voir dire were amply supported by competent evidence in the record and are binding on us. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). These facts fully support the conclusion that the arresting officers had reasonable grounds to believe that defendant had committed a felony and unless defendant was apprehended, she might escape and destroy any narcotic drugs she had on her person. Under these circumstances, the arrest without a warrant was justified, and a search incident to the arrest was proper. *Chimel v. California,* 395 U.S. 752, 23 L. Ed. 2d 685, 89 S.Ct. 2034 (1969); *Sibron v. New York* and *Peters v. New York,* 392 U.S. 40, 20 L. Ed. 2d 917, 88 S.Ct. 1889 (1968); *Draper v. United States,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S.Ct. 329 (1959).

In *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971), it is stated:

> " ' A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. . . . In the course of such search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof. If such article is otherwise competent, it may properly be

introduced in evidence by the State.' *State v. Roberts,* 276 N.C. 98, 102, 171 S.E. 2d 440, 443. Accord, *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. 'Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime.' *Preston v. United States,* 376 U.S. 364, 367, 11 L. ed. 2d 777, 780, 84 S.Ct. 881, 883. Accord, *Chimel v. California,* 395 U.S. 752, 762-763, 23 L. ed. 2d 685, 694, 89 S.Ct. 2034, 2040."

Defendant contends, however, that the search of defendant in this case cannot be justified as a search incident to a lawful arrest, since such search was not made until some 30 to 45 minutes after she was taken into custody. For a search and seizure incident to a lawful arrest to be constitutionally permissible, it must be "substantially contemporaneous with the arrest." *Stoner v. California,* 376 U.S. 483, 11 L. Ed. 2d 856, 84 S.Ct. 889 (1964); *Preston v. United States,* 376 U.S. 364, 11 L. Ed. 2d 777, 84 S.Ct. 881 (1964). In the instant case, the arresting officers had information that defendant had narcotic drugs concealed inside her brassiere when they took her into custody at the Biltmore Grill. This was probable cause for her arrest and the officers could have searched her immediately. *State v. Harris, supra.* Instead, the officers took her to jail where she could be searched in privacy by a police matron. In doing so the police officers acted lawfully and commendably. As stated in *United States v. Robinson,* 354 F. 2d 109, 113 (2d Cir. 1965), cert. denied 384 U.S. 1024, 16 L. Ed. 2d 1028, 86 S.Ct. 1965 (1965):

> "Narcotics and the implements with which it is sold and used are small items that can be secreted in numerous places on the body; an adequate search obviously required greater privacy than the street corner. More important, Annita Daniels was a woman and the arresting officers were men. It would have violated . . . all concepts of decency . . . if the officers had attempted a thorough search at the place of arrest."

[3] Neither the removal of the defendant to the jail nor the delay of 30 to 45 minutes waiting for the matron to search her made the search too remote in time or place to be invalid as a search incident to a lawful arrest. Other jurisdictions have so

held. *United States v. Gonzalez-Perez,* 426 F. 2d 1283 (5th Cir. 1970); *United States v. DeLeo,* 422 F. 2d 487, 491-93 (1st Cir. 1970), cert. denied 397 U.S. 1037, 25 L. Ed. 2d 648, 90 S.Ct. 1355 (1970); *United States v. Miles,* 413 F. 2d 34 (3rd Cir. 1969); *United States v. Caruso,* 358 F. 2d 184 (2d Cir. 1966), cert. denied 385 U.S. 862, 17 L. Ed. 2d 88, 87 S.Ct. 116 (1966); *United States v. Powell,* 407 F. 2d 582 (4th Cir. 1969), cert. denied, 395 U.S. 966, 23 L. Ed. 2d 753, 89 S.Ct. 2113 (1969); *Rangel v. State,* 444 S.W. 2d 924 (Tex. Crim. App. 1969); Annot., 19 A.L.R. 3d 727 (1968).

The search in this case was valid as an incident to a lawful arrest, and the heroin found on the defendant's person was properly introduced in evidence. Therefore, it is not necessary to determine whether or not defendant consented to the search.

For the reasons stated above, the trial court's denial of defendant's motion to suppress the evidence obtained in the search of the defendant was without error.

No error.

STATE OF NORTH CAROLINA v. BYRON CARLTON CUMBER

No. 73

(Filed 15 December 1971)

1. **Criminal Law § 162— ground of objection to evidence**

The trial court, upon inquiry, is entitled to know the ground upon which an objection is interposed, and if counsel specifies one ground, he cannot be heard to urge a different ground upon appeal.

2. **Criminal Law § 84— objection to admission of exhibits — grounds stated — failure to hold voir dire hearing on search and seizure**

Where defendant's objection to the introduction of stolen property found in defendant's station wagon was directed specifically to the sufficiency of the identification of some of the property, the trial court was not required to conduct a voir dire hearing to determine whether the property was obtained by an illegal search and seizure.

3. **Criminal Law § 146— appeal from Court of Appeals to Supreme Court — substantial constitutional question — failure to raise question in trial court**

Purported appeal as of right to the Supreme Court from the Court of Appeals is dismissed for failure to present a substantial constitu-

tional question where the constitutional question upon which defendant relies to sustain his appeal—illegal search and seizure—was not raised in the trial court.

APPEAL by defendant from decision of the Court of Appeals upholding judgment of *Cowper, J.*, at the 26 October 1970 Criminal Session, NEW HANOVER Superior Court.

Defendant was charged in separate bills of indictment with breaking and entering two school buildings in New Hanover County on the night of 27 September 1970, and larceny of property from each school. At the trial in superior court, defendant was represented by counsel of his choice, James Larrick and John Newton of the New Hanover Bar.

Jackie Watts, defendant's nephew, was a principal witness for the State. He testified that near dark on 27 September 1970 he and his two uncles, defendant and James Cumber, left their homes in Wilmington to return to Petersburg, Virginia, where they were employed. The three men were traveling in defendant's station wagon with Watts driving. On their way out of town Watts stopped the station wagon twice "because they wanted to stop." Each stop was near a school building, and defendant left the vehicle on each occasion. The first time he returned in about twenty minutes with a radio which he put in the vehicle. The second time defendant was gone about an hour and returned with a typewriter and an adding machine which he put in the station wagon. The three men then left that area and drove to the Martha Ann Restaurant in Hampstead where defendant and James Cumber again left the vehicle and started walking down the road. Watts drove the station wagon to a nearby picnic area to await their return. He had been parked there about an hour when Patrolman Talbert came and took him into custody. The radio, typewriter and adding machine offered in evidence by the State are the same items defendant placed in the station wagon when he returned from the two school buildings.

Patrolman Talbert testified that he went to the picnic area about 11:15 p.m. in response to a call and found Jackie Watts sitting in a station wagon under the wheel. In the back seat and cargo area of the vehicle he observed a Remington typewriter, two table model radios and "an adding machine cover, looked like it was full." The officer stated that "it was in plain view

when he went up to the car and talked to Watts." Officer Talbert called the Sheriff's Department and Detective Padgett came to the picnic area and drove the station wagon to the Martha Ann Restaurant.

Norman Kimbrough, Principal of the Ogden Elementary School, testified that he went to the Ogden School on Sunday night, 27 September 1970, in response to a call from the Sheriff's Department. He found the school building had been entered and a typewriter, an adding machine, a radio, two stopwatches, and a small amount of petty cash were missing. This witness stated that he then accompanied two deputy sheriffs to Topsail School where he saw the missing property in the back of a station wagon. He identified the typewriter by serial number which matched the serial number on a card file maintained by the school. He identified the adding machine as the property of Ogden School and pointed out, in fact, that the name of the school was stenciled on the bottom of the machine with a Magic Marker. He also identified the radio and stopwatches as the property of Ogden School.

Lawrence Fladd, Principal of Bradley Creek School, testified that the window had been broken in his office door at the school, the office entered, and a radio and a flashlight taken. The witness identified State's Exhibit No. 5 as the radio taken from a shelf in his office, and identified State's Exhibit No. 6 as the flashlight he left in an unlocked safe at the school. The witness further stated that about $2.50 in cash was missing.

The stolen articles were offered by the State and admitted into evidence over defendant's objection.

Defendant did not testify as a witness in his own behalf but offered several witnesses, including his wife, whose testimony tended to establish an alibi.

The jury convicted defendant on both counts in each case. Defendant appealed from judgments pronounced, and the Court of Appeals found no error, 11 N.C. App. 302, 181 S.E. 2d 218. This Court denied defendant's petition for certiorari to the Court of Appeals to review its decision; and defendant, allegedly as of right, appealed to the Supreme Court asserting involvement of a substantial constitutional question.

Upon a finding of indigency following trial, defendant's present counsel were appointed by the court to perfect his appeal.

Norman B. Smith and Michael K. Curtis (Smith & Patterson) Attorneys for defendant appellant.

Robert Morgan, Attorney General, and Roy A. Giles, Jr., Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the General Assembly followed the basic principle that there should be only one trial on the merits and one appeal on the law, *as of right,* in every case. Consequently, double appeals as of right—first to the Court of Appeals and then to the Supreme Court—are authorized only in three instances specified by G.S. 7A-30. Here, defendant seeks to qualify for a double appeal as of right on the first ground listed in that statute, *i.e.,* involvement of a substantial question arising under the Constitution of the United States or of this State.

The record reveals that after the two school principals had identified the typewriter, adding machine, radios and other property owned by the schools, and after one of the principals had testified that he observed these items in defendant's station wagon on the night of 27 September 1970, the State tendered the various items in evidence. This tender evoked the following colloquy:

"MR. COBB [the solicitor]: I would like to introduce this evidence and these exhibits into evidence.

"MR. NEWTON [defense counsel]: Objection.

"COURT: On what grounds?

"MR. NEWTON: Especially the last two at Bradley Creek; been no positive identification of those, just common items.

"COURT: Overruled.

"MR. COBB: I would like to introduce them at this time.

"COURT: All right."

Defendant contends in this Court, as he did in the Court of Appeals, that the foregoing objection required the trial judge to conduct a voir dire to determine whether the officers obtained the stolen property by an illegal search of his station wagon in violation of the Fourth and Fourteenth Amendments to the Federal Constitution. The Court of Appeals rejected this contention and so do we.

[1] Defendant's objection was directed specifically to an alleged lack of proper identification of some of the stolen property. Had an allegedly illegal search and seizure been the basis of the objection, counsel would certainly have said so when answering the court's inquiry. The law does not require trial judges to be clairvoyant and omniscient. Neither does it permit defense counsel to play hide and seek with objections. The trial court, upon inquiry, is entitled to know the ground upon which an objection is interposed; and if counsel specifies one ground, he cannot be heard to urge a different ground on appeal. "When the objection is made, the court may, in all cases, require the grounds of objection to be stated, and only those stated can be made the subjects of exception and review." *State v. Wilkerson,* 103 N.C. 337, 9 S.E. 415 (1889). As aptly stated in *Gidney v. Moore,* 86 N.C. 484 (1882), "although a general objection to obnoxious evidence will be sustained when no ground has been assigned, if upon any ground it ought to have been rejected, yet when the ground of the objection can be fairly inferred from the record as understood by the parties at the time, another cannot be assigned in the reviewing court. The ground of exception is to be deemed on appeal a part of the exception itself."

[2] When these legal principles are applied to the record in this case, it is abundantly clear that the constitutional question upon which defendant relies to sustain his double appeal *as of right* was not raised in the trial court. The trial judge had no occasion to conduct a voir dire on the question of search and seizure, and his failure to do so was not error. That belated constitutional question was injected for the first time on appeal to the Court of Appeals and therefore came too late. It was not properly before that court and is not now properly before us. "The attempt to smuggle in new questions is not approved. *Irvine v. California,* 347 U.S. 128, 129. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed

upon in the trial court. *State v. Jones,* 242 N.C. 563, 564, 89 S.E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 358." *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1 (1959). *Accord, State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968).

[3] Having failed to show involvement of a substantial constitutional question which was raised and passed upon in the trial court and properly brought forward for consideration by the Court of Appeals, no legal basis exists for this appeal to the Supreme Court, and it must therefore be dismissed.

Appeal dismissed.

STATE OF NORTH CAROLINA v. ROBERT WILLIAMS, JR.

No. 134

(Filed 15 December 1971)

1. **Homicide §§ 23, 24— instructions on presumptions arising in a homicide case — expression of opinion**

The instructions in a homicide prosecution, when considered in their totality, warranted a new trial for the following errors: (1) the trial court, in purporting to charge on the presumptions arising from the intentional use of a deadly weapon, failed to mention the intentional use of a deadly weapon; (2) the charge failed to indicate that the presumption of malice might be rebutted; (3) the trial court set out to charge on manslaughter but ended up by defining murder in the second degree; (4) the court, by inadvertently omitting the word "if," stated as a proven fact that the State had established the defendant's criminal negligence in stabbing the homicide victim.

2. **Criminal Law § 111— purpose of the charge**

The chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.

3. **Criminal Law § 158— conclusiveness of certified record**

The Supreme Court is bound by the record as certified and can judicially know only what appears of record.

APPEAL by defendant from *Bickett, J.,* 26 April 1971 Session of ORANGE Superior Court.

Defendant was charged by bill of indictment with murder. The State elected to seek a verdict of guilty of second degree murder or manslaughter.

The State's evidence tends to show the following:

William Aaron Crutchfield testified that he, Jerry Stroud (also known as Jerry Thompson), Rachel Davis, Alonzo Jennings, and defendant were in the parking lot in front of Mason's Grill and Grocery Store in Chapel Hill just before noon on 23 January 1971. While they were engaged in a conversation about purchasing some wine, defendant and Stroud began to talk in a loud manner. Officer Farrow of the Chapel Hill Police Department stopped and cautioned them about the excessive noise. Shortly after Officer Farrow drove off, defendant and Stroud began wrestling. After wrestling for a short time, defendant pulled out a knife. Stroud told defendant to quit playing with the knife. Then Stroud threw defendant to the ground. Defendant, still holding the knife, got up and moved towards Stroud, who raised both his hands above his head. Defendant walked up and "gigged" Stroud one time in the chest. Stroud said, "You cut me," and pulled out his knife. Stroud did not have a weapon of any sort in his hands before this. Stroud opened his knife and stepped towards defendant. Stroud stopped and closed his knife. By this time he was bleeding profusely from the wound in his chest.

Crutchfield, an employee of North Carolina Memorial Hospital, walked around defendant to Stroud and offered to take him to the hospital. Stroud collapsed on the way to Crutchfield's car. Crutchfield's efforts to revive Stroud were futile. While Crutchfield was assisting Stroud, defendant walked behind them, saying, "I didn't stab you." Defendant was the only one who could have inflicted the fatal wound.

Dr. David K. Wiecking testified that deceased died from a single stab wound which pierced his heart and caused a severe hemorrhage.

The State offered other witnesses whose testimony tended to corroborate the witness Aaron Crutchfield.

Defendant testified that he and Stroud were playing around and wrestling; and that both he and Stroud pulled out knives. Defendant slipped to the ground after grabbing Stroud. As defendant got up an old lady walked by and said, "Fellows, quit playing before one of you gets hurt." They quit playing and both closed their knives. As defendant was walking off, the old lady said, "The boy has been stabbed." Defendant turned around and

replied, "Jerry, I wouldn't stab you for nothing in the world." Defendant ran home. He voluntarily surrendered to the police after talking with his father.

The jury returned a verdict of guilty of voluntary manslaughter. Defendant appealed from judgment imposing prison sentence of seven to ten years.

This case is transferred for initial appellate review by the Supreme Court under an order made pursuant to G.S. 7A-31(b)(4).

Attorney General Morgan and Assistant Attorney General Banks for the State.

Winston, Coleman and Bernholz, by Barry T. Winston, for defendant.

BRANCH, Justice.

All of defendant's assignments of error are directed to the charge.

[1] Defendant contends that the court erred in instructing the jury as to second degree murder and manslaughter. In this connection, the trial judge instructed the jury:

> There is no evidence of malice in this case other than the presumption if you find from the evidence beyond a reasonable doubt that the Defendant intentionally inflicted the wound upon the deceased, Mr. Stroud, as he has been referred to here in the Bill of Indictment. Then, if you so find, that it proximally resulted, there is from no other cause, the death of Mr. Stroud, that the wound was intentionally inflicted by the Defendant, that raises the presumption that he is guilty of murder in the second degree.

The correct rule concerning the presumptions which arise in a homicide case are found in *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560. There the Court stated:

> If and when the State satisfied the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot Taylor with a .38 pistol and thereby proximately caused Taylor's death, two presumptions arose: (1) that the killing was unlawful, and (2) that it was done

with malice. Nothing else appearing, the defendant would be guilty of murder in the second degree. *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *State v. Adams,* 241 N.C. 559, 85 S.E. 2d 918; *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83; *State v. Revis,* 253 N.C. 50, 116 S.E. 2d 171; *State v. Phillips,* 264 N.C. 508, 515, 142 S.E. 2d 337, 340; *State v. Price,* 271 N.C. 521, 525, 157 S.E. 2d 127, 129-130; *State v. Cooper,* 273 N.C. 51, 57, 159 S.E. 2d 305, 309.

Here the charge does not mention the intentional use of a deadly weapon. Nor are the presumptions which arise from the intentional use of a deadly weapon correctly stated. Further, nothing appears in this part of the charge which indicates that the presumption of malice might be rebutted. Thus, even a cursory examination of this portion of the charge reveals that it does not comply with the rule as correctly stated in *State v. Propst, supra.*

The court thereafter charged:

Now, manslaughter, ladies and gentlemen of the jury, as I have told you before, if you find from the evidence beyond a reasonable doubt that the defendant, Mr. Williams, intentionally inflicted the wound in the chest of the deceased, Jerry Stroud, and that it proximally resulted in death of Mr. Stroud, then he would be presumed to be guilty of murder in the second degree; . . .

The court set out to charge on manslaughter, but proceeded to give a definition of murder in the second degree.

Again, in discussing distinctions in homicides, the record shows:

[The presence in one case of premeditation and deliberation and the absence of the other, or one or both of these elements is the distinction different between murder in the first degree and murder in the second degree.]

To the above portion of the charge as set out in brackets, the Defendant excepts. DEFENDANT'S EXCEPTION NO. 4.

[The presence of the one and the absence of the other element of malice is the distinction between murder in the second degree and manslaughter.]

[2] The chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict. *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484.

Defendant further contends that the trial judge expressed opinions to the jury. In support of this contention defendant cites portions of the record which show the following:

> Criminal negligence is more than carelessness. The Defendant's act of criminal negligence, if it was done, was with recklessness or carelessness and showed a thoughtless disregard for consequences or heedless indifference for the safety and rights of others. That would be what is known in law as culpable negligence or criminal negligence . . . . and the State of course will further prove to you in both murder in the second degree and manslaughter that Jerry Stroud's death was a natural and probable result of the Defendant's act.

Defendant correctly contends that this portion of the charge amounted to a statement of opinion that, if the stabbing was done, an act of criminal negligence had been committed by defendant.

> In that connection, you are instructed, ladies and gentlemen of the jury, the State of North Carolina has satisfied you beyond a reasonable doubt that the Defendant, Mr. Robert Williams, Jr., unlawfully, willfully and feloniously, in a criminal and negligent way and the act was criminally negligent, reckless, and careless and showed total disregard for consequences or heedless indifference to the safety and rights of others and such act was done with a deadly weapon, as that term has been described to you, and you are further satisfied from the evidence that the deceased, Mr. Stroud's death was a natural and probable result of the Defendant's act, it would be your duty to return a verdict of involuntary manslaughter.

This part of the court's instructions omitted the single word "if." Undoubtedly this was an inadvertent omission. It resulted, however, in an expression of opinion by the court that the State had already shown that defendant's act was criminally negligent.

In the case of *State v. Kea,* 256 N.C. 492, 124 S.E. 2d 174, the trial judge charged "Manslaughter is the unlawful killing of a human being *with malice* . . . ." It was apparent that the trial judge intended to charge that "Manslaughter is the unlawful killing of a human being *without malice.*" There the trial court in other places correctly charged as to this element of manslaughter; nevertheless, this Court held that such charge resulted in prejudicial error.

It is clear that some of the errors in this charge resulted from *lapsus linguae* on the part of the trial judge; however, in all fairness to this experienced trial judge, we feel compelled to observe that it is also apparant that many of the errors of omission and commission resulted from the taking and transcription of the record.

[3] This Court, however, is bound by the record as certified and can judicially know only what appears of record. *State v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621; *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423.

We seriously doubt that any part of the charge as challenged by any one assignment of error would constitute prejudicial error; however, without attempting to discuss all assignments of error, we conclude that the total charge failed to clarify the material issues so as to aid the jury in reaching a verdict.

For reasons stated, there must be a

New trial.

STATE OF NORTH CAROLINA v. JOHN PEURIFOY SPEIGHTS

No. 90

(Filed 15 December 1971)

1. **Constitutional Law § 32— consolidated trial of petty misdemeanors — failure to appoint counsel**

An indigent defendant was not denied his Sixth Amendment right to counsel by the trial court's refusal to appoint counsel to represent him in the consolidated trial of two petty misdemeanors, notwithstanding the combined punishment for both offenses could have exceeded six months' imprisonment.

2. **Criminal Law § 138— appeal from district court to superior court — increased sentence**

Upon appeal to the superior court from conviction in the district court, defendant's constitutional rights were not violated by the imposition of a greater sentence in the superior court than that imposed in the district court.

APPEAL by defendant from decision of the Court of Appeals, reported in 12 N. C. App. 32, 182 S.E. 2d 204 (1971), upholding judgment of *Brewer, J.*, 11 January 1971 Session of WAKE Superior Court.

Defendant was arrested in Raleigh, North Carolina, on 5 August 1970 for operating an automobile on the streets and highways of North Carolina with improper equipment; to wit, no horn, and for resisting the officer when arrested on the improper equipment charge. Defendant was convicted in the District Court of Wake County on both charges, and was ordered to pay the costs of the court on the improper equipment charge and was given a sixty-day prison sentence, suspended on condition that he pay a fine of $50 and the costs, on the resisting arrest charge. Defendant appealed to the Superior Court.

Prior to trial in Superior Court, defendant moved that, due to his indigency, counsel be appointed to represent him. No inquiry as to defendant's indigency was made, the motion was denied, and he was not represented by counsel at trial. The cases were consolidated for trial, verdicts of guilty on both charges were returned, and defendant was sentenced to a prison term of not less than four nor more than six months. Notice of appeal was given to the North Carolina Court of Appeals. The Superior Court then found defendant to be an indigent and appointed counsel to perfect his appeal.

The Court of Appeals, in an opinion by Judge Vaughn, concurred in by Chief Judge Mallard and Judge Parker, found no error. Defendant, through his court-appointed counsel, gave notice of appeal to the Supreme Court, pursuant to G.S. 7A-30(1).

Attorney General Robert Morgan, Assistant Attorney General I. Beverly Lake, Jr., and Staff Attorney Ronald M. Price for the State.

Manning, Fulton & Skinner by John B. McMillan for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that as an indigent his rights under the Sixth Amendment to the Constitution of the United States were violated in that he was tried without benefit of counsel on two charges arising out of the same incident, the combined punishment for which could have been in excess of six months' imprisonment. The maximum punishment for resisting arrest is six months' imprisonment and a $500 fine. G.S. 14-223. The maximum punishment for operating a motor vehicle with improper equipment is imprisonment not to exceed thirty days and a $50 fine. G.S. 20-125 and G.S. 20-176(b).

G.S. 7A-451(a)(1) provides that an indigent person is entitled to services of counsel in any felony case, and in any misdemeanor case for which the authorized punishment exceeds six months' imprisonment or a $500 fine.

In *State v. Green,* 277 N.C. 188, 176 S.E. 2d 756 (1970), in which the trial court refused to appoint counsel for an indigent charged with a misdemeanor for which punishment could not exceed six months' imprisonment, it is stated:

> "Whether an offense is *petty* or *serious* is measured, in both state and federal courts, by the punishment authorrized by law *for the particular offense* in question. 18 U.S.C. § 1; G.S. 7A-451. Under these statutory yardsticks *any* crime the maximum authorized punishment for which does not exceed six months in prison is a petty offense for which the offender may be tried without a jury and *without the assistance of counsel. State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969); *Blue Jeans Corp. v. Clothing Workers,* 275 N.C. 503, 169 S.E. 2d 867 (1969); *Cheff v. Schnackenberg,* 384 U.S. 373, 16 L. Ed. 2d 629, 86 S. Ct. 1523 (1966); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472 (1968); *Duncan v. Louisiana,* 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968); *Bloom v. Illinois,* 391 U.S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477 (1968)." (Emphasis added.)

The fact that defendant was charged with separate offenses in separate warrants does not change the punishment authorized for either offense. Defendant was arrested for driving an automobile without a horn, a violation of a statute designed to pro-

tect the traveling public but a comparatively minor criminal offense. When arrested on that charge, he elected to resist the arresting officer, a violation of another statute. Neither of the charges was a "serious" offense as defined by either State or Federal courts. Each was a "petty" offense for which appointed counsel was not required by the decisions of this Court or of the Supreme Court of the United States. While no loss of liberty is a trivial matter, the need of the individual for legal assistance must be weighed against the State's ability reasonably to furnish it. We think the distinction made between petty and serious offenses achieves a reasonable balance between the individual's need and the State's duty to furnish counsel. This duty on the part of the State should not be extended to include those cases consolidated for trial in which an individual is charged with more than one petty offense. To do so would tend to encourage a multiplicity of separate trials for petty offenses, further adding to the already congested condition of the criminal dockets within the State. Since defendant was not charged with a serious offense, his trial without counsel did not violate his constitutional rights under the Sixth Amendment.

[2] Defendant next contends that it was error for the Superior Court to impose a more severe sentence than had been imposed in the District Court, citing *Rice v. State of North Carolina,* 434 F. 2d 297 (4th Cir. 1970). Rice was convicted in the General County Court of Buncombe County and sentenced to nine months' imprisonment, suspended upon payment of a fine of $100 and costs. On appeal to the Superior Court he was found guilty and sentenced to two years' imprisonment. Rice applied to the Federal District Court for the Western District of North Carolina for habeas corpus. The District Judge denied the application for habeas corpus for the reason that Rice had failed to exhaust his State remedies by not appealing to the North Carolina Court of Appeals. The Circuit Court, in reversing the ruling of the District Court, said:

> "We think the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State court. It would have been futile. Concededly the Supreme Court of North Carolina had consistently refused to follow *Patton. State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969) ; *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371 (1968) ; *State v. Tolley,* 271 N.C.

459, 156 S.E. 2d 858 (1967). In these circumstances, exhaustion of State remedies is not indispensable. *Hayes v. Boslow,* 336 F. 2d 31, 32 (4 Cir. 1964); cf *Wright v. Maryland Penitentiary,* 429 F. 2d 1101 (4 Cir. 1970).

". . . On the strength of *Pearce* [*North Carolina v. Pearce,* 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969)], we again see the more drastic sentence on the second trial as a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal.

* * *

"In today's decision, the court is not insensitive to the logical and persuasive argument to the contrary in *Lemieux v. Robbins,* 414 F. 2d 353 (1 Cir. 1969), cert. denied 397 U.S. 1017, 90 S. Ct. 1247, 25 L. Ed. 2d 432 (1970). Likewise we express deference to the opinion in *Evans v. City of Richmond,* 210 Va. 403, 171 S.E. 2d 247 (1969). We simply disagree."

Justice Huskins, in *State v. Spencer,* 276 N.C. 535, 545, 173 S.E. 2d 765, 772 (1970), involving an appeal as of right from a District Court to the Superior Court, said:

"In *Pearce,* both sentences were imposed in the same court. To get a retrial, Pearce had to attack the validity of his first sentence and show a violation of his constitutional rights committed during the first trial. Here, defendants were entitled to a trial *de novo* in the superior court even though their trials in the inferior court were free from error. G.S. 7A-288 (now G.S. 7A-290) and G.S. 15-177.1. This is an unfettered statutory right. It therefore appears that when these defendants appealed to the superior court the slate was wiped clean and the cases stood for trial in the superior court as if there had been no previous trial in the district court. Hence, in the sound discretion of the superior court judge, his sentence may be lighter or heavier than that imposed in the district court. *State v. Morris,* 275 N.C. 50, 61, 165 S.E. 2d 245, 252. Other jurisdictions which have considered this question have reached the same conclusion. *Lemieux v. Robbins,* 414 F. 2d 353 (1st Cir. 1969), cert. den. 397 U.S. 1017, 90 S. Ct. 1247, 25 L. ed. 2d 432, and in *People v. Olary,* 382 Mich. 559, 170 N.W. 2d 842. To hold otherwise, and say that upon appeal the

superior court judge may decrease the sentence imposed below but is precluded from increasing it, would encourage appeal to the superior court in every case. Trial in the district court would be futile and the court itself an impediment to the administration of justice. In our view, we are dealing here with wholly new sentences rather than increases in old ones.

"We hold that the decision in *Pearce,* based on a different factual situation was never intended to apply to judgments following trials *de novo* on appeal from inferior tribunals. The fact that defendants received a greater sentence in the superior court than they received in the district court is no violation of their constitutional rights. Upon appeal from an inferior court for a trial *de novo* in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858. *Pearce,* decided 23 June 1969, is not applicable. . . ."

Accord, State v. Sparrow, 276 N.C. 499, 173 S.E. 2d 897 (1970).

We adhere to our decisions in *State v. Spencer, supra,* and *State v. Sparrow, supra.* The imposition of punishment by the Superior Court in excess of that imposed in the District Court was not error.

We find no error of law in the trial which would justify a new trial.

No error.

STATE OF NORTH CAROLINA v. WILLIAM GASTON GRIFFIN

No. 79

(Filed 15 December 1971)

1. Criminal Law § 117— instructions — testimony of interested witnesses — designation of defendant and his mother as interested witnesses

The trial court did not express an opinion upon the credibility of defendant and his mother in violation of G.S. 1-180 in designating defendant and his mother as interested witnesses during its instructions on the duty of the jury to scrutinize carefully the testimony of any interested witness.

2. **Criminal Law § 115— error in failure to submit lesser degrees — verdict of guilty of crime charged**

Error in failing to submit the question of a defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged.

3. **Criminal Law § 115— necessity for instructing on lesser degrees**

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed.

4. **Rape § 6— failure to submit lesser degrees**

In this rape prosecution, the trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the evidence was to the effect that defendant had actual sexual intercourse with prosecutrix by force and against her will and defendant relied on the defense of alibi.

APPEAL by defendant from *Godwin, S.J.*, 3 March 1971 Regular Criminal Session, WAKE Superior Court.

Criminal prosecution upon a bill of indictment charging defendant with the rape of Anna L. Holloway on 3 February 1970.

Anna L. Holloway, the prosecuting witness, testified that at 8:00 p.m. on 3 February 1970 she was walking home alone from Dr. McDowell's office when a man approached and walked behind her for several blocks. At the corner of Lee and East Streets in the City of Raleigh, the man threw a coat over her head and knocked her to the street. She screamed and he told her if she screamed again he would cut her damn throat. He dragged her between two houses, had intercourse with her by force and against her will, and then ran away.

Miss Holloway went to her mother's home and then to the hospital where she was examined by Dr. McDowell. The examination revealed sperm in her vagina.

Miss Holloway told the police she did not know her assailant's name but he went by the nickname of "Peter Rabbit" and she would know him if she saw him again. Thereafter, she positively identified defendant William Gaston Griffin from photographs, in a lineup, and in court as the man who raped her.

Defendant offered evidence, including his own testimony, tending to show that on the night in question he was at the

home of Mary Muldrow, an old family friend, from approximately 6:00 p.m. until 9:50 p.m. and thus could not have raped the prosecuting witness at 8:00 p.m.

The jury returned a verdict of guilty as charged with recommendation of life imprisonment. From judgment in accordance therewith defendant appealed to the Supreme Court. Errors assigned will be discussed in the opinion.

Hatch, Little, Bunn, Jones & Liggett by Richard Jones, Jr., Attorneys for defendant appellant.

Robert Morgan, Attorney General, and Charles M. Hensey, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

[1] Defendant's first assignment of error is addressed to the following portion of the charge: "The defendant and his mother testified in his behalf during the trial of the case. I charge you that as you consider the evidence, and the testimony of those witnesses, the defendant and his mother, that you should scrutinize and closely examine the testimony of each of them and of any witness who has an immediate personal interest in the outcome of your verdict, but that after you do so, if you find that you believe the evidence of such a witness, then you should give to that evidence the same weight and credit that you would to the evidence or testimony of any other disinterested witness whose testimony has been presented to you." Defendant argues that it is not the province of the trial judge to single out and designate any particular witness as an *interested witness;* rather, it is exclusively the function of the jury to decide which witness, if any, has a personal interest in the outcome of the case.

Instructions couched in substantially similar language are fully supported by our decisions. "There is no hard and fast form of expression, or consecrated formula, required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, that the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested." *State v. Green,* 187 N.C. 466, 122 S.E. 178 (1924).

Accord, State v. McKinnon, 223 N.C. 160, 25 S.E. 2d 606 (1943); *State v. Turner,* 253 N.C. 37, 116 S.E. 2d 194 (1960); *State v. Choplin,* 268 N.C. 461, 150 S.E. 2d 851 (1966).

The charge complained of did not constitute an expression of opinion upon the credibility of defendant or his mother in violation of G.S. 1-180. The admonition to scrutinize included not only the defendant and his mother but also the testimony "of *any witness* who has an immediate personal interest in the outcome" of the verdict. There is no merit in defendant's position, and his first assignment is overruled.

The court limited the jury in its deliberations to one of three verdicts, to wit: guilty of rape as charged, guilty of rape with recommendation that the punishment be life imprisonment, or not guilty. Defendant assigns as error the failure of the court to submit the lesser included offenses of assault with intent to commit rape and assault on a female.

[2, 3] It is firmly established by decisions of this Court that a defendant is entitled to have the different permissible verdicts *arising on the evidence* presented to the jury under proper instructions. *State v. Keaton,* 206 N.C. 682, 175 S.E. 296 (1934); *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970). Error in failing to submit the question of a defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees *arising on the evidence* had been correctly presented in the charge. *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906 (1955); *State v. Childress,* 228 N.C. 208, 45 S.E. 2d 42 (1947). However, this principle applies when, and only when, there is evidence of guilt of the lesser degrees. *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, 84 S.E. 2d 545 (1954). Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree, the principle does not apply and it would be erroneous for the court to charge on the unsupported lesser degree. *State v. Manning,* 221 N.C. 70,

18 S.E. 2d 821 (1942); *State v. Sawyer*, 224 N.C. 61, 29 S.E. 2d 34 (1944); *State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834 (1948). These principles were recently analyzed and applied in *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). *Compare State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969).

[4] The record in this case is barren of any evidence tending to show that the defendant may be guilty of a lesser included offense. All the evidence is to the effect that defendant had actual sexual intercourse with Miss Holloway by force and against her will and that her resistance ceased solely because she feared death or serious bodily harm. There is not a scintilla of evidence that she willingly submitted or that the rape was not consummated. The defense is alibi. Hence, there being no evidence from which the jury could find defendant guilty of the included crimes of assault with intent to commit rape, or assault on a female, the court properly refused to instruct the jury with reference to such verdicts. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969). Defendant's second assignment of error is overruled.

In the trial below, we find

No error.

HAROLD ADLER v. LUMBER MUTUAL FIRE INSURANCE COMPANY

No. 40

(Filed 15 December 1971)

1. **Rules of Civil Procedure § 50— motion for directed verdict — consideration and sufficiency of evidence**

On defendant's motion for a directed verdict at the close of plaintiff's evidence in a jury case, the evidence must be taken as true and considered in the light most favorable to plaintiff; when so considered, the motion should be allowed if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff.

2. **Insurance § 142— recovery under homeowner's policy for theft — burden of proof**

In order to bring a loss within the theft provision of a homeowner's policy in which the word "theft" is defined as "any act of stealing or attempt thereat," plaintiff must offer evidence pointing

to theft as the more probable cause of the loss—that is, evidence which (1) excludes the probability that the property was mislaid or lost and (2) points to larceny as the more rational inference.

3. Insurance § 142— theft policy — mere disappearance of article

The mere disappearance of an article covered by a theft policy which does not contain a specific provision dealing with disappearance is not sufficient of itself to warrant a finding that the loss was due to theft, larceny or burglary within the terms of the policy.

4. Insurance § 142— homeowner's policy — theft of rings — mysterious disappearance

Plaintiff's evidence was insufficient to be submitted to the jury in an action to recover under the theft provision of a homeowner's policy for the loss of two diamond rings where it tended to show only that plaintiff's wife placed the rings in a dish on a dresser at bedtime on 18 August and missed them on the morning of 20 August, that plaintiff's wife was absent from the home for two hours during that period and the doors were locked during her absence, and that there was an unlocked bathroom window through which intruders could have entered the house.

ON *certiorari* to review decision of the Court of Appeals (reported in 10 N.C. App. 720, 179 S.E. 2d 786) affirming judgment of *Winborne, District Judge,* November 1970 Civil Session of WAKE County District Court.

Action to recover the value of two diamond rings allegedly stolen from plaintiff's home, liability for the loss of which is denied by defendant under the terms of the insurance contract between the parties.

At the close of plaintiff's evidence the trial judge directed a verdict in favor of the defendant. The Court of Appeals affirmed and we allowed certiorari to review that decision.

William T. McCuiston, Attorney for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey, Attorneys for defendant appellee.

HUSKINS, Justice.

Under a "Homeowners Policy" of insurance issued by defendant, plaintiff was insured against loss by "THEFT, meaning any act of stealing or attempt thereat. . . . " The question posed on this appeal is whether the trial court erred in directing verdict for defendant and thereby denying recovery of the value

of two diamond rings which disappeared under the circumstances narrated below.

On 18 August 1969 plaintiff owned two valuable diamond rings which were habitually worn by his wife. On that date she removed the rings from her hand upon retiring for the night and placed them in a dish on a dresser in her bedroom. The next day she stayed home until 4:00 p.m. when she left the house for two hours. Upon leaving, she locked all the doors to the house; however, there was an unlocked bathroom window through which the house could have been entered by intruders. The following morning, 20 August 1969, while dressing for work, she reached into the dish for the rings and they were gone. She reported the loss of the rings to the police, and a detective came to the premises and made an investigation. She called his attention to the unlocked bathroom window. The police discovered no evidence of a break in and made no tests for fingerprints. No one has been charged with the theft of the rings. The dwelling was occupied by Mr. and Mrs. Adler, their eighteen-year-old daughter and a fourteen-year-old son. They have two pets, "a Chihuahua and a dog." The rings have never been recovered.

Plaintiff contends the foregoing facts, taken in the light most favorable to him, negate any cause for the loss save theft and are therefore sufficient to repel defendant's motion for a directed verdict and carry the larceny issue to the jury. We now explore the validity of that contention.

[1] On defendant's motion for a directed verdict at close of plaintiff's evidence in a jury case, as here, the evidence must be taken as true and considered in the light most favorable to plaintiff. *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971); *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971). When so considered, the motion should be allowed if, *as a matter of law,* the evidence is insufficient to justify a verdict for the plaintiff. *Kelly v. Harvester Co., supra.*

[2] It must be recognized at the outset that plaintiff seeks recovery only under the theft provision of the policy and that the word *theft* is defined therein as "any act of stealing or attempt thereat." To bring his loss within the provisions of such policy, plaintiff is required to offer evidence of facts and circumstances pointing to theft as the more probable cause of the

loss—that is, evidence which (1) excludes the probability that the property was mislaid or lost and (2) points to larceny as the more rational inference. *Davis v. Indemnity Co.*, 227 N.C. 80, 40 S.E. 2d 609 (1946).

The insurance policy construed in *Davis* contained this provision: "Mysterious disappearance of any insured property shall be presumed to be due to theft." This Court held that a rule of evidence binding on the parties was created by that provision and the insured was thereby relieved from the necessity of producing evidence which would exclude the probability that the property was mislaid or lost and point to larceny as the more rational inference. Hence, a mere showing of mysterious disappearance was sufficient to carry the theft issue to the jury.

[3, 4] Not so here. In this case the mere proof of a mysterious disappearance raises no presumption of theft because the policy contains no provision to that effect. The mere disappearance of an article covered by a theft policy which does not contain a specific provision dealing with disappearance "is not sufficient of itself to warrant a finding that the loss was due to theft, larceny, or burglary within the terms of the policy, . . . " 44 Am. Jur. 2d, Insurance § 2047. Therefore, plaintiff is required to offer evidence of facts and circumstances surrounding the disappearance which excludes the probability that the rings were mislaid or lost and points to theft as the more rational inference. He has failed to carry that burden. His evidence, taken as true, shows: (1) The rings were placed in the dish at bedtime on 18 August 1969 and missed while Mrs. Adler was dressing for work on the morning of 20 August 1969; (2) Mrs. Adler was absent from the home for two hours during that period and the doors were locked during her absence; (3) there were no signs of breaking and entering; (4) the police did not try to lift fingerprints or to determine whether anyone had entered plaintiff's home through an unlocked bathroom window; (5) Mrs. Adler inquired "among my whole family if they had seen these rings"; and (6) no one has been charged with the theft of the rings. This evidence shows a mysterious disappearance and nothing more. The *mere possibility* of theft would not alone justify a jury in inferring theft as "the more rational hypothesis" for the plaintiff's loss. Rather, the absence of any suspicious circumstances pointing toward theft, other than the mere disappearance of the rings, suggests with equal logic that a theft did not in fact occur.

For factual situations showing suspicious circumstances pointing toward theft, see *National Surety Co. v. Fox,* 174 Ark. 827, 296 S.W. 718, 54 A.L.R. 458 (1927); *Reed v. American Bonding Co.,* 102 Neb. 113, 166 N.W. 196 (1918); *Caldwell v. St. Paul Mercury & Indemnity Co.,* 210 Miss. 320, 49 So. 2d 570 (1950). For a collection of cases construing and applying various provisions in theft insurance policies, see Annotation: Provisions of Burglary or Theft Policy as to Effect of Disappearance of Property, 12 A.L.R. 3d 865 (1967).

Absent evidence of facts and circumstances sufficient to justify the inference of theft as the more rational hypothesis, the Court of Appeals correctly affirmed the action of the trial judge allowing defendant's motion for a directed verdict. This conclusion renders other assignments moot.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. PAUL PAYNE

No. 95

(Filed 15 December 1971)

1. **Criminal Law § 87— leading questions to nine-year-old assault victim**

The trial court did not abuse its discretion in allowing the solicitor to ask leading questions of the nine-year-old victim of an assault with intent to commit rape.

2. **Criminal Law § 101; Trial § 13— denial of motion to have jury view crime scene**

In a prosecution for assault with intent to commit rape, the trial court did not abuse its discretion in the denial of defendant's motion that the jury be directed to view the trailer where the assault allegedly occurred.

3. **Criminal Law §§ 102, 170— solicitor's improper remarks in jury argument — admonition by court**

In this prosecution for assault with intent to commit rape, defendant was not prejudiced by the solicitor's improper argument to the jury where the court, upon objection by defense counsel, admonished the solicitor to "stay away from this sort of thing" and to "argue the facts of the case and the law."

State v. Payne

4. Rape § 18— assault with intent to rape — lesser included offense

In this prosecution for assault with intent to commit rape, there was no evidence which would support instructions on a lesser included offense.

APPEAL by defendant from *Collier, J.*, March 1971 Session, RANDOLPH Superior Court, transferred here for original appellate review under our order of July 31, 1970.

The defendant was indicted for the crime of assault on Glenda Lavon Fore with intent to commit rape.

The State's witness, Glenda Lavon Fore, age nine years, testified that in September, 1970, after school she went down to the playground near her home. From there, at the direction of Paul Greeson, she went to a trailer nearby. The defendant, Paul Payne, was there also. "Paul Greeson pulled my clothes down when I went into the trailer." She testified that both boys attempted to have intercourse with her. "I was frightened and scared. I tried to get up. They held me down. I couldn't fight them off. They were stronger than I was. I pushed at them to try to get them off but I couldn't."

At this juncture the defense counsel objected to the solicitor's somewhat leading questions. The court directed the solicitor to proceed. Glenda Lavon Fore left the trailer and told her grandmother, describing what the boys had done. The grandmother testified her granddaughter was crying when she came from the trailer. An examination disclosed her hip was red and her vagina was red. A neighbor saw Glenda as she was on her way home from the trailer. She was crying.

The defendant and Paul Greeson both testified as witnesses for the defense. Both told essentially the same story. They said Glenda went with them to Payne's tree house. She left and told them she was going to the trailer parked nearby. When she didn't come out, they immediately went to the trailer to see what had happened to her. Greeson testified that when they entered the trailer " . . . I saw her (Glenda) on the top bunk, and her pants and underpants were pulled down just below her knees. . . . (S)he said, 'Get on top of me.' Paul (Payne) said for her to get out, . . . we didn't want to get in trouble so we left after that." Each of the boys weighed 155 to 160 pounds. Paul Payne, the defendant, was 16 years old

three days after this occurrence. He testified that when they entered the trailer Glenda said, "Get on me. If you don't, I'll tell my mother." Both boys testified Glenda was not crying when she left the trailer.

A number of neighbors testified to the good character of both Greeson and Payne. Defense counsel made a motion that the jury be directed to view the trailer. The court overruled the motion.

During the argument, defense counsel interrupted the solicitor and objected to his argument. After some discussion, the court in the presence of the jury gave this admonition: "Let's try to stay away from this sort of thing. Let's argue the facts of the case and the law." The defense counsel then requested the court to direct the reporter to take down the solicitor's argument. The court denied the motion. At the conclusion of the charge, the jury after deliberating only ten minutes returned its verdict finding the defendant guilty as charged.

After an extensive hearing on the question of punishment, the court entered this judgment:

> "It is ADJUDGED that the defendant be imprisoned for the term of five (5) years in the custody of the Commissioner of Corrections in a Youthful Offender's Camp.
>
> The execution of this sentence is suspended, however, for five (5) years upon compliance with the following conditions, to which the defendant gave assent: the usual terms of probation; pay the costs in the amount of $71.08; remain either a full time student or gainfully employed at all times; not violate any laws of State or the Federal government."

The defendant noted exceptions and gave notice of appeal.

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

Ottway Burton for defendant appellant.

HIGGINS, Justice.

[1] The victim of the alleged assault was 9 years of age. The defendant was 15 years, 11 months and 27 days of age. He

weighed 155 to 160 pounds. Because of the tender age of the victim and the nature of the charge, the court had discretionary authority, and exercised it properly, to permit the solicitor to ask leading questions. *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5; *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251.

[2] Likewise it was in the discretion of the court to determine whether to order the jury to visit and view the trailer where the assault occurred. The description of the trailer came entirely from the defendant. There was no conflict in the evidence regarding its structure or contents. The court acted well within its discretion in denying the motion for the jury's inspection. *State v. Ross,* 273 N.C. 498, 160 S.E. 2d 465.

[3] The record indicates defense counsel and the solicitor were somewhat less than well restrained in their arguments. When defense counsel challenged the solicitor, the court admonished the solicitor, "Let's try to stay away from this sort of thing. Let's argue the facts of the case and the law." The court overruled the defendant's motion for a mistrial on account of the solicitor's argument.

The law takes a sensible view of jury arguments realizing that in hotly contested cases counsel sometimes approach the out of bounds line. But the judge is on the field and is in a favored position to call the play and to determine whether the debate is within permissible bounds. Except in extreme cases, the appellate court will not intervene. No cause whatever for intervention appears in this record. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Phillips,* 262 N.C. 723, 138 S.E. 2d 626; *State v. Dickens,* 278 N.C. 537, 180 S.E. 2d 844.

[4] The State's evidence is stated in skeleton form only to the end the record may be kept as unsoiled as possible. The evidence in its entirety makes out a strong case of assault with intent to commit rape. The defendant's evidence, as well as that of his associate, depicts total innocence. The jury resolved the conflict in ten minutes. There was no evidence to support a lesser included offense. *State v. Allen,* 279 N.C. 115, 181 S.E. 2d 453; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513.

The defendant's objection to the judgment is not well advised. The penalty exacted is a payment of $71.08 costs, remain-

ing a student or gainfully employed for five years, and obeying state and federal laws.

In the trial, verdict and judgment there is

No error.

STATE OF NORTH CAROLINA v. HENRY LEE PRICE, JR.

No. 149

(Filed 15 December 1971)

1. **Criminal Law § 104— motion for nonsuit — consideration of evidence**

In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true, and inconsistencies or contradictions therein are disregarded.

2. **Criminal Law § 104— motion for nonsuit — consideration of defendant's evidence**

On motion for nonsuit, evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered.

3. **Criminal Law § 106— motion for nonsuit — questions presented**

The question for the court on motion for nonsuit is whether, when the evidence is so considered, there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant is the perpetrator, or one of the perpetrators, of it.

4. **Robbery § 1— attempted armed robbery — elements of the offense**

An attempt to rob another of personal property, made with the use of a dangerous weapon, whereby the life of a person is endangered or threatened, is itself a completed crime and is punishable to the same extent as if the property had been taken as intended. G.S. 14-87.

5. **Robbery § 4— attempted armed robbery — sufficiency of the evidence**

Evidence was sufficient to show that the offense of attempted armed robbery had been committed, where there was sufficient evidence to justify a jury in finding that an accomplice of defendant entered a store with the intent to rob the storekeeper, that the accomplice struck the storekeeper in the head with a blackjack for the purpose of accomplishing the intended robbery and thereby endangered his life, but that the accomplice left the store without taking any property.

6. Criminal Law § 9— principal in the second degree

One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means whereby the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator.

7. Robbery § 4— attempted armed robbery — defendant as principal in the second degree — sufficiency of evidence

The evidence was sufficient to support a jury finding that the defendant was guilty of the attempted armed robbery of a country store, where there was evidence that (1) the defendant, who remained in the car during the attempt, instructed an accomplice to enter the store, hit the storekeeper on the head with a blackjack, and take the money; (2) the accomplice, together with a companion, entered the store and struck the storekeeper on the head with the blackjack; (3) the accomplice then struggled with the storekeeper but left the store without taking any money or other property; and (4) the defendant picked up the companion in the automobile.

APPEAL by defendant from *McLean, J.*, at the 29 March 1971 Session of MECKLENBURG, heard prior to determination by the Court of Appeals.

The defendant was indicted for, and found guilty of, an attempt to commit armed robbery. He was sentenced to imprisonment for a term of twelve years. His only assignment of error is to the denial of his motion for judgment of nonsuit.

The evidence for the State consisted of the testimony of William Lowery, the victim, John Walker and Keith Stephens, alleged accomplices of the defendant, and Officer Styron who testified to statements made to him by Walker and Stephens. Officer Styron's testimony was admitted for the sole purpose of corroborating the testimony of Walker and Stephens. The defendant testified in his own behalf.

The evidence for the State tends to show:

In the morning of 24 December 1970, Walker, Stephens and Stephens' younger brother accompanied the defendant in the defendant's car to a point on the highway approximately a quarter of a mile from the combination filling station and grocery store at which William Lowery was working alone.

Walker was driving the car. He parked at that point pursuant to the defendant's direction.

The defendant had said that Lowery had a large sum of money on him and Walker and Stephens should go and get it. He gave Walker a blackjack, instructing him to hit Lowery on the head with it. The defendant said that he did not want to go into the store, himself, because Lowery could identify him. When Keith Stephens did not want to go with Walker, the defendant struck him with a hammer and directed him to take a gasoline can from the car and go to the store. The car was not out of gasoline. Walker and Keith Stephens went to the Lowery store as instructed, the defendant and the younger Stephens boy remaining in the car. The defendant told Walker and Keith Stephens he would give them two minutes and then pick them up at the corner by the store.

Walker and Stephens entered the store, selected several items as if desiring to purchase them and placed these on the counter beside Lowery's adding machine. When Lowery began to total the prices of these items on the machine, Walker moved behind him as if looking for other items to purchase and struck Lowery on the head with the blackjack. Lowery was knocked against his cash register but did not lose consciousness. Realizing what was occurring, he grabbed Walker and they wrestled. Stephens, standing in front of Lowery, grabbed his arm but, in the struggle, fell over some boxes. Stephens then jumped up and ran out of the door. Walker broke free from Lowery's grasp and also ran out of the door. Neither Walker nor Stephens took any property from the store or from the person of Lowery. Lowery grabbed a pistol and ran out after Walker and Stephens. He fired shots at Walker who ran into woods nearby. He saw Stephens run up the road to a car in which someone was sitting. The car drove down from where it was parked and picked up Stephens. Lowery could not identify the driver. Walker struck Lowery with the blackjack somewhat halfheartedly because, after entering the store as directed by the defendant, he "felt funny," knew he was doing wrong and did not want to kill Lowery. He went into the store with the intent to take something but abandoned the purpose and did not make an effort to take any of Lowery's property.

The defendant's testimony was to the following effect:

He did not give Walker and Stephens any instructions to go to the Lowery store. He was asleep in the car when Walker stopped it near the Lowery store, was aroused partially when someone took the gasoline can from under his feet and, observing that Walker and Keith Stephens had left the car, he decided to start it up and go to them and find out why they had taken the gasoline can. On the way to the store, Keith Stephens came running up and jumped in the car, telling the defendant "they were fighting and he was shooting at them." The defendant became frightened and drove back toward Charlotte, where he was visiting his family. He had a job in a restaurant in Columbia, South Carolina, was home for the holidays and had no need of money. He knew Lowery, having previously run a bread route through that area.

Attorney General Morgan, Assistant Attorney General Mitchell and Staff Attorney Lloyd for the State.

Robert F. Rush for defendant.

LAKE, Justice.

[1-3] In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and inconsistencies or contradictions therein are disregarded. *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44. Evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered upon such motion. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789; *State v. Vincent, supra.* The question for the court is whether, when the evidence is so considered, there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant is the perpetrator, or one of the perpetrators, of it. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679.

[4] By the terms of G.S. 14-87 an attempt to rob another of personal property, made with the use of a dangerous weapon, whereby the life of a person is endangered or threatened, is, itself, a completed crime and is punishable to the same extent as if the property had been taken as intended. *State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569. Such attempt occurs when the defendant, with the requisite intent to rob, does some overt act

calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person. *State v. Spratt, supra.* " 'In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it 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 a direct movement towards the commission of the offense after the preparations are made.' 8 R.C.L., 279." *State v. Parker,* 224 N.C. 524, 31 S.E. 2d 531.

[5] Considered in accordance with the above stated principles, the evidence in the record is amply sufficient to justify a jury in finding that Walker entered the store with the intent to rob Lowery, struck him in the head with a blackjack, a dangerous weapon, for the purpose of accomplishing the intended robbery and thereby endangered his life. Thus, the evidence of the State is sufficient to show that the offense charged in the indictment was committed.

[6, 7] The remaining question is whether the evidence is sufficient to show that the defendant was a perpetrator of it. One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225. By its express terms G.S. 14-87 extends to one who aids and abets in an attempt to commit armed robbery. The State's evidence, considered as above stated, is ample to support a finding by a jury that the defendant so participated in

the attempt to rob Lowery. The present case is not distinguishable from *State v. Sellers, supra.*

The motion for judgment of nonsuit was, therefore, properly denied.

No error.

STATE OF NORTH CAROLINA v. JOSEPH McNEIL AND JOSEPH BRIDGES

No. 124

(Filed 15 December 1971)

1. **Criminal Law § 104— motion for nonsuit — consideration of evidence**

Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom.

2. **Criminal Law § 104— motion for nonsuit — sufficiency of evidence**

When considering the motion for nonsuit, the court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment.

3. **Burglary and Unlawful Breakings § 5; Safecracking— breaking and entering — safecracking**

Evidence of defendants' guilt of safecracking and breaking and entering and larceny of goods valued at $295, *held* properly submitted to the jury.

4. **Criminal Law §§ 128, 129— motions to set aside verdict and for new trial**

Defendants' motions to set aside the verdict and for a new trial are addressed to the discretion of the trial court, and refusal to grant them is not reviewable.

5. **Criminal Law § 127— arrest of judgment**

Judgment may be arrested when and only when some fatal error or defect appears on the face of the record proper.

6. **Criminal Law § 127— arrest of judgment — review on appeal**

The review of the denial of a motion in arrest of judgment is ordinarily limited to the question of whether error of law appears on the face of the record and whether the judgment is regular in form.

7. **Criminal Law § 146— review on appeal — no error on the record**

When error does not appear on the face of the record the judgment will be affirmed.

State v. McNeil

DEFENDANTS appeal from judgment of *Clark, J.*, 22 February 1971 Regular Session, WAKE Superior Court.

Each defendant was charged in separate bills of indictment with (1) safecracking in violation of G.S. 14-89.1, and (2) breaking and entering and larceny of goods valued at $295. The four cases were consolidated for trial.

The State's evidence tends to show that the place of business of Warren Brothers, Inc., located at 330 Dupont Circle in the City of Raleigh, was broken into on the night of 23 July 1970. The safe was forced open and its contents rifled. The following items of personal property were stolen: one Zenith portable television set, one Motorola portable televison set, one .22 caliber semi-automatic Remington rifle, one Burroughs adding machine, one Royal typewriter and one flashlight. Papers were strewn over the floor. The top of the safe "had been peeled back so that you could get your hand inside." A crowbar, hammer, screwdriver, chisel, snips, and other small tools were found on the floor in front of the safe on the morning following the robbery.

William Henry Abrams, Jr., testified that he, Joseph Bridges, Joseph McNeil and Robert Lucas were together at the Lucas home on the night of 23 July 1970. There was some conversation about going to Warren Brothers, and Joseph Bridges invited the others to take a ride with him, "said he know where some money was." He and the defendants went to the Warren Brothers place of business in Robert Lucas' car which was driven by Joseph Bridges. Lucas was drunk and did not go. He (Abrams) stayed in the car as a lookout while Joseph Bridges and Joseph McNeil broke the lock on the door and went inside. Defendants brought out three television sets, a typewriter, and an adding machine and put them in the car. He didn't see the rifle until they were unloading later that night. Defendants said they didn't get the safe because it was bolted to the wall. Defendant Bridges drove the car back to the Lucas home, and all three of them unloaded the stolen property and put it in an old broken-down car beside the Lucas house. He received only two dollars from Joseph Bridges as his part of the loot.

On cross-examination this witness stated that he had been tried and convicted "three weeks ago" for these identical charges

but had not yet been sentenced; that in his trial he took the stand and testified that he didn't know anything about it; that he had not been promised anything and his present testimony in this case was the truth.

L. R. Mason testified that on the last Friday in July 1970 Robert Lucas, accompanied by two other men, came to his store near Knightdale and sold him an adding machine for twenty dollars. Following the purchase he called the sheriff's office and reported the transaction. Detective Watson came to the store and picked up the adding machine. The machine he bought from Lucas was the adding machine offered in evidence as State's Exhibit 3.

Ruth Goodman testified that she had been living with Joseph McNeil for three years; that Joseph Bridges and Joseph McNeil brought a television set to her home about 3:00 or 3:30 p.m. on 24 July 1970; that McNeil said a boy wanted eight dollars for it, and she gave McNeil eight dollars; that defendants left the television at her home, and Detective Whitley later came to her house and got it. The television marked State's Exhibit 5 was the one defendants left at her home.

Defendants offered no evidence. Their motions for nonsuit at the close of the State's evidence were denied. The jury convicted each defendant of (1) safecracking and (2) breaking and entering and larceny as charged. Active prison terms were imposed on both defendants and they appealed to the Court of Appeals. The case was transferred to the Supreme Court for initial appellate review under our general order dated 31 July 1970. Errors assigned will be noted in the opinion.

W. Arnold Smith, Attorney for Defendant Appellant McNeil; Earle R. Purser, Attorney for Defendant Appellant Bridges.

Robert Morgan, Attorney General, and Millard R. Rich, Jr., Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

[1-3] Failure to nonsuit constitutes defendants' first assignment of error. Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable

inference to be drawn therefrom. *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971). "Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). When considering such motion the court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). When tested by these principles there is abundant evidence to carry the cases against both defendants to the jury. The motions for compulsory nonsuit were properly denied.

[4] Defendants' motions to set aside the verdict and for a new trial are merely formal and require no discussion. Such motions are addressed to the discretion of the trial court and refusal to grant them is not reviewable. *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909 (1943); *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960). These motions were properly denied.

Finally, defendants moved in arrest of judgment and assign as error the denial of their motions.

[5-7] "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record." *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503 (1940). Judgment may be arrested when and only when some fatal error or defect appears on the face of the record proper. *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966). "When based on such defect, the motion may be made at any time, even in the Supreme Court on appeal; and, in the absence of such motion, the Court *ex mero motu* will examine the record proper for such defect." *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). But review is ordinarily limited to the question of whether error of law appears on the face of the record and whether the judgment is regular in form. *State v. Mallory,* 266 N.C. 31, 145 S.E. 2d 335 (1965). When error does not appear on the face of the record proper the judgment will be affirmed. *Seibold v. Kinston,* 268 N.C. 615, 151 S.E. 2d 654 (1966). "The record proper in any action includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. . . . The evidence in a

case is no part of the record proper. . . . In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment." *State v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311 (1952).

When the foregoing rules regulating practice and procedure in criminal actions are applied to the record on this appeal, it is evident the motions in arrest of judgment were properly denied. An examination of the record proper reveals no error. The judgments must therefore be sustained. *State v. High,* 279 N.C. 487, 183 S.E. 2d 633 (1971).

No error.

ROBERT ALLEN PERSON v. JOE W. GARRETT, COMMISSIONER OF MOTOR VEHICLES

No. 121

(Filed 15 December 1971)

1. **Automobiles § 2— revocation of license — two convictions of reckless driving within a 12-month period**

The statute authorizing the mandatory revocation of a driver's license upon two convictions of reckless driving within a twelve-month period was not repealed by the subsequently enacted statute authorizing the discretionary suspension of a driver's license upon one or more convictions of reckless driving and one or more convictions of speeding in excess of 55 mph and not more than 75 mph, within a twelve-month period. G.S. 20-16(a)(9); G.S. 20-17(6).

2. **Statutes § 5— statutory construction**

The intent of the legislature controls the interpretation of a statute.

3. **Statutes § 5— statutory construction — enactment of another statute on same subject**

A statute is not deemed to be repealed merely by the enactment of another statute on the same subject; the later statute on the same subject does not repeal the earlier if both can stand, or where they are cumulative, and the court will give effect to statutes covering the same subject matter where they are not absolutely irreconcilable and when no purpose of repeal is clearly indicated.

4. **Statutes § 5— repeal by implication**

Repeal of statutes by implication is not favored in this jurisdiction.

5. Statutes § 5— statutory construction

The language of the statute will be interpreted to avoid absurd consequences.

APPEAL by plaintiff from *Hobgood, J.*, 12 July 1971 Criminal Session of WAKE Superior Court.

The facts pertinent to decision of this appeal are, in substance, as follows:

Prior to the events hereinafter set forth, the North Carolina Department of Motor Vehicles issued to plaintiff a valid vehicle operator's license. Prior to 16 June 1971, plaintiff was charged and convicted on two different occasions with operating a motor vehicle in a careless and reckless manner, which offenses occurred within a twelve months period of time. By letter dated 7 June 1971, the North Carolina Department of Motor Vehicles notified plaintiff that his operator's license was to be revoked for one year, beginning at midnight, 16 June 1971, because of the two convictions, pursuant to G.S. 20-17(6).

Plaintiff brought this action on 8 June 1971 to restrain the Department from revoking his operator's license on the ground that the Department was without power to make such revocation.

The trial judge, sitting without a jury, heard the case on an agreed statement of facts, entered conclusions of law, and adjudged that the order of the Commissioner of Motor Vehicles revoking the driving privileges of plaintiff be affirmed. Plaintiff appealed.

This case is before this Court pursuant to our general referral order effective 1 August 1970.

Davis & Sturges, by Charles M. Davis, for plaintiff.

Attorney General Morgan, Assistant Attorney General Melvin and Assistant Attorney General Ray for defendant.

BRANCH, Justice.

[1] The sole question presented by this appeal is whether the enactment of G.S. 20-16(a)(9) repealed G.S. 20-17(6). We quote pertinent portions of G.S. 20-17 and G.S. 20-16:

> § 20-17. Mandatory revocation of license by Department.—The Department shall forthwith revoke the license

of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

. . . .

(6) Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of twelve months.

§ 20-16. Authority of Department to suspend license.—(a) The Department shall have authority to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

. . . .

(9) Has, within a period of twelve (12) months, been convicted of two or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour;

. . .

The portion of G.S. 20-16 which defendant contends repealed G.S. 20-17(6) was enacted by the General Assembly of 1947 as a portion of Chapter 1067 entitled "An Act to make the streets and highways of North Carolina safe for pedestrians and the motoring public." In its statement of intent, § 1(d) of that chapter, the General Assembly stated:

To guarantee to motorists and pedestrians the safe use of the streets and highways of the State is the purpose of the General Assembly in enacting this Act.

[2-5] Decision in this case is controlled by certain rules of statutory construction, viz: The intent of the legislature controls the interpretation of a statute. *State Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22; *Shue v. Scheidt,* 252 N.C. 561, 114 S.E. 2d 237. A statute is not deemed to be repealed merely by the enactment of another statute on the same subject. The later statute on the same subject does not repeal the earlier if both can stand, or where they are cumulative, and the court will give effect to statutes covering the same subject matter where they are not absolutely irreconcilable and when

no purpose of repeal is clearly indicated. 82 C.J.S., Statutes, § 292, p. 497. Repeal of statutes by implication is not favored in this jurisdiction. *State v. Hockaday,* 265 N.C. 688, 144 S.E. 2d 867; *State v. Lance,* 244 N.C. 455, 94 S.E. 2d 335. The language of the statute will be interpreted to avoid absurb consequences. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1; *State v. Burell,* 256 N.C. 288, 123 S.E. 2d 795.

Here, it should be noted that the portion of Chapter 1067 of the 1947 Session Laws which defendant contends repealed G.S. 20-17(6) in fact amended G.S. 20-16, the *permissive* statute allowing suspension of operator's license by the Department of Motor Vehicles for certain causes. G.S. 20-16(a) (9) neither amends nor refers to G.S. 20-17, which is the statute providing for the *mandatory revocation* of operator's license by the Department of Motor Vehicles for states causes.

The provisions contained in G.S. 20-17(6) were enacted by the General Assembly of 1935 and today remain in the General Statutes as originally enacted. It would be more than passing strange for the legislature to allow this section to remain in the General Statutes for a period of twenty-four years if the legislature had intended to repeal it. Further, reckless driving is one of the more serious motor vehicle violations, and it would strain one's credulity to conclude that the legislature, by implication, intended to repeal the provision of G.S. 20-17(6) requiring mandatory revocation for conviction of two offenses of reckless driving within a period of twelve months by the vehicle of legislation which sought to guarantee safety on the streets and highways. Such interpretation produces an absurd result.

We concede that the two statutes relate to some of the same subject matter; however, such subject matter is merely cumulative. We cannot find a clear indication of intent to repeal G.S. 20-17(6) in any of the provisions of G.S. 20-16(a) (9).

The judgment entered by the trial judge is

Affirmed.

STATE OF NORTH CAROLINA v. PHILLIP LANCE BENNETT

No. 117

(Filed 15 December 1971)

1. **Narcotics § 2— sale of narcotics — indictment — name of purchaser**

An indictment charging the sale of narcotics must allege the name of the purchaser, or that his name is unknown.

2. **Narcotics § 1— unlawful possession of narcotics — allegation of time and place**

Time and place are not essential elements of the offense of unlawful possession of narcotics; it is sufficient that the county of the offense be named in order to establish the jurisdiction of the court.

ON *certiorari* to review the decision of the Court of Appeals, reported in 12 N.C. App. 42, 182 S.E. 2d 29, which found no error in defendant's trial before *Parker, J.*, 14 January 1971 Session of NEW HANOVER.

Defendant was tried upon a bill of indictment, which charged that on 17 June 1970 in New Hanover County (1) he "unlawfully, wilfully and feloniously did possess a quantity of Narcotic Drugs, to-wit: Two (2) Tablets of Lysergic Acid Diethylamide (commonly known as LSD). . . ."; and (2) he "unlawfully and wilfully and feloniously did sell a quantity of Narcotic Drugs, to-wit: Two (2) Tablets of Lysergic Acid Diethylamide (commonly known as LSD), contrary to the form of the Statute. . . ."

The evidence for the State tended to show: On 17 June 1970, in the Town of Carolina Beach at a corner on Cape Fear Avenue adjacent to the Beachcomber, defendant had in his possession two tablets of LSD, which he sold to F. L. McKinney, an SBI undercover agent, for seven dollars.

Defendant offered no evidence.

The jury's verdict was guilty as charged upon each count. Upon the return of the verdict defendant moved in arrest of judgment "for insufficiency of the indictments." Judge Parker overruled the motions. On the count charging possession of narcotics he imposed a sentence of 4-5 years. On the count charging the sale of narcotics he imposed an identical, consecutive sentence, which he suspended for five years upon stated condi-

tions. Defendant appealed to the Court of Appeals, which found no error in the trial. We allowed certiorari.

Attorney General Morgan; Associate Attorney Ricks for the State.

Harold P. Laing for defendant appellant.

SHARP, Justice.

[1] Defendant brings forward five assignments of error. Only the fifth merits discussion. It raises the question whether the second count in the bill of indictment states facts sufficient to charge defendant with the commission of a crime. Specifically, the inquiry is: In a count charging the sale of narcotics must the indictment allege the name of the purchaser?

The rule is stated in *State v. Bissette,* 250 N.C. 514, 517-18, 108 S.E. 2d 858, 861: "Where a sale is prohibited, it is necessary, for a conviction, to allege in the bill of indictment the name of the person to whom the sale was made or that his name is unknown, *unless some statute eliminates that requirement.* The proof must, of course, conform to the allegations and establish a sale to the named person or that the purchaser was in fact unknown." (Emphasis added.)

In 1913, by N. C. Sess. Laws, Ch. 44, § 6, the General Assembly provided that in indictments charging the unlawful sale of intoxicating liquors it should not be necessary to allege a sale to a particular person. This enactment, duplicated in N. C. Sess. Laws, Ch. 1, § 16 (1923), was later codified as G.S. 18-17. (Effective October 1, 1971, G.S. 18-17 was repealed by N. C. Sess. Laws, Ch. 872, § 3 (1971).) Prior to the 1913 Act this Court had consistently held that in an indictment for selling spirituous liquors it was necessary to aver that the sale was made to some particular person or persons, or to some person or persons unknown. *State v. Blythe,* 18 N.C. 199; *State v. Faucett,* 20 N.C. 239; *State v. Stamey,* 71 N.C. 202; *State v. Pickens,* 79 N.C. 652; *State v. Tisdale,* 145 N.C. 422, 58 S.E. 998; *State v. Dowdy,* 145 N.C. 432, 58 S.E. 1002. *See also State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770; *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46.

G.S. 90-88 (1965), the statute under which defendant stands indicted, makes it unlawful, *inter alia,* for any person to

possess or sell any narcotic, except as authorized by the Uniform Narcotic Drug Act of 1935, G.S. 90-86 to -113.7. The Act contains no modification of the common-law requirement that the name of the person, to whom the accused allegedly sold narcotics unlawfully, be stated in the indictment when it is known. Therefore, the second count in the indictment upon which defendant was tried fails to state facts sufficient to sustain his conviction. His motion to quash should have been allowed, and the judgment pronounced thereon must be arrested. We note that the Uniform Narcotic Drug Act of 1935 was rewritten as the North Carolina Controlled Substances Act by N. C. Sess. Laws, Ch. 919 (1971), to become effective 1 January 1972.

[2] As to the first count, which charges defendant with the unlawful possession of narcotics, time and place are not essential elements of the offense. The jurisdiction of the court was established by the averment that the crime occurred in New Hanover County. "[A]fter jurisdiction was established, the place of the crime became immaterial. The indictment charged the offense in a plain, intelligible and explicit manner, and contained averments sufficient to enable the court to proceed to judgment and thus bar a subsequent prosecution for the same offense." *State v. Rogers,* 273 N.C. 208, 211, 159 S.E. 2d 525, 528. In defendant's conviction upon the charge of possession of narcotics we find no error, and the judgment on that count is affirmed.

As to the second count of the bill charging the unlawful sale of narcotics, the judgment based thereon is arrested.

The decision of the Court of Appeals is

Affirmed in part;

Reversed in part.

STATE OF NORTH CAROLINA v. TED FLOYD PAYNE, JR.

No. 41

(Filed 15 December 1971)

1. **Criminal Law §§ 162, 173— objection after previous consent**

Where defense counsel stated that he had no objection to the reporter reading a witness' testimony to the jury after the jury returned to the courtroom for clarification of the witness' testimony, objection thereto interposed by defendant after the testimony had been read and the jury had resumed its deliberations came too late.

2. **Criminal Law § 173— invited error**

Invited error is not ground for a new trial.

APPEAL by defendant from decision of the North Carolina Court of Appeals reported in 11 N.C. App. 101 finding no error in the trial, verdict of guilty, and judgment against the defendant entered in the Superior Court of MADISON County, upon a charge of operating a motor vehicle on a public highway while under the influence of intoxicating liquor.

There was a dissent filed to the decision of the Court of Appeals which gave the defendant the right to this appeal.

After the appeal was docketed here, the defendant filed an addendum to the record, to which the solicitor agreed, adding Assignments of Error Nos. 79 and 80.

Robert Morgan, Attorney General, by William W. Melvin, Assistant Attorney General, and T. Buie Costen, Assistant Attorney General, for the State.

Swain and Fowler, attorneys, by Robert S. Swain for defendant appellant.

HIGGINS, Justice.

The evidence is accurately stated and discussed in the opinions filed in the Court of Appeals. We agree with the evaluation of the evidence stated in the majority opinion. The objections to the trial discussed in the dissenting opinion do not appear to us to be of sufficient moment to have had any influence whatever on the outcome of the trial. However, the addendum to the record, by Assignment of Error No. 79, presents a question not raised in the Court of Appeals. We quote here the full text of the assignment:

"The Court committed error in allowing the re-introduction of State's evidence after the Jury retired to deliberate as follows:

(After retiring the Jury returned to the Court for further instruction.)

THE FOREMAN: We would like to know, when the patrolman saw that man, if there was just him in the car when he first caught up with him. We would like for that part to be read back to us, or either ask Mr. Bumgarner to take the stand—when he met the man, first met him and turned around.

THE COURT inquired of counsel if there was any objection to reading the tape back to the Jury. The Solicitor and Defense Counsel stated that they did not object. The pertinent portion of the tape was played back to the Jury. After the Jury retired, counsel for the Defendant stated to the Court that the Defendant excepted to the inquiry being made in the presence of the Jury and that he objected to the re-introduction of this evidence."

[1] The jury returned for clarification of the patrolman's evidence. The court made inquiry whether there was objection to the reporter reading the testimony. Both the solicitor and defense counsel each stated he had no objection. After the testimony was read and the jury returned for further deliberation, the defendant entered an objection to the reading of the testimony and assigned it as Error No. 79. The objection came after the previous consent upon which the court had acted. The objection came too late.

[2] Ordinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. The foregoing is not intended as any intimation the court committed error in this instance; but to point out the legal bar to the defendant's right to raise the question. Invited error is not ground for a new trial. *Overton v. Overton,* 260 N.C. 139, 132 S.E. 2d 349; *Brittain v. Blankenship,* 244 N.C. 518, 94 S.E. 2d 489; *Sumner v. Sumner,* 227 N.C. 610, 44 S.E. 2d 40.

Assignment of Error No. 80 involved the refusal of the court to set the verdict aside. This assignment is formal and does not require discussion.

The decision of the Court of Appeals in our opinion is correct and is

Affirmed.

STATE OF NORTH CAROLINA v. MARION EDWARD TART

No. 20

(Filed 15 December 1971)

Criminal Law § 163— objections to the charge — review of the evidence — statement of the contentions

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal.

APPEAL by defendant from *Parker, J.*, August 1970 Session of SAMPSON Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b) (4).

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of Everette Devane on February 28, 1970, and tried thereon for murder in the second degree or manslaughter as the law and the evidence might justify.

Evidence was offered by the State and by defendant.

There was plenary evidence that defendant, age 29, shot Everette Devane, age 22, with a .22 pistol, and thereby inflicted a bullet wound which proximately caused Everette's death.

Uncontradicted evidence tends to show the following: The shooting occurred on February 28, 1970, at approximately 9:30 p.m. in the yard of Tart's Paradise, which was owned and operated by defendant. A pool room, a dance hall and a bar comprised the front portion of the building. Defendant lived in the

back portion. Prior to the shooting, Everette had been in the pool room portion of Tart's Paradise; his brother, Bobby Devane, age 20, had been in the dance hall portion. On two occasions, when Everette had become troublesome and unruly, Bobby went to the pool room and took Everette outside the building. After the second removal of Everette by Bobby, defendant stepped from the pool room door into the yard. As to what happened thereafter, the State's evidence and version and the evidence and version of defendant are in sharp conflict.

The State's version: Bobby and Everette were standing "twenty feet or more" from the door when six shots were fired by defendant, five of which struck Everette. Everette did not advance on defendant. Defendant was enraged because Everette had not completely left defendant's outside premises as defendant had demanded.

Defendant's version: He was standing about two feet from the door. Bobby and Everette were about ten to fifteen feet from him at the corner of the building. Everette pushed Bobby aside; and, with a knife in his hand, started toward defendant. Defendant first shot into the ground but Everette kept coming. As Everette approached, defendant fired successive shots. The first shots were directed toward lower portions of Everette's body. Everette was within three or four feet of defendant when the last and fatal shot was fired.

There was conflicting evidence as to whether Everette had a knife in his hand when the shooting occurred.

Defendant's evidence included testimony to the effect that inside the pool room Everette had a knife described only as having a "black rough handle"; also, testimony that a knife described only as a pocket knife was found in the yard after the shooting occurred.

A deputy sheriff testified that he saw several small splotches of blood twenty-two feet from the door and more blood thirty-two feet from the door. An employee of defendant testified that she saw spots of blood, "the closest one" being "about four feet from the cement walk as you come out of the door."

Review of other conflicts in the evidence is deemed unnecessary.

The jury returned a verdict of guilty of manslaughter. Thereupon, the court pronounced judgment that defendant be confined in the State's prison for a term of not less than seven nor more than ten years.

Attorney General Morgan and Deputy Attorney General Moody for the State.

Joseph B. Chambliss for defendant appellant.

PER CURIAM.

All of defendant's thirteen assignments of error are directed to portions of the court's charge.

Assignments Nos. 3 and 12 are not discussed in defendant's brief and therefore are deemed abandoned.

Assignments Nos. 1 and 2 relate to two brief excerpts from the court's review of the evidence offered by defendant. Assignments Nos. 4, 5, 6, 7 and 8 relate to excerpts from the court's review of the State's *contentions.* Assignments Nos. 9 and 10 relate to excerpts from the court's review of defendant's *contentions.* None of the statements challenged by these assignments was called to the attention of the trial judge. Seemingly, at trial, defendant's counsel did not consider defendant was prejudiced thereby.

"[I]t is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Virgil,* 276 N.C. 217, 230, 172 S.E. 2d 28, 36 (1970), and cases there cited. After careful consideration, we have concluded that the matters asserted in these assignments are of such nature as to call for application of the quoted salutary rule.

Assignment No. 11 is directed to an isolated instruction relating to defendant's right of self-defense. In our view, this instruction was not unfavorable to defendant and particular discussion thereof is unnecessary.

Assignment No. 13 is formal.

It was the province of the jury to resolve the conflicts in the evidence and find the facts. The jury did so and returned a verdict adverse to defendant. Finding no error of law, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. JOHNNY CLYDE ALLISON

No. 148

(Filed 15 December 1971)

Robbery § 5— armed robbery case — instruction on assault with a deadly weapon

Where all of the State's evidence tended to show the armed robbery of another person of more than $900, and where all of defendant's evidence tended to show that he committed no crime, the trial court was not required to charge on the lesser offense of assault with a deadly weapon.

APPEAL by defendant from *Beal, J.*, 1 March 1971 Special Criminal Session of MECKLENBURG, transferred from the Court of Appeals for initial appellate review by the Supreme Court under its general order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

Defendant, indicted under G.S. 14-87 (1969) for robbery with firearms, was found guilty as charged. As an indigent, he appeals a sentence of ten years.

Evidence for the State tended to show: On 23 October 1970, about 4:20 p.m., defendant and another man, went to the office of the Lefler Concrete Block Company in Charlotte and told Mr. R. E. Blayton, an employee, that they wanted a job. Blayton talked to them about ten minutes while the owner of the business, Mr. George F. Lefler, finished a phone call. When Mr. Lefler invited them into his office, both men drew pistols, and defendant said, "I ought to kill you damn two; I don't like you no how." Lefler asked defendant what he wanted and the reply was, " I want your money." Lefler gave him $100.00 from his pocket, and defendant took about $872.00 from the cash register. Apparently angered because Blayton had only $1.00

in his pocket, defendant "addled" him by a blow on the back of his head with the pistol. The two intruders then forced Lefler, Blayton, and another employee into the restroom and ordered them not to come out for five minutes. About two minutes after they heard the outer door slam the three men emerged and called the police.

At the trial both Lefler and Blayton positively identified defendant as the man who robbed Lefler and "pistol whipped" Blayton.

Defendant's evidence tended to show that he was not in the City of Charlotte on 23 October 1970, and that at the time Lefler was robbed he was at Barbara Scotia College "watching the boys and girls swim."

The judge charged the jury that they might return one of two verdicts, guilty as charged in the bill of indictment or not guilty.

Attorney General Morgan; Assistant Attorney General Hensey for the State.

Edmond R. Johnson for defendant appellant.

PER CURIAM.

Defendant brings forward only one assignment of error, that the trial judge erred in failing to submit to the jury the issue of defendant's guilt of an assault with a deadly weapon. This assignment is frivolous.

All the evidence for the State tended to show that defendant, armed with a pistol, threatened the life of Lefler and unlawfully took from him cash in excess of $900.00. All of defendant's evidence tended to show that he committed no crime. There was no evidence which would support a verdict of guilty of an assault with a deadly weapon, a lesser offense included within the crime charged. "The *presence* of such *evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547. *Accord, State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744; *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481.

In the trial below we find

No error.

LEO BEASLEY v. HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 56

(Filed 15 December 1971)

ON *certiorari* to the Court of Appeals to review its decision reported in 11 N.C. App. 34, 180 S.E. 2d 381 (1971), reversing the judgment of *Lee, District Court Judge*, 26 August 1970 Session of District Court, DURHAM County.

At the trial the parties stipulated that this action presented questions of law only and that the facts essential to decision were not in dispute. Both parties moved for summary judgment under Rule 56, North Carolina Rules of Civil Procedure, and it was stipulated in writing that the court might render judgment based on an agreed statement of facts, which facts are fully set out in the opinion of the Court of Appeals. On these facts the District Court concluded that the policy issued by Hartford was written under the North Carolina Assigned Risk Plan and was an assigned risk policy within the meaning of G.S. 20-279.21(f)(1) and G.S. 20-279.34; that the policy was in force on 20 April 1969, and that Thomas Brunson, Jr., was an assigned risk insured under the policy issued by Hartford (No. 22AZ153249). The court then denied plaintiff's motion for summary judgment and allowed defendant's motion for summary judgment. Plaintiff appealed to the Court of Appeals, and that court in a well-reasoned opinion by Judge Morris, concurred in by Judges Brock and Vaughn, reversed the judgment of the District Court.

Newsom, Graham, Strayhorn, Hedrick & Murray, by E. C. Bryson, Jr., and K. Byron McCoy for defendant appellant.

C. Horton Poe, Jr., for plaintiff appellee.

PER CURIAM.

We allowed *certiorari* to review the decision of the Court of Appeals, but after further consideration we feel that the decision of the Court of Appeals is correct, and for the reasons set out in Judge Morris' opinion it should be and is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ESTELLA RICHARDSON

No. 150

(Filed 15 December 1971)

APPEAL by defendant from *McLean, J.*, July 19, 1971, Schedule "B" Session of MECKLENBURG Superior Court.

The defendant, Estella Richardson, was indicted for murder in the second degree for killing Sara Mae Green. The indictment specifically stated the killing was with malice aforethought, but without premeditation and deliberation. The defendant, represented by court-appointed counsel, entered a plea of not guilty.

At the trial the State offered eyewitnesses who testified that on June 30, 1970, they were visitors at the home of the defendant, Estella Richardson, at 440 North Summit Avenue in Charlotte. At about seven o'clock in the evening, Sara Mae Green (the deceased) appeared in the yard outside the defendant's house. The defendant speaking to Sara Mae Green said, "didn't I tell you to stay away from my house . . . don't you believe I'll shoot you . . . . " Estella and Rufus Johnson began scuffling over a pistol in Estella's possession. When Estella promised not to use the pistol he released her. She then addressed Sara Mae, "poor bitch, don't you believe I'll shoot you" and Sara Mae said, "shoot" and Estella shot Sara Mae. Sara Mae was unarmed. Dr. Wood, a qualified pathologist, testified that on June 30, 1970, Sara Mae Green died as a result of the gunshot wound.

The defendant testified she had ordered the deceased, Sara Mae Green, to stay away from her house. On the day of the shooting Sara Mae appeared, stated that she had come to "whoop" the defendant. She reached in her bosom (for a weapon), then the defendant shot her in self-defense. None of the witnesses corroborated the defendant's testimony.

The jury returned a verdict of guilty of murder in the second degree. From the judgment that the defendant be imprisoned for a term of twenty-one years, she appealed. The court, finding the defendant to be indigent, entered an order permitting her to appeal as a pauper and appointed her trial counsel to prosecute her appeal.

Robert Morgan, Attorney General by James L. Blackburn, Assistant Attorney General for the State.

T. O. Stennett for defendant appellant.

PER CURIAM.

Defense counsel stated he has searched the record and has been unable to discover anything properly assignable as error. As defense counsel requested, this Court has carefully reviewed the record. We find the indictment in proper form, the evidence abundantly sufficient to make out a case of murder in the second degree, and the prison sentence within the limits prescribed for the offense charged. The defendant's testimony that she acted in self-defense in firing the fatal shot is contradicted by all other witnesses.

In the trial and judgment we find

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BALLARD v. HUNTER

No. 80 PC.

Case below: 12 N.C. App. 618.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 January 1972.

JARRELL v. SAMSONITE CORP.

No. 79 PC.

Case below: 12 N.C. App. 673.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 January 1972.

LUMBER CO. v. SURETY CO.

No. 83 PC.

Case below: 12 N.C. App. 641.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 January 1972.

STATE v. BOYETTE

No. 95 PC.

Case below: 13 N.C. App. 252.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 January 1972.

STATE OF NORTH CAROLINA v. JOHNNIE FRAZIER

No. 114

(Filed 14 January 1972)

1. **Criminal Law § 28— amnesty defined**

Amnesty is an exercise of the sovereign power by which immunity to prosecution is granted by wiping out the offense supposed to have been committed by a group or class of persons prior to their being brought to trial.

2. **Criminal Law § 28— pleas in amnesty — authority of judge and solicitor**

Neither the solicitor nor the judge of the superior court has authority under the law of this State to grant amnesty.

3. **Criminal Law §§ 28, 30— testimony by defendant in trial of accomplice — plea in amnesty**

The State was not precluded from prosecuting defendant by the fact that defendant had testified for the State in the first degree murder trial of his alleged accomplice, and defendant's "plea in amnesty" was properly denied, where defendant, through his attorney, had volunteered to testify for the State because he believed his accomplice was going to place the blame for a killing on him, and there is nothing in the record to suggest any promise by the solicitor or the private prosecutor that defendant would receive any benefit or reward by reason of his proposed testimony.

4. **Criminal Law §§ 22, 30— trial for first degree murder — solicitor's agreement to accept guilty plea to second degree murder — repudiation of plea by defendant**

There is no merit to defendant's contention that the State violated an agreement with defendant by placing him on trial for first degree murder and that he should have been arraigned and tried only for second degree murder, where the record shows that defendant voluntarily testified for the State in the first degree murder trial of his accomplice, that the solicitor thereafter stated to defendant's counsel his willingness to accept pleas of guilty of second degree murder, kidnapping and armed robbery, that defendant, upon being first arraigned for kidnapping, repudiated a plea of guilty to that charge entered by his attorney and requested a jury trial, that defendant's counsel was allowed to withdraw and other counsel was appointed to represent him, and that defendant subsequently entered pleas of not guilty when arraigned upon the charges of first degree murder, kidnapping and armed robbery.

5. **Constitutional Law § 30; Criminal Law § 135; Homicide § 31— capital crime — single verdict procedure — punishment discretion of jury**

Constitutional rights of a defendant on trial for the capital crime of first degree murder were not violated by the single verdict procedure or by the fact that the jury had unbridled discretion to determine whether to impose the death penalty. G.S. 14-17.

6. **Constitutional Law § 36; Criminal Law § 135; Homicide § 31— death penalty — cruel and unusual punishment**

The imposition of the death penalty for murder in the first degree does not constitute cruel and unusual punishment.

7. **Criminal Law § 92— consolidation of charges involving different victims**

The trial court did not err in consolidating for trial charges against defendant for the first degree murder of one person and the kidnapping and armed robbery of another person, where the State contended that the three offenses occurred on the same day and as a part of a single course of action by defendant and his accomplice.

8. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors who would never return death penalty**

In this prosecution for the capital crime of first degree murder, the trial court did not err in allowing the State's challenges for cause to prospective jurors who stated on voir dire that, regardless of the evidence, he or she would not consider returning a verdict upon which the judge would have to impose a death sentence.

9. **Criminal Law § 101— trial recesses — failure to instruct jury not to discuss case**

While it is the better practice for the court, at a recess of a trial, to instruct the jury that during such recess they are not to discuss the case among themselves or with any other person, no prejudicial error is shown in this case by the silence of the record on this point, there being no suggestion of any improper conduct by any juror or of any effort by any other person to communicate with a juror, and there being nothing in the record to indicate that defendant requested the court so to instruct the jury.

10. **Criminal Law § 5— refusal of demand for psychiatric examination**

The trial court did not err in the refusal of defendant's demand, following selection and impaneling of the jury, for a psychiatric examination prior to the beginning of his trial, where there is nothing else in the record that suggests any contention by the defendant that he was not guilty by reason of insanity or that he was mentally incompetent to stand trial, and it is apparent that the demand for psychiatric examination was for the sole purpose of delay.

11. **Criminal Law §§ 51, 99— ruling that witness is an expert — expression of opinion**

The trial court did not express an opinion as to the credibility of two witnesses for the State by ruling in the presence of the jury that one was an expert in the field of lifting fingerprints and that the other was an expert in the field of fingerprint comparisons.

12. **Constitutional Law § 32— dissatisfaction with counsel — refusal to appoint another**

Where defendant, an indigent, advised the court at the beginning of the third day of the trial that he was not satisfied with his attorney, the trial court did not err in advising defendant that he had the

right to conduct his own case without counsel, if he so desired, but that, having appointed counsel for him, the court would not appoint another.

13. Criminal Law § 43; Homicide § 20— photographs of homicide victim's body

It was not error to admit in evidence photographs of the body of a homicide victim as it lay where found, the court carefully instructing the jury that such photograph was allowed in evidence for the sole purpose of illustrating the testimony of the witnesses and not as substantive evidence.

14. Criminal Law § 87— allowance of leading questions

The allowance of leading questions is within the discretion of the trial judge.

15. Criminal Law § 60— fingerprints of defendant's accomplice

There was no error in the admission of evidence that the fingerprints of defendant's alleged accomplice, as well as those of defendant, were found in kidnap victim's automobile.

16. Criminal Law § 75— admission of in-custody statements

No right of defendant under the U. S. Constitution was violated by the admission of in-custody statements made by defendant where the court found upon competent evidence that, prior to interrogation, defendant was given and understood the full Miranda warning, that he voluntarily and understandingly made statements without any promise, threat, reward or hope of reward and that, after being advised of his rights, he waived in writing his right to counsel at such interrogation and his right to remain silent.

17. Criminal Law § 75— capital case — interrogation without counsel — admission of defendant's statements — harmless error

Even if the court in this capital case erred in the admission over objection of an in-custody statement made by defendant without the presence of counsel, such error was harmless where defendant, while represented by counsel, had testified to the same facts at the trial of his alleged accomplice, since the State could have introduced the transcript of defendant's testimony at the trial of his accomplice if the court had sustained the objection to the introduction of the in-custody statement.

18. Criminal Law § 102— jury argument — reference to defendant as thief and robber

Private prosecutor's reference to defendant in his jury argument as a thief and robber was supported by defendant's own statement admitted in evidence.

19. Homicide § 12— indictment — homicide in perpetration of felony

An indictment charging murder in the language of G.S. 15-144 is sufficient to support a conviction of first degree murder upon proof of a murder committed in the perpetration of the felony of robbery, notwithstanding the indictment contained no allegation that the murder was committed in the perpetration of a robbery.

20. Robbery § 5— armed robbery — failure to submit common law robbery

The evidence in an armed robbery prosecution did not require the court to submit to the jury the lesser included offense of common law robbery.

APPEAL by defendant from *McLean, J.*, at the 13 April 1971 Session of MECKLENBURG.

By indictments, proper in form, the defendant was charged with: (1) The murder of Carla Jean Underwood; (2) the kidnapping of Rose Collins; and (3) the armed robbery of Rose Collins. The contention of the State was that the three offenses occurred on the same day and as part of a single course of action, upon which the defendant embarked with his companion and accomplice James Nathaniel Westbrook. Westbrook was tried separately and earlier for the murder of Miss Underwood. His conviction and sentence to death was affirmed in *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572.

The three charges against the present defendant were consolidated for trial. The defendant entered a plea of not guilty to each charge. The jury found him guilty of armed robbery, guilty of kidnapping and guilty of murder in the first degree, making no recommendation that the punishment for such murder be imprisonment for life. Pursuant to the verdicts, the court sentenced the defendant to imprisonment for 30 years upon the charge of robbery and to imprisonment for life upon the charge of kidnapping, this sentence to commence at the expiration of the sentence for armed robbery, and sentenced him to death upon the charge of murder.

Pre-Trial Hearing On Plea In Amnesty And Motion To Suppress

Prior to trial, the defendant filed a plea in amnesty on the ground that he testified for the State during the trial of Westbrook. He also, prior to trial, filed a motion to suppress evidence of in-custody statements made by him to interrogating police officers. Prior to trial, the court conducted a full hearing upon the plea and the motion, at which the State offered the testimony of the police officers, who were cross-examined by the defendant. At that hearing, the defendant testified in his own behalf and also called as his witnesses, among others, the former solicitor and the attorney employed as private prosecutor in the trial of Westbrook, who also appeared in that capacity in the trial of this defendant.

At that pre-trial hearing, the police officers, called as witnesses by the State, testified that, having been assigned to investigate the kidnapping of Mrs. Collins, they interrogated the defendant while he was under arrest in Cabarrus County upon an entirely separate charge of armed robbery alleged to have been committed there. The officers testified that, having first told the defendant they wished to talk to him about kidnapping, robbery and murder, which they told him was punishable by death, they read to the defendant the full Miranda warning, specifying in their testimony all of the elements of that warning. Thereupon, the defendant signed a written waiver of his right to remain silent and of his right to counsel during the interview, the waiver having been read to him prior to his signing it. The defendant was then 22 years of age and had completed the 11th grade in high school.

At the pre-trial hearing, the officers further testified that, four days prior to this interrogation, a bullet had been removed from the defendant's leg and the officers had received from the State Bureau of Investigation laboratory a report to the effect that this bullet had been fired from the same weapon used to fire the bullets removed from the body of Miss Underwood. The officers then testified that the defendant gave them a statement as to his activities in company with Westbrook on the day in question, which statement was reduced to writing and signed by the defendant. Following this statement, the warrants charging the three offenses were served on the defendant. The next day he directed and accompanied the officers on a tour of the route followed by him and Westbrook during the events recounted in his statement. This led to the place where Mrs. Collins was left by her assailants, bound and blindfolded, in a wooded area outside the city, and to another wooded place at which the body of Miss Underwood was discovered.

At this pre-trial hearing, the defendant testified that he signed the waiver of his right to remain silent and of his right to counsel after the officers had advised him of his rights, which he told the officers he understood, and that his statement was made freely and voluntarily.

At the pre-trial hearing, the former solicitor and the counsel for the private prosecution at the trial of Westbrook, called as witnesses for the defendant, testified that the defendant's

then attorney approached them and informed them that the defendant wanted to testify at the trial of Westbrook, then in progress. After they conferred with Frazier, in the presence of his then counsel and his parents, they called Frazier as a witness for the State in the Westbrook trial and he testified.

Frazier was then recalled to the stand at the pre-trial hearing. He testified that his testimony in the trial of Westbrook was as the result of the advice of his then counsel; that the solicitor, in the conference preceding his testimony in the Westbrook case, told him that if he took the stand he was to tell the truth, which he did; and that: "The testimony I gave in that trial was given freely and voluntarily. Mr. Stack [Frazier's then counsel] convinced me to testify. * * * I told the truth according to the statement I made."

At the conclusion of the pre-trial hearing, the court entered its order denying the motion to suppress and denying the plea in amnesty. The order contained full findings of fact, including findings that: Prior to the making of the statement to the interrogating officers, the defendant, having been advised of his rights, signed a written waiver of his right to counsel at the interrogation and of his right to make no statement; his statement to the interrogating officers was made freely, understandingly and voluntarily, without any promise, threat, reward or hope of reward; Mr. Warren Stack, counsel for Frazier at the time of the Westbrook trial, approached the solicitor during that trial and told him the defendant desired to testify therein on behalf of the State; at a conference arranged by the defendant's then counsel the defendant so advised the solicitor; the defendant's testimony at the trial of Westbrook was freely, voluntarily, knowingly and understandingly given, no promises or threats were made to the defendant by the solicitor or by the private prosecution counsel and no reward or hope of reward was given or held out to the defendant for his testimony; when the defendant was called to the stand as a witness in the trial of Westbrook, he was advised of his rights by his then counsel and by the presiding judge; and that the State was not put to an election of either prosecuting the defendant or receiving his testimony in the trial of Westbrook. The court thereupon denied the motion to suppress the evidence and the plea in amnesty.

The Trial; Evidence As To Kidnapping And Robbery Of Mrs. Collins

Mrs. Rose Collins testified that at 10:30 a.m. on 18 June 1970 she drove her Volkswagen into the parking area of the Tryon Mall Shopping Center in the City of Charlotte. As she was getting out of the vehicle, two Negro men seized her and stuck a pistol in her ribs, telling her to be quiet or they would kill her. She pretended to faint. Thereupon, the men picked her up, put her on the floor of the back seat of her car, covered her head so that she could not see them, and drove the car out of the city into a wooded area near Highway 49. There, they took from her $5.00, her watch, her wedding ring and other articles. They removed her from the car, threw her, blindfolded, to the ground on top of a baby crib mattress which they had also taken from her car, tied her hands and feet, told her they were leaving an armed guard who would kill her if she moved and drove away in her automobile, leaving her lying in the woods, blindfolded and bound.

Finding that she was alone, Mrs. Collins managed to get to her feet, remove the blindfold and, hopping and falling, make her way slowly through the woods to the highway. While in the edge of the woods, she noted a foreign-make car, or station wagon, go down the dirt road into the woods to the clearing where she had been left and return almost immediately at a high rate of speed. She could not determine how many persons were in it or whether they were white or Negro. With a broken glass bottle she managed to cut the tape binding her feet and then made her way up an embankment to the highway. She was picked up by a passing motorist and carried to the city. Returning, thereafter, with police officers to the clearing in the woods, where she had been left by her assailants, she found her Volkswagen parked there.

Having been blindfolded by her assailants, Mrs. Collins was not able to identify the defendant as one of them, but testified that she could see their hands and both were Negroes, one with darker skin than the other. Both of her assailants participated in taking her out of the car, tying her hands and feet and putting a gag in her mouth. She knows of no occasion when either this defendant or Westbrook had been in her vehicle prior to this occurrence. Frazier is "a medium to dark skinned Negro," Westbrook darker.

It was approximately 3 p.m. when Mrs. Collins was picked up on the highway by the passing motorist. Her hands were still bound behind her back with friction tape fastened so tightly as to cut down into her flesh. She was also suffering from scratches, bruises, insect bites and poison ivy.

The place where Mrs. Collins was left by her assailants is reached by a little dirt road running down into and out of the woods in the form of a horseshoe. The officers who accompanied Mrs. Collins back to this place found there her Volkswagen, her opened pocketbook, its scattered contents, the crib mattress and her shoes.

Fingerprints and a palm print, lifted by an expert from the interior of Mrs. Collins' Volkswagen, were identified by a fingerprint expert as identical with fingerprints and palm print taken from the defendant Frazier. Fingerprints, identified by an expert as those of James Nathaniel Westbrook, were also lifted from the interior of the Collins vehicle.

The Trial; Evidence As To Murder Of Miss Underwood

Carla Jean Underwood, 17 years of age, was last seen alive by her mother at her home on the morning of 18 June 1970. At approximately 3:45 p.m. that day, her mother learned she had disappeared. At approximately 5 p.m. that day, her mother identified a burned Opel Cadet station wagon, which Miss Underwood used to travel to and from work and which employees of the City Fire Department had found burning on Cates Street in the City of Charlotte at approximately 3:45 o'clock that afternoon. An investigator of the City Fire Department observed an odor of gasoline in the vehicle not attributable to leakage from the gasoline tank or the motor. A small bottle nearby gave off a similar odor. Miss Underwood's father, the registered owner of the vehicle, had not given this defendant or Westbrook permission to drive the vehicle or use it in any way. He had never seen either of them prior to that date.

On 21 June, a body, stipulated to be that of Miss Underwood, was found in a clump of trees near the parking lot of the Celanese Corporation. The body, clothed, was partially covered with an old piece of carpet and two pieces of plywood. The clothing and jewelry were identified as those of Miss Underwood. There were five bullet wounds in the abdomen, one bullet having passed completely through the body. The other four

were removed from the body in the course of an autopsy. Fastened to the left breast of the dress was a Belk's Department Store name plate bearing the name "Underwood." The dress was "bunched up under the arms" of the deceased and one leg hung in the fork of a bush. Properly identified photographs of the body, as it lay where found, disclosed that the face was mutilated by decomposition and maggots beyond recognition. In the opinion of the medical expert who performed the autopsy, the cause of death was the five bullet wounds in the abdomen and the date of death was 18 June, the date of Miss Underwood's disappearance.

In the opinion of witness Pearce, Special Agent of the State Bureau of Investigation, stipulated to be an expert in the field of firearms identification, the bullet removed from the front portion of the left thigh of the defendant Frazier, as above stated, was fired from the same weapon as were the bullets removed from the body of Miss Underwood, the weapon being a .22 caliber pistol.

Frazier's Statement

The defendant, Frazier, testified at the trial of Westbrook "with no substantial deviations" from the statement made by him to the interrogating officers under the above mentioned circumstances. That statement, admitted in evidence pursuant to the court's ruling at the pre-trial hearing of the motion to suppress, was to the following effect:

Frazier spent the night of 17 June with Westbrook. On the morning of the 18th, they walked to the K-Mart on North Tryon Street. After remaining there about an hour they went to the Woolco Shopping Center. They were "looking for a car." Observing a white Volkswagen parking, they went to it and Westbrook "put a gun on" the driver. She fell as if she had fainted. They took a baby crib out of the car and put the woman into the back seat portion with a spread over her. Westbrook got in the back seat with her and Frazier drove the car out of the parking lot, out of the city and onto Highway 49. Turning off onto a dirt road, they stopped "in a little field next to some woods." Taking the woman out of the car, they put her down on a mattress and left her bound and blindfolded, telling her that they were leaving a man to watch her and that he had a gun and would shoot her if she moved. Westbrook took a ring from the woman and they

also got "a few dollars." They left in the woman's car, Frazier driving, and returned to the city.

Arriving at the South-Park Shopping Center, Frazier stopped the car and Westbrook got out, saying, "I think I have got one. Come around on the other side." Frazier looked back and saw a girl get into a light colored, small station wagon. Westbrook ran up to her and got into the car. Frazier heard one shot and thereafter did not see the girl. Westbrook backed the car out and signalled for Frazier to follow him, which Frazier did. He followed Westbrook into the driveway "of the big building and down a road to where some construction equipment, tractors and things, were parked." Frazier then got into the front seat of the station wagon. The girl was lying across the seat. Frazier lifted her head and laid her across his lap. She was "trying to say something." Then Westbrook shot her four more times and one of those bullets struck Frazier in the leg. Westbrook then dragged the girl out of the car and down to the place where her body was found, placing a piece of wood over her. They then drove away and left the girl's body there.

Following this, Frazier and Westbrook went back to the place where they had left the first woman [Mrs. Collins] bound and lying in the woods. Finding she was not there, they abandoned her Volkswagen and returned to the city in the station wagon. They went to Frazier's house. Two or three hours later, Westbrook returned in the station wagon, saying that they must burn it because his fingerprints were all over it. Thereupon, they drove the station wagon to the place where it was ultimately located by the Fire Department, set it on fire and left it.

The defendant offered no evidence at his trial.

Hearing On Motions After The Verdict

Following the verdict and prior to the entry of judgment, the defendant moved to set aside the verdict on the murder charge and for the entry of an order requiring the solicitor to arraign the defendant on the charge of second degree murder in accordance with an alleged agreement by the solicitor with the defendant so to do. This motion was heard before McLean, J., on 23 April 1971. Witnesses then called by the defendant included the solicitor, Mr. Allen Bailey, counsel for the private prosecution, Mr. Warren Stack, who was counsel for the defendant Frazier until he was relieved of that responsibility by order

of the court subsequent to the trial of Westbrook and prior to the trial of Frazier, Mr. Ernest Delaney, who represented Westbrook at his trial, the defendant Frazier, his mother and his father. At the request of the defendant, Judge McLean also dictated for the record his own recollection of discussions with the court by Mr. Stack and the solicitor prior to Frazier's arraignment.

The record of the hearing upon this motion, which is made a part of the record on this appeal, discloses that, in a conference with the court by Mr. Stack and the solicitor, the court was advised that Mr. Stack believed his client would tender pleas of guilty of second degree murder, kidnapping and armed robbery and the court was also advised that such pleas would be acceptable to the State. In order to determine whether such pleas should be accepted by the court, Judge McLean requested and was given a transcript of Frazier's testimony at the trial of Westbrook.

The transcript of Frazier's testimony at the Westbrook trial was introduced by the defendant at the hearing upon his motion and constitutes part of the record on this appeal, being designated "Defendant's Exhibit 'Y' (Amnesty hearing)." This transcript was not offered in evidence before the jury at the trial of this defendant. Examination of it reveals that it fully supports the testimony at Frazier's trial by Police Officer Clark that there were "no substantial deviations" between Frazier's testimony at the Westbrook trial and the statement given by Frazier to the investigating officers, hereinabove discussed and summarized.

When Frazier was first arraigned on these charges, 9 March 1971, the first charge mentioned was that of kidnapping. Mr. Stack, still Frazier's counsel at that time, entered a plea of guilty to that charge. Thereupon, the court interrogated Frazier to determine whether such plea was voluntary and made understandingly. In response to the court's inquiry, Frazier stated that he wanted a jury trial. Thereupon, the court struck the plea of guilty to the charge of kidnapping and ordered the record to show that the defendant entered a plea of not guilty thereto. Mr. Stack, thereupon, requested permission to withdraw as Frazier's counsel. After a further conference between Frazier and Mr. Stack, it being determined that Frazier did not wish to enter a plea of guilty, Mr. Stack was permitted by the court

to withdraw as Frazier's counsel and the court thereupon appointed Mrs. Bellar, who represented him at his trial and at the above mentioned pre-trial and post verdict hearings and upon appeal.

The transcript of the hearing upon this post verdict motion further discloses, there being no evidence to the contrary, that Frazier, through Mr. Stack, approached the solicitor and Mr. Bailey while the jury for the Westbrook trial was being selected and told them Frazier desired to testify for the State at that trial. Prior to so doing, Mr. Stack had fully advised Frazier with reference to this step and had told him that the decision as to whether to testify or not was one for Frazier, himself, to make. No inducements whatever were made to Frazier to get him so to testify.

Following his testimony, Frazier was advised by Mr. Stack that, in the latter's opinion, it would be advisable to consider the entry of pleas to the charges pending against him. Thereupon, Mr. Stack conferred with the solicitor and Mr. Bailey and it was ascertained that the above mentioned pleas by Frazier would be acceptable to the prosecution. At the time of the arraignment, Frazier repudiated such pleas and requested a jury trial, as above stated. Frazier's mother testified that it was Frazier's own decision to testify against Westbrook, neither she nor Mr. Stack advising him to do so. From Frazier's own testimony at this post verdict hearing, it appears that his decision to testify for the State at Westbrook's trial was due to his belief that Westbrook intended to put the entire blame upon Frazier.

At the conclusion of this hearing, the motion to set aside the verdict was denied.

Attorney General Morgan and Special Counsel Moody for the State.

Lila Bellar for defendant.

LAKE, Justice.

[1, 2] The defendant assigns as error the denial of his plea in amnesty and asserts that if this was not error the State should have arraigned him for second degree murder only, by reason of an alleged agreement to accept a plea of guilty thereof.

Amnesty is an exercise of the sovereign power by which immunity to prosecution is granted by wiping out the offense supposed to have been committed by a group or class of persons prior to their being brought to trial. It is related to the granting of a pardon, which is the forgiveness by the sovereign of an offense, granted to an individual after his conviction thereof. 59 AM. JUR. 2d, Pardon and Parole, §§ 5 and 9. Amnesty has been granted in this State by acts of the Legislature. See: *State v. Blalock,* 61 N.C. 242, and *State v. Applewhite,* 75 N.C. 229, relating to the Amnesty Acts of 1866, 1872 and 1874. See also: *State v. Bowman,* 145 N.C. 452, 59 S.E. 74, and *State v. Love and West,* 229 N.C. 99, 47 S.E. 2d 712, wherein statutes provided immunity to the witness for the State with reference to a specific type of crime. Federal grants of amnesty have been proclaimed by the President on a number of occasions beginning with an amnesty proclamation by President Washington in 1795. See *United States v. Burdick,* 211 F. 492 (S.D.N.Y., 1914). Neither the solicitor nor the judge of the superior court has authority under the law of this State to grant amnesty.

Actions of the solicitor in the prosecution of a specific criminal case may result in a bar to further prosecution for the commission of an offense, as where the solicitor enters a *nolle prosequi* or his actions give rise to a proper plea of former jeopardy or, perhaps, where they are so basically unfair as to make further prosecution a denial of due process of law, or as where the State, with the approval of the trial court, accepts a plea of guilty of a lesser offense, or the solicitor announces in open court, when the defendant is brought to trial, that the State seeks only a verdict of guilty upon a lesser degree of, or a lesser offense included within, the offense charged in the indictment. None of these situations is disclosed by this record.

[3] The basis of the defendant's contention upon this point is that he testified when called as a witness by the State at the trial of his alleged accomplice Westbrook. Prior to and throughout that testimony this defendant, Frazier, was represented by competent, experienced trial counsel, who was present in that capacity when Frazier testified. The present record makes it abundantly clear that the decision so to testify was the decision of this defendant after his conferences with his then counsel. Following those conferences, this defendant's then counsel approached the solicitor with the suggestion that this defendant

testify for the State against Westbrook. Nothing whatever in this record suggests any promise or suggestion by the solicitor, or by counsel for the private prosecution of Westbrook, that the defendant would receive any benefit or reward by reason of his proposed testimony. His reason for so testifying was his belief that Westbrook intended, by his own testimony at that trial, to place the blame for the killing of Miss Underwood upon this defendant, Frazier. Nothing in the use of that testimony by the State precludes the State from now prosecuting this defendant. *State v. Lyon,* 81 N.C. 600; *State v. Newell,* 172 N.C. 933, 90 S.E. 594.

[4] The record on this appeal discloses that, following Frazier's testimony in the trial of Westbrook, his then counsel conferred with him and advised him that "by virtue of the admissions which he had made in his testimony" it was such counsel's opinion that he, Frazier, should think seriously about entering a plea to the charges pending against him. No one was present at that conference except the defendant, his then counsel and his parents. Thereupon, the defendant's then counsel conferred with the then solicitor and the counsel for the private prosecution and ascertained that the solicitor would be willing to accept a plea of guilty to murder in the second degree by this defendant upon the murder charge and a plea of guilty to kidnapping. The defendant's then counsel so advised the defendant. Defendant's then counsel testified that at no time did the judge make any suggestion as to the type of sentence he would impose in the event of such pleas. The defendant's then counsel so informed the defendant.

Thereafter, the defendant was brought into court for arraignment on the charges against him. The first case called was the kidnapping charge. The defendant's counsel entered a plea of guilty. Upon the court's interrogation of the defendant to ascertain that this plea was entered with his consent, voluntarily and understandingly, the defendant advised the court, "I want to have a jury trial." Thereupon, the court ordered the plea of guilty stricken. The defendant's then counsel thereupon requested to be relieved of his assignment. This was done and the defendant's present counsel was appointed to represent him. Arraignment proceedings were suspended and when the defendant was thereafter arraigned upon the three charges, he entered, through his present counsel, a plea of not guilty to each. In this

record there is no basis whatever for a finding that the defendant was induced by the State to testify in the trial of Westbrook, or that by placing the defendant on trial on the charge of murder in the first degree the State has violated any agreement with the defendant, or has otherwise violated his legal rights.

[5, 6] The defendant next contends that the court erred in denying his motion to quash the indictment for murder on the grounds that G.S. 14-17 is unconstitutional in that: (1) It permits the jury to return a verdict of guilty of murder in the first degree without more, or to return a verdict of guilty of murder in the first degree with a recommendation that the punishment shall be imprisonment for life, no standards or guide lines being provided for the guidance of the jury in this determination; (2) the statute provides for the determination of guilt and punishment by a single verdict trial; and (3) the death penalty constitutes cruel and unusual punishment. All of these contentions were considered and rejected by this Court in *State v. Westbrook,* 279 N.C. 18, 29, 181 S.E. 2d 572. See also: *McGautha v. California,* 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed. 2d 711; *Trop v. Dulles,* 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed. 2d 630, 641.

The defendant next contends that there was prejudicial error in the consolidation for trial of the three charges against him. In this there was no error.

[7] G.S. 15-152 authorizes the consolidation of two or more indictments where the charges are for "two or more acts or transactions connected together." In *State v. Old,* 272 N.C. 42, 157 S.E. 2d 651, this Court found no error in the consolidation for trial of a charge of murder and two charges of assault with a deadly weapon upon different individuals, saying, "Ordinarily, and unless as here, the evidence showing guilt of a minor offense fits into the proof on the capital charge, the minor offenses should not be included." In the present case, the State contends that the murder of Miss Underwood, the kidnapping of Mrs. Collins and the robbery of Mrs. Collins were all parts of a continuing program of action by the defendant and Westbrook, covering a period of approximately three hours. Under such circumstances, evidence of the whole affair is pertinent to the several charges and there is no error in consolidating them for trial. *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99; *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406; *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245; *State v. White,* 256 N.C. 244, 123

S.E. 2d 483; *State v. Brown,* 250 N.C. 209, 108 S.E. 2d 233.

[8] The defendant next contends that there was error in allowing challenges for cause by the State to prospective jurors who, on voir dire, stated that they were opposed to capital punishment. Each prospective juror, so excused, not only stated that he was opposed to capital punishment, but further, in response to questions by counsel for the private prosecution and in response to inquiries by the court, stated that, regardless of the evidence, he or she would not consider returning a verdict upon which the judge would have to impose a death sentence. The sustaining of the challenges to these jurors did not violate the rule of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776. *State v. Westbrook, supra.*

[9] The record does not show that at each recess the court instructed the jury not to discuss the case among themselves or to let anyone talk to them about it. The defendant assigns this omission as error. The record indicates that the jury was kept together under the supervision of the sheriff throughout the trial. There is no suggestion of any improper conduct by any juror or of any effort by any other person to communicate with a juror. While it is the better practice for the court, at a recess of a trial, to instruct the jury that during such recess they are not to discuss the case among themselves or with any other person, no prejudicial error is shown in this case by the silence of the record upon this point. Nothing in the record indicates that the defendant requested the court so to instruct the jury at any time.

[10] Following the selection and impaneling of the jury, the defendant, for the first time, advised the court that he wanted a psychiatric examination and treatment before the trial began. In presenting this request to the court, his counsel stated:

> "Mr. Frazier insists upon having a psychiatric or mental examination prior to the beginning of this trial. He insists that he needs psychiatric attention. I told Frazier that we have attempted and the court has attempted and I have requested several times that he be examined by a psychiatrist and effort has been made toward this end. However, they have been unsuccessful up to the present time."

She then requested the defendant to state his desire to the court, which he did, setting forth no ground for such request. After

ascertaining the location of the mental health clinic, the court requested a conference of attorneys. The record shows such a conference was conducted in the judge's chambers, but does not show what conclusion was reached, except that the trial proceeded immediately.

Nothing else in the record suggests any contention by the defendant that he was not guilty by reason of insanity or that he was unable, by reason of insanity, to go to trial. It is quite apparent that the demand for psychiatric examination was for the sole purpose of delay. We find no merit in this assignment of error. In *State v. Propst,* 274 N.C. 62, 68, 161 S.E. 2d 560, this Court, speaking through Justice Bobbitt, now Chief Justice, said:

> "Ordinarily, it is for the court, in its discretion, to determine whether the circumstances brought to its attention are sufficient to call for a formal inquiry to determine whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense."

[11] The defendant next contends that the court expressed an opinion as to the credibility of certain witnesses for the State by ruling, in the presence of the jury, that each was an expert in the field of his testimony. It is elementary that it is error for the trial judge to indicate to the jury in any manner his opinion as to the credibility of a witness, or as to the weight to be given his testimony. G.S. 1-180; *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568; *State v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *State v. Auston,* 223 N.C. 203, 25 S.E. 2d 613. After the State's witness Ensley testified concerning his training and experience in the lifting of fingerprints, the court ruled: "Upon the evidence offered, the Court will find that he is an expert in the field of lifting fingerprints, and entitled to give his opinion evidence in that field." A similar ruling was made by the court with reference to the State's witness Stubbs, held to be an expert in the field of fingerprint comparisons. It has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert. It is quite obvious that the rulings here challenged by the defendant could not have been understood by the jury as anything other than rulings upon the qualification of the witness to testify as to his opinion.

This case is distinguishable from *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861. That was a suit against a surgeon for damages due to malpractice. The defendant, himself, was called to the stand as a witness in his own behalf and tendered as an expert witness. The court, in the presence of the jury, said, "Let the record show that the Court finds as a fact that Dr. Lawrence is a medical expert, to wit: an expert physician in surgery." Since the point at issue in that case dealt with the defendant's skill and expertness in surgery, we held that the court's finding, as stated, should not have been made in the presence of the jury. In the present case, on the contrary, the court's ruling could not have been interpreted by the jury as anything other than a holding that the witness was qualified to testify concerning his expert opinion in his field. There is no merit in this assignment of error.

[12] At the beginning of the third day of the trial, in the absence of the jury, the defendant's court appointed counsel advised the court that the defendant, himself, desired to address the court. Thereupon, the defendant announced to the court that he was not satisfied with his attorney. The court advised the defendant that he had the right to conduct his own case without counsel, if he so desired, but, having appointed counsel for him, the court would not appoint another. The court further stated that in its opinion the defendant's attorney was doing an excellent job for him under the circumstances. At the court's suggestion, the defendant conferred further with his counsel and the trial proceeded with the same counsel continuing to represent the defendant. In this, there was no error. The defendant, an indigent, was entitled to have the court appoint competent counsel to represent him at his trial. *State v. Simpson,* 243 N.C. 436, 90 S.E. 2d 708. He was not entitled to have the court appoint counsel of his own choosing or to have the Court change his counsel in the middle of the trial.

[13] The defendant next contends that the court erred in the admission of incompetent evidence. This assignment of error is based upon numerous exceptions. We have examined all of these and find in none of them basis for the granting of a new trial. It was not error to admit in evidence photographs of the body of Miss Underwood as it lay where found, the court carefully instructing the jury that such photograph was allowed in evidence for the sole purpose of illustrating the testimony of the

witnesses and not as substantive evidence. The photographs were properly authenticated as correct portrayals of conditions observed by and related by the witnesses who used the photographs to illustrate their testimony. As we said in *State v. Atkinson,* 275 N.C. 288, 311, 167 S.E. 2d 241, "The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence" when so authenticated. Accord: *State v. Westbrook,* p. 32, *supra; State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; Stansbury, North Carolina Evidence, 2d Ed., § 34.

[14] The defendant asserts in his brief, "The Court should not have allowed the State to cross-examine its own witnesses, and the ruling of the Court in allowing continued leading questions amounts to an abuse of discretion." We have examined each of the eleven exceptions on which this assignment of error is based and find no merit therein. The allowance of leading questions is within the discretion of the trial judge. *McKay v. Bullard,* 219 N.C. 589, 594, 14 S.E. 2d 657; *State v. Buck,* 191 N.C. 528, 132 S.E. 151.

[15, 16] There was no error in the admission of evidence to the effect that fingerprints of Westbrook, as well as those of this defendant, were found in the Collins automobile. The defendant's statement, previously introduced in evidence, showed that he and Westbrook were together throughout the entire day on which Mrs. Collins was kidnapped and her automobile taken by her two assailants. The evidence introduced at the pre-trial hearing, upon the defendant's motion to suppress evidence of in-custody statements made by him, is ample to support the court's findings of fact that, prior to interrogation, the defendant was given and understood the full warning required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, that he voluntarily and understandingly made statements without any promise, threat, reward or hope of reward and that, after being advised of his rights, he waived in writing his right to counsel at such interrogation and his right to remain silent. Consequently, these findings of fact are binding upon this Court. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404; *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681; *State v. Gray,*

268 N.C. 69, 150 S.E. 2d 1. Upon these findings, there was no violation of any right of the defendant under the Constitution of the United States in the admission into evidence of the said statements, or in the denial of the motion to suppress the same. There is no basis for distinction in this respect between the written statement of the defendant and his oral statements to which Officer Clark was permitted to testify.

After the argument of the appeal in this Court by his counsel, the defendant *in propria personna* filed a further brief, apparently without the knowledge of his counsel, whose brief in his behalf was filed in due time. Ordinarily, the communication so received by this Court from a litigant represented by counsel will not be considered by the Court. Due to the fact that this is an appeal from the imposition of a sentence of death, we have considered the supplemental brief so filed by the defendant for the sole purpose of giving him the full benefit of any matter raised and discussed therein.

[17] In this supplemental brief, the defendant contends that the court erred in admitting in evidence the statement made by him to the investigating officers while he was in custody, notwithstanding his written waiver of his right to counsel at such interrogation, for the reason that G.S. 7A-457, prior to the 1971 amendment thereof, provided that an indigent defendant, charged with a capital offense, could not waive his right to counsel at such in-custody interrogation. He cites *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561.

Assuming, without deciding, that it was error to admit in evidence, over objection, the in-custody statement, such error was harmless and does not entitle the defendant to a new trial, for the reason that the defendant, while represented by counsel, testified to the same facts at the trial of Westbrook. The complete transcript of this defendant's testimony at the trial of Westbrook was made a part of the record on this appeal by the defendant. It was presented to and examined by the court at the pre-trial hearing upon the defendant's plea of amnesty and motion to suppress. Had the court sustained the objection to the introduction of the in-custody statement, the State could have introduced the transcript of this defendant's testimony at the Westbrook trial, when his then counsel was present. It fully corroborates the testimony of Officer Clark at this defendant's trial to the effect that he heard the defendant's testimony

at the Westbrook trial and there were no substantial deviations between the statements given at the in-custody interrogation and such sworn testimony at the trial of Westbrook. The use of the one rather than the other of these accounts by the defendant of his and his companion's actions could not have affected the verdict of the jury.

[18] The defendant's contention that the argument of counsel for the private prosecution was improper has no merit. *State v. Westbrook, supra,* pp. 37-41. The reference in the argument to the defendant as a thief and a robber is supported by the defendant's own statement admitted in evidence. We find no statement in the argument of counsel for the private prosecution, set forth in full in the record, which is not supported by the evidence. Consequently, the argument did not go beyond permissible limits.

[19] The defendant next contends that his motion for judgment of nonsuit should have been allowed with reference to the charge of murder. The basis of this contention is that the bill of indictment for murder does not allege that it was committed in the perpetration of a robbery. The indictment is sufficient in form to allege murder and support a conviction of murder in the first degree. G.S. 15-144; *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435. G.S. 14-17 provides that a murder committed in the perpetration of a robbery or other felony shall be deemed murder in the first degree. It is not required that the indictment allege that the murder was so committed in order that it be sufficient to support a verdict of murder in the first degree. *State v. Haynes, supra.* In *State v. Mays,* 225 N.C. 486, 489, 35 S.E. 2d 494, this Court, speaking through Justice Barnhill, later Chief Justice, said:

> "The bill of indictment charges the capital felony of murder in the language prescribed by statute. G.S., 15-144. It contains every averment necessary to be made. *S. v. Arnold,* 107 N.C., 861; *S. v. R. R.,* 125 N.C., 666. Proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata. S. v. Fogleman,* 204 N.C., 401, 168 S.E., 536. If the defendant desired more definite information, he had the right to request a bill of particulars, in the absence of which he has no cause to complain."

The evidence, including the statement to the investigating officers by the defendant, makes it abundantly clear that the defendant and Westbrook were collaborating in the robbery of Miss Underwood through the stealing of her automobile, and in the course of that felony she was brutally murdered and her body callously dragged to and dumped in the woods. The undisputed evidence is that the bullet removed from the front of the defendant's left thigh was fired from the same weapon as the four bullets recovered from the body of Miss Underwood, the fifth bullet fired into her, as she was held by the defendant, having passed through her body.

[20] We find no merit in any of the defendant's exceptions to the charge of the court. There was no evidence to show the commission of common law robbery in the robbery of Mrs. Collins. The defendant's own statement, admitted in evidence, is to the effect that Westbrook "put a gun on" Mrs. Collins and that, upon their arrival at the South-Park Shopping Center, immediately after leaving Mrs. Collins bound and blindfolded in the woods, Westbrook had a gun with which he shot Miss Underwood. Where there is no evidence of a lesser offense included in the offense charged in the indictment, it is not error for the court to fail to charge the jury with reference to the lesser included offense. *State v. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

We have carefully considered each of the defendant's assignments of error and find no merit in any of them.

No error.

STATE OF NORTH CAROLINA v. ARTIE GILBERT THOMPSON

No. 135

(Filed 14 January 1972)

1. **Homicide § 21— felony-murder prosecution — sufficiency of evidence**

The State's evidence tending to show that the defendant killed a 16-year-old boy while defendant was engaged in the perpetration of the crimes of felonious breaking and entering and felonious larceny, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder.

2. Homicide § 4— murder committed during perpetration of felony — premeditation and malice

A murder committed in the perpetration or attempted perpetration of any felony within the purview of G.S. 14-17 is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought.

3. Homicide § 4— felony-murder statute — felony creating risks to human life

Any unspecified felony is within the purview of the felony-murder statute if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life; this includes, but is not limited to, felonies which are inherently dangerous to life. G.S. 14-17.

4. Homicide § 4— prosecution under felony-murder statute — what constituted unspecified felonies — felonious breaking and entering and larceny

The crimes of felonious breaking and entering and felonious larceny created substantial foreseeable human risks and therefore were unspecified felonies within the purview of the felony-murder statute, G.S. 14-17, where the evidence tended to show that the defendant, armed with a pistol, feloniously broke into and entered an apartment, that he committed felonious larceny therein, and that while in the apartment he came upon an occupant thereof and shot and killed him.

5. Homicide § 4— felony-murder prosecution

A killing is committed in the perpetration or attempted perpetration of a felony within the purview of the felony-murder statute when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction.

6. Homicide § 4— felony-murder prosecution — unintentional discharge of pistol

The killing of a person by one who is engaged in the perpetration or attempted perpetration of a felony which is inherently or foreseeably dangerous to human life is murder in the first degree notwithstanding the discharge of the pistol is unintentional.

7. Burglary and Unlawful Breakings § 2— felonious breaking and entering — elements of the offense

A person is guilty of feloniously breaking and entering a dwelling house if he unlawfully breaks and enters such dwelling house with the intent to steal personal property located therein without reference to the ownership thereof.

8. Criminal Law § 26; Homicide § 4— felony-murder prosecution — separate punishment for felony and murder

Where defendant's conviction of felony-murder was based upon a jury finding that the murder was committed in the perpetration of felonious breaking and entering, no separate punishment can be imposed for the felonious breaking and entering.

9. Larceny § 7— larceny prosecution — variance as to owner of stolen property

In a prosecution on indictment charging the larceny of personal property of a named person, evidence tending to show that the only property missing was that belonging to another person and his wife, *held* sufficient to warrant nonsuit on the ground of fatal variance.

Justice HIGGINS concurring.

APPEAL by defendant under G.S. 7A-27(a) from *McLean, J.*, May 17, 1971 Schedule "A" Criminal Session of MECKLENBURG Superior Court.

Defendant was indicted, in the form prescribed by G.S. 15-144, for the murder of Ernest Mackey on February 9, 1971.

Defendant was indicted separately in a two-count bill which charged that on February 9, 1971, defendant committed the felonies described therein, *viz.*: The first count charged defendant with feloniously breaking and entering a certain dwelling house and building occupied by one Ernest Mackey, 3517 Burkland Drive, Apartment #3, Charlotte, N. C., with intent to steal personal property of Ernest Mackey. The second count charged that, after having feloniously broken into and entered the said dwelling house and building and apartment, defendant did steal certain goods and chattels of Ernest Mackey, to wit, "1 Zenith televison set, model K1670, assorted mens and womens clothing, 1 yellow bedspread, and 1 television antenna, of the value of $400.00 . . . . "

Upon arraignment thereon, defendant, represented by James Shannonhouse, Esq., his court-appointed counsel, pleaded not guilty to each indictment.

Uncontradicted evidence tends to show the facts narrated below.

On the morning of February 9, 1971, between 7:15 and 7:20, Cecil Mackey and his wife left their residence at 3517 Burkland Drive, Apartment #3, Charlotte, N. C., for work. The apartment consisted of a living room and kitchen downstairs and two bedrooms and a bath upstairs. There was a door at the front and one at the back. Cecil locked the front door. The door at the back "would not lock." There was no doorknob

on the back door on the outside, but there was one on the inside. One could come in the back through a window. When Cecil and his wife left for work, Ernest Mackey, age 16, was the only person in the apartment. He was in bed asleep. Ernest was Cecil's stepson, the son of Cecil's wife.

When Cecil returned to the apartment, "about 1:30 or quarter of 2:00 in the afternoon," he saw "a lot of people outside." The dead body of Ernest was being placed in an ambulance. Certain articles which had been in the apartment when Cecil left that morning were missing, namely, Cecil's "black and white Zenith television" and "bunny type antenna" and clothes of Cecil and of his wife.

Detective James L. Ruckart arrived at the Mackey apartment before Cecil's return. Ruckart observed a raised window located "approximately a foot from the back door," from which the screen had been removed. Entering the apartment, he observed a chest of drawers. Some of the drawers were standing open and part of one was on the floor in front of the dresser. Upstairs, there was a blanket on the floor of a bedroom. The blanket was smoking and burning. In the bathroom "a young Negro male [was] lying on the floor." He was lying on his face, his head resting against the base of the bathroom door, his hands "under his belly and his feet up in the bathtub." He was "fully clothed and dead." There was a wound in the back of his head, behind his right ear at the base of the skull, with "a round hole about the size of a piece of chalk." Blood from the wound was running on the shoulder of the victim and on the bathroom floor.

An autopsy was performed on the body of Ernest Mackey on February 10, 1971, by Dr. Hobart R. Wood, Medical Examiner of Mecklenburg County. Dr. Wood first saw the dead body of Ernest on February 9, 1971, at 2:05 p.m., in the bathroom on the upper floor of the Mackey apartment. From his inspection of the body at that time Dr. Wood determined Ernest "had died recently." He testified: "The body was warm, cooling, had all the aspects of fresh death." There was "no stiffness" and "no rigidity" present at that time. Dr. Wood described the bullet wound in the back of Ernest's head and testified that, in his opinion, this wound caused Ernest's death. There was no evidence of injury other than that caused by this bullet wound.

To establish that defendant committed the crimes charged, the State offered the testimony of Frances Nichols, Edward Clyburn, age 19, Larry Sings, age "about twenty," and Willie Mae Harris. Their testimony, summarized except when quoted, tends to show the facts narrated below.

On February 9, 1971, about 1:00 p.m., at the Red Shed Cafe, defendant asked Sings "if [he] could use a few dollars" and "mentioned furniture and things he could get if he had a truck or something to move it in." Sings had no conveyance but suggested that defendant talk to Clyburn. Defendant offered Clyburn $1.00 "to carry him down to his house to get a television" and "two more dollars" if he "carried him to the pawn shop." Accompanied by defendant and by Sings, and as directed by defendant, Clyburn drove his mother's 1964 blue Ford to 3517 Burkland Drive. Leaving Sings and Clyburn in the car, defendant got out and knocked on the front door of the Mackey apartment. Receiving no answer, defendant went around to the back. Obtaining entrance at the back, defendant walked through the apartment, opened the front door and called to Sings and Clyburn to "[c]ome on in." Sings entered the front door and, at the foot of the stairs, received from defendant a portable television set. Sings carried the TV set out of the back of the house and put it in Clyburn's car. The car was then located in a driveway between the apartment building in which the Mackey apartment was located and the apartment building in which the apartment of Frances Nichols was located. Frances Nichols observed the removal of the TV set from the Mackey apartment and the placement of it in the "turquoise" Ford and made haste to notify the police. Sings went back into the Mackey apartment but Clyburn drove away "real fast."

After giving Sings the TV set defendant went back upstairs. Upon Sings's return, defendant "had some clothing downstairs" and told Sings to put it in the car. Sings told him that Clyburn had already "pulled off." In response to Sings's question whether he had gotten everything he wanted, defendant replied, "Yes." When Sings said, "Let's go," defendant answered as follows: "Wait a minute. Something I have to take care of." Sings asked what it was, and defendant replied: "Somebody upstairs." When Sings asked defendant if "they" had seen him, defendant replied, "No," and added, "You go ahead and I will meet up with you later." Sings left, carrying the clothes, leaving defendant in the apartment.

A short distance from the Mackey apartment Clyburn picked up Sings and took him to the house of Willie Mae Harris at 3105 Zircon Street, "eight blocks or more" from the Mackey apartment. Over Willie Mae's protest, the television set and the clothes were taken into her house. Clyburn and Sings then left and picked up defendant. Clyburn drove back to Willie Mae's and Sings and defendant got out and went into her house. Clyburn drove away.

When Sings and defendant were alone in a bedroom in Willie Mae's house, defendant told Sings he had shot "a boy upstairs"; that he did not know whether he had killed him; that "[t]he gun just went off." He did not tell Sings "what he did with the gun" or "why he killed or shot him." After defendant told Sings "he had shot the boy upstairs," defendant left Willie Mae's house. Willie Mae demanded that the "stuff" be taken out of her house. The television set was put under a house in back of Willie Mae's house. The clothes were put in a garbage dumpster at the end of Zircon Street. Sings saw defendant again that night in Griertown. Defendant then told Sings "he didn't know why the gun went off and he had never killed nobody before." Sings told defendant to "step off" and "not to be hanging around [him]." Then Sings called the police station and about an hour later the police came to Willie Mae's house and picked up Sings. Clyburn was arrested the same night. Sings and Clyburn made statements concerning their connection with the charges set forth in the bills of indictment.

Willie Mae testified she overheard a conversation between Sings and defendant in which defendant told Sings that he had to shoot the boy because "when he was going back in the house the boy could see him and he could identify him."

Defendant was taken into custody in Philadelphia, Pennsylvania, waived extradition proceedings, and was arrested in North Carolina on February 19, 1971.

Cecil Mackey had seen defendant prior to February 9, 1971, but did not know him. Cecil *understood* that Ernest had known defendant and that defendant had previously been at the Mackey apartment.

The only evidence offered by defendant was the testimony of Dorothy Ann Burton. She testified that she saw defendant on February 9, 1971, at her house, "about 10:00 or 10:30" until

"about 2:00," and that she saw him again "about 4:00, 4:30." Upon cross-examination, she testified that she was "not sure it was the ninth," that "it could have been the 10th, it could have been the 11th," and that she just did not know "what day it was that [she] saw him at 10:00 in the morning."

In the murder case, the jury returned a verdict of guilty of murder in the first degree with recommendation that the punishment be life imprisonment.

With reference to the two-count bill of indictment charging (1) felonious breaking and entering, and (2) felonious larceny, the jury returned a verdict of guilty as charged on each count.

In the murder case, the judgment pronounced imposed a sentence of imprisonment for life. In the felonious breaking and entering case, and in the felonious larceny case, separate judgments were pronounced, each imposing a prison sentence of ten years with provision that the sentence in the felonious larceny case commence at the expiration of the sentence in the felonious breaking and entering case.

Defendant excepted to each of the three judgments and noted separate appeal entries in respect of each.

Attorney General Morgan and Deputy Attorney General Vanore for the State.

James M. Shannonhouse, Jr., for defendant appellant.

BOBBITT, Chief Justice.

[1] Defendant assigns as error the court's denial of his motion under G.S. 15-173 for judgment as in case of nonsuit in respect of each of the three charges. The evidence, when considered in the light most favorable to the State, required submission of the murder charge. Whether the court should have submitted felonious breaking and entering and felonious larceny as separate criminal offenses will be considered below.

With reference to the murder indictment, the court instructed the jury they could return a verdict of guilty of murder in the first degree, or a verdict of guilty of murder in the first degree with a recommendation that the punishment be imprisonment for life, or a verdict of not guilty. Defendant assigns as error the court's failure to instruct the jury on the lesser in-

cluded crimes of murder in the second degree and manslaughter.

An indictment for murder in the form prescribed by G.S. 15-144 is sufficient to support a verdict of guilty of murder in the first degree if the jury finds from the evidence beyond a reasonable doubt that defendant killed the deceased with malice and after premeditation and deliberation *or* in the perpetration or attempt to perpetrate "any arson, rape, robbery, burglary or other felony." *State v. Haynes,* 276 N.C. 150, 156, 171 S.E. 2d 435, 439 (1970), and cases cited; *State v. Lee,* 277 N.C. 205, 212, 176 S.E. 2d 765, 769 (1970), and cases cited. The State contends, and offered evidence tending to show, that defendant killed Ernest Mackey while defendant was engaged in the perpetration of the crimes of felonious breaking and entering and felonious larceny. In respect of the indictment and trial for murder, variances between the allegations in the separate two-count indictment and the evidence are immaterial. These variances are considered below in determining whether defendant was properly tried, convicted and sentenced for felonious breaking and entering and for felonious larceny as separate crimes in addition to the crime of murder.

G.S. 14-17 provides in pertinent part that "[a] murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, *or* which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary *or other felony,* shall be deemed to be murder in the first degree . . . . " (Our italics.)

[2] "It is evident that under this statute [G.S. 14-17] a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death was intended or not." *State v. Streeton,* 231 N.C. 301, 305, 56 S.E. 2d 649, 652 (1949). A murder committed in the perpetration or attempt to perpetrate any felony within the purview of G.S. 14-17 is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *State v. Maynard,* 247 N.C. 462, 469, 101 S.E. 2d 340, 345 (1958), and cases cited.

Decisions holding that homicides committed in the perpetration or attempt to perpetrate the specified felonies of arson,

burglary, rape and robbery constitute murder in the first degree are cited in *State v. Streeton, supra* at 305-06, 56 S.E. 2d at 653. Subsequent cases to like effect include the following: Rape, *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104 (1951); *State v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387 (1954); *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365 (1960); *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232 (1963); robbery, *State v. Rogers, supra; State v. Maynard, supra; State v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454 (1958); *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165 (1961); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970); *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Rich,* 277 N.C. 333, 177 S.E. 2d 422 (1970).

Decisions holding that homicides committed in the perpetration or attempt to perpetrate unspecified felonies constitute murder in the first degree include the following: Kidnapping, *State v. Streeton, supra;* felonious escape, *State v. Lee, supra;* sodomy, *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971).

In *State v. Covington,* 117 N.C. 834, 23 S.E. 337 (1895), the indictment for murder was in the form prescribed by G.S. 15-144. The felony-murder aspect of the case was submitted as murder pursuant to a felonious breaking and entering of a store with intent to commit the crime of larceny therein. In *State v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533 (1940), the indictment charged murder committed by defendant "while engaged in the perpetration of the crime of store breaking and larceny," but the felony-murder aspect of the case was submitted as murder committed by defendant while engaged in the perpetration of the crime of robbery.

The only evidence of the circumstances under which Ernest Mackey was killed was offered by the State. It tends to show that defendant feloniously broke into and entered Cecil Mackey's apartment; that he committed the crime of felonious larceny therein; and that, while upstairs in the Mackey apartment, defendant shot and killed Ernest Mackey. The fatal wound was inflicted under circumstances not disclosed by the evidence. Both Sings and Willie Mae testified that defendant stated that he had shot the boy. According to Sings, defendant told him the "gun just went off" and "he didn't know why the gun went off." According to Willie Mae, defendant told Sings he had to shoot

the boy "because when he was going back in the house the boy could see him and he could identify him."

We consider first whether the felonious breaking and entering and the felonious larceny disclosed by the evidence are felonies within the purview of G.S. 14-17. Under the evidence, defendant was guilty of felonious larceny only if the larceny was committed pursuant to a felonious breaking and entering. G.S. 14-70; G.S. 14-72(b)(2); G.S. 14-54(a). (There was no evidence that the property stolen had a value in excess of $200.00.) The crimes of felonious breaking and entering and of felonious larceny herein were interrelated and committed as successive events in a continuing course of conduct. The court instructed the jury that they would not consider whether defendant was guilty of felonious larceny unless they first found that he was guilty of felonious breaking and entering. The court also instructed the jury that they should return a verdict of guilty of murder in the first degree if satisfied beyond a reasonable doubt that defendant shot and fatally injured Ernest Mackey "while committing or attempting to commit the felony of breaking into or entering the apartment of Mackey . . . or during the felonious larceny"; and that if they failed so to find they would return a verdict of not guilty.

[3] We have held that a felony which is inherently dangerous to life is within the purview of G.S. 14-17 although not specified therein. *State v. Streeton, supra; State v. Lee, supra; State v. Doss, supra.* However, as indicated in *State v. Doss, supra* at 427, 183 S.E. 2d at 679, no decision of this Court purports to hold that the only unspecified felonies within the purview of G.S. 14-17 are felonies which are inherently dangerous to life. In our view, and we so hold, any unspecified felony is within the purview of G.S. 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. 14-17. In a discussion of the "Felony-Murder Rule," Professor Perkins states: "One who is perpetrating a felony which seems not of itself to involve any element of human risk, may resort to a dangerous method of committing it, or may make

use of dangerous force to deter others from interfering. If the dangerous force thus used results in death, the crime is murder just as much as if the danger was inherent in the very nature of the felony itself." R. Perkins, Criminal Law 34 (1957).

[4] In the present case, the evidence tends to show that defendant, armed with a pistol, feloniously broke into and entered the Mackey apartment; that he committed the crime of felonious larceny therein; and that while upstairs in said apartment he came upon Ernest Mackey and shot and killed him. These crimes of felonious breaking and entering, and felonious larceny, *committed under these circumstances,* created substantial foreseeable human risks and therefore were unspecified felonies within the purview of G.S. 14-17.

[5] We consider next whether the evidence shows the fatal wound was inflicted while defendant was engaged *in the perpetration of,* or attempt to perpetrate, the crimes of felonious breaking and entering and of felonious larceny. An interrelationship between the felony and the homicide is prerequisite to the application of the felony-murder doctrine. 40 C.J.S. *Homicide* § 21(b), at 870; Perkins, *op. cit.* at 35. A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute "when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction." 40 Am. Jur. 2d *Homicide* § 73, at 367; see 51 Dickinson Law Review 12, 18-19 (1946). Robbery cases bearing on this point are *Campbell v. State,* 227 So. 2d 873, 878 (Fla. 1969); *State v. Glenn,* 429 S.W. 2d 225, 231 (Mo. 1968); *Jones v. State,* 220 Ga. 899, 142 S.E. 2d 801 (1965); *Commonwealth v. Dellelo,* 349 Mass. 525, 529-31, 209 N.E. 2d 303, 306-07 (1965); *People v. Mitchell,* 61 Cal. 2d 353, 360-62, 38 Cal. Rptr. 726, 731, 392 P. 2d 526, 531-32 (1964).

In the present case, the homicide was committed within the apartment of Cecil Mackey after defendant had feloniously broken into and entered the apartment and after the personal property of Cecil Mackey had been feloniously stolen or while it was being stolen. Ernest Mackey, the stepson of Cecil, lived in that apartment. The fact that he was fully clothed and in the bathroom when his warm body was discovered indicates plainly he was awake when shot. Whether Ernest Mackey was shot when

first approached or confronted by defendant or whether he was shot later when defendant went back "to take care of" the "somebody upstairs" is immaterial. Too, it is immaterial whether the killing was to enable defendant to consummate the crime of larceny, or to overcome resistance, or to avoid identification and arrest. In either event the killing resulted from and was the culmination of defendant's course of criminal conduct while engaged in the perpetration of felonious breaking and entering and felonious larceny.

We consider next the attenuate suggestion that the discharge of the pistol was unintentional. It is difficult to reconcile defendant's statement to Sings that "the gun just went off" and he "didn't know why" with defendant's statement to Sings that there was somebody upstairs he had "to take care of" and with the fact that Ernest Mackey's death was caused by a bullet wound in the back of his head. These evidential facts are in substantial accord with the statement attributed to defendant by Willie Mae. For present purposes we may assume that the actual discharge of the gun was unintentional. This assumed, the question presented is whether death caused by the unintentional discharge of a gun in the hands of a felon engaged in the perpetration or attempt to perpetrate a felony within the purview of G.S. 14-17 is murder in the first degree.

[6] We are in accord with Perkins's statement that "[i]t is not necessary . . . to show that the killing was intended or even that the act resulting in death was intended. It may have been quite unexpected." Perkins, *op. cit.* at 35. We hold that the killing of a person by one who is engaged in the perpetration or attempt to perpetrate a felony which is inherently or foreseeably dangerous to human life is murder in the first degree notwithstanding the discharge of the pistol is unintentional. Decisions in accord include the following: *People v. Mitchell,* 61 Cal. 2d 353, 360, 38 Cal. Rptr. 726, 730, 392 P. 2d 526, 530 (1964); *State v. Jensen,* 209 Ore. 239, 260, 264, 296 P. 2d 618, 626, 628 (1956); *Stansbury v. State,* 218 Md. 255, 260-61, 146 A. 2d 17, 20 (1958); *State v. Best,* 44 Wyo. 383, 389, 12 P. 2d 1110, 1111 (1932). "The turpitude of the felonious act is deemed to supply the element of deliberation or design to effect death." 40 Am. Jur. 2d *Homicide* § 46, at 336.

Although our research indicates the precise question now decided has not been presented previously to this Court, it is

noteworthy that in *State v. Phillips,* 264 N.C. 508, 512, 142 S.E. 2d 337, 339 (1965), this dictum appears: "(Of course, accident will be no defense to a homicide committed in the perpetration of or in the attempt to perpetrate a felony. G.S. 14-17.)" In *Phillips,* the question presented and decided involved the court's instructions with reference to homicide by misadventure in a second-degree-murder—manslaughter case.

G.S. 15-169, involving conviction of the lesser offense of assault in a prosecution for a greater felony, and G.S. 15-170, involving conviction for a less degree of or an attempt to commit a crime, are applicable *only when there is evidence* tending to show the defendant may be guilty of an included crime of lesser degree. *State v. Carnes,* 279 N.C. 549, 554, 184 S.E. 2d 235, 238 (1971), and cases cited. There is no evidence that Ernest Mackey was murdered by defendant otherwise than while defendant was engaged in the perpetration of the crimes of felonious breaking and entering and felonious larceny. Since there was no evidential basis therefor, defendant's contention that the court should have submitted lesser degrees of unlawful homicide is without merit.

We come now to defendant's contention that judgments as in case of nonsuit should have been entered in respect of both counts in the separate two-count bill of indictment.

[7] With reference to the felonious breaking and entering count in the separate bill of indictment, it is noted that the dwelling involved is described as "a certain dwelling house and building occupied by one Ernest Mackey, 3517 Burkland Avenue, Apartment #3, Charlotte, N. C." Although primarily the dwelling of Cecil Mackey and his wife, Ernest Mackey lived there as a member of the family. Unquestionably, the identification of the dwelling house allegedly feloniously broken into and entered by defendant was sufficient. Moreover, the breaking and entering with the felonious intent to steal was explicitly alleged. The additional allegation that the intent was to steal "the merchandise . . . and other personal property of the said Ernest Mackey," (the evidence, as discussed below, tended to show the personalty did not belong to Ernest Mackey) was unnecessary and without legal significance. If there was a breaking and entering with the felonious intent to steal, neither the identification of the owner of the personal property sought to be stolen nor the accomplishment of the felonious intent is a prerequisite

of guilt. A person is guilty of feloniously breaking and entering a dwelling house if he unlawful breaks and enters such dwelling house with the intent to steal personal property located therein without reference to the ownership thereof.

Although the evidence indicates there was a breaking, accomplished by opening a door or raising a window or both, as well as an entry into the Mackey apartment, it is noted that G.S. 14-54(a) provides: "Any person who breaks *or* enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2." (Our italics.) Under G.S. 14-54(c), the Mackey apartment was a "building" within the purview of G.S. 14-54(a).

The motion for judgment as in case of nonsuit with reference to the felonious breaking and entering count in the separate indictment was properly overruled. Although a remote possibility, conceivably the jury could have found beyond a reasonable doubt that defendant feloniously broke into and entered the Mackey apartment but not that defendant shot and killed Ernest Mackey. Under appropriate instructions as to this contingency, it was proper to submit the felonious breaking and entering count in the separate indictment. (Of course there would have been no basis for submitting the felonious breaking and entering if defendant had been tried solely on the murder indictment.)

[8] However, the separate judgment imposing punishment for felonious breaking and entering in addition to that imposed for the murder conviction cannot stand. When a person is convicted of murder in the first degree no separate punishment may be imposed for any lesser included offense. Technically, feloniously breaking and entering a dwelling is never a lesser included offense of the crime of murder. However, in the present and similar factual situations, a cognate principle applies. Here, proof that defendant feloniously broke into and entered the dwelling of Cecil Mackey, to wit, Apartment #3, 3517 Burkland Drive, was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and entering that particular dwelling. The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and

entering. In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder. Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder. *State v. Bell,* 205 N.C. 225, 171 S.E. 50 (1933).

[9] The second count in the separate bill of indictment charges the larceny of personal property of Ernest Mackey. The evidence tends to show that the only personal property missing from the Mackey apartment was the TV set of Cecil Mackey and clothes of Cecil Mackey and his wife. There is no evidence that Ernest Mackey had any general or special property interest in any of the stolen articles. The motion for judgment as in case of nonsuit, which properly presented the question of fatal variance, should have been granted. *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699 (1946), and cases cited. See also *State v. Jessup,* 279 N.C. 108, 181 S.E. 2d 594 (1971), and cases cited therein. This fatal variance alone is sufficient ground for arresting the judgment based on the verdict of guilty as charged in the larceny count of the separate bill of indictment. However, if the larceny count had properly charged the larceny of personal property of Cecil Mackey, the separate verdict of guilty of felonious larceny would have afforded no basis for additional punishment. For the reasons stated above with reference to the felonious breaking and entering count in the separate bill of indictment, the felonious larceny was, under the circumstances of this case, a lesser included offense of the felony-murder, in the special sense above mentioned. The jury's verdict in the murder case established that defendant killed Ernest Mackey while engaged in the perpetration of the interrelated crimes of felonious breaking and entering and of felonious larceny.

Defendant assigns as error portions of the court's instructions relating to the larceny count in the separate indictment. He contends the court erred by referring to the Mackey property without being specific whether the larceny involved personal property of Ernest Mackey as charged or of Cecil Mackey as shown by the evidence. Further, he contends the court erred by refusing to submit the lesser included offense of nonfelonious larceny. In view of our holding that judgment as in case of nonsuit should have been granted as to the larceny count in the sep-

arate indictment, and our arrest of the judgment based on the verdict of guilty of larceny as an independent criminal offense, these assignments of error have no present legal significance.

Each of defendant's remaining assignments of error has been considered. Suffice to say, none discloses prejudicial error or merits discussion.

The foregoing leads to this conclusion: In respect of the murder indictment, the verdict and judgment will not be disturbed. However, the separate judgments based on the verdicts of guilty of feloniously breaking and entering and felonious larceny are arrested on the ground that the commission of these crimes was an essential of and the basis for the conviction of defendant for felony-murder and therefore no additional punishment may be imposed for them as independent criminal offenses.

In the murder case: No error.

In the breaking and entering and larceny cases: Judgments arrested.

Justice HIGGINS concurring.

The defendant was tried on two bills of indictment consolidated for the purpose of trial. The bill in No. 71-CR-9360 charged that on February 9, 1971, the defendant feloniously, wilfully and of his malice aforethought did kill and murder Ernest Mackey. The bill in No. 71-CR-18932 contained two counts. The first count charged that on February 9, 1971, the defendant did feloniously break and enter a specifically described dwelling-house occupied by Ernest Mackey for the purpose of stealing personal property therein contained. The second count charged larceny of certain specifically described articles of the personal property of Ernest Mackey.

Indictment in the murder case was drawn according to the provisions of G.S. 15-144 which permitted the State to make out a case of murder in the first degree by showing either, (1) that the killing was done with malice and after premeditation and deliberation; or (2) in the perpetration or attempt to perpetrate a robbery or other felony. *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435; *State v. Maynard,* 247 N.C. 262, 101 S.E. 2d 340; *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536; *State v.*

Arnold, 107 N.C. 861, 11 S.E. 990. (The latter case was decided before murder was divided into two degrees.)

In this case the State proceeded under (2) and offered evidence the killing was done in the perpetration of a felonious breaking and entering and in an attempt to commit larceny (crimes of violence). The court in short summary charged the jury: "Now in Case No. 71-CR-9360 as the court has heretofore explained to you, the defendant has been accused of first degree murder. By law, any killing of a human being by a person committing or attempting to commit . . . felonious breaking . . . or . . . felonious larceny, is first degree murder without anything further being shown."

From the indictment, the evidence, and the court's charge, it is obvious the State offered evidence of felonious housebreaking and felonious larceny as material elements of murder in the first degree. The defendant argues the housebreaking and the larceny acts having been used against him as a substitute for premeditation and deliberation raising the homicide to guilty in the first degree, these same acts may not be used as an independent crime. To do so would violate his rights under Article I, Section 19, North Carolina Constitution, and Articles V and XIV of the United States Constitution which give protection against double jeopardy, or two punishments for one offense.

The rule against double jeopardy, or two punishments for one offense, is succinctly stated in Wharton's Criminal Law and Procedure, Volume 1, Section 148: "It is generally agreed that if a person is tried for a greater offense, he cannot be tried thereafter for a lesser offense necessarily involved in, and a part of, the greater . . . ."

Justice Clifton Moore, for this Court, in *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838, stated the rule.

> ". . . (W)hen an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution to the other.
>
> The only exception to this well established rule is the holding in some cases that conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime, embracing the former, where the inferior court did not have jurisdiction of the higher crime."

Chief Justice Stacy thus stated the rule in *State v. Bell,* 205 N.C. 225, 171 S.E. 50.

> "The principle to be extracted from well-considered cases is that by the term, 'same offense,' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment.
>
> When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater.
>
> To adopt any other view would tend to destroy the efficacy of the doctrine governing second jeopardy which is embedded in our organic law as a safeguard to the liberties of the citizens."

Additional authorities on the question of double jeopardy, or two punishments for one offense, are cited and discussed in the dissenting opinion in *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102. The jury returned a verdict of guilty of murder in the first degree with a recommendation the punishment be life imprisonment. "The jury also returned a general verdict of guilty of the housebreaking and larceny charge." The court imposed the mandatory sentence of life imprisonment in the murder case and a sentence of ten years in the housebreaking and larceny case.

I agree the record does not disclose reversible error in Case No. 71-CR-9360 and likewise I agree the judgment must be arrested in Case No. 71-CR-18932. The Court now arrests the judgment in the included offense. This the Court should have done but failed to do in Richardson.

STATE OF NORTH CAROLINA v. CHARLES CURTIS HAIRSTON
STATE OF NORTH CAROLINA v. EDWARD ALEXANDER HOWARD
STATE OF NORTH CAROLINA v. EARNEST McINTYRE, JR.

No. 130

(Filed 14 January 1972)

1. **Criminal Law § 166— abandonment of assignments of error**

Assignments of error not discussed in defendants' briefs are deemed abandoned.

2. **Criminal Law § 21— necessity for preliminary hearing**

In North Carolina a preliminary hearing is not a constitutional requirement and is not essential to the finding of an indictment.

3. **Criminal Law § 21— waiver of preliminary hearing**

The preliminary hearing may be waived, in which case the defendant is bound over to the superior court to await grand jury action without forfeiting any right or defense available to him.

4. **Constitutional Law § 32; Criminal Law § 21— preliminary hearing — right to appointment of counsel**

An indigent defendant is entitled to have counsel appointed to represent him in a preliminary hearing. G.S. 7A-451(b)(4).

5. **Constitutional Law § 32; Criminal Law § 21— failure to appoint counsel for preliminary hearing**

Failure of the court to appoint counsel to represent defendant at his preliminary hearing was not error where the court found upon competent evidence that for the purpose of the preliminary hearing defendant was not an indigent and was in a position to employ his own attorney, defendant informed the court prior to the hearing that he did not want an attorney but wished to represent himself, and defendant signed a written waiver of counsel.

6. **Criminal Law § 51— qualification of expert**

The trial court in this homicide prosecution did not err in allowing a pathologist to give expert testimony before he was found to be an expert, where defendant made no request for a finding by the court as to the qualification of the witness as an expert, and where, upon defendant's objection to a question calling for an opinion as to the cause of death, the court examined the witness as to his qualifications and then found him to be an expert in pathology.

7. **Criminal Law § 33; Homicide § 15— evidence that defendants were members of "Mau Mau"**

The trial court in this homicide prosecution did not err in allowing testimony that defendants were members of a group known as the "Mau Mau," that such group met twice a week in each other's homes, and that the members would go out into the woods and practice shooting, since the testimony showed that defendants knew each

other, associated together, had access to firearms, and had practice and training in the use of firearms, all of which was relevant and material to support the State's theory of a conspiracy to rob and, if necessary, to kill the victim.

8. **Criminal Law § 114; Homicide § 25— instructions on malice — use of word "black"**

In instructing the jury that malice is "wickedness, a disposition to do wrong, a black and diabolical heart regardless of social duty and fatally bent on mischief," the court's use of the word "black" did not refer to the fact that the defendants are Negroes but was an adjective synonymous with evil.

9. **Homicide § 21— first degree murder — conspiracy and robbery by all defendants — killing by one defendant**

Defendants' motions for nonsuit in this first degree murder prosecution were properly denied where the State's evidence tended to show that one of the defendants shot and killed the victim while all defendants were carrying out a conspiracy to rob the victim and while they were actually engaged in the perpetration or attempted perpetration of the felony of robbery.

10. **Conspiracy § 5— declarations of conspirator — admission against coconspirator**

When a conspiracy has been established, declarations of any one of the conspirators made while the conspiracy is in existence and in furtherance of the common design are admissible against the other conspirators.

11. **Criminal Law § 79— statement by conspirator — admission against coconspirators**

The trial court did not err in the admission of testimony that a member of a group which included the defendants stated that they "were going to knock a store off," notwithstanding the witness did not know which member of the group made the statement, where all the evidence tended to show a conspiracy to commit robbery and that the statement was made by one of the conspirators while on the way to the scene of the crime.

12. **Criminal Law § 87— leading questions by solicitor**

The trial court did not err in allowing the solicitor to ask leading questions of a State's witness for the purpose of showing that the witness did not implicate one of the defendants in the crime in his initial statement to the police because such defendant had threatened to kill him if he talked.

13. **Criminal Law § 38; Homicide § 15— officer's view from spot where shot was fired**

In this homicide prosecution, the trial court did not err in allowing a police officer to testify that he viewed the scene of the crime on the night of the murder and the next day, and that when standing in the place from which the fatal shot was allegedly fired, he could see the spot where the victim fell.

14. Criminal Law § 169— objection — similar testimony admitted without objection

The benefit of an objection is lost where the witness had previously given the same testimony without objection.

15. Criminal Law § 117— instructions on testimony by accomplices

An instruction that the jury should "examine" the testimony of accomplices with the "greatest care and caution" is equivalent to an instruction which defendants contend the court should have given that the jury "should scrutinize and look carefully into the testimony of accomplices."

16. Homicide § 4— murder in perpetration of a felony

A murder committed in the perpetration or attempt to perpetrate any felony within the purview of G.S. 14-17 is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought.

17. Homicide § 30— first degree murder — failure to submit second degree murder

In this prosecution for first degree murder, the trial court did not err in failing to instruct the jury on second degree murder where all the evidence was to the effect that the victim was killed in the perpetration or attempted perpetration of the felony of robbery.

18. Conspiracy § 7; Homicide § 25— instructions — abandonment of conspiracy

Where the evidence shows that all the defendants had formed a conspiracy to commit a robbery and that in attempting to perpetrate this crime one defendant shot and killed the robbery victim, the trial court correctly refused to charge the jury that the conspiracy had been abandoned and that the other defendants were not accountable for the act of the defendant who did the shooting, notwithstanding there was testimony that prior to the robbery the conspirators had decided not to shoot the victim but only to hit him and take his money.

APPEAL by defendants from *Kivett, J.*, 10 May 1971 Session of FORSYTH Superior Court.

Defendants, Charles Hairston, Edward Howard, and Earnest McIntyre, were each indicted in separate bills of indictment, proper in form, for the murder of Roy Minor on 6 January 1971. The court appointed separate counsel to represent each defendant. Defendants entered pleas of not guilty. The cases were consolidated for trial, and the jury returned a verdict of guilty of murder in the first degree as to each defendant and recommended that each defendant be imprisoned for life. From judgments imprisoning defendants in the State's prison for life, defendants appealed.

The State's evidence tends to show that Roy Minor operated a small grocery store on Cameron Avenue in the city of Winston-Salem. Reedy Carter was employed at this store by Minor. Around 6 p.m. on 6 January 1971, Minor and Carter closed the store and left, Minor going toward his car parked a few feet from the store on a bridge and Carter going off in another direction. Carter heard a shot, turned and saw Minor fall behind his car. On seeing this, Carter ran to a nearby home and asked the occupants to call an ambulance and the police. He then returned to the vicinity of the store. There he saw three youths standing on the sidewalk. Carter did not know any of the three by name, but did recognize one and later identified him at the preliminary hearing and in court as being Earnest McIntyre, one of the defendants. The area in the vicinity of the store was fairly well lighted. A street light was on a nearby corner, a small light was on the outside of the store building, and the area was further illuminated by the headlights of a car which arrived just after the shooting occurred. Mr. Minor was shot in the right temple and died from severe brain injury due to a wound from a shotgun slug.

Around 5:45 p.m. on 6 January 1971, Durkin Woodruff and Bobby Hairston, both of whom testified for the State, met with Earnest McIntyre, Charles Hairston, and Edward Howard at the home of Bobby Hairston. These five were members of a local club called the "Mau Mau." McIntyre was the leader. The group met twice a week at each other's homes. They had guns and would go out in the woods to practice shooting. Howard and McIntyre instructed the others. On the night in question, shortly after 5:45 p.m., the five left Bobby Hairston's home. Bobby Hairston had a 20-gauge shotgun loaded with three slugs; Charles Hairston had a 410-gauge shotgun. The group followed a path to a wooded area near Minor's Grocery. On the way to the store Bobby Hairston asked where they were going, to which one member of the group replied that they were going to "knock off a store." After arriving at this wooded area, the group discussed robbing the man who ran the store and which one of them would do the shooting. Bobby Hairston gave the 20-gauge shotgun to Charles Hairston, and Durkin Woodruff had the 40-gauge shotgun in his possession. Bobby Hairston, McIntyre and Howard then left with the intention of "hitting the man, snatching the money and running." After these three had left the wooded area, Charles Hairston, upon seeing Mr. Minor leave

the grocery store, raised the 20-gauge shotgun, shot and killed him. Upon hearing the shot, Howard, McIntyre, and Bobby Hairston walked to a point near the body and stood for a few minutes. They then left and went to a lady's home. They stayed there for a while and then returned to their respective homes. Later on that evening, Charles Hairston and Bobby Hairston went to get the guns which Charles Hairston and Durkin Woodruff had hidden on the way to the lady's home. The 20-gauge shotgun belonging to Bobby Hairston contained only two of the three slugs he had earlier loaded in it. At the home where the five met shortly after the shooting, Howard and McIntyre congratulated Charles Hairston for being a good shot, and McIntyre told the others that he would "knock off" anyone who talked. The next day when it was found that Mr. Minor was dead, Charles Hairston laughed and said that he "should have been dead." Just prior to the preliminary hearing, McIntyre again told Bobby Hairston that if he said anything about the shooting he would come down to the training school and get him.

When first questioned by the police, Bobby Hairston did not admit any knowledge of the murder. At a later time, however, both Bobby Hairston and Durkin Woodruff made statements to the police although neither's statement contained any reference to McIntyre's part in the murder or to the fact that they had gone to the lady's house after the shooting. Both later stated that the reason they had made no reference to these facts in their earlier statement was because of their fear of McIntyre. At the trial both testified to facts substantially as set out above.

Defendants offered no evidence.

Attorney General Robert Morgan and Associate Attorney Edwin M. Speas, Jr., for the State.

Stephen G. Calaway for defendant Hairston, appellant.

William G. Pfefferkorn for defendant McIntyre, appellant.

J. Erle McMichael and Thomas W. Moore, Jr., for defendant Howard, appellant.

MOORE, Justice.

[1] On appeal defendants set forth 21 assignments of error. Assignments Nos. 3, 11, 12 and 18 are not discussed in defend-

ants' briefs and are therefore deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810 (1961). Nevertheless, since these are capital cases, these assignments have been carefully considered and found to be without merit.

Defendant McIntyre first assigns as error the court's failure to provide him with counsel at the preliminary hearing. On 8 March 1971 McIntyre appeared before Judge Sherk of the District Court for a hearing to determine whether counsel should be appointed to defend him. The court found that defendant had a job with George Sparks Construction Company and made $90 per week, that his wife worked and made $385 per month, and that they owned an automobile and furniture. Based on these findings, the court refused to appoint counsel.

On 11 March 1971 defendant McIntyre appeared before Judge Sherk for a preliminary hearing. At that time the court inquired into whether the defendant wanted counsel appointed. Defendant specifically refused the appointment of counsel, stating that he had had trial experience in the service and did not need an attorney.

Before trial, William G. Pfefferkorn was appointed counsel for McIntyre. Counsel then moved that the indictment against McIntyre be quashed and that all proceedings against defendant be dismissed with prejudice for the reason that a preliminary hearing was held for the defendant on the capital offense of murder, and at said time defendant was not appointed counsel as required by the Constitution and statutes of North Carolina and by the Constitution of the United States. On 18 May 1971 a hearing was held on this motion before Charles Kivett, Judge Presiding, at which hearing the State offered the testimony of Judge A. Lincoln Sherk, before whom the preliminary hearing was held; Mr. George Thomas, an attorney at law in the city of Winston-Salem; Mr. R. H. Frye, one of the investigating officers from the Winston-Salem Police Department; and James C. Yates, III, the assistant solicitor. Defendant McIntyre took the stand and testified in his own behalf. After this hearing, the court made, among others, the following findings:

> " . . . [T]hat on the date of March 8, 1971, a short time after his arrest, the defendant was taken into the District Court before District Court Judge Sherk for the purpose of making an inquiry to determine whether or not

the defendant should have an attorney appointed to represent him; that, on that date, at the hearing, the Court, after making an inquiry of the defendant, determined that he was in a position to employ his own attorney; that between that date and the date of March 11, 1971, at which time the Preliminary Hearing was conducted, the defendant advised Officer R. H. Frye that he would not have a lawyer to represent him at the hearing and that he had decided, after conferring with his wife, to represent himself and that he had had some experience in criminal matters while in the military service, where he served for approximately five and one-half years; the Court further finds that on the date of March 11, 1971, the defendant was brought into Court before Judge Sherk and that Judge Sherk on that occasion asked the defendant if he had an attorney; that he stated that he did not and that he would represent himself; that Judge Sherk on that date and prior to that statement by the defendant had advised the defendant that he would appoint counsel to represent him, and that the defendant, McIntyre, thereupon advised the Court that he did not want an attorney; and the Court further finds that Judge Sherk advised him as to the charge against him and as to the nature thereof and the Statutory punishment therefor, and the nature of the proceedings taking place and of his right to assignment of counsel and the consequences of a waiver; all of which the defendant told the Court that he fully understood.

"This Court further finds that the defendant, McIntyre, stated to the Court that he did not desire the assignment of counsel and that he expressly waived the same and that he desired to appear at the Preliminary Hearing in all respects in his own behalf, which he said he understood he had the right to do.

"The Court finds that he signed on the date of March 3rd, 1971, a waiver of right to have counsel assigned, and that he swore to the same and subscribed his name following said waiver before a representative of the Clerk of Superior Court's Office, Mr. J. R. Reece, on March 11, 1971."

The court further found:

" . . . [T]hat, prior to and at the Preliminary Hearing, Judge Sherk informed the defendant that he thought he

should have an attorney, despite the fact that the defendant said he wanted to waive his right to an attorney and that Judge Sherk, notwithstanding that fact, designated an attorney present in the courtroom at that time, Mr. George Thomas, who is a licensed attorney in the State of North Carolina and who engages in the practice of law in Winston-Salem, to sit next to the defendant and to be there for the purpose of advising the defendant at any time he cared to take advantage of any advice that he might give; and that Judge Sherk explained to the defendant and to Mr. Thomas the reason why Mr. Thomas was being placed next to the defendant, that reason being to advise him or to be available to represent him, should he choose to utilize his services at the Preliminary Hearing.

"The Court further finds that once or twice during the hearing that proceeded, the defendant did, in fact, ask certain questions of Mr. Thomas and that immediately prior to the hearing, Mr. Thomas and the defendant conferred briefly."

[2-4] In North Carolina a preliminary hearing is not a constitutional requirement nor is it essential to the finding of an indictment. *State v. Gasque,* 271 N.C. 323, 156 S.E. 2d 740 (1967), cert. denied 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423 (1968). The preliminary hearing may be waived (G.S. 15-85), in which case the defendant is bound over to the superior court to await grand jury action without forfeiting any right or defense available to him. *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589 (1961). However, G.S. 7A-451(b)(4) provides that a preliminary hearing is a critical stage in a criminal proceeding and that an indigent person is entitled to services of counsel at such hearing.

Defendant relies on *Coleman v. Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970). This decision also holds that a preliminary hearing is a critical stage of the proceeding so as to require the presence of counsel. In *Coleman,* the opinion written by Mr. Justice Brennan states:

" . . . Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. . . .

"The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself.' *Powell v. Alabama, supra* [287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 A.L.R. 527 (1932)] at 57, 77 L.Ed. at 164, 84 A.L.R. 527."

[5] Both *Coleman* and G.S. 7A-451(b)(4) apply to an indigent person. Judge Sherk, upon competent evidence, found that for the purpose of the preliminary hearing defendant McIntyre was not an indigent and was in a position to employ his own attorney. This Court is bound by that finding. *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). Not being indigent for the purpose of the preliminary hearing, McIntyre did not have the right to appointed counsel, and he could waive counsel and elect to defend himself. Before the preliminary hearing began, the court again inquired as to whether or not McIntyre wished counsel to be appointed. He specifically replied that he did not, stating that he had had some experience while in the service and wished to represent himself. He then signed a written waiver of counsel which he had a right to do. *State v. Williams,* 274 N.C. 328, 339, 163 S.E. 2d 353, 361 (1968), and cases therein cited.

In *State v. McNeil,* 263 N.C. 260, 268, 139 S.E. 2d 667, 672 (1965), this Court said:

"The United States Constitution does not deny to a defendant the right to defend himself. Nor does the constitutional right to assistance of counsel justify forcing counsel upon a defendant in a criminal action who wants none. *Moore v. Michigan,* 355 U.S. 155, 2 L.Ed. 2d 167; *Carter v. Illinois,* 329 U.S. 173, 91 L.Ed. 172; *United States v. Johnson,* 6 Cir. (June 1964), 333 F. 2d 1004."

Under the circumstances of this case, the refusal of the trial court to appoint counsel to represent defendant McIntyre at the preliminary hearing was not error, and the court properly overruled defendant's motion to suppress all evidence presented at the preliminary hearing.

Before the trial, Judge Kivett, in accordance with G.S. 7A-450(c), which provides that the question of indigency may be determined or redetermined by the court at any stage of the action, made a further finding that for the purpose of trial defendant McIntyre was an indigent and appointed William G. Pfefferkorn to represent him. Mr. Pfefferkorn was later appointed to perfect this appeal.

It appears from the record that Mr. R. H. Frye talked to defendant McIntyre on 9 March 1971 prior to the preliminary hearing. At that time Mr. Frye told defendant that he would need a lawyer for the preliminary hearing. Defendant stated that he was going to leave it up to his wife as to whether or not he should employ an attorney. After that, and before the hearing, defendant told Mr. Frye he was going to represent himself at the preliminary hearing.

These facts all fully support the findings of Judge Kivett:

> " . . . [T]hat never, at any time, at the hearing on March 11, 1971, did the defendant indicate to the Court that he wanted an attorney present to represent him; that at no point, at any time, either on March 8, 1971, or on March 11, 1971, was the defendant denied the right to counsel and that he had been fully advised of his right to have counsel present."

And they also support Judge Kivett's conclusion:

> " . . . [T]he Court ascertains, finds, and determines beyond a reasonable doubt from clear and convincing evidence that there was no violation of the defendant's Constitutional Rights at the Preliminary Hearing in this case and that the defendant freely, understandingly, intelligently, voluntarily and knowingly, without promise or coercion of any kind, waived his right to have an attorney present at that time to represent him; that the presence of the defendant in District Court, without counsel being directly appointed to represent him, has not prejudiced or harmed the defendant's right to a fair trial, de novo, in the Superior Court."

See *Coleman v. Alabama, supra; Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

[6] Defendants next assert that the trial court committed prejudicial error when it allowed the State's witness Dr. Wisotzkey to give expert testimony before he was found by the court to be an expert witness. Dr. Wisotzkey testified:

> "I am assistant professor of pathology in neuropathology at Bowman Gray School of Medicine. Neuropathology is the study of diseases of the brain and spinal cord and peripheral nervous system. I attended and graduated from the University of Maryland School of Medicine, 1961, with a degree in Doctor of Medicine. I have six years of postgraduate training, two years general pathology and two years of neuropathology and a year of clinical and of neurology research. Following this, I spent two years in the U. S. Army. At that time I was at the Armed Forces Institute of Pathology in Washington which is the military review institution for all military pathology. We review all military autopsies and most of the military surgery and in 1969 I came here to Bowman Gray.
>
> "I was working for the Baptist Hospital as assistant professor of pathology on January 6. I had an occasion to perform and assist in performing an autopsy on one Roy H. Minor."

After stating these qualifications, Dr. Wisotzkey testified at length as to what he found at the autopsy. When asked if he had an opinion satisfactory to himself as to the cause of Mr. Minor's death, defendants objected. The jury was sent out, and Dr. Wisotzkey was again examined as to his qualifications. Following this examination, the court found him to be an expert medical doctor, specializing in pathology, and qualified to give his opinion in that regard. Dr. Wisotzkey then testified that in his opinion Mr. Minor died of severe brain injury due to a gunshot wound in the head.

In *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969), this Court said:

> "In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness. *Paris v.*

Aggregates, Inc., 271 N.C. 471, 157 S.E. 2d 131; *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14; *State v. Coal Company*, 210 N.C. 742, 188 S.E. 412; *Brewer v. Valk*, 177 N.C. 476, 99 S.E. 358; Stansbury, North Carolina Evidence, 2d Ed., § 133; Strong, N. C. Index, 2d Ed., Evidence, § 48."

However, in the present case, when defendants objected to the doctor's giving an opinion as to the cause of death, the court did examine the witness further as to his qualifications and found him to be a medical expert. This finding will not be disturbed when, as here, there was ample evidence to support it. *State v. Smith*, 221 N.C. 278, 20 S.E. 2d 313 (1942). This assignment is overruled.

[7] Defendants next contend that the trial court erred in allowing testimony to the effect that defendants were members of a group known as the "Mau Mau." Defendants contend that this evidence was irrelevant and that its admission was error in that it tended to prejudice the defendants in the eyes of the jury.

There was no evidence concerning the nature of the group except that the membership was composed of the three defendants in this case and Bobby Hairston and Durkin Woodruff; that the leader of the group was Earnest McIntyre; that the group met twice a week at each other's homes; and that the members would go out into the woods and practice shooting. This evidence was pertinent to the State's case. It showed that defendants knew each other, associated together, had access to firearms, and had practice and training in the use of such firearms, all of which was relevant and material to support the State's theory of a conspiracy to rob and, if necessary, to kill Mr. Minor.

In *State v. Cox*, 201 N.C. 357, 160 S.E. 358 (1931), this Court said:

". . . The State could not be deprived of the benefit of evidence which was relevant and material because it might also have a tendency to prejudice the defendants in the eyes of the jury."

And in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), it is stated:

". . . The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought

to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected. . . ."

See also *State v. Sneeden,* 274 N.C. 498, 502, 164 S.E. 2d 190, 193 (1968) ; 2 Strong, N. C. Index 2d, Criminal Law § 33, p. 532. This assignment is overruled.

[8] Defendants next contend that the court erred in charging the jury that "general malice is wickedness, a disposition to do wrong, a black and diabolical heart regardless of social duty and fatally bent on mischief," for the reason that it was prejudicial to defendants; that the use of the word "black" made reference to the fact that the defendants were Negroes, and that this reference to race was prejudicial error. This assignment is without merit. The word "black" was not used with reference to the color of the defendants, but rather as an adjective synonymous with evil. In *State v. Knotts,* 168 N.C. 173, 184, 83 S.E. 972, 977 (1914), the Court approved the same definition of general malice. This is also the definition given in Black's Law Dictionary, Revised Fourth Edition, p. 1109.

[9] Defendants next contend that the trial court committed prejudicial error in denying defendants' motions for nonsuit at the close of the State's evidence and at the close of all the evidence. This assignment is overruled. There is ample evidence from which the jury could find that while defendants were carrying out a conspiracy to rob Mr. Minor, and while actually engaged in the perpetration or attempted perpetration of the felony of robbery, one of the defendants shot and killed Mr. Minor. This is sufficient to overcome the motions for judgment as of nonsuit. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970), and cases cited therein.

Defendants next contend that it was error for the court to allow the witness Bobby Hairston to testify that on the way from his house to the wooded area behind Mr. Minor's store he asked the group where they were going and received the answer that they "were going to knock a store off." Defendants insist that this testimony should have been excluded as hearsay because the witness did not know who answered his question.

[10, 11] When a conspiracy has been established, declarations of any one of the conspirators made while the conspiracy is in existence and in furtherance of the common design are admis-

sible against the other conspirators. Here, all the evidence tended to show that a conspiracy to rob Mr. Minor existed, and that the declaration was made by one of the defendants while on the way to the scene of the crime. For that reason, the testimony would be competent. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969); *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505 (1968); *State v. Davis,* 177 N.C. 573, 98 S.E. 785 (1919); Stansbury, N. C. Evidence § 173 (2d Ed. 1963); 2 Strong, N. C. Index 2d, Conspiracy § 5.

[12] Defendants next contend that the court erred in allowing the solicitor to ask leading questions of State's witness Bobby Hairston, who himself was involved in the perpetration of the crime charged. In his initial statement to the police, this witness had not implicated defendant McIntyre in the shooting, and the leading questions were intended to show why he had not done so. The witness was naturally hesitant to testify, explaining that he was afraid of McIntyre because McIntyre had threatened to kill him if he talked. The court has discretionary power to permit leading questions to be asked and when there is no abuse of this discretion it will not be reviewed on appeal. *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95 (1967); *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965); *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251 (1962); *State v. Beatty,* 226 N.C. 765, 40 S.E. 2d 357 (1946); Stansbury, N. C. Evidence § 31 (2d Ed. 1963). No abuse of discretion is shown, and this assignment is overruled.

[13, 14] Sergeant Burke, a member of the detective division of the Winston-Salem Police Department, testified that he viewed the scene of the crime on the night of the murder and the next day, and that when standing in the place from which the shot allegedly was fired, he could see the spot where Mr. Minor fell. Defendants contend that the admission of this testimony was error. Defendants in their briefs quote from 3 Strong, N. C. Index 2d, Evidence § 19, p. 625:

> "Whether the existence of a state of affairs at one time is competent to show the existence of the same state at another time is a question of materiality or remoteness to be determined upon the facts of each particular case in accordance with the nature of the subject matter, the length of time intervening, and a showing, if any, as to whether con-

ditions had remained unchanged; the determination of competency rests largely in the discretion of the trial court. It is required that there be reasonable proximity in time, or proof that the conditions remained the same."

The fact that Sergeant Burke examined the scene the night of the murder and again the next morning meets the requirement that there be a reasonable proximity in time. Moreover, the determination of competency of such evidence rests largely in the discretion of the trial court. *Jenkins v. Hawthorne,* 269 N.C. 672, 153 S.E. 2d 339 (1967). Here, no abuse of discretion is shown. It is also noted that Sergeant Burke had previously given the same testimony without objection. For this reason, the benefit of the later objection would be lost. Stansbury, N. C. Evidence § 30 (2d Ed. 1963); *Shelton v. R. R.,* 193 N.C. 670, 139 S.E. 232 (1927); *Smith v. R. R.,* 163 N.C. 143, 79 S.E. 433 (1913). This assignment is overruled.

[15] Defendants contend that the trial court failed to correctly charge on the law of accomplice testimony. The court charged as follows:

"There is evidence here which tends to show in this case or in these cases that have been consolidated for trial that the witnesses for the State, Robert Hairston and Durkin Woodruff, were accomplices in the commission of the crime charged in these cases. I instruct you that an accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in acts necessary to accomplish the crime or he may knowingly help or encourage another in the crime either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. If you find that these witnesses were accomplices, you should *examine* every part of their testimony with the *greatest care and caution.* If, after doing so, you believe their testimony in whole or in part, you should treat what you believe—that which you believe—the same as you would any other believable evidence." (Emphasis added.)

Defendants contend that in lieu of the above the court should have charged as follows:

"The court charges you that an accomplice is an interested witness; that he has an interest in the outcome of

> your verdict in this case. And so, the court charged you that you should *scrutinize and look carefully* into the testimony of the accomplices, Bobby Hairston and Durkin Woodruff. But, if after you have looked carefully into and scrutinized their testimony, you believe they are telling the truth about the matter, then you would give the same weight and the same belief to their testimony that you would to that of any disinterested witness who may have testified." (Emphasis added.)

While it is true that the charge as contended for by the defendants is correct, it is equally true that the charge as given—that the jury should examine the testimony of the accomplices with the "greatest care and caution"—is in fact stating to the jury that they "should scrutinize and look carefully into the testimony of the accomplices." Defendants' contentions are based on a distinction without a difference. The charge as given by the court is very similar to that adopted by the Committee on Pattern Jury Instructions of the North Carolina Conference of Superior Court Judges. N.C.P.I. Crim. (tentative) 104.25. There is no merit to this assignment.

Defendants next assign as error the failure of the court to instruct the jury that they could find the defendants guilty of murder in the second degree. This assignment is without merit.

> "Where all the evidence tends to show that the homicide was committed by lying in wait, or in the perpetration or attempted perpetration of robbery or rape, the court correctly charges the jury either to convict the defendant of murder in the first degree, if the evidence satisfied them beyond a reasonable doubt, or to acquit the defendant if not so satisfied. The same rule applies when the evidence tends to show that the defendants conspired together to commit the felony and the homicide was committed by one of them in the perpetration or attempted perpetration of a felony. . . ." 4 Strong, N. C. Index 2d, Homicide § 30.

[16] G.S. 14-17 provides in pertinent part: "A murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree. . . ." A murder committed in the perpetration or attempt to perpetrate any fel-

ony within the purview of G.S. 14-17 is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340 (1958), and cases cited. *Accord, State v. Rich,* 277 N.C. 333, 177 S.E. 2d 422 (1970); *State v. Fox, supra; State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969).

[17] The evidence in the present case is to the effect that this group of five assembled at the home of Bobby Hairston; that they proceeded to an area near Mr. Minor's grocery store and there discussed robbing Mr. Minor and which one would do the shooting; that after some discussion they split into two groups, two staying in the wooded area near the grocery store and three proceeding to the store to rob Mr. Minor; and that one of the two who stayed in the woods, upon seeing Mr. Minor emerge from the grocery store, shot and killed him. All the evidence is to the effect that Mr. Minor was killed in the perpetration or attempted perpetration of a felony—robbery. Under these circumstances, it was not necessary for the court to charge on second degree murder, and the failure to do so was not error.

[18] Defendants next contend that the court should have instructed the jury on the law regarding the abandonment of a conspiracy, and further that if the conspiracy was abandoned, the other defendants would not be accountable for the independent act of Charles Hairston. Bobby Hairston testified in part:

> "All five of us were together in the woods. We stayed in the woods for a few moments and then we had discussion of who was going to shoot the gun. We had the discussion among ourselves. So, I decided instead of shooting the man we just run around and snatch the money and run. So, then, I gave the gun to Charles Hairston, the defendant here. And Mr. McIntyre and Edward Howard and myself went around the corner. It was my shotgun. We were going to hit the man, snatch the money, and run."

Durkin Woodruff testified:

> "All five of us were present in the woods at that time. We sit down. Earnest McIntyre told me to stay with Charles up on the hill in the woods nearby the store. When Charles shot the man, they were going around to get the money. We

talked about how we were going to rob the man that owned this store. Charles and Bobby was choosing over the gun and who was going to shoot. Charles got the gun and Robert left then with Ed Howard and Earnest McIntyre. . . . From the spot in the woods, we could see the Minor's store and the bridge. . . . First, I saw this boy come out of the store and put something in the car on the bridge. Then the man came out of the store. The boy left from the car. Then the man came to get something. He had something in his hand. I could see the man from the woods. And the man came out of the store and then Charles said, 'There he go,' and say, 'I can't get to him,' and then he moved over to him and then he shot and I saw the man grab his head. I saw the man fall. Charles shot."

This testimony clearly shows that the original conspiracy to rob Mr. Minor had not been abandoned, and that the defendants were continuing their efforts to carry out the plan to rob him.

In *State v. Smith,* 221 N.C. 400, 405, 20 S.E. 2d 360, 363-64 (1942), it is said:

" . . . If many engage in an unlawful conspiracy, to be executed in a given manner, and some of them execute it in another manner, yet their act, though different in the manner, is the act of all who conspired. *S. v. Bell,* 205 N.C. 225, 171 S.E. 50; 1 Bishop on Crim. Law (9 Ed.), 465.

"And the liability also extends to acts not intended or contemplated as a part of the original design, but which are a natural or probable consequence of the unlawful combination or undertaking. *S. v. Williams,* 216 N.C. 446, 5 S.E. (2d) 314; *S. v. Beal,* 199 N.C., p. 294, 154 S.E. 604; 1 Brill's Cyclopedia Crim. Law, 464. The general rule is, that if a number of persons combine or conspire to commit a crime, or to engage in an unlawful enterprise, each is responsible for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as a part of the original design. *S. v. Williams, supra; S. v. Powell, supra* [168 N.C. 134, 83 S.E. 310]; *S. v. Lea, supra* [203 N.C. 13, 164 S.E. 747]; *S. v. Stewart,* 189 N.C. 340, 127 S.E. 260. In the *McCahill case, supra* [*S. v.*

McCahill, 72 Iowa, 111], it was held that where a large number of persons combined to drive employees from premises, and in carrying out the conspiracy, one committed a murder, the rest, who did not intend it, were also guilty. And in the *Bell case, supra,* where six persons were charged with conspiracy to burglarize a house, and a murder was committed by one of the conspirators in the attempted perpetration of the burglary, it was said that each and all of the conspirators were properly tried for the murder, albeit one of the defendants remained a distance from the scene of the crime."

Accord, State v. Fox, supra.

In the present case, the evidence shows that all defendants had formed a conspiracy to rob Mr. Minor, and that in attempting to perpetrate this crime Charles Hairston shot and killed Mr. Minor. Under these facts, each and all of the conspirators are guilty of murder in the first degree, and the court correctly refused to charge that the conspiracy had been abandoned, and that the other defendants were not accountable for the act of Charles Hairston.

The other assignments of error, although formal, have been carefully considered and found to be without merit.

For the reasons indicated, the verdicts and judgments will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. JOHN TENORE

No. 77

(Filed 14 January 1972)

1. Indictment and Warrant § 9— motion to quash — question presented — sufficiency of warrant

A motion to quash is a proper method of testing the sufficiency of the warrant to charge a criminal offense; it is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged.

2. Obscenity— obscene dancing — prosecution — sufficiency of the warrant — county ordinance

A warrant charging that defendant unlawfully permitted on the premises of the Tempo Lounge, over which he has control, a nude and obscene dance of a named female person, in the presence of one or more male persons wherein she showed her breasts with less than a fully opaque covering of portions thereof below the top of the complete nipple area including the areola, the Tempo Lounge being a public or private place to which the public is invited, such offense being in violation of the county ordinance, *held* sufficient to charge a violation of the county ordinance prohibiting such conduct.

3. Indictment and Warrant § 9— sufficiency of the warrant — requisite

A warrant must be sufficiently definite so as to enable the defendant to prepare his defense, to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense. G.S. 15-153.

4. Obscenity; Counties § 1— county ordinance prohibiting obscene dancing — preemption by state law

A county board of commissioners had no authority to adopt an ordinance prohibiting the presentation of a nude or obscene dance or exhibition—the ordinance making it a misdemeanor, punishable by a fine not to exceed $50.00 or imprisonment not to exceed 30 days, for any person "as owner, manager, lessee, director, promoter, or agent" to permit "the premises over which he has control to be used for any . . . purposes of obscenity or nudity" as defined in the ordinance—since the General Assembly has preempted the field by enactment of a state-wide statute which prohibits and punishes the precise type of conduct prohibited by the ordinance. [former] G.S. 14-190; G.S. 14-190.1 to G.S. 14-190.9; G.S. 153-9(55); G.S. 160A-174, -181.

5. Statutes § 8— prospective effect of statute — county ordinances

The repeal of a state-wide law which during its life prohibited the enactment of a county ordinance is prospective in this respect and does not breathe life into an ordinance which was beyond the authority of the ordaining body when it was adopted.

6. Counties § 2— county commissioners — extent of legislative authority

A county board of commissioners has no legislative authority not granted to it expressly or by necessary implication from expressly granted powers.

7. Criminal Law § 1— statutory offense — authority of legislating body

One may not be tried and convicted of a statutory offense if, at the time of his trial, the legislative body which declared his conduct in question to be a crime had no authority to do so.

APPEAL by defendant from the judgment of the Court of Appeals, reported in 11 N.C. App. 374, 180 S.E. 2d 115, reversing the judgment of *Copeland, S.J.*, at the 21 September 1970 Special Criminal Session of ONSLOW.

The defendant was tried in the District Court of Onslow County upon a warrant charging him as follows:

"The undersigned, W. C. Jarman, being duly sworn, complains and says that at and in the county named above and on or about the 21st day of May, 1970, the defendant named above did unlawfully, wilfully, as owner, manager, director and promotor permit on the premises of the Tempo Lounge, over which he has control, a nude and obscene dance, exhibition, and performance of one Virginia P. Lewis, a female person, in the presence of one or more male persons wherein she showed her breasts with less than a fully opaque covering of portions thereof below the top of the complete nipple area including the areola, said Tempo Lounge being a public or private place to which the public is invited.

"The offense charged here was committed against the peace and dignity of the State and in violation of law, Section 1-B, An Ordinance making it a misdemeanor to permit recreations, amusements, exhibitions and entertainment detrimental to the public good (Onslow County)."

Defendant's brief states he moved in the district court to quash the warrant, which motion was there denied. He was found guilty in the district court and sentence was imposed. He appealed to the superior court and was there brought to trial upon the warrant. Before entering a plea to the charge, he moved to quash. The motion was allowed by the superior court on the following grounds:

"1. That Section 1-B upon which warrant is based is in violation of the United States Constitution and the Constitution of North Carolina.

"2. The ordinance is vague and ambiguous.

"3. The warrant fails to state a proper cause of action."

The State appealed to the Court of Appeals, which reversed the judgment of the superior court without stating any reason for its decision.

The original record filed in the Court of Appeals shows that the Board of Commissioners of Onslow County adopted an ordinance, filed for registration and duly recorded 27 April

1970 in the county's Ordinance Book No. 1, which ordinance reads as follows:

"AN ORDINANCE MAKING IT A MISDEMEANOR TO DO OR PERMIT RECREATIONS, AMUSEMENTS, EXHIBITIONS AND ENTERTAINMENT DETRIMENTAL TO THE PUBLIC GOOD

"PREAMBLE: That whereas, it is the opinion of the governing body of Onslow County and in the interest of public morals, welfare and public good of the citizens of Onslow County, and especially for the benefit of our youth and young people residing in Onslow County, to prohibit certain recreations, amusements, exhibitions and entertainment;

"BE IT ORDAINED by the Board of Commissioners of Onslow County:

"SECTION 1. Presentation of an obscene or nude play, dance, exhibition or other performance or exhibition of private parts of a person creating a lewd, lascivious, or lustful atmosphere.

"(A) DEFINITION OF TERMS.

As used in this section:

"(1) 'Nude' or 'Nudity'—means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the complete nipple area including the areola.

"(2) 'Private Parts'—As used herein, private parts shall include not only male and female genitals but shall also include the breasts of a physically developed female.

"(3) 'Obscene' or 'Obscenity'—A thing is obscene if considered as a whole; its predominant appeal is the prurient interest, i.e.,

"(a) A shameful or morbid interest in nudity, sex or excretion and it goes substantially beyond customary limits of candor in description or presentation of such matters; and

"(b) Is patently offensive to prevailing standards in the adult community as a whole; and

"(c) Is utterly without redeeming social importance.

"(B) PRESENTATION OF OBSCENE OR NUDE PLAY, DANCE, EXHIBITION, OR OTHER PERFORMANCE:

"Any person who in any place willfully exposes or shows any obscene or nude play, dance, exhibition or other performance in the presence of one or more persons of the opposite sex or who aids or abets in any such act or who procures another to so perform or takes part in such exhibition or performance where such obscene or nude play, dance, exhibition or other performance is conducted in any public place, street, highway or other public or private place to which the public is invited; or any person who as owner, manager, lessee, director, promoter, or agent permits the premises over which he has control to be used for any such purposes of obscenity and nudity, shall be guilty of a midemeanor.

"(C) INDECENT PUBLIC EXPOSURE:

"Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place, street, or highway shall be guilty of a misdemeanor.

"SECTION 2. Separate Violations.

"Each violation of this Ordinance shall constitute a separate offense.

"SECTION 3. Penalty.

"Any person found guilty of violation of this Ordinance shall be punishable by a fine not to exceed $50.00 or imprisonment not to exceed thirty (30) days.

"SECTION 4. Severability.

"If any section or provision of this Ordinance shall be held invalid by a court of competent jurisdiction, such invalidation shall not affect the remaining or other sections or provisions to the end that provisions of this Ordinance are severable.

"SECTION 5. Effective date of Ordinance.

"This Ordinance shall become effective at the end of twenty (20) days following date of Publication of this Ordinance in compliance with N.C. G.S. 153-9 (55)."

A written stipulation of the parties, added to the record in this Court, sets forth that the minutes of the Board of Commissioners of Onslow County show that the motion to adopt the ordinance was carried unanimously on the first reading at a meeting of the Board held on 2 March 1970 and was again carried unanimously on a second reading at a meeting of the Board held on 6 April 1970, that such motion directed publication of the ordinance on 7 April 1970 and further directed that the ordinance take effect on 27 April 1970. The stipulation further shows that the ordinance was published in the Jacksonville Daily News, a newspaper of Onslow County, on 7 April 1970, twenty days prior to its effective date.

A further stipulation of the parties, added to the record in this Court, states that a notice of public hearing upon the proposal to adopt said ordinance, which hearing was called by the Board at its meeting on 2 March 1970, was published in the said newspaper on 9 March 1970. This notice set forth the substance of the then proposed ordinance and stated that such hearing would be had on 16 March 1970; i.e., twenty-one days prior to the meeting of the Board at which the motion to enact the ordinance was passed by the Board of Commissioners on its second reading.

Attorney General Robert Morgan and Assistant Attorney General Christine Y. Denson for the State.

Turner and Harrison by J. Harvey Turner for defendant.

LAKE, Justice.

[1] "A motion to quash is a proper method of testing the sufficiency of the warrant * * * to charge a criminal offense. It is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged." *State v. Cooke, et al.*, 248 N.C. 485, 489, 103 S.E. 2d 846. We do not have before us on this appeal any question concerning the sufficiency of evidence to establish the defendant's guilt of the offense charged in the warrant, if any, for no evidence has been offered. For the purposes of this appeal, we take the facts to be as alleged in the

warrant. The questions to be determined are: (1) Does the conduct of the defendant, so alleged, constitute a violation of the ordinance adopted by the County Board of Commissioners? and (2) if so, may the Board of Commissioners of the County, by adopting such ordinance, make such conduct a criminal offense?

[2] The warrant plainly charges: The Tempo Lounge is a public place or a private place to which the public is invited; the defendant, as owner, manager, director and promoter of the Tempo Lounge, has control of the premises on which it is located; as such, he unlawfully and wilfully permitted on the premises of the Tempo Lounge, in the presence of one or more male persons, "a nude and obscene dance, exhibition and performance" by Virginia P. Lewis, a female person, wherein she "showed her breasts with less than a fully opaque covering of portions thereof below the top of the complete nipple area including the areola;" such permission by the defendant was in violation of Section 1-B of the County Ordinance.

Section 1-B of the County Ordinance provides that it shall be a misdemeanor for any person, as owner, manager, lessee, director or promoter to permit premises over which he has control to be used for "any such purposes of obscenity and nudity." The phrase "any such purposes of obscenity and nudity" is made clear by reference to the first clause of Section 1-B of the ordinance, which makes it a misdemeanor for any person, in the presence of one or more persons of the opposite sex, wilfully to show any "obscene" dance or to take part in such exhibition or performance conducted in any public place or any private place to which the public is invited. The term "obscene," "obscenity," "nude" and "nudity" are defined in Section 1-A of the ordinance. The appropriate definition is to be read into Section 1-B of the ordinance wherever such word appears.

[2, 3] There is nothing vague or ambiguous about what the warrant charges the defendant with having done. It is impossible to believe that the reading of this warrant did not make the defendant fully aware of what he stands charged with having permitted Virginia P. Lewis to do on the premises of the Tempo Lounge on 21 May 1970. The reference in the warrant to the section of the ordinance alleged to have been violated, together with the above stated recitals of fact contained therein, is sufficient to charge the offense. *State v. Walker,* 179 N.C. 730, 102 S.E. 404. See also, *State v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703. The charge is sufficiently definite to enable the defend-

ant to prepare his defense, to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. This is the test of the sufficiency of a warrant as to the definiteness of its allegations. G.S. 15-153; *State v. Sparrow,* 276 N.C. 499, 510, 173 S.E. 2d 897; *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318; Strong, N.C. Index 2d, Indictment and Warrant, § 9.

[4] We find no basis for the conclusion of the superior court that the ordinance is vague and ambiguous or for its conclusion that the warrant fails to state a violation of the ordinance. There remains for consideration the more serious question of whether the Board of Commissioners of Onslow County had authority to adopt an ordinance making such conduct by the defendant a criminal offense. We are forced to the conclusion that it did not have such authority, for the reason that the General Assembly preempted this field by enactment of a state-wide statute making criminal, and providing for the punishment of, the precise type of conduct with which the defendant is charged in this warrant.

In *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275, we said, "[W]here the Legislature has enacted a statute making an act a criminal offense, a city may not adopt an ordinance dealing with the same conduct." In *State v. Brittain,* 89 N.C. 574, this Court, speaking through Justice Merrimon, later Chief Justice, said: "Nor can municipalities, by ordinances, create offenses known to the general laws of the State, and provide for the punishment of the same, unless they have special authority so to provide conferred either by some general or special statute. Hence, when an offense is indictable in the superior court, a city or town ordinance, making the same act, or substantially the same act, an offense punishable by fine or imprisonment, such ordinance is void. It may be that the legislature has power to authorize a town to make an offense against the state a separate offense against the town, but this could be done only by an express grant of authority." Accord: *State v. Dannenberg,* 150 N.C. 799, 63 S.E. 946; *State v. Langston,* 88 N.C. 692.

In *State v. Langston, supra,* the defendant was convicted in the mayor's court of the City of Goldsboro upon a warrant charging violation of a city ordinance which forbade any person, having a license, to sell spirituous liquors on the Sabbath and imposed a fine of $20.00 for such offense. A state-wide statute

made it a misdemeanor, punishable by fine or imprisonment in the discretion of the court, for any person to sell spirituous or malt liquors on Sunday except on the prescription of a physician and for medical purposes. On appeal to the superior court, the action was dismissed for want of jurisdiction in the mayor's court. This Court affirmed the superior court, saying through Chief Justice Smith:

> "This statute, more comprehensive in its scope than the ordinance, embracing as well those who have not, as those who have, license to sell, and involving the same criminal act for which is prescribed a punishment by fine or imprisonment at the discretion of the court, must supersede the latter.
>
> "The rule is thus stated as a deduction from the decided cases: 'A general grant of power, such as a mere authority to make by-laws, or to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act; for example, an assault and battery, which is made punishable as a criminal offense by the laws of the State.' 1 Dill. on Mun. Corp., § 302. The power conferred upon the municipal body is presumed to be in subordination to a public law regulating the same matter for the entire state, unless a clear intent to the contrary is manifest."

By G.S. 153-9(55) the General Assembly conferred upon the boards of commissioners of the several counties power to adopt "ordinances supervising, regulating, or suppressing or prohibiting in the interest of public morals, comfort, safety, convenience and welfare, public recreations, amusements and entertainments, and all things detrimental to the public good; and ordinances in exercise of the general police power not inconsistent with the Constitution and laws of the State or the Constitution and laws of the United States." Similar authority was conferred upon all cities by G.S. 160-200(6) and G.S. 160-200(7), now repealed, and is presently conferred thereon by G.S. 160A-174 and G.S. 160A-181.

In *Whitney Stores v. Clark,* 277 N.C. 322, 327, 177 S.E. 2d 418, this Court, speaking through Chief Justice Bobbitt, said, concerning G.S. 153-9(55): "The Act does not confer or withhold

authority in respect of specific activities; on the contrary, it confers authority to enact ordinances in the exercise of the general police power. In this respect, the 1969 Act is similar to the statutes which confer general police power upon cities and towns."

With reference to cities and towns, the General Assembly of 1971 provided in G.S. 160A-174(b), "The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition." In *State v. Furio, supra,* we said, with reference to the authority conferred upon cities by the former statutes, G.S. 160-200(6) and G.S. 160-200(7), that it could not be "fairly implied from these statutes that the Legislature intended to preempt the entire subject of obscene displays and publications so as to forbid a city to enact an ordinance, otherwise within its authority, which forbids publications or displays neither forbidden nor permitted by these statutes." Thus, the above quoted provision of G.S. 160A-174(b) reaffirms our conclusion in *State v. Furio, supra,* that, notwithstanding the existence of a general state-wide law relating to obscene displays and publications, a city may enact an ordinance prohibiting and punishing conduct not forbidden by such state-wide law. As we noted in *Whitney Stores v. Clark, supra,* the authority conferred by G.S. 153-9(55) upon the boards of commissioners of the respective counties is the same as that conferred upon cities and towns by G.S. 160-200(6) and G.S. 160-200(7) now brought forward into G.S. 160A-174 and G.S. 160A-181.

The 1971 General Assembly repealed G.S. 14-189 to G.S. 14-190, inclusive, and enacted G.S. 14-190.1 to G.S. 14-190.9, state-wide laws relating to obscene literature and exhibitions and to indecent exposure. We find nothing therein which expresses or indicates an intent by the General Assembly to preclude cities and towns or counties from enacting and enforcing ordinances "requiring a higher standard of conduct or condition" within their respective jurisdictions.

We must, therefore, compare the ordinance of Onslow County here in question with the state-wide law to determine whether the ordinance, as in *State v. Furio, supra,* undertakes to prohibit and punish, with reference to the charge in the warrant before us, conduct which is not forbidden by the state-

wide statute, and thus to require "a higher standard of conduct or condition," or undertakes to prohibit and punish the identical conduct dealt with by the state-wide statute.

The ordinance in question makes it a misdemeanor, punishable by a fine not to exceed $50.00 nor imprisonment not to exceed 30 days, for any person "as owner, manager, lessee, director, promoter, or agent" to permit "the premises over which he has control to be used for any * * * purposes of obscenity and nudity" as defined in the ordinance.

G.S. 14-190, which was in effect when the Board of Commissioners of Onslow County adopted the ordinance in question, provided:

> "Any person who in any place wilfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed, or who aids or abets in any such act, or who procures another so to expose his person, or the private parts thereof, or take part in any immoral show, exhibition or performance where indecent, immoral or lewd dances or plays are conducted in any booth, tent, room or other public or private place to which the public is invited; *or any person, who, as owner, manager, lessee, director, promoter or agent, or in any other capacity, hires, leases or permits the land, buildings, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for any such immoral purposes, shall be guilty of a misdemeanor.* * * * Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both." (Emphasis added.)

Thus, the state-wide statute in effect at the time the ordinance in question was adopted dealt specifically with the identical conduct with which this defendant is charged in the warrant as a violation of the county ordinance.

[5] Since the Board of Commissioners of the county could not, at the time they adopted this ordinance, enact a valid ordinance forbidding the conduct with which the defendant is charged in this warrant, the ordinance, in that respect, is void and does not support the warrant. It is immaterial that, subsequently,

G.S. 14-190 was repealed, for the repeal of a state-wide law which, during its life, prohibited the enactment of a county ordinance is prospective in this respect and does not breathe life into an ordinance which was beyond the authority of the ordaining body when it was adopted.

Furthermore, G.S. 14-190.9, the 1971 enactment which replaced G.S. 14-190, provides:

> "Any person who shall wilfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; *or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act,* shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both." (Emphasis added.)

Thus, it is apparent that the present state-wide law also deals specifically with the precise conduct with which the defendant is charged in this warrant pursuant to the county ordinance.

[6, 7] A county board of commissioners, like the Congress of the United States, and unlike the General Assembly of North Carolina, has no legislative authority not granted to it expressly or by necessary implication from expressly granted powers. *Surplus Company v. Pleasants, Sheriff,* 264 N.C. 650, 654, 142 S.E. 2d 697; *Ramsey v. Commissioners of Cleveland,* 246 N.C. 647, 100 S.E. 2d 55. One may not be tried and convicted of a statutory offense if, at the time of his trial, the legislative body which declared his conduct in question to be a crime had no authority to do so. *United States v. Chambers,* 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763. The defendant has not yet been tried for the offense charged in the warrant. Since, even if the Board of Commissioners of Onslow County formerly had authority to enact an ordinance making the conduct charged in this warrant a criminal offense, such authority has been withdrawn by the enactment of G.S. 14-190.9, the defendant cannot now be tried and convicted under this warrant.

It will be observed that the state-wide statute permits a substantially greater punishment for the offense than that imposed by the ordinance.

We do not have before us and we express no opinion as to the liability of the defendant to prosecution for violation of G.S. 14-190, which was in effect at the time of the conduct alleged in the warrant. Likewise, we do not have before us and express no opinion with reference to the validity of the ordinance in question concerning any matter or conduct other than the alleged conduct of this defendant as set forth in this warrant. Thus, we express no opinion as to whether the definition of "obscene" and "obscenity" contained in this ordinance establishes a "higher standard of conduct or condition" (see G.S. 160A-174) than the "contemporary national community standards" (see G.S. 14-190.1(b)) so as to permit a prosecution under it for conduct which would not violate the state-wide statute. Nor do we express any opinion as to whether, in accordance with the decisions of the Supreme Court of the United States, a county or municipal ordinance, otherwise valid, may constitutionally prohibit and make punishable an exhibition or the dissemination of materials found to be "obscene" under the standards of the community wherein such ordinance applies, though not "obscene" as judged by the "contemporary national community standards."

In *Manual Enterprises v. Day, Postmaster General of the United States,* 370 U.S. 478, 82 S.Ct 1432, 8 L.Ed. 2d 639, the question was as to the right of the Postmaster General, under an Act of Congress, to bar certain materials from the mail. The decision was that the Act of Congress should not be construed to confer this power. It was in that case that the term "national community standard" with reference to obscenity originated. There was no opinion in that case concurred in by a majority of the justices. The concept of a national community standard was mentioned only in the opinion of Mr. Justice Harlan, in which only Mr. Justice Stewart joined. Mr. Justice Harlan said:

> "There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. We think that the proper test under this *federal* statute, *reaching as it does all parts of the United States* whose population reflects many different ethnic and cul-

tural backgrounds, is a national standard of decency." (Emphasis added.)

The leading case with reference to the constitutionality of a statute dealing with the dissemination of obscenity is *Roth v. United States and Alberts v. California* (decided together), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498. There, the standard adopted was the "contemporary community standards." (Page 488-9). Our research has disclosed no decision of the United States Supreme Court holding that a state statute or a city or county ordinance must limit its reach to conduct, exhibitions or the dissemination of materials "obscene" under the contemporary *national* standard.

For the reasons above stated, the judgment of the superior court quashing the warrant in this case was correct and the Court of Appeals erred in reversing it. The matter is, therefore, remanded to the Court of Appeals, for the entry by it of a judgment affirming the judgment of the superior court.

Reversed and remanded.

NAT HARRISON ASSOCIATES, INC. v. NORTH CAROLINA STATE PORTS AUTHORITY

No. 127

(Filed 14 January 1972)

1. **Rules of Civil Procedure § 56— summary judgment**

Summary judgment may be granted where the pleadings or proof disclose that no cause of action or defense exists. G.S. 1A-1, Rule 56(c).

2. **State § 4— State Ports Authority — agency of the State**

The North Carolina State Ports Authority is an instrumentality and agency of the State, created and empowered to accomplish a public purpose.

3. **State § 4— action against Ports Authority — recovery outside the contract**

In an action instituted against the State Ports Authority under G.S. 143-135.3, summary judgment was properly allowed in favor of the Ports Authority as to counts in which plaintiff sought to recover for loss of profits due to alleged delay by defendant and by other contractors, and for losses due to extra payments made to German sup-

pliers by reason of devaluation of the German mark, where there was no provision in the contracts for recovery of such damages, since plaintiff is entitled to recover only under the terms of his contract.

4. State § 4— contract action against Ports Authority — failure to complete contract — "as-built" drawings

Plaintiff's contract action against the State Ports Authority under G.S. 143-135.3 should have been dismissed where plaintiff had not completed a material part of its contract by furnishing "as-built" drawings to defendant prior to filing a claim with the Director of the Department of Administration and instituting the action in superior court.

5. State § 4— contract against Ports Authority — failure to complete contract — affidavit that no liens exist

Plaintiff's contract action against the State Ports Authority should have been dismissed where plaintiff has failed to comply with a contract requirement that it furnish defendant with an affidavit to the effect that all payments for materials, services, or any other reason in connection with the contract have been satisfied and that no claims or liens exist against the contractor in connection with these contracts.

APPEAL by plaintiff and by defendant from *Clark, J.*, 4 January 1971 Session of WAKE Superior Court, transferred to this Court for initial appellate review under our general transferral order dated 31 July 1970.

This action arose upon certain contracts between plaintiff and defendant. Defendant solicited bids on nine contracts for portions of the work involved in the construction of a bulk phosphate handling facility at Morehead City. Plaintiff submitted separate bids for four of these: (1) the Ship Loading Tower, (2) the Bucket Wheel Reclaimer, (3) the Conveyor System, and (4) the Dust Collection System, and a combined bid on all four of these items in the amount of $3,523,850. The combined bid was accepted, but at the request of defendant and the Architect-Engineer four separate contracts were signed, with the separate amounts being computed as a division of the combined bid. These contracts were designated as Contracts Nos. 1, 2, 3, and 7. Various other contractors were awarded the remaining five contracts.

All contractors, including plaintiff, were notified to begin work on 21 December 1966. Each of plaintiff's four contracts specified the number of days in which the work was to be

completed, the time varying in each contract. Contracts Nos. 1, 2, and 3 provided for liquidated damages of $500 per day for each day's delay in excess of the number of days specified in the contracts, and Contract No. 7 provided for liquidated damages of $200 per day for each day's delay in excess of the specified time. All the contracts provided that the beginning time and the time for completion would be of the essence.

Each contract provided for an Architect-Engineer, and Section 35 of the General Conditions stated in pertinent part:

> "The Architect-Engineer shall give all orders and directions contemplated under this contract and specifications relative to the execution of the work. The Architect-Engineer shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract and shall decide all questions which may arise in relation to said work and the construction thereof. The Architect-Engineer estimates and decisions shall be final and conclusive, except as herein otherwise expressly provided. In case any question shall arise between the parties hereto relative to said contract or specifications, the determination or decision of the Architect-Engineer shall be a condition precedent to the right of the Contractor to receive any money or payment for work under this contract affected in any manner or to any extent by such question.
>
> " . . . Any differences or conflicts in regard to their work which may arise between the Contractor under this contract and other contractors performing work for the Owner shall be adjusted and determined by the Architect-Engineer."

Numerous delays were encountered in completing the work, and at the final inspection on 20 March 1969 the Architect-Engineer for the project determined that plaintiff had completed work under Contracts Nos. 1, 2, and 3 on 12 March 1969, and had completed work under Contract No. 7 on 1 October 1968. The Architect-Engineer also determined that an extension of time of 21 days should be allowed on Contract No. 7, and an extension of 112 days should be allowed on Contract No. 3, even though plaintiff had neither given notice of delays nor requested any extension of time as required by the contract.

After allowing these extensions, the Architect-Engineer further found that there was a delay of 221 days on Contract No. 1, of 210 days on Contract No. 2, of 132 days on Contract No. 3, and 70 days on Contract No. 7. Based on these findings, liquidated damages for the delay in completion of the work under the terms of the four contracts would be $295,500.

In September 1969, plaintiff was informed that defendant was going to retain the final payment of $182,246 due plaintiff under the contracts and apply this amount to defendant's claim for liquidated damages. On 16 February 1970 plaintiff, under G.S. 143-135.3, filed a verified claim with the Director of the Department of Administration claiming that defendant owed the plaintiff $589,354.50, consisting of the final payment of $182,246 retained by defendant, plus claims for additional spare parts furnished, measured job costs, overhead losses, capital interest losses and loss of profits, loss due to revaluation of the German mark, claims for additional drawings furnished, and interest. Defendant replied to this claim denying any indebtedness to the plaintiff and claiming a total of $295,500 as liquidated damages on the four contracts.

The Director, after an extensive hearing, made findings of fact, entered conclusions of law, and awarded plaintiff $78,023.81. The Director ordered plaintiff to furnish defendant properly executed affidavits stating that plaintiff had paid all claims, liens, etc., arising out of the four contracts, and further ordered that the plaintiff furnish defendant "as-built" drawings of the construction work done, as provided for in the contracts. Defendant accepted the decision of the Director as to certain change orders in the sum of $10,127.76, but refused the remainder of the Director's award.

Plaintiff then filed an action in the Superior Court of Wake County, as authorized by G.S. 143-135.3, alleging six counts. The first alleged that plaintiff had completed its four contracts by 6 November 1968, that any delay in the completion of the work was caused by acts of the defendant or of the other contractors or other causes beyond plaintiff's control, that no liquidated damages should be assessed against the plaintiff, and that plaintiff was entitled to recover $178,746 wrongfully retained by defendant, with interest thereon from 6 November 1968. The second count alleged that plaintiff had suffered certain damages or loss of profits due to being delayed by other

contractors on this project and was entitled to recover $297,427.44 for damages for this delay, with interest from November, 1968. The third count alleged that due to delay in the completion of the contracts caused by defendant or other contractors, plaintiff lost the sum of $6,435 in extra payments made to German subcontractors and suppliers, due to the fact that the German mark was revalued during the period of these delays. The fourth count alleged that plaintiff had been forced to furnish, under protest, spare parts of the value of $39,568.09 not required to be furnished under the terms of one of the contracts. The fifth count alleged that the plaintiff had been forced to furnish extra drawings, tools, and parts not required by its contract in the value of $8,550. The sixth count sought recovery of the $10,127.76 granted by the Director for change orders. (The parties stipulated that this item of $10,127.76 should be paid.)

Defendant in its answer to the complaint denied all allegations and counterclaimed for liquidated damages in the sum of $295,500, alleging that all delays not covered by extensions of time were the sole fault of plaintiff.

Prior to trial defendant moved to dismiss the action, and alternatively moved for summary judgment as to counts two and three of the complaint. The motion to dismiss was denied. The trial judge allowed summary judgment in favor of defendant on the second and third counts, for the reason that the terms of the contracts did not provide for the recovery of such increased job costs, overhead losses, capital interest losses and loss of profit. The case was tried by Judge Clark without a jury at the 4 January 1971 Session of Wake Superior Court. Plaintiff moved to dismiss the counterclaim of defendant at the beginning of the trial, at the close of plaintiff's evidence, and at the close of all the evidence. These motions were denied.

After trial the court made findings of fact, entered conclusions of law, and awarded judgment for the plaintiff in the sum of $210,746, with interest from 26 April 1969, and the sum of $10,127.76, with interest from 14 August 1969, "said award being contingent upon the furnishing by plaintiff to defendant of a contractor's affidavit for Contracts 1, 2, 3 and 7 to the effect that no claims or liens exist against plaintiff in connection with said contracts."

Plaintiff appealed from the entry of summary judgment for defendant on counts two and three of its complaint, and defendant appealed from the entry of judgment in favor of the plaintiff.

Broughton, Broughton, McConnell & Boxley by John D. McConnell, Jr., and J. Melville Broughton, Jr., for plaintiff appellant and plaintiff appellee.

Attorney General Robert Morgan, Assistant Attorney General Eugene A. Smith, and Staff Attorney Rafford E. Jones for defendant appellant and defendant appellee.

MOORE, Justice.

PLAINTIFF'S APPEAL

[1] Plaintiff contends that the trial court erred in granting summary judgment in favor of defendant on the second and third counts in the complaint. Plaintiff alleged in the second count that plaintiff had anticipated profits on the four contracts of $497,025, but due to delays caused by defendant and other contractors, it realized profits of only $111,401.66. In this count plaintiff sought to recover the lost profits of $297,427.44. The third count in the complaint alleged that since December of 1968, when the $178,746 final payment was retained by defendant, the German mark had been revalued, requiring the plaintiff to pay a German supplier an additional $6,435 which would not have been necessary if this retainage had been timely released. On this count plaintiff sought to recover the $6,435. Summary judgment for defendant was granted on these two counts under the provision of Rule 56(c) of the Rules of Civil Procedure. G.S. 1A-1.

Rule 56(c) provides:

> " . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. . . . "

This rule provides for the disposition of cases where there is no genuine issue of fact, and its purpose is to eliminate formal

trials where only questions of law are involved. Where the pleadings or proof disclose that no cause of action or defense exists, a summary judgment may be granted. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); 2 McIntosh, N. C. Practice and Procedure § 1660.5 (2d Ed., Phillips' Supp. 1970); 3 Barron and Holtzoff, Federal Practice and Procedure § 1234 (Wright Ed., 1958).

Procedurally, the question in the present case is: Assuming the facts alleged in the second and third counts in the complaint to be true, was the defendant entitled to summary judgment as a matter of law? We think so.

Plaintiff brought its suit under G.S. 143-135.3, which provides:

> "Upon completion of any contract for construction or repair work awarded by any State board to any contractor, under the provisions of this article, should the contractor fail to receive such settlement as he claims to be entitled to *under terms of his contract,* he may, within 60 days from the time of receiving written notice as to the disposition to be made of his claim, submit to the Director of the Department of Administration a written and verified claim for such amount as he deems himself entitled to *under the terms of said contract,* setting forth the facts upon which said claim is based. In addition, the claimant, either in person or through counsel, may appear before the Director of the Department of Administration and present any additional facts and arguments in support of his claim. Within 90 days from the receipt of the said written claim, the Director of the Department of Administration shall make an investigation of the claim and may allow all or any part or may deny said claim and shall have the authority to reach a compromise agreement with the contractor and shall notify the contractor in writing of his decision.
>
> "As to such portion of the claim which may be denied by the Director of the Department of Administration, the contractor may, within six months from receipt of the decision, institute a civil action for such sum as he claims to be entitled to *under said contract* by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any

county where in the work under said contract was performed. The procedure shall be the same as in all civil actions except as herein and as hereinafter set out.

"All issues of law and fact and every other issue shall be tried by the judge, without jury; provided that the matter may be referred in the instances and in the manner provided for in article 20 of chapter 1 of the General Statutes." (Emphasis added.)

[2] The North Carolina State Ports Authority, defendant in this action, was created by Article 22 of Chapter 143 of the General Statutes, and is an instrumentality and agency of the State, created and empowered to accomplish a public purpose. G.S. 143-217; *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377 (1934).

In *Insurance Co. v. Gold, Commissioner of Insurance,* 254 N.C. 168, 172, 118 S.E. 2d 792, 795 (1961), Justice Clifton Moore stated for the Court:

"'. . . An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State.' *Insurance Co. v. Unemployment Compensation Commission, supra* [217 N.C. 495, 8 S.E. 2d 619]. The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action. *Kirkpatrick v. Currie, Comr. of Revenue,* 250 N.C. 213, 108 S.E. 2d 209; *Duke v. Shaw, Comr. of Revenue,* 247 N.C. 236, 100 S.E. 2d 506; *Insurance Co. v. Unemployment Compensation Commission, supra; Rotan v. State, supra* [195 N.C. 291, 141 S.E. 733]."

In *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247 (1965), Justice Bobbitt (now Chief Justice), speaking of G.S. 136-29 (a statute almost identical to G.S. 143-135.3), which

permits suits on highway construction claims against the State Highway Commission, said: "The quoted statute, which assumes a valid contract is subsisting, provides for recovery, 'under the said contract.' In our view, recovery, if any, 'under the said contract' must be based on the terms and provisions thereof." And the Court then continued: "Even so, recovery, if any, must be within the terms and framework of the provisions of the contract of July 8, 1958 and not otherwise."

[3] In the present case, the trial judge correctly found that there was no provision in the contracts for recovery of damages for delays or for losses by reason of the devaluation of the German mark. Under the provisions of G.S. 143-135.3, the plaintiff is only entitled to recover "such settlement as he claims to be entitled to under terms of his contract" and since plaintiff's claims as set out in the second and third counts of its complaint did not arise under the terms of its contracts, the court properly entered summary judgment on these two counts.

DEFENDANT'S APPEAL

Defendant contends the trial court committed prejudicial error in failing to allow defendant's motion to dismiss. At the beginning of the trial, defendant moved to dismiss this action under Rule 12(b)(6) of the Rules of Civil Procedure on the ground that the plaintiff had not complied with the conditions of the contracts and the pertinent statutes so as to be entitled to bring this action. At the close of plaintiff's evidence, the defendant moved to dismiss for failure to establish a cause of action. At the close of all the evidence, defendant moved to dismiss under Rule 41(b) of the Rules of Civil Procedure. Each motion was denied, and defendant excepted.

Defendant contends that the four contracts involved in this case were not completed within the meaning of G.S. 143-135.3 so as to enable plaintiff to proceed with the filing of its claim before the Director of the Department of Administration. This contention is based first upon Section 29.00 of the Special Conditions of each contract, which is as follows:

> "29.00 AS-BUILT DRAWINGS. As the work progresses, each Contractor shall keep a complete record of any and all variations between actual project installations and contract drawing and specification requirements. Upon com-

pletion of project one set of drawings shall be marked in red to show all such variations and these drawings shall be forwarded to Architect-Engineer."

It is also based on Section 1.08 of the Technical Specifications in Contract No. 3, which provides:

"1.08 RECORD DRAWINGS. Upon completion of the work the contractor shall furnish to the engineer original or reproducible tracings of a complete set of drawings and calculations of the facility, as built, and furnish in book form 8 copies of instructions for operation, maintenance and lists of spare parts. These books are to include all descriptive material, parts list, drawings covering all items of electrical equipment and mechanical units, and instructions prepared by the manufacturers covering the proper methods of adjusting, lubricating and otherwise maintaining each item."

[4] The trial court found as a fact that these drawings were not furnished and accepted by the defendant until on or about 1 March 1971. This claim was filed with the Director of the Department of Administration on 16 February 1970, over a year before the plantiff furnished the "as-built" drawings, and this action was instituted on 9 July 1970, some eight months before the plaintiff had completed a material part of its contract by furnishing these drawings. It is apparent that the plaintiff filed its claim with the Director of the Department of Administration and also instituted this action before it had completed these provisions of its contracts. The "as-built" drawings were very important to defendant. During the course of construction numerous changes were made in the contract drawings and specifications, and the amended drawings were necessary for future use in repairs or other changes. The court erred in not dismissing this action because of the failure of plaintiff to complete its contracts by the timely filing of these "as-built" drawings, as it was required to do by G.S. 143-135.3.

The next contention of the defendant presents an even more serious question. The Special Conditions of each contract provide:

"16.00 CONTRACTOR'S AFFIDAVIT. The final payment of retained amount due the Contractor on account of the contract shall not become due until the Contractor has furnished to

the Owner through the A-E an affidavit signed, sworn, and notarized to the effect that all payments for materials, services, or any other reason in connection with his contract have been satisfied and that no claims or liens exist against the Contractor in connection with this contract. In the event that the Contractor cannot obtain similar affidavits from subcontractors to protect the Contractor and the Owner from possible liens or claims against the subcontractor, the Contractor shall state in his affidavit that no claims or liens exist against any subcontractor to the best of his (the Contractor's) knowledge, and if any appear afterwards, the Contractor shall save the Owner harmless on account thereof."

The plaintiff has not furnished such affidavits, and the trial court, although holding that the failure to furnish affidavits was not so material as to prevent plaintiff from proceeding with this action, did hold that plaintiff would not be entitled to final payment under each of its contracts until such time as the affidavits were furnished. The final judgment provided that the plaintiff have and recover certain money of the defendant " . . . said award being contingent upon the furnishing by plaintiff to defendant of a contractor's affidavit for Contracts Nos. 1, 2, 3, and 7." Section 14.00 of the Special Conditions of each contract states:

"(c) Final payment will not be made until certificates of the A-E and such State Agencies having jurisdiction have been duly issued as required by State Laws. (G.S. 133-1.1)."

G.S. 133-1.1 provides that the Architect-Engineer must furnish to the owner a certificate that the contractor has fulfilled all obligations of the contract, and further provides:

"(f) Neither the designer nor the contractor involved shall receive his final payment until the required certificate of compliance shall have been received by the awarding authority."

G.S. 133-4 makes failure to comply with the provisions of this chapter a misdemeanor.

The Architect-Engineer has not and cannot furnish defendant a certificate in this case as required by G.S. 133-1.1 since

the contractor has failed to furnish the affidavits to the effect that all payments for materials, services, or any other reason in connection with these contracts have been satisfied and that no claims or liens exist against the contractor in connection with these contracts. Plaintiff is unable to furnish these affidavits due to the fact that Krupp International, one of its subcontractors under these contracts, claims plaintiff still owes it the sum of approximately $150,000. Defendant has been put on notice of this claim by Krupp International, and should defendant pay plaintiff the final amount due under the contracts before the claim between plaintiff and Krupp International is settled, Krupp International would have a claim against the defendant for the amount of that indebtedness. For the Architect-Engineer to furnish defendant a certificate that plaintiff has fulfilled all obligations under its contracts before the plaintiff has settled with Krupp International would be a violation of G.S. 133-4, and if defendant paid plaintiff before receiving the certificate of compliance from the Architect-Engineer, defendant would be violating G.S. 133-1.1. The plaintiff's failure to complete its obligation under the terms of its contracts prohibits the plaintiff from seeking the relief provided under G.S. 143-135.3.

> "The rights of the contractor are fixed by the contract and by the law in force at the time of its execution, and, where the contract prescribes the procedure to be followed to obtain payment, it has been held that compliance therewith is a condition precedent to the enforcement of the liability of the state. There can be no recovery against the state on a contract not performed according to its terms." 81 C.J.S., States § 124a, pp. 1115-16.

It is stated in 43 Am. Jur., Public Works and Contracts § 71, p. 813:

> "In the performance of a contract for public work differences frequently arise between the contractor and public authorities, and for the purpose of avoiding litigation or delay most such contracts contain stipulations which require the work to be done under the supervision of an architect, engineer, building superintendent, or other public officer or employee who is given authority to determine questions relating to the execution of the work; such stipulations usually restrict the making of payments to the

> contractor except upon the designated officer's certificate that the work has been properly performed . . . . Under such provisions the procurance of the prescribed certificate is a condition precedent to the right of the contractor to be paid for his work and therefore to sue for money alleged due him, in the absence of any showing of fraud or mistake as ground for the refusal of payment . . . . "

See also 3A Corbin on Contracts § 650, p. 115; *Teer Co. v. Highway Commission, supra; Insurance Co. v. Gold, Commissioner of Insurance, supra.*

[5] Plaintiff must furnish the affidavits required by the contracts before it can file claim with the Director of the Department of Administration or file suit thereon. Since it has not done so, its contracts have not been completed as required by G.S. 143-135.3, and the action should be dismissed. The court erred in overruling defendant's motion to dismiss, and the judgment entered by Judge Clark for plaintiff must be reversed. For this reason, we do not deem it necessary to consider whether or not the judgment entered by Judge Clark was void as a conditional judgment, nor do we need to consider the other assignments of error brought forward by defendant.

The judgment for plaintiff is reversed without prejudice to plaintiff to file a new claim with the Director of the Department of Administration within one year upon compliance with the requirements of G.S. 143-135.3 and in accordance with this opinion.

On plaintiff's appeal: Affirmed.

On defendant's appeal: Reversed.

STATE OF NORTH CAROLINA v. WILLIAM BAILEY, JR.

No. 128

(Filed 14 January 1972)

1. **Robbery § 5— armed robbery — instructions on firearms**

Trial judge's instruction in an armed robbery prosecution that "a .22 caliber pistol is a firearm" was not prejudicial.

2. **Robbery § 5— armed robbery — instructions on endangering the life of the victim**

Trial court's instruction in an armed robbery prosecution, when construed contextually, properly instructed the jury on the legal requirement that the life of the victim must be endangered by the use or threatened use of a firearm or other dangerous weapon, implement, or means.

3. **Criminal Law § 168— review on appeal — construction of the charge**

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.

4. **Criminal Law § 114— instructions — expression of opinion**

Trial court's instruction in an armed robbery prosecution was not open to the interpretation that the judge expressed an opinion that defendant had confessed his guilt to a police officer, but the court merely detailed what the State's evidence tended to show.

5. **Criminal Law § 168— instructions — review on appeal**

The charge of the court must be read as a whole.

6. **Criminal Law §§ 122, 168— instructions — jury's request to ask questions of the judge**

Trial judge's instruction, when he was asked if each member of the jury could have the privilege of asking any questions of clarification, "All right, if they want to do it. The judges always shudder when the jury comes back in and say when they have a question to ask. . . . But anyway if you do have any other questions I will be glad to try to answer any of them.", *held* not prejudicial.

7. **Criminal Law § 122— instructions — contention that instruction was coercive**

Defendant's contention that the trial court's charge was coercive and compelled unwilling jurors to surrender individual judgments and vote with the majority for a verdict of guilty, *held* without merit, the court's instruction being to the effect that the jury had a duty to reach a verdict "if you can do so without violence to your conscience."

8. **Criminal Law § 122— instructions — contention that instruction was coercive**

Language of the trial judge in instructing the jury on the gravity and importance of its position, including language that punishment

was the concern of the court and that "I have certain information before me as to the background of the defendant's prior record, if any," *held* disapproved by the Supreme Court in this appeal from an armed robbery conviction, but such language did not constitute reversible error.

APPEAL by defendant from *Clark, J.*, 29 March 1971 Session, WAKE Superior Court.

Criminal prosecution on a bill of indictment charging defendant with armed robbery.

The State's evidence tends to show that Loretta Williams had known defendant since 1967 when they worked together at the Sir Walter Hotel. She knew him by the name of "Shorty." She was working at Leonard's One Hour Valet Cleaners on 23 March 1970, the day of the robbery. Defendant, accompanied by another man, came to the cleaners around 3:00 p.m. While threatening Mrs. Williams with a pistol he demanded the money in the cash register. "He had the pistol in his hand pointed right straight out. I was in front of it." Loretta gave him eighty-four dollars in cash and the two men fled.

Defendant was arrested that same evening at the Downtowner Motor Inn when he reported for work about 7:15 p.m. The arresting officers told him he was charged with armed robbery, read the warrant to him, and warned him of his rights as required by *Miranda v. Arizona*, 384 U.S. 436. Defendant said he understood his rights but knew nothing about the armed robbery. He said he had taken three seven-dollar bags of heroin at approximately 4:00 p.m. that afternoon and, as a result of this information, the officers took him to Wake Memorial Hospital. At the hospital defendant said he wanted to talk to the officers about the robbery. They replied they would talk to him after he had seen a doctor but defendant insisted on talking then and there. He was coherent and appeared to understand and to know exactly what he was doing. He was again fully advised of his rights and again stated that he understood them. He then proceeded to tell the officers that at approximately 3:00 p.m. on 23 March 1970 he and a man named Piccolo went to Leonard's One Hour Valet where he pulled a gun he had borrowed earlier in the day from Harry Martin, Jr., and demanded all of the money in the cash register. After receiving the money he and Piccolo ran east on Martin Street to the corner,

where they were joined by Harry Martin, Jr., and a man named Willis, and then ran down Wilmington Street. The four went to the In Crowd Club, where the money was split four ways, and then to a location in Southside where they played cards and the gun was returned to its owner. Defendant told the officers the weapon was a small .22 caliber blue steel pistol with white handles. In the opinion of Officer Carroll defendant was normal and was not under the influence of alcohol or drugs.

The following morning Officer Carroll went to Harry Martin's residence with a warrant for his arrest. The warrant was served and on the nightstand directly beside Martin's bed was a pistol, "a white handled revolver, short barrel, matching the description of the gun used in the robbery. It was a blue steel pistol with white handles. I took it into my possession."

Defendant did not testify himself. He offered Johnny Christmas, Allen Willis, and Dorothy Sims as witnesses in his behalf. The testimony of these witnesses tends to show that defendant spent the forenoon of 23 March 1970 "shooting heroin"; that defendant was addicted to heroin at that time and "administered about seven or eight bags a day." Johnny Christmas admitted on cross-examination that he was serving thirteen to fifteen years for robbery and had previously been addicted to heroin himself. Allen Willis stated that he had been convicted twice for robbery and was then serving time.

Defendant was convicted of armed robbery and sentenced to a term of not less than fifteen nor more than twenty-five years in the penitentiary. His appeal to the Court of Appeals was transferred to the Supreme Court for initial appellate review pursuant to our general referral order dated 31 July 1970.

James R. Rogers, III, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Edwin M. Speas, Jr., Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

[1] The trial judge instructed the jury that "a .22 caliber pistol is a firearm." Defendant contends the court thus told the jury, in effect, that defendant used a firearm in the commission of the robbery, thereby relieving the State of the burden of

proving an essential element of armed robbery. This is defendant's first assignment of error.

There is no merit in this assignment. The instruction merely informed the jury that a .22 caliber pistol is, in fact, a firearm and should the jury find that defendant used a .22 caliber pistol on the occasion in question then such a weapon would be a firearm within the meaning of that term as used in G.S. 14-87, the statute defining and condemning armed robbery.

[2] The court charged the jury that "it is incumbent upon you to find as one of the necessary elements of the offense charged, that is robbery with a firearm, that the defendant had a firearm in his possession at the time that he obtained the property." Defendant contends the quoted instruction enabled the jury to convict the defendant of armed robbery upon a mere finding that he had a firearm in his possession at the time of the robbery and overlooked the legal requirement that the life of the victim must be endangered by the use or threatened use of a firearm or other dangerous weapon, implement or means. This constitutes defendant's second assignment of error.

[3] There is no merit in this assignment. Elsewhere in the charge the court had fully instructed the jury with respect to all the elements of armed robbery, including the instruction "that the defendant had a firearm in his possession at the time he obtained the property; and . . . that the defendant obtained the property by endangering or threatening the life of Loretta Williams with a firearm." We have said many times that a charge must be construed contextually, "and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). Here, the court is merely emphasizing that possession of a firearm (or other dangerous weapon, implement or means) is one of the essential elements of armed robbery. This statement in nowise negatives other portions of the charge to the effect that the life of a person must be endangered or threatened by the use of such weapon. This assignment merits no further discussion.

[4] In the course of his charge to the jury the trial judge said: "I believe . . . the State's evidence further tends to show that the defendant after being warned of his rights made an admission or confession to Detective J. S. Carroll . . . of the

Raleigh City Police and told him that he had a gun; that is to wit: a .22 caliber pistol with a blue steel barrel and white handles." Defendant contends that after hearing J. S. Carroll's testimony it was a question for the jury as to whether defendant made any statement to that witness. Defendant argues that the court in effect told the jury that defendant had admitted his guilt "or at least some part of it," thus expressing an opinion in violation of G.S. 1-180. This is defendant's third assignment of error.

[5] There is no merit in this assignment. The court was merely detailing what the State's evidence "tended to show." In no sense can it be characterized as an expression of opinion that defendant had confessed his guilt. Elsewhere in the charge the jury was instructed that "as finders of the fact, it is your duty to remember the evidence and if your recollection of what the evidence was . . . differs from [what] the court anywhere in its charge has or does recall the evidence to be, then you are to use your recollection of what the evidence was. Now, Members of the Jury, you are the sole judges of the credit to be given to the witnesses who testified in this case. You may believe all, or any part, or none of what a witness has said on the stand." Thus it was still left for the jury to determine the credibility of Officer Carroll's testimony. The charge of the court must be read as a whole. *State v. Wilson,* 176 N.C. 751, 97 S.E. 496 (1918). A disconnected portion may not be detached from the context of the charge and then critically examined for an interpretation from which erroneous expressions may be inferred. *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. McWilliams, supra; State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971).

[6] After retiring to deliberate, the jury returned to the courtroom and the foreman propounded four separate questions which the court answered in clarification of instructions previously given. The foreman then said: "Your Honor, I would like each one of the jurors to have a privilege for asking any question of clarification, if that is in order but I would like for them to do that." The court replied: "All right, if they want to do it. The judges always shudder when the jury comes back in and say when they have a question to ask. Of course, everything we say is taken down and recorded. . . . But anyway if you do have any other questions I will be glad to try to answer any

of them." The foreman said, "Thank you, your Honor," and the jury retired for further deliberations. Defendant contends the court's comment stifled further inquiry by the jurors and argues that the court in effect refused to answer any more questions. Defendant assigns the comment of the court as prejudicial error but fails to specify wherein he was prejudiced. No authority is cited.

It suffices to say that defendant's bare assertion of prejudice is not self-sustaining. It is a specious argument with no visible means of support. The unwisdom of permitting unlimited questions from the entire jury panel is a matter of common knowledge among trial judges. Judicial prudence tends to discourage the practice. Here, a wise judge cautiously planted the seeds of discouragement and then courageously agreed to try to answer any other questions the jurors desired to ask. We perceive no prejudice to defendant. This assignment is overruled.

[7] The following instruction by the court constitutes defendant's fifth assignment of error: "Now, I would say this further, Members of the Jury, that you deliberated for some time yesterday afternoon, did not arrive at a verdict. Now I instruct you that it is your duty as jurors to agree and arrive at a verdict if you can do so without violence [to] your conscience. I hasten to add that neither the court nor anyone else can force you to agree but as I say it is your duty to agree if you can do so without violence to your conscience. If you do not agree, it would simply mean that this case would have to be recalendared for trial at some future date and, of course, we would like to avoid that if we can in view of the number of criminal cases that we have calendared for trial here." Defendant contends the quoted statement from the charge was coercive and compelled unwilling jurors to surrender individual judgments and vote with the majority for a verdict of guilty. In such fashion, defendant argues, the court intimated what the verdict should be.

Instructions of similar import have been upheld in many cases, including *State v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552 (1939); *State v. Pugh,* 183 N.C. 800, 111 S.E. 849 (1922); *State v. Brodie,* 190 N.C. 554, 130 S.E. 205 (1925); *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1 (1960). "It is the duty of the judge to counsel a perplexed jury towards an agreement, keeping always within the statutory restriction that he shall give no intimation on the merits or whether 'any fact has been fully and

sufficiently proved.' " *Nixon v. Oil Mill,* 174 N.C. 730, 94 S.E. 410 (1917). Here, the instruction was to the effect that the jury had a duty to reach a verdict "if you can do so without violence to your conscience." This language negates coercion and its use was specifically upheld in *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). Accord, *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767 (1966); *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536 (1967). We find nothing in this instruction that tends to coerce, and we are unable to see any expression of opinion as to what the verdict should be. This assignment is not sustained.

[8] Defendant's sixth and seventh assignments of error attack the following portion of the charge:

> "I would say to you, Members of the Jury, that you have been summoned to perform one of the highest duties of citizenship, that is of jury service. On Monday when you came in you were sworn, took an oath that you would act fairly and impartially. I have instructed you that your duty is to find the truth, find the facts based on the evidence as it came from the witness stand and based on the law as given to you by the court. I have told you that you are not to be influenced by sympathy on the one hand or prejudice on the other. Your duty is to find the facts. You are not to be influenced by punishment in arriving at your verdict, that is a matter for the court and I have certain information before me as to the background of the defendant's prior record, if any, and other things that the court takes into consideration in imposing punishment. I would further say to you that our, the purpose of our criminal laws is not punishment. When we talk about criminal law, we are talking about rights. You have the right, for example, to walk down the street without having somebody come up and hit you in the mouth. So we have a law against assault. You have the right to get out, out on the highways and drive an automobile without some drunk running into you and injuring you and tearing up your car. So we have a law against that sort of thing, driving under the influence. You have a right to operate a business without being subjected to your goods, your money, being stolen. So you have a law against larceny. So we are not talking—the primary purpose of the criminal laws is not punishment but to protect

> the rights of society, you and I and everyone else. So I simply ask you to perform the duty as the court has instructed you to do and as you take an oath to do. In arriving at your verdict, you should not be guided or influenced by your social or economic philosophy. Simply base your verdict on the evidence as it came from the witnesses and the law as given you by the court. So I again instruct you, Members of the Jury, to retire and to arrive at a verdict if you can do so without violence to your conscience."

Defendant contends the quoted instruction tells the jury defendant has a prior record, thus putting his character in evidence, and expresses an opinion that the jury should return a verdict of guilty.

It must be conceded that the quoted portion of the charge represents an unfortunate choice of words to express several unnecessary observations. It does not put defendant's character in evidence, as contended, but it does border on a violation of G.S. 1-180. The able and patient trial judge obviously sought to remind the jury of the gravity and importance of its position and the duty imposed on it by law. He sought to emphasize that punishment was not a proper concern for the jury but a matter for the court who, when imposing sentence in *any* criminal case, takes into consideration a defendant's prior record, if any, and other matters relating to his background—information not available to the jury. He told the jury that our criminal laws are primarily designed to protect the rights of society rather than to punish offenders. Certainly it is not error for the trial judge, when circumstances require it, to instruct the jury with respect to any of these matters if the instructions are properly expressed. But the language used here is a poor choice for the purpose and is expressly disapproved. Ordinarily, it would require a new trial. However, not every ill-advised or poorly expressed instruction by the trial judge is of such harmful effect as to constitute reversible error. The objectionable language must be considered in light of all the facts and circumstances, "and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950); *State v. Hoover*, 252 N.C. 133, 113 S.E. 2d 281 (1960).

The facts and attendant circumstances in this case reveal that defendant was first tried for this offense at the 29 May 1970 Regular Criminal Session of Wake Superior Court and convicted of armed robbery by the jury. We awarded a new trial for failure of the trial judge to submit common law robbery as a permissible verdict. *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971). Defendant was retried before another jury and again convicted of armed robbery. At each trial he was positively identified by the victim who had known him since 1967 when they worked together at the Sir Walter Hotel. He was identified at each trial by Guy Gray, a presser at Leonard's One Hour Valet and an eyewitness to the robbery. He confessed to Officer Carroll and the competency of that confession has been established. In this setting it is apparent that the ill-chosen words of the judge here under attack had no prejudicial effect on the result of the trial and must therefore be considered harmless. Often in the course of a trial it becomes necessary for the judge to further instruct the jury, and such instructions taken separately *might* seem to be an expression of opinion; "but it must be presumed that their true import and bearing are understood by the jury, and unless it appears with ordinary certainty that the rights of the prisoner have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error." *State v. Browning,* 78 N.C. 555 (1877). There is no reason to believe that yet another trial would produce a different result.

Analogous cases involve the admission of incompetent evidence which had no effect on the result of the trial. We have consistently held that the admission of evidence, even though technically incompetent, will be treated as harmless unless it is made to appear that defendant was prejudiced thereby and that a different result likely would have ensued had the evidence been excluded. *State v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42 (1953); *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955); *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661 (1965); *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206 (1967); *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740 (1967); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971). Defendant's sixth and seventh assignments of error are overruled.

Defendant having failed to show prejudicial error, the verdict and judgment will be upheld.

No error.

STATE OF NORTH CAROLINA v. JAMES ROBERT TAYLOR

No. 34

(Filed 14 January 1972)

1. Indictment and Warrant § 9— sufficiency of indictment

The indictment must allege all of the essential elements of the crime sought to be charged, and a bill is sufficient if it charges the offense in a plain, intelligible and explicit manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. G.S. 15-153.

2. Indictment and Warrant § 9— superfluous allegations

Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.

3. Indictment and Warrant § 9— form of indictment

Prosecuting officers should ordinarily follow approved forms in drafting bills of indictment so as to avoid raising questions unnecessarily as to what are refinements and what are essential allegations.

4. Rape § 3— indictment for rape — superfluous allegations

The trial court did not err in the refusal to strike from an indictment for rape the words "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," and the word "wickedly," the court having properly regarded such words as mere surplusage.

5. Criminal Law § 98— refusal to sequester witnesses

The trial court in this rape prosecution did not abuse its discretion in refusing to sequester the State's two chief witnesses—the ten-year-old victim and her eight-year-old brother.

6. Criminal Law § 66— findings as to lineup procedure — conclusiveness on appeal

Trial court's findings of fact as to lineup procedure are conclusive when supported by competent evidence in the record.

7. Criminal Law § 66— lineup identification — defendant's shirt darker than shirts of other participants

Lineup was not rendered unnecessarily suggestive so as to violate due process by the fact that defendant was wearing a dark colored shirt and the other five lineup participants were wearing lighter colored

shirts, the clothing worn by all six lineup participants having been chosen by the subjects themselves and the difference in the shades of color not being attributable to the officers.

8. **Criminal Law § 66— lineup identification procedure**

The total circumstances revealed by the record show that the rules established for in-custody lineup identification were substantially followed for a lineup in which a ten-year-old rape victim and her eight-year-old brother identified defendant as the victim's assailant.

9. **Criminal Law § 66— illegal lineup — in-court identifications — independent origin**

Even if the lineup identifications of defendant were illegal, there was ample evidence to support the court's finding that the in-court identifications of defendant by the rape victim and her brother were of independent origin and therefore competent, where the evidence showed that the victim and her brother had ample opportunity to see defendant at a Tastee-Freez and to observe him as he walked and talked with them prior to the assault, and that the victim recognized defendant on a public street the first time she saw him following the assault and prior to the time the lineup was held.

10. **Criminal Law § 167— harmless constitutional error**

Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt.

11. **Criminal Error § 66— admission of evidence concerning lineup — harmless error**

In this prosecution for rape, there is no reasonable possibility that a pretrial lineup could have led to a mistaken identification or contributed to defendant's conviction, and admission of evidence concerning the lineup was harmless, where the victim had identified defendant on a public street only two or three hours prior to the lineup.

12. **Criminal Law § 77— denial of guilt — self-serving declaration**

Evidence sought to be elicited on cross-examination of a State's witness that defendant immediately denied his guilt when told he was under arrest for rape was properly excluded as a self-serving declaration.

APPEAL by defendant from judgment of *Hall, J.*, 14 September 1970 Regular Session, WAKE Superior Court.

Defendant was tried upon the following bill of indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That James Robert Taylor, late of the County of Wake, on the 29th day of May, 1970, with force and arms, at and in the County aforesaid, not having the fear of God

before his eyes, but being moved and seduced by the instigation of the devil, in and upon one Renee Veronica Overby, a female child under the age of 12 years, to wit: of the age of 10 years and upwards, in the peace of God and the State, then and there feloniously did make an assault and her the said Renee Veronica Overby then and there wickedly, unlawfully and feloniously did carnally know and abuse, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The State's evidence tends to show that between 10:45 and 11:00 p.m. on Friday night, 29 May 1970, Renee Overby, age ten, and her brother Daniel Overby, age eight, were sent by their mother to a place called Tastee-Freez to buy drinks and sandwiches. Several customers were ahead of them, and the children had to wait in line to be served. The place was well lighted and while waiting they saw a man buy matches from a boy and heard him ask the boy for some ice. The man was not in the line to be served.

When the children left the sandwich place the man told them he would "walk them home" and Renee replied they could go by themselves. The man walked along with them anyway. When they reached the First Baptist Church on South Fayetteville Street below Memorial Auditorium in Raleigh, he told Renee to follow him or he would shoot her. He said he had a gun. They followed him across the street and into the woods. There he placed a piece of cardboard on the ground and told Renee to lie down upon it. He then proceeded to rape the child while her brother Daniel sat on the ground nearby as he had been commanded to do.

After completion of the rape Renee struck the man with her shoe and both the children ran toward home. They met their mother who was on the sidewalk looking for them. Renee had one sandal and her panties in her hand and was covered with blood. She told her mother what had happened and was taken to the hospital where she remained until the following day.

On Monday, June 2nd, Mrs. Overby went uptown with Renee. The car in which they were riding was parked on East Martin Street in front of Carter's Furniture Store. Mrs. Overby went to the bank to cash a check, and upon returning to the car Renee said to her: "Mommie, Mommie, there is the man, that's

the man that did that to me, the one in the green in the middle." Renee was referring to defendant who was walking on the street with two other men. Mrs. Overby left the car and followed defendant for several blocks, then called the police and he was taken into custody.

Both Renee and her little brother Daniel Overby identified defendant in a lineup and later from the witness stand in court.

Defendant offered no evidence. The jury found him guilty of rape as charged and recommended life imprisonment. Judgment was pronounced accordingly, and defendant appealed to the Court of Appeals. The case was transferred to the Supreme Court for initial appellate review under the general transfer order dated 31 July 1970. Errors assigned will be noted in the opinion.

William T. McCuiston, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Ralph Moody, Deputy Attorney General, for the State of North Carolina.

HUSKINS, Justice.

[4] Before pleading to the charge defendant moved to quash certain language in the bill of indictment, specifically the words "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil"; and also the word "wickedly" near the end of the bill. Denial of his motion constitutes defendant's first assignment of error.

[1, 2] An indictment is "a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill." *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283 (1952). The indictment *must* allege all of the essential elements of the crime sought to be charged, *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861 (1958); and a bill is sufficient if it charges the offense in a plain, intelligible and explicit manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. G.S. 15-153; *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857 (1963). Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage. The use of superfluous words should be disregarded. *State v. Piner,* 141 N.C. 760, 53 S.E. 305 (1906).

[3] While G.S. 15-153 was designed to free the courts from the fetters of form, technicality and refinement not concerned with the substance of the charge, *State v. Barnes,* 122 N.C. 1031, 29 S.E. 381 (1898), prosecuting officers should ordinarily follow approved forms in drafting bills of indictment so as to avoid raising questions unnecessarily as to what are refinements and what are essential allegations. *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954).

[4] It is obvious that the solicitor who drafted the bill in this case was merely following the language of an old, approved form. "In the old indictment for murder, the depth, width and nature of wound, date of death and divers other matters were charged, including the 'instigation of the devil,' but were not required to be proven." *State v. Wynne,* 151 N.C. 644, 65 S.E. 459 (1909). The words embraced in defendant's motion to quash were surplusage and properly regarded as such by the trial court. Defendant's contention that the surplusage was so inflammatory and so inherently prejudicial as to violate his constitutional rights to a fair trial is an unwarranted exaggeration. While such surplusage might well have been stricken, failure to do so was not prejudicial error. It seems to us that the essential averments of this bill are far more inflammatory than the surplusage of which defendant complains. His apprehensions of prejudice on this account are unsound. This assignment is overruled.

Contending that identification of defendant as the culprit who assaulted and raped Renee Overby rested solely upon the testimony of two minor children, defendant moved to sequester the children and remove them from the courtroom except when each was testifying. Denial of his motion for sequestration is the basis for defendant's second assignment of error.

[5] Sequestration of witnessses is discretionary with the trial judge and may not be claimed as a matter of right. Stansbury, N. C. Evidence § 20 (2d Ed., 1963). Refusal to sequester the State's witness in a criminal case is not reviewable unless an abuse of discretion is shown. *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557 (1968). This accords with the great majority of jurisdictions. 53 Am. Jur., Trial § 31 (1945). The record before us discloses no reason for sequestration of the State's two minor witnesses—the victim and her small brother—and no abuse of discretion has been shown. That ends the matter.

State v. Fox, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970). This assignment has no merit.

Defendant's third, fourth and fifth assignments of error pertain to defendant's identification in and out of court and in a pretrial lineup. They will be considered *en masse*.

Defendant was arrested at 4:30 p.m. on 2 June 1970 and placed in a lineup at 6:30 p.m. on the same date. Prior to the lineup he was advised of his constitutional rights, including the right to have counsel present at the lineup. Defendant stated he was willing to stand in a lineup without a lawyer, that "the people didn't know him anyway." He and five other inmates of the jail were thereupon placed in a lineup and viewed through a two-way mirror by Renee and Daniel Overby, each child viewing the lineup separately. Each subject in the lineup was holding a number. The defendant was holding Number 3, and Renee Overby and Daniel Overby each wrote down Number 3. The lineup participants were then moved into different positions in the line and given different numbers. Each child then separately viewed the lineup again, and each wrote down Number 6, the number assigned to the defendant in the second lineup. Defendant had on a dark colored green shirt and light green pants, the same clothes he was wearing on the street when recognized by Renee Overby. All the other subjects in the lineup had on lighter colored shirts, two of which were green, and trousers of varying shades. Defendant's darker colored shirt, in contrast to the lighter colored shirts worn by the other subjects, was the only mark of identification peculiar to him alone.

Upon timely objection to evidence concerning the lineup, the court conducted a voir dire in the absence of the jury. Following the State's evidence on voir dire—defendant offered none—the court found: (1) that prior to any lineup defendant was fully advised of his constitutional rights, including the right to have counsel present; (2) that defendant stated "he wanted to stand in the lineup, that the people didn't know him anyway," that he would be glad to stand in the lineup without an attorney being present; (3) that defendant knowingly and intelligently waived his right to the presence of counsel; (4) that the lineup procedure was fairly and properly conducted; (5) that evidence of defendant's identification at the lineup was competent and admissible; and (6) that the in-court iden-

tification of defendant was based upon observation of him at the time of the rape and not influenced by the later lineup procedure.

Defendant contends the lineup procedure, as outlined above, was so unnecessarily suggestive and so conducive to irreparable mistaken identification as to constitute a denial of due process in violation of the Fourteenth Amendment.

[6, 7] There is competent evidence in the record to support the findings of the trial judge. The findings are therefore conclusive. "Such findings of fact, so made by the trial judge, are conclusive if they are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported by competent evidence in the record." *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). *Accord, State v. McVay and Simmons,* 277 N.C. 410, 177 S.E. 2d 874 (1970); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); *States v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344 (1965). Moreover, it should be noted that the dark shirt worn by defendant, the only identifying item of clothing peculiar to him alone, was chosen by defendant himself—not by the law enforcement authorities. "The officers were under no compulsion, constitutional or otherwise, to remove it. Nor were they required to place similar [shirts on] the other boys in the lineup." *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969). In fact, the clothing worn by all six participants in the lineup was chosen by the subjects themselves. Thus the difference in the shades of color cannot be attributed to the officers and does not amount to the kind of rigged suggestiveness in identification procedures discussed and condemned in *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967); and *Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969).

[8, 9] The total circumstances revealed by this record indicate that the rules established for in-custody lineup identification were substantially followed. See *State v. Rogers, supra,* where these rules are discussed. There is no evidence of suggestions by the police prior to the lineup or of any effort by the officers or anyone else to direct the attention of Renee and Daniel Overby to any particular lineup participant. No apparent physical disparities between the participants rendering defendant especially

conspicuous appear in the record, and six participants in the lineup were a sufficient number to negate any suggestion that defendant was the culprit merely because of his presence. Renee and Daniel Overby had ample opportunity to see defendant at the Tastee-Freez (where he asked another boy for ice and matches) and to observe him as he walked and talked with them prior to the assault. At no time have the children ever identified any other person. It is especially significant that Renee recognized defendant on the street the first time she saw him following the assault upon her. Her identification at that time was unequivocal and she has never wavered. Thus, had the lineup been illegal, as suggested but not shown, there is ample evidence that the in-court identification was of independent origin and therefore competent. The trial court so found. This alone renders the in-court identification competent. *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971). There has been no denial of due process to this defendant. *State v. Harris,* 279 N.C. 177, 181 S.E. 2d 420 (1971); *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21 (1971); *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968). See *State v. Rogers, supra,* for cases from other jurisdictions which illustrate the suggestive, unfair type of lineup referred to in *Wade* and *Gilbert* and condemned in *Foster.*

[10, 11] Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). Applying that test to the facts in this case, we see no reasonable possibility that the lineup here could have led to a mistaken identification or contributed to defendant's conviction. After all, the victim had identified this defendant on the street only two or three hours prior to the lineup. But for the on-street identification there would have been no lineup. This conclusively shows that defendant's in-court identification originated independently, and admission of evidence concerning the lineup was entirely

harmless. *Chapman v. California, supra; Harrington v. California, supra; State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7 (1971); *State v. Fletcher and Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). Defendant's third, fourth and fifth assignments are overruled.

[12] Defense counsel proposed to ask a State's witness on cross-examination if defendant, when told by the witness that he was under arrest for rape, did not immediately deny his guilt. In the absence of the jury the witness stated that the defendant did deny it. The court sustained objection to the question and excluded the answer. This is the basis for defendant's sixth assignment of error.

Defendant did not take the witness stand and offered no evidence whatever. The proposed cross-examination was therefore not competent to corroborate the defendant or, for that matter, any other witness. It was properly excluded as a self-serving declaration. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967); *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340 (1958); *State v. Davis,* 246 N.C. 73, 97 S.E. 2d 444 (1957); *State v. McCanless,* 182 N.C. 843, 109 S.E. 62 (1921). This assignment is not sustained.

There was ample evidence to carry the case to the jury and to sustain the verdict. Prejudicial error has not been shown, and the judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. DARRYL WAYNE JOHNSON

No. 112

(Filed 14 January 1972)

1. **Indictment and Warrant § 6— issuance of arrest warrant**

Evidence concerning a rape and defendant's responsibility for it as gathered by police officers and related to the magistrate was sufficient to justify the issuance of an arrest warrant.

2. **Jury § 7— denial of challenges for cause**

In this rape prosecution, the trial court did not abuse its discretion in the denial of defendant's challenges for cause to certain prospective jurors after his peremptory challenges had been exhausted.

3. Rape § 5— sufficiency of evidence

The State's evidence was sufficient for the jury in this rape prosecution where the victim positively identified defendant as her assailant and testified that she had bitten defendant's lip and that defendant had taken her watch, and the State presented evidence that on the morning following the crime defendant appeared with a bitten lower lip and that he used the victim's watch as security for a loan.

4. Criminal Law § 87— solicitor's leading questions — rape victim

The trial court did not abuse its discretion in allowing the solicitor to ask leading questions of a rape victim.

5. Criminal Law § 43— photographs of scene of a rape

Photographs of the scene where the rape occurred were properly admitted for illustrative purposes, nothwithstanding the photographs were taken in the daytime and the crime occurred at night.

6. Criminal Law § 51— qualification of experts

In this rape prosecution, the trial court did not err in finding that one State's witness was a medical expert and that another witness was an expert in medical technology, or in allowing the medical expert to testify as to evidence of recent injuries on the prosecutrix' body and the technologist to testify as to the presence of sperm cells taken from the body of the prosecutrix on the night of the assault.

7. Constitutional Law § 33; Rape § 4— hair and blood samples taken from defendant

The trial court in this rape prosecution did not err in its refusal to suppress evidence of blood and hair samples obtained from defendant with his consent.

8. Criminal Law § 102— solicitor's jury argument

The solicitor's argument to the jury in this rape prosecution was well within the rules of fair debate.

APPEAL by defendant from *Kivett, J.*, May 1971 Session, GUILFORD Superior Court.

In this criminal prosecution the defendant, Darryl Wayne Johnson, was charged by bill of indictment with the rape of Cassandra Lea Hoff, a female. The offense is alleged to have occurred in Greensboro, Guilford County, on February 24, 1971. After his arrest and before his arraignment, the court found the defendant to be indigent and appointed Wallace C. Harrelson, the public defender, to represent him. Defense counsel immediately challenged the validity of the warrant of arrest on the ground the issuing officer did not have probable cause upon which to base a custody order. The court, on defendant's motion, conducted a pre-trial voir dire, found facts, and concluded the

issuing officer had sufficient evidence upon which to issue the warrant.

Following the formal arraignment and plea of not guilty, the selection of the trial jury began. During the selection, the defendant noted exceptions to the court's denial of certain of his challenges for cause. These challenges were made after the defendant had exhausted his peremptories. Twelve regular jurors and one alternate were selected and empaneled.

The victim of the alleged assault, Miss Hoff, age eighteen years, testified as a witness for the State. In short summary, her evidence disclosed that on February 24, 1971, she was a member of the freshman class of the University of North Carolina at Greensboro. Shortly after nine o'clock in the evening she left her dormitory room and went to the Switchboard to look for her roommate who occasionally worked there. Failing to locate her roommate, she took a stroll on Spring Garden Street adjacent to the campus. As she approached Warren Street a man on the other side of Spring Garden called to her. She continued walking. The defendant, Darryl Wayne Johnson, whom she identified at the preliminary hearing and at the trial, followed her, caught up with her from behind, dragged her from the street through a vacant lot and behind a fence forced her to take off her clothes, drew a knife, threatened to "slit her throat," and forcibly and in spite of her violent efforts completed an act of rape. During the struggle the witness lost the heel to one of her shoes. In the struggle, she bit her assailant's lip. Before leaving the scene, the defendant searched the pocketbook of the witness and finding no money, forcibly took her gold Timex watch.

The witness immediately reported to the college infirmary, received examination and treatment from the attending physician, and gave the police officers a description of her assailant.

Acting on the detailed description the victim gave the police as to the age, size, dress, and appearance of her assailant, including the fact that she had bitten his lip, the police arrested the defendant. The witness identified him positively at the preliminary hearing and at the trial. In each instance the identification was positive and unequivocal and based on her view of him under the street light.

As a part of their investigation, the officers went to the place of the alleged assault, made pictures, and there found the heel from one of the victim's shoes.

A witness at the infirmary testified that when Miss Hoff appeared on the night of February 24, 1971, she was very much agitated, had been crying, her hair was stringy and contained leaves and dirt. Her arms and shoulders disclosed fresh bruises and scratches. Dr. Abernathy, who qualified as a medical expert, testified that she examined the witness and found evidence compatible with a charge of criminal assault. She described her findings to the court and jury.

The State offered the testimony of Mrs. Sharpe, whom the court found to be a registered medical technologist qualified as an expert in her special field. She testified that examination and analysis disclosed the presence of sperm cells and lacerations of the vagina membrane. She also testified that in her opinion intercourse had been recent.

The State offered evidence the defendant was in the vicinity of the College shortly before the time of the assault. The following morning he appeared at the home of one of his acquaintances, borrowed $5.00, and gave as security the gold Timex watch identified by the prosecuting witness as the one taken from her at the conclusion of the assault. His explanation at the time of the loan was that he got the lady's watch from his sister.

The defendant neither testified nor offered evidence. At the conclusion of the charge the court excused the alternate juror. The jury returned a verdict of guilty of rape with a recommendation the punishment be imprisonment for life in the State's prison. From the judgment in accordance with the jury's verdict, the defendant appealed.

Robert Morgan, Attorney General, by Edwin M. Speas, Jr., Associate Attorney, for the State.

Wallace C. Harrelson, Public Defender, and Dale Shepherd, Assistant Public Defender, for defendant appellant.

HIGGINS, Justice.

[1] The evidence concerning the crime charged and the defendant's responsibility for it as gathered by the officers and related to the magistrate, was amply sufficient to justify the warrant of arrest and to support the finding of probable cause at the preliminary hearing. *State v. Dickens,* 278 N.C. 537, 180 S.E.

2d 844; *Spinelli v. U.S.*, 393 U.S. 410, 21 L.Ed. 2d 637. The defendant's objections to the issuance of the warrant and to the finding of probable cause are not sustained.

[2] During the jury selection, the defendant made objection to the court's failure to sustain his challenges for cause after his peremptory challenges had been exhausted. The competency of jurors at the time of selection and their continued competence to serve thereafter are matters left largely to the sound legal discretion of the presiding judge. "It is provided by G.S. 9-14, that the judge 'shall decide all questions as to the competency of jurors,' and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. . . . The ruling in respect of the impartiality . . . presents no reviewable question of law." *State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523. See also *State v. Bailey,* 179 N.C. 724, 102 S.E. 406; *State v. Bohanon,* 142 N.C. 695, 55 S.E. 797; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670. The defendant presents nothing which tends to support the defendant's objection to the jury.

[3, 4] The defendant's exception to the sufficiency of the evidence to make out a case does not justify serious discussion. The victim's identification of the defendant was positive and based on a good view of him under a vapor light. During the struggle, she bit his lip and so reported to the officers. The taking of her watch and his use of it as security for a loan the following morning and his appearance with a bitten lower lip remove all reasonable doubt as to the accuracy of the identification. With such evidence before the jury, reason does not appear why the solicitor for days continued to offer little bits of evidence most of which had only a remote bearing on the identification. The defendant contended the evidence resulted from leading questions and should have been disregarded. The reluctance of the victim, a young college girl, to disclose the full details of the criminal assault upon her is understandable. The court's failure to sustain the objection on the ground a question was leading was discretionary and not subject to appellate review. *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5; *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251.

The evidence in this case, both direct and circumstantial, required the court to overrule the defendant's motion to dismiss. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431; *State v.*

Davis, 246 N.C. 73, 97 S.E. 2d 444; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Goins,* 261 N.C. 707, 136 S.E. 2d 97.

[5] The defendant has brought forward three assignments of error based on six exceptions to the court's failure to exclude photographs of the scene where the assault occurred. These photographs were identified as correctly disclosing the conditions at the scene of the crime. They were made the day following the assault. The court instructed the jury the photographs were introduced for the purpose of illustrating the testimony of the witness and for no other purpose. The defendant based his objections on the ground the photographs were taken in the daytime, whereas the assault took place at night. Any change in the scene between the event and the taking of the photographs is not even suggested. The admissibility of the photographs for the limited purpose did not depend on the degree or the source of the illumination at the time they were made. The photographs were admissible for the purpose of illustrating the testimony to the end that the court and jury might better evaluate it. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410.

[6] The defendant insists the court committed error in finding Dr. Abernathy and Mrs. Sharpe were experts in their respective fields; and in permitting them to give expert testimony. Dr. Abernathy was a licensed and practicing physician with many years of experience. Mrs. Sharpe was a registered technician and was experienced in her special field which includes analysis of human body cells, secretions and fluids. Dr. Abernathy testified as to evidence of recent injuries on the body of the witness and Mrs. Sharpe testified as to the presence of sperm cells taken from the body of the prosecuting witness on the night of the assault.

The evidence before the court was amply sufficient to support the findings that each witness was an expert and qualified to testify as such. "The court's finding that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies." *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755. See

also *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548. The court's finding the witnesses were qualified is conclusive on this appeal.

[7] The defendant charges error in the failure of the court to suppress evidence of blood and hair samples obtained from the defendant and cites as authority the case of *Schmerber v. California,* 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826. The evidence offered does not fall within the narrow limits pointed out as error in the Schmerber case. In fact, the defendant consented to the hair and blood samples requested by the officers. The analysis of the samples might have been beneficial to the accused. May we not assume that officers and witnesses, including the victim, are interested in the conviction of the guilty and, as a corollary, the exoneration of the innocent? The conviction of the innocent would tend to create a shield for the guilty, especially in a one-man crime. *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732. At most, analysis of hair and blood samples tended to identify the defendant as belonging to the class to which the guilty party belonged. The analysis might have indicated he did not belong to that class.

[8] Finally, the defendant concludes his brief by finding fault with the solicitor's argument and by exceptions to much of the court's charge. The solicitor's argument seems to be well within the rules of fair debate. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Maynor,* 272 N.C. 524, 158 S.E. 2d 612; *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568.

Realizing the jury pays close attention to the court's instructions, we have examined the charge with that care appropriate to the gravity of the case and the consequences incident to a conviction. However, we find the charge to be fair, accurate, and in accord with our decided cases.

The real issue in the case was the identity of Miss Hoff's assailant. On this issue the direct evidence was short and explicit. The circumstantial evidence supported *and fortified the direct evidence.* Nothing in the record tends to discolor or to obscure the clear picture of guilt painted by the testimony.

In the trial, verdict, and judgment we find

No error.

STATE OF NORTH CAROLINA v. LOUIE ALBERT McCLURE

No. 8

(Filed 14 January 1972)

1. **Criminal Law § 75— confession — intoxication of defendant**

The trial court did not err in the denial of defendant's motion to suppress evidence of his alleged confession made on the ground that he was intoxicated and thus could not effectively waive his constitutional rights, where the court found that defendant was not under the influence of intoxicants at the time of his interrogation and such finding was supported by the evidence.

2. **Criminal Law § 23— guilty plea — defendant's failure to admit guilt**

The trial court could properly accept defendant's plea of guilty notwithstanding defendant did not expressly admit his guilt, since defendant by his plea waived his right to a trial and authorized the court for purposes of the case to treat him as if he were guilty.

3. **Courts § 9— setting aside order of another judge**

A judgment entered by one superior court judge may not be modified, reversed or set aside by another superior court judge.

4. **Courts § 9; Criminal Law § 23— refusal of one judge to accept guilty plea — continuance — acceptance of guilty plea by another judge**

Where one superior court judge refused to accept defendant's plea of guilty of second degree murder and continued the case on defendant's motion when defendant stated during examination as to the voluntariness of his plea that, because of intoxication, he did not know whether or not he committed the crime, the discretionary acceptance of defendant's plea of guilty of second degree murder by another judge when the case again came on for trial was not a modification, overruling or setting aside of the judgment of the first judge, the the case being before the second judge *de novo*.

APPEAL by defendant from *Martin, J.*, 1 December 1970 Session of BUNCOMBE Superior Court.

Defendant was tried under a bill of indictment charging that he "on the 5 day of June 1970 . . . unlawfully, wilfully and feloniously of his deliberate and premeditated malice aforethought, did kill and murder one Gary Evan Miller . . . . " Before trial, defendant filed a motion to suppress the evidence of an alleged confession. The matter came on before Judge Hasty, who conducted a voir dire hearing and entered an order denying defendant's motion to suppress. Defendant was arraigned, and the State elected to try him for second degree murder. Defendant, through counsel, tendered a plea of guilty of second degree murder. During Judge Hasty's inquiry into the voluntariness of the plea, defendant hestitated when the Judge

asked if he wished to plead guilty. Upon further questioning, defendant stated that, because of intoxication, he did not know whether he committed the crime or not. Judge Hasty, thereupon refused to accept the tendered plea, ordered it stricken from the record and, upon motion of defense counsel, continued the case.

The case came on for trial before Martin, J., and defendant again tendered a plea of guilty of murder in the second degree. After an extended inquiry into the voluntariness of the plea, the court found the plea to have been freely and voluntarily made, accepted the plea, and ordered it entered upon the minutes. After hearing the evidence of the State and defendant, the trial judge sentenced defendant to imprisonment for a term of not less than twenty-five years nor more than thirty years. Defendant appealed. This case is before us pursuant to our general order of referral effective 1 August 1970.

Attorney General Morgan and Assistant Attorney General Ray for the State.

Gudger, Erwin and Crow, by James P. Erwin, Jr., for defendant.

BRANCH, Justice.

[1] Defendant assigns as error Judge Hasty's denial of the motion to suppress evidence of his alleged confession. Defendant contends that his alleged confession was involuntary because his intoxication prevented effectual waiver of his constitutional rights.

Pursuant to defendant's motion to suppress, Judge Hasty properly held a voir dire hearing and heard evidence from both the State and defendant. On voir dire defendant testified that he had been drinking heavily for three weeks prior to 5 June 1970, and that because of his intoxication he remembered nothing about the events of the night of 4 June 1970 or early morning of 5 June 1970. He specifically stated that he did not remember talking to or making admissions to deputy sheriff J. C. Laws, nor did he remember signing a waiver. He, in part, stated: "All I remember is that morning, Thursday (5 June 1970) ; that afternoon I don't know where I was. The next thing I remember is waking up on that cold steel up there in the jail on Friday."

J. C. Laws, a deputy sheriff of Buncombe County, testified that he went to the Dolson residence on the night of 5 June 1970 and observed Gary Miller with a wound in his abdomen. He further testified:

> "Later on the same evening I went to the home of Mrs. Alva Brooks at 111 Edwards Avenue and there saw Louie Albert McClure. About one and a half hours later we transported Mr. McClure along with Joseph Charles Brooks to the sheriff's department. I smelled the odor of alcohol about Mr. McClure and observed that he was shakey. I advised Mr. McClure of his constitutional rights and he made a statement as follows:
>
> "He said, 'I went to the Gary Miller home at 305 Richmond Avenue about 1:30 a.m., this date and knocked on the door and Gary Miller came to the door. I had never seen the man before. I went up there to shoot him and I did. I went back to the house and threw the gun on Joe's bed and told Joe I had shot a fellow.'
>
> "I wrote the statement in my own handwriting and Mr. McClure looked at the statement and then signed it. He made no other statement other than shown above. In my opinion Mr. McClure was not substantially under the influence of alcohol at the time he made the statement."

Deputy Sheriffs John H. Barnes, Jr., and Phillip Anderson each testified that they saw defendant in the early morning hours of 5 June 1970, and in their respective opinions defendant was not under the influence of intoxicants.

Defendant's motion to suppress is founded solely on his intoxication at the time he allegedly made the inculpatory statements. He does not contend that the voir dire proceedings were improperly conducted.

In *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, Justice Sharp clearly stated the rule concerning a defendant's plea of drunkenness as a bar to the admissibility of his confession, to wit:

> " . . . Unless a defendant's intoxication amounts to mania—that is, unless he is so drunk as to be unconscious of the meaning of his words—his intoxication does not render inadmissible his confession of facts tending to in-

criminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, a question exclusively for the jury's determination."

This Court reaffirmed and adhered to the rule stated above in *State v. Logner,* 269 N.C. 550, 153 S.E. 2d 63. See also *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6, and *State v. Stephens,* 262 N.C. 45, 136 S.E. 2d 209.

Among Judge Hasty's full findings of fact was the specific finding that "On Friday morning, June 5, 1970, about 1 a.m., and thereafter until his arrest and interrogation, the defendant was not under the influence of intoxicating liquors . . . . "

There was ample evidence to support this finding and the other findings incorporated into the record. We find no error of law which may be imputed to Judge Hasty's conclusion that defendant freely, understandingly and voluntarily made the statements which he sought to suppress. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *State v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572.

Judge Hasty ruled correctly, and his ruling could therefore have no prejudicial effect on defendant's decision to enter a plea of guilty.

Defendant next contends that Judge Martin erred when he accepted the plea of guilty of second degree murder.

[2] We first consider whether Judge Martin properly accepted the plea in light of defendant's failure to expressly admit his guilt.

When defendant tendered his plea of guilty of second degree murder, Judge Martin carefully examined defendant concerning the voluntariness of his plea. We quote a portion of this examination, as follows:

Q. Now, you know that you are charged with second degree murder, don't you?

A. Yes sir.

Q. And you know and understand that you have a right to plead not guilty and be tried by a jury, don't you?

A. Yes sir.

Q. Now, your lawyer has said that you have instructed him to enter a plea of guilty to second degree murder. Now, I ask you how do you plead to the charge of second degree murder?

A. I plead guilty.

Q. Now, you know that on a plea of guilty to second degree murder that you could be sent to prison for as much as 30 years, don't you?

A. Yes sir.

Q. Now, has anyone, has your lawyer or the solicitor or any policeman or law officer or anyone made any promise or threat to you to influence you to plead guilty to this charge?

A. No, they haven't.

Q. Now, you have had plenty of time to talk to and work with Mr. Erwin in this case, haven't you?

A. Yes, I have.

Q. Are you satisfied with his services on your behalf?

A. Very much so.

The court then found that the plea was freely and voluntarily made, and accepted the plea as tendered.

In *North Carolina v. Alford,* 400 U.S. 25, 27 L.ed. 2d 162, 91 S.Ct. 160 (1970), defendant was indicted for murder. There was strong evidence of guilt, and upon recommendation of his counsel he tendered a plea of guilty of second degree murder, although he continued to disclaim any guilt of the crime. The trial judge heard strong damaging evidence before sentencing. The U. S. Supreme Court, in holding that the trial judge did not commit constitutional error in accepting the plea *inter alia,* stated:

> The issue in *Hudson v. United States,* 272 U.S. 451 (1926), was whether a federal court has power to impose a prison sentence after accepting a plea of nolo contendere, a plea by which a defendant does not expressly admit his

guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty. The Court held that a trial court does have such power, and, except for the cases which were rejected in Hudson, the federal courts have uniformly followed this rule, even in cases involving moral turpitude. *Bruce v. United States, supra,* at 343 n. 20, 379 F. 2d, at 120 n. 20 (dictum). See, e.g., *Lott v. United States,* 367 U.S. 421 (1961) (fraudulent evasion of income tax); *Sullivan v. United States,* 348 U.S. 170 (1954) (ibid.); *Farnsworth v. Zerbst,* 98 F. 2d 541 (CA5 1938) (espionage); *Pharr v. United States,* 48 F. 2d 767 (CA6 1931) (misapplication of bank funds); *United States v. Bagliore,* 182 F. Supp. 714 (EDNY 1960) (receiving stolen property). Implicit in the nolo contendere cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.

These cases would be directly in point if Alford had simply insisted on his plea but refused to admit the crime. The fact that his plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law. See *Smith v. Bennett,* 365 U.S. 708, 712 (1961); *Jones v. United States,* 362 U.S. 257, 266 (1960). Cf. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630-632 (1959). Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Defendant recognizes the holding in *Alford,* but points to the fact that, in *Alford,* defendant had much to gain in that he avoided the possibility of the death sentence by pleading guilty to second degree murder, while here, defendant gained nothing

since the State had already elected to try him for second degree murder.

We do not think that this point is controlling. The true test is whether defendant's plea was voluntarily, understandingly and intelligently tendered. *N.C. v. Alford, supra; Boykin v. Alabama,* 395 U.S. 238, 23 L.ed. 2d 274, 89 S.Ct. 1709 (1969). It should be noted that in *Alford* defendant continuously denied his guilt of any crime, while in instant case defendant adopts the posture of not expressly admitting his guilt while waiving trial and authorizing the court to impose sentence.

We can only speculate as to the motives which caused defendant to plead guilty. Perhaps defendant, in light of the strong evidence against him, concluded that punishment would be milder if he avoided a hotly contested trial which would highlight an unprovoked and unnecessary killing. Further, there is the possibility that defendant recognized his guilt without being willing to publicly disclose it. The true reasons which induce an accused to plead guilty are often known only to himself, and he should be permitted, after receiving advise of counsel, to judge for himself what plea to enter. See *State v. Kaufman,* 51 Iowa 578, 2 N.W. 275 (1879). It is then the duty of the trial judge to determine whether the plea was freely, understandingly and voluntarily made.

Defendant further argues that the plea was invalid because Judge Martin reversed, modified or overruled a judgment entered by Judge Hasty when he accepted defendant's plea.

[3] It is generally recognized that "[t]he proper method for obtaining relief from legal errors is by appeal, G.S. 1-277, and not by application to another Superior Court. 'In such cases, a judgment entered by one judge of the Superior Court may not be modified, reversed or set aside by another Superior Court Judge.' *Davis v. Jenkins,* 239 N.C. 533, 80 S.E. 2d 257; *Rawls v. Mayo,* 163 N.C. 177, 79 S.E. 298." *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107.

A defendant may retract his plea of guilty and plead not guilty. He may also withdraw his plea of not guilty, even after it is recorded, and plead guilty. However, in either case the retraction is not a matter of right but is addressed to the sound discretion of the trial judge. *State v. Branner,* 149 N.C. 559, 63 S.E. 169.

[4] This case was before Judge Martin *de novo,* because Judge Hasty, in the exercise of his discretion, refused to accept defendant's plea and continued the case upon defendant's motion. It was not before Judge Martin as an appeal from an order or judgment of Judge Hasty. Judge Martin's discretionary acceptance of the plea did not modify, overrule or set aside a judgment of another Superior Court judge.

This record reveals that defendant, represented by competent counsel, elected to tender a plea of guilty to the charge of second degree murder, and the able trial judge, after conducting a careful examination as to whether the plea was freely, voluntarily and understandingly made, accepted the plea. Under these circumstances, the plea should not be disturbed.

The proceedings in the trial court were free from error, and Judge Martin's judgment is

Affirmed.

STATE OF NORTH CAROLINA v. WALTER EUGENE JOHNSON

No. 42

(Filed 14 January 1972)

1. **Criminal Law § 66— in-court identification — pretrial view of defendant at victim's home**

   The evidence presented on voir dire supported the court's determination that a rape victim's in-court identification of defendant was of independent origin based on observations at the scene of the rape and was not tainted by her prior view of defendant when an officer brought defendant to her home, and that defendant knowingly, understandingly and voluntarily waived his right to an attorney before he was viewed by the victim.

2. **Rape § 5— sufficiency of evidence**

   The State's evidence, including the victim's in-court identification of defendant, was sufficient to be submitted to the jury in this rape prosecution.

APPEAL by defendant from *Kivett, J.,* January 4, 1971, Criminal Session, FORSYTH Superior Court.

The defendant, Walter Eugene Johnson, was tried on a bill of indictment proper in form, charging the capital offense of

rape. The victim was Marcella Stroud, a female child under the age of twelve years. The offense was committed in Forsyth County on September 11, 1970.

The defendant's affidavit of indigency filed in court after his arrest disclosed that he is single, has $435 in cash, and is employed at a weekly salary of $90. The district judge found the defendant was financially able to employ counsel and denied his petition that counsel be assigned. On October 26, 1970, Judge Walter E. Johnston, Jr. found the defendant to be indigent and appointed W. Warren Sparrow attorney to represent him.

At the trial Marcella Stroud testified that just before five o'clock on the evening of September 11, 1970, as she was returning home from a store, a man she did not know grabbed her by the sweater, pushed and dragged her up a steep hill to a vacant house. He threatened her with an open knife, tied a necktie around her mouth, and forced her to lie down on some papers and by force had intercourse with her. " . . . (A)fter he heard somebody calling, . . . the man got up and zipped his pants up and then I got up. . . . Then he say wait little girl, and then he ran out before I did."

The witness further testified she went to the home of her aunt who discovered blood on her clothing. Her mother took her home and made inquiry as to what had happened. At first she said a boy was responsible. After further questioning she said her assailant was a man. She was afraid to tell on him because he had threatened to kill her.

When the officers came in response to a call, she described the man as being about forty years old with sideburns, a little thin moustache and an Afro-hairdo with cross parts on the top and back. He was wearing a green shirt.

Acting on the description given by the victim, the officers interviewed a number of persons in the vicinity of the assault. In consequence of the information they obtained, they went to the house of the defendant's sister with whom he lived. Officer McFadden interviewed the defendant whom he had known for many years. "I told him somebody was accusing him of having messed with a little kid. . . . I . . . read him . . . the Miranda warning." He signed the written waiver which concluded: "I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer

questions. . . . I understand and know what I am doing." He stated to the officer that he got off work around four o'clock, went to town and about four-thirty returned to the house where he lived and did not leave thereafter. When told of the charge against him, he said: " . . . I know what this is all about, . . . I don't want to call no lawyer. . . . I did not do anything and if you will bring the person down that has accused me of this, I will convince them of this." The officer thereafter took the defendant to the Stroud home where Marcella looked at him.

The defendant objected to the admission of any identifying evidence on the ground the identification was based on Marcella's view of the defendant who was then in police custody; and the identification on that account was tainted and inadmissible. The court in the absence of the jury conducted an inquiry reported on thirty-seven pages of the record. Based on the evidence developed, the court made findings of fact reported on six pages of the record. The court concluded: " . . . (T)he evidence is clear and convincing that the in-court identification of the defendant by Marcella Stroud is of independent origin based on observations made at the scene of the rape alleged in this case, and that the in-court identification of the defendant by Marcella Stroud isn't tainted by any other factors . . . . "

After the jury was recalled, Marcella identified the defendant saying: "That was the man."

The State offered Dr. Quivers, a medical expert, who testified that his vaginal examination disclosed " . . . (B)right and dark red blood. . . . That means that the child underwent some sort of trauma . . . damage to the vaginal mucosa. . . . "

At the close of the State's evidence the defendant lodged and the court overruled a motion to dismiss.

The defendant testified and offered witnesses in his defense. He stated that on September 11, 1970, he worked until four-thirty, went to several places in town, and got home at ten minutes until six o'clock and did not leave until the police came a day or two later. On cross-examination the defendant admitted that since 1950 he had been convicted in court four times for assault on a female, five times for assault with a deadly weapon, and one time for larceny. His convictions for public drunkenness and traffic violations were numerous.

The defendant's sister, with whom he lived, testified: " . . . (I)t was about twenty-six minutes past six when Walter came home . . . . " James Pope testified that he and the defendant worked together, that they left work at four-thirty. They went to town, made some stops and he took Walter home. On cross-examination he admitted he had been convicted six times for assault on a woman and that he had been convicted of numerous other charges.

At the close of all the evidence the defendant renewed, and the court again overruled, his motion to dismiss.

After the arguments and the court's charge, the jury deliberated and returned in the court a verdict of guilty of rape with a recommendation the punishment be imprisonment for life in the State's prison. From a sentence of life imprisonment, as the jury's recommendation, the defendant appealed. A second addendum to the record discloses the verdict as returned by the jury.

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

W. Warren Sparrow for defendant appellant.

HIGGINS, Justice.

The defendant by brief and by oral argument, presents two questions for review: (1) Was the in-court identification of the defendant by the prosecuting witness tainted and rendered inadmissible by the prior identification while the defendant was in custody of the officers and without counsel? and (2) Was the evidence sufficient to survive the motion to dismiss and to sustain the guilty verdict? Neither question is a stranger to this Court.

The victim, Marcella Stroud, age 9, did not at first report the assault. Shortly after its commission her aunt and her mother discovered the evidence of assault, made inquiry, and were told a boy was responsible. When questioned further as to his identity, she admitted a man about forty years old dragged her from the street into a vacant house where he committed the act of rape. She did not at first make a truthful statement for fear of the defendant's threat to kill her. However, on further inquiry she gave her mother a detailed description of her

assailant and repeated the description to the police. She described her assailant as about forty years old with sideburns, a thin moustache and Afro-hairdo with two cross parts in the hair. He was wearing a green shirt and carried a knife which he opened and threatened to kill her. Although the defendant and the victim lived within the same section of Winston-Salem, neither knew the other.

Acting on the victim's description and other information developed by inquiry, the officers interrogated the defendant telling him he was suspected of having "messed with a little kid." He was given due warning of his rights and signed a written waiver of counsel and consented to the interrogation.

[1] At the trial when the victim was asked to identify her assailant the defendant objected and requested a hearing in the absence of the jury. The evidence developed on the voir dire fully sustained the findings of fact made by the court and supported the court's conclusion, " . . . (T)he evidence is clear and convincing that the in-court identification of the defendant by Marcella Stroud is of independent origin based on observations made at the scene of the rape alleged in this case, and that the in-court identification of the defendant by Marcella Stroud isn't tainted by any other factors that were so impressively suggestive so as to give rise to a substantial likelihood of . . . misidentification; and that the defendant knowingly, understandingly, voluntarily, and intelligently waived his constitutional right to have an attorney present before . . . being viewed by others, including Marcella Stroud . . . . " The defendant did not offer any evidence on the voir dire, hence the evidence was not in conflict.

The trial court's findings are amply supported by that evidence, hence binding on the courts. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561; *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. The objection to Marcella's in-court identification of the defendant was properly overruled. *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732; *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199.

[2] The State's evidence of guilt and the defendant's denial raised issues of fact to be decided by the jury. *State v. McKnight,*

279 N.C. 148, 181 S.E. 2d 415; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755; *State v. Davis,* 246 N.C. 73, 97 S.E. 2d 444; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

The State having offered substantial evidence of every material element of the crime charged in the indictment, the jury finding of guilt is conclusive. In the trial, verdict, and judgment we find

No error.

STATE OF NORTH CAROLINA v. CHARLES M. SHELLY

No. 91

(Filed 14 January 1972)

1. **Criminal Law § 23— voluntariness of guilty plea**

Acceptance of defendant's plea of guilty of assault with intent to commit rape will not be disturbed where there was ample evidence to support the trial judge's finding that defendant entered the plea freely, understandingly and voluntarily.

2. **Criminal Law § 161— exception to entry of judgment — appellate review**

Defendant's assignment of error to the signing and entry of the judgment upon his plea of guilty presents only the face of the record proper for review.

APPEAL by defendant from *Kivett, J.,* 3 May 1971 Criminal Session of FORSYTH Superior Court.

Defendant was charged in a bill of indictment with the capital crime of rape. Upon call of the case defendant, through his privately employed counsel, tendered a plea of guilty to the lesser offense of assault with intent to commit rape. Before allowing the plea to be entered, the trial judge carefully and extensively examined defendant, under oath, as to the voluntariness of his plea. Defendant also, under oath, executed a written "transcript of plea" containing statements indicating that the plea was freely, understandingly and voluntarily made. The court then adjudged that the plea of guilty by defendant is "freely, understandingly and voluntarily made," and ordered that defendant's plea of guilty be entered into the record.

The State offered evidence, and it appears in the statement of the case on appeal that "The State's evidence, through the testimony of E. P. Oldham, a Deputy Sheriff of the Forsyth County Sheriff's Department, tended to show that the defendant did feloniously commit the crime of assault with intent to commit rape."

Defendant offered no evidence. The trial judge imposed a sentence of not less than ten years nor more than fifteen years in the State Department of Correction. Defendant appealed. This case is before this Court pursuant to our general referral order effective 1 August 1970.

Attorney General Morgan and Trial Attorney Magner for the State.

Laurel O. Boyles; Wilson, Morrow and Boyles, for defendant.

PER CURIAM.

Defendant's only assignment of error is that "the trial judge erred in signing and entering the judgment as appears of record."

[1] There was ample evidence to support the trial judge's finding that defendant freely, understandingly and voluntarily entered his plea of guilty to assault with intent to commit rape, and acceptance of the plea will not be disturbed. *State v. Jackson,* 279 N.C. 503, 183 S.E. 2d 550; *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433. The plea of guilty is equivalent to a conviction of the offense charged. *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591.

[2] Further, defendant's sole assignment of error presents the case for review for error appearing on the face of the record. The indictment sufficiently charged the crime to which defendant voluntarily pleaded guilty in a properly organized court. No fatal defect appears upon the face of the record, and the sentence imposed was within statutory limits. *State v. Jackson, supra; State v. Higgs,* 270 N.C. 111, 153 S.E. 2d 781.

We have carefully examined this record and find

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ACCEPTANCE CORP. v. FEDER

No. 82 PC.

Case below: 12 N. C. App. 696.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 January 1972.

MACHINERY CO. v. INSURANCE CO.

No. 112 PC.

Case below: 13 N.C. App. 85.

Petition for writ of certiorari to North Carolina Court of Appeals denied 28 January 1972.

STATE v. BLAYLOCK

No. 101 PC.

Case below: 13 N.C. App. 134.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 February 1972.

STATE v. CRAWFORD

No. 114 PC.

Case below: 13 N.C. App. 146.

Petition for writ of certiorari to North Carolina Court of Appeals denied 28 January 1972.

STATE v. FARRIS

No. 100 PC.

Case below: 13 N.C. App. 143.

Petition for writ of certiorari to North Carolina Court of Appeals denied 28 January 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. FOUNTAIN

No. 107 PC.

Case below: 13 N.C. App. 107.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 February 1972.

STATE v. FOWLER

No. 108 PC.

Case below: 13 N.C. App. 116.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 February 1972.

STATE v. GREENE

No. 12.

Case below: 12 N.C. App. 687.

Motion of Attorney General to dismiss appeal for lack of a substantial constitutional question allowed 28 January 1972.

STATE v. HOLT

No. 1 PC.

Case below: 13 N.C. App. 339.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 February 1972.

STATE v. JORDAN

No. 91 PC.

Case below: 13 N.C. App. 254.

Petition for writ of certiorari to North Carolina Court of Appeals denied 14 January 1972.

STATE v. NICKERSON

No. 99 PC.

Case below: 13 N.C. App. 125.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 February 1972.

STATE v. REDFERN

No. 106 PC.

Case below: 13 N.C. App. 230.

Petition for writ of certiorari to North Carolina Court of Appeals denied 28 January 1972.

STATE v. RHODES

No. 22.

Case below: 13 N.C. App. 247.

Motion of Attorney General to dismiss appeal for lack of a substantial constitutional question allowed 28 January 1972.

STATE v. RICH

No. 29.

Case below: 13 N.C. App. 60.

Petition for writ of certiorari to North Carolina Court of Appeals denied 1 February 1972. Appeal dismissed for lack of substantial constitutional question 1 February 1972.

STATE v. ROBINETTE

No. 102 PC.

Case below: 13 N.C. App. 224.

Petition for writ of certiorari to North Carolina Court of Appeals denied 28 January 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WATSON

No. 88 PC.

Case below: 13 N.C. App. 54.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 14 January 1972.

WILMAR, INC. v. ANDERSON

No. 116 PC.

Case below: 13 N.C. App. 80.

Petition for writ of certiorari to North Carolina Court of Appeals denied 28 January 1972.

WILMAR, INC. v. LILES and WILMAR, INC. v. POLK

No. 117 PC.

Case below: 13 N.C. App. 71.

Petition for writ of certiorari to North Carolina Court of Appeals denied 28 January 1972.

STATE OF NORTH CAROLINA v. LAWRENCE STEPNEY

No. 92

(Filed 28 January 1972)

1. **Criminal Law § 91— motion for continuance**

A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion.

2. **Criminal Law § 91— motion for continuance — supporting affidavit**

A motion for continuance should be supported by an affidavit showing sufficient grounds.

3. **Criminal Law § 91— absence of witnesses — denial of continuance**

The trial court did not err in the denial of defendant's motion for continuance due to absence of witnesses "located in the area of Chicago" who were allegedly necessary to prove his defense of alibi, where the oral motion was not supported by affidavit or other proof of the names of absent witnesses or what defendant expected to prove by such witnesses.

4. **Constitutional Law § 32; Criminal Law § 66— photographic identification — right to counsel**

A suspect has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification regardless of whether he is at liberty or in custody at the time.

5. **Criminal Law § 66— identification testimony — general objection**

Upon even a general objection to identification testimony, the trial judge should conduct a voir dire in the absence of the jury, find facts, and thereupon determine the admissibility of in-court identification testimony.

6. **Criminal Law § 66— pretrial photographic identification**

Pretrial photographic procedure was not impermissibly suggestive where both robbery victims observed defendant during the robbery and described defendant and his clothing immediately thereafter, the victims rejected numerous photographs as not being those of the robbers, the victims immediately recognized defendant and another as the robbers upon being shown three additional photographs, and neither victim has ever identified anyone else except defendant and his accomplice.

7. **Criminal Law § 66— pretrial photographic identification — failure to hold voir dire — harmless error**

Failure of the trial court in a robbery prosecution to conduct a voir dire and make findings of fact concerning a pretrial photographic identification procedure was harmless error where the record shows that the photographic identification was free of impermissible suggestiveness, and the evidence is clear and convincing that the in-court identification originated with observation of defendant at the time of the robbery and not with the photographs.

8. Criminal Law § 169— admission of evidence over objection — similar evidence admitted without objection

The admission of evidence over objection cannot be regarded as prejudicial when testimony of like import is thereafter admitted without objection.

9. Criminal Law § 162— failure to object

When there is no objection to the admission of evidence, the question of its competency is foreclosed on appeal.

10. Criminal Law § 75— spontaneous statements by defendant to officers — failure to waive counsel

The trial court did not err in the admission of testimony that, while being transported to Central Prison for safekeeping, defendant told officers that he "was sorry that the robbery happened, but that he didn't shoot anybody, that the other man — or another man — had done the shooting," notwithstanding defendant had not waived his right to counsel prior to making the statement, where the court found upon competent evidence that defendant's statement was not in response to any question by the officers but was spontaneously made by defendant.

11. Criminal Law § 175 — findings of fact — conclusive on appeal

The findings of the trial court are binding and conclusive in appellate courts in this jurisdiction when supported by competent evidence.

12. Robbery § 5— sufficiency of instructions

Contention by defendant that the court's instructions in an armed robbery prosecution were inadequate in that "the jury could have returned a compromise verdict, even though it followed the Court's instructions," *held* without merit.

13. Assault and Battery § 5; Criminal Law § 26; Robbery § 6— armed robbery — felonious assault during robbery — conviction of both crimes

Where defendant was tried upon separate indictments charging armed robbery and felonious assault committed during the robbery, and the jury returned verdicts of guilty of armed robbery and guilty of assault with a deadly weapon inflicting serious injury, the trial court could properly pronounce separate judgments for each crime, since an assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery.

Justices HIGGINS and LAKE concurring in part and dissenting in part.

APPEAL by defendant from *James, J.*, 9 November 1970 Session, CRAVEN Superior Court.

Defendant was charged in separate bills of indictment with armed robbery and felonious assault. The cases were consolidated for trial.

The State's evidence tends to show that on and prior to 25 February 1970 Lillian D. Powell was the manager of the Western Union Office at 414 Broad Street in New Bern, North Carolina. A man named Charles Hampton, Jr., entered the office alone at 1:45 p.m. on that date and "appeared to be making out a money order." He left and returned at 2:15 p.m. accompanied by the defendant Lawrence Stepney. Each had a gun. Hampton entered the area behind the counter, rushed up to Mrs. Powell's desk and said, "This is a stickup, this is a real hold up." Defendant held a gun on Mrs. Powell while Charles Hampton went to the back of the office and "ordered Mr. Harrelson [another Western Union employee] to come and lie down on the floor." Harrelson did so and Hampton "hit him on the back of the head with a gun, and proceeded to tape him up." Hampton then ordered Mrs. Powell to lie on the floor, and he taped her arms and legs while defendant held the gun on her. Hampton then shot Mr. Harrelson in his left leg above the knee and said, "You know I mean business." Defendant then moved about the office pulling out drawers and emptying the safe. All told, the robbers took $484.00 in cash belonging to Western Union, Mrs. Powell's blue Lady Buxton wallet containing $238.00 in cash, Mr. Harrelson's watch and wallet containing $75.00 in cash, six books of Western Union Express Money Orders in hundred-dollar denominations (thirty in each book), and five and one-half books of money order drafts in hundred-dollar denominations (thirty in each book). All the Western Union Express Money Orders bore the stamp "New Bern, North Carolina," and each bore a serial number which had been recorded in the records of the office.

After the robbers left, Mr. Harrelson was taken to the hospital. Officer Bratcher arrived on the scene about 2:20 p.m. He examined the premises and dug a bullet (S-10) from the floor where Mr. Harrelson lay when he was shot. He took possession of a partly filled out Western Union Telegraph Money Order, identified by Mrs. Powell as the one Hampton was filling out when he first entered the office. Thereafter, that same day, Officer Bratcher carried about twenty-five photographs of different persons to the hospital and showed them to Mr. Harrel-

son who could not, and did not, identify any of them. Photographs of defendants Stepney and Charles Hampton were not among this group. Three or four days later Mr. Harrelson was shown three additional photographs (S-7, S-8 and S-9), and he immediately identified S-7 (Charles Hampton, Jr.) and S-9 (Lawrence Stepney) as the robbers.

Officer Bratcher received a telephone call from Detective Smythe of the District of Columbia Police at approximately midnight on 25 February 1970. As a result of that conversation he went to Washington, D. C., about a month later, accompanied by Officer Pate, to return Lawrence Stepney, Charles Hampton, Jr., and Hoyle L. Starks, Jr., to Craven County. At the extradition hearing defendant was wearing an Afro haircut, a blue shirt, brown jacket and checkered pants. They waived extradition and were returned to New Bern, North Carolina. In addition to the three men, the officers brought back from Washington, D. C., the following items: (1) an envelope containing $209.00 in cash; (2) six books of Western Union Money Orders stamped "New Bern, North Carolina" and bearing serial numbers matching the numbers on a list maintained by Mrs. Powell: (3) one blue Lady Buxton wallet containing an identification card bearing the name of Lillian D. Powell of New Bern, North Carolina; (4) one brown man's wallet containing an identification card bearing the name of Daniel Harrelson of Kinston, North Carolina; (5) one expended .22 caliber cartridge and a .22 caliber revolver containing eight live rounds and one empty in the chamber; (6) an envelope containing $50.00 in cash and another containing $149.00 in cash.

Defendant and Hampton were lodged in the Craven County Jail. On 28 April 1970 they escaped and were recaptured three miles west of New Bern on Highway 17. Defendant Lawrence Stepney was shot and injured during his recapture. Following treatment in Craven County Hospital, where a bullet was removed from his body, defendant was taken to Central Prison in Raleigh for safekeeping pending trial. On the trip to Raleigh, while seemingly in a repentant mood, defendant said they really treated him nicely at the hospital; that he was sorry the robbery happened; that he didn't shoot anybody—the other man did the shooting. Upon timely objection by defendant, a voir dire was conducted in the jury's absence to determine admissibility of defendant's statement. Deputy Sheriff Edwards and

Officer Bratcher testified on voir dire for the State, and defendant testified in his own behalf. The court found facts and concluded that the statement was volunteered by defendant who was not being interrogated by the officers, was freely and understandingly made, and was competent. It was admitted before the jury over objection.

Based on her observations at the time of the robbery, Mrs. Powell positively identified defendant and Hampton at the preliminary hearing and, over defendant's objection, in court at the trial. She described defendant as having an Afro haircut, wearing a blue shirt and brown coat and taller than Hampton. "From my observation of the defendant Lawrence Stepney and the person that I saw on that day, there is no doubt at all in my mind that this is the same man, because he held a gun in my face for about five minutes, and I had a good look at him for about five whole minutes. He told me not to look 'round or move; I had to look at him in the face."

DEFENDANT'S EVIDENCE

Defendant Stepney testified that he left his home in Chicago, Illinois, about 7:30 a.m. on 25 February 1970 going to Washington, D. C., to obtain a job. He traveled with a friend named Frank Robinson in Robinson's car and arrived in Washington, D. C., around 6:30 or 7:00 p.m. that day. He entered a restaurant to phone his family and let them know he had arrived safely in Washington. There, he met Charles Hampton, Jr., whom he had known in Chicago and decided to stay at a motel with him that night. He had not previously known Hoyle Starks, Jr., but met him for the first time at the restaurant. Frank Robinson left to spend the night with his relatives, first dropping defendant off at the Harrington Hotel. Hampton and Starks proceeded to the Harrington Hotel in another car. Defendant went to the desk to register but was told he had to have reservations. Hampton started to call another hotel, and at that time the police entered and arrested them.

Defendant further testified he was brought to New Bern in March 1970, escaped jail, and received a gunshot wound during his recapture on April 29. A bullet was removed from his body at Craven Memorial Hospital on April 30. After five days he was released from the hospital and taken to Raleigh. On the

way to Raleigh with Sheriff Berry and Deputy Edwards, "they did not ask any questions. There was just talk in general. . . . I don't deny saying I was sorry this thing happened; I do deny saying the other man shot him."

Defendant further testified that while he was in the hospital and thought he was going to die, he wrote a letter to the Western Union Company "and told the lady I was sorry this thing happened." He continued to deny, however, that he committed the robbery.

Defendant's mother testified that her son came by her home in Chicago between 6:30 and 7:00 a.m. on the morning of 25 February 1970 and told her he was going to Washington, D. C., with Frank Robinson.

Charles Hampton, Jr., testified that he had been convicted of this robbery but was not guilty; that he was not in New Bern on 25 February 1970; that he arrived in Washington at 10:45 a.m. on that date, riding in a Chrysler belonging to Starks' uncle in Chicago, and had been in Washington seven or eight hours when he first saw defendant Lawrence Stepney; that he was surprised to run into defendant in the Washington restaurant; that he "heard Starks testify in my presence at my trial that he came down here to New Bern in his uncle's car. I heard him so testify after he was intimidated." Hampton's further testimony with respect to events in Washington after meeting defendant corroborates the testimony of defendant in minute detail. He denied that money orders, wallets, and other items stolen from the Western Union Office at New Bern were "taken from a bag where he was standing. They were not in the phone booth where I was making a call."

Defendant was convicted on both charges and sentenced to not less than twenty nor more than twenty-five years for the armed robbery and not less than two nor more than three years for the felonious assault, to run concurrently. He gave notice of appeal, but his appeal was not perfected in apt time. However, his petition for certiorari to bring up a late appeal was allowed by the Court of Appeals in conference on 27 April 1971. The case on appeal was duly docketed in that court on 20 July 1971 and transferred to the Supreme Court for initial appellate review pursuant to our general order dated 31 July 1970.

E. Lamar Sledge, appointed counsel for defendant appellant.

Robert Morgan, Attorney General; James L. Blackburn, Staff Attorney; Walter E. Ricks III, Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

Prior to introduction of evidence defendant moved for a continuance due to absence of witnesses "located in the area of Chicago," allegedly necessary to prove his defense of alibi. Denial of the motion constitutes defendant's first assignment of error.

[1, 2] A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion. *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966). Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for continuance should be supported by an affidavit showing sufficient grounds. *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948).

[3] Here, the record recites that defendant attempted through counsel "to obtain statements of the prospective testimony of such persons in regard to defendant's defense of alibi, but without success." No names of absent witnesses are shown. What defendant expected to prove by these witnesses must be surmised. The oral motion is not supported by affidavit or other proof. This state of the record suggests only a natural reluctance to go to trial and affords no basis to conclude that absent witnesses, if such existed, would ever be present for the trial. No abuse of discretion is shown on these facts, and the assignment of error based thereon is overruled.

Defendant contends his in-court identification was tainted by an out-of-court pretrial photographic identification in that (1) he was not represented by counsel and (2) the circumstances surrounding the photographic identification were unnecessarily suggestive and conducive to irreparable mistaken identity. He interposed two objections to Mrs. Powell's references to him and two objections and one motion to strike to the witness Harrelson's references to him. Each witness was positive when identifying defendant as one of the robbers and stated that identification was based on personal observations

made of the defendant at the time of the robbery. Without conducting a voir dire the court overruled the objections and denied the motion to strike. The act of the court in this respect constitutes defendant's second assignment of error.

This assignment presents for decision whether the trial court committed prejudicial error in failing to conduct a voir dire examination and make appropriate findings of fact with respect to (1) the procedures employed in the identification process and (2) the origin of the in-court identification.

[4] A suspect has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether he is at liberty or in custody at the time. *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970). Such pretrial identification procedure is not a critical stage of the proceeding as delineated in *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967), and *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967).

We held in *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481 (1968), that 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. However, this rule has never been applied directly to pretrial photographic identification procedures.

In *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), we said: "In proper cases the voir dire procedure may be invoked concerning identification testimony; however, defendant cannot challenge an in-court identification so as to obtain a voir dire hearing, and a ruling on the offered testimony on the basis that it was 'tainted' by prior photographic identification procedures, a 'lineup,' or other in-custody confrontation without at least, a general objection."

In *State v. Accor and Moore, supra,* we said, *inter alia:* "When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection *and requests a voir dire or asks for an opportunity*

to 'qualify' the witness, such voir dire should be conducted in the absence of the jury and the competency of the evidence evaluated. Upon such hearing, if the in-court identification by a witness is challenged on the ground it is tainted by an unlawful out-of-court photographic or corporeal identification, all relevant facts should be elicited and all factual questions determined, including those involving the defendant's constitutional rights, pertinent to the admissibility of the proffered evidence." (Emphasis ours.) A new trial was awarded on the ground that each defendant's photograph was taken while he was being unlawfully detained by the Gastonia Police, then viewed by the State's witnesses and admitted into evidence with the in-court identification of the witnesses, all over the timely and consistent objections of defendants.

In *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968), we held that failure of the trial judge to conduct a voir dire and make specific findings of fact concerning the procedures used in a pretrial identification *lineup* will be deemed harmless error where the uncontradicted evidence clearly shows that (1) defendant waived counsel at the lineup, (2) the lineup was conducted fairly and without prejudice, and (3) the in-court identification was independent in origin, based upon what the witness observed at the time of the robbery, and was not fruit of the lineup.

[5, 7] It is apparent from the foregoing decisions that the better procedure dictates that the trial judge, even upon a general objection only, should conduct a voir dire in the absence of the jury, find facts, and thereupon determine the admissibility of in-court identification testimony. *State v. Blackwell, supra* (276 N.C. 714, 174 S.E. 2d 534). Failure to conduct the voir dire, however, does not necessarily render such evidence incompetent. Where, as here, the pretrial viewing of photographs was free of impermissible suggestiveness, and the evidence is clear and convincing that defendant's in-court identification originated with observation of defendant at the time of the robbery and not with the photographs, the failure of the trial court to conduct a voir dire and make findings of fact, as he should have done, must be deemed harmless error. *State v. Williams, supra* (274 N.C. 328, 163 S.E. 2d 353). A different result could not reasonably be expected upon a retrial if all evidence of pretrial photographic identification were excluded.

Identification by photograph was expressly approved in *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), where it was held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall v. Denno,* 388 U.S. 293, 301-302, 18 L.Ed. 2d 1199, 1206, 87 S.Ct. 1967, and with decisions of other courts on the question of identification by photograph."

[6, 7] Applying the standard enunciated in *Simmons,* we find no impermissible suggestiveness in the photographic identification procedure used in this case. Both victims observed defendant during the course of the robbery—Mrs. Powell observed him intently for five minutes while he held a gun in her face. It may be inferred that she obtained an indelible impression of his facial characteristics. She conversed with him during the robbery and had full opportunity to observe his mannerisms and mode of speech. Both victims described his hair style and his clothing immediately following the robbery. Neither victim has ever identified anyone else save defendant and his accomplice Hampton. Numerous photographs were rejected by these eyewitnesses because they did not fit the mental picture of the robbers obtained at the time of the robbery. Three days after the robbery the photographs of this defendant, Charles Hampton, Jr., and Hoyle Starks, Jr., were lawfully received by mail (presumably from the Washington, D. C. Police Department) and shown to the victims. Defendant and Charles Hampton, Jr., were immediately *recognized* as the two robbers. These three photographs were offered and received in evidence *without objection.* Whether the victims viewed an estimated fifteen to twenty-five photographs one at a time or all at one time is immaterial. Viewed in context and in light of the total circumstances, there is little chance that defendant was incorrectly identified. In our view it is quite obvious from the whole of the evidence that defendant's in-court identification was independent in origin, based upon what the witnesses observed at the time of the robbery, and not upon the photographs. Impermissible suggestive-

ness amounting to a denial of due process has not been shown, and failure of the trial judge to conduct a voir dire must be deemed harmless. *State v. Williams, supra* (274 N.C. 328, 163 S.E. 2d 353) ; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967). We think it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967) ; *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970).

[8] Defendant's second assignment must fail for yet another reason. The record discloses that both eyewitnesses implicated defendant as one of the robbers in numerous references on direct as well as cross-examination. Defendant objected to only part of this testimony and moved to strike only once. The admission of evidence over objection cannot be regarded as prejudicial when testimony of like import is thereafter admitted without objection. *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263 (1955) ; *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165 (1956). Defendant's second assignment of error is overruled.

[9] Defendant's third assignment requires no discussion. The photograph in question (S-9) was offered by the State and defendant did not object. When there is no objection to the admission of evidence, the question of its competency is foreclosed on appeal. *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643 (1966).

While being transferred from Craven County Hospital to Central Prison in Raleigh for safekeeping, defendant allegedly stated to the Sheriff that he was sorry the robbery happened; that he did not shoot anybody—the other man did the shooting. The Sheriff's testimony to that effect was admitted over defendant's timely objection. Defendant argues he had not been warned of his constitutional rights and had not waived his right to the presence of counsel at the time the incriminating statement was allegedly made. He therefore contends this evidence was incompetent and violated his constitutional rights under the due process clause of the Fourteenth Amendment, citing *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966). We now examine the validity of this assignment.

[10] The Court conducted a voir dire examination in the jury's absence to determine the competency of the challenged evidence. The evidence on voir dire tends to show, and the Court found as a fact, that on 27 March 1970 Officer Bratcher had, in fact,

advised defendant of his constitutional rights as required by *Miranda* at which time defendant stated he wanted a lawyer before discussing the case; that en route to Raleigh, defendant engaged in a general conversation with Sheriff Berry and Deputy Sheriff Edwards and stated in that conversation that "he had been reading a Bible at the hospital and was sorry that the robbery happened, but that he didn't shoot anybody, that the other man—or another man—had done the shooting." The Court found that the quoted statement was not in response to any question by the officers but was spontaneously made by defendant while riding along toward Raleigh. The Court accordingly concluded that the statement was volunteered freely and understandingly and that the defendant was an intelligent, knowledgeable person who fully understood his constitutional rights. The incriminating statement was thereupon admitted into evidence.

[11] It is settled law that the findings of the trial judge when supported by competent evidence, as here, are binding and conclusive in appellate courts in this jurisdiction. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971). The evidence was properly admitted. Defendant's fourth assignment of error is overruled.

[12] Defendant's fifth assignment attacks the charge as inadequate to comply with G.S. 1-180. Defendant contends "the jury could have returned a compromise verdict, even though it followed the Court's instructions." This assignment is sheer speculation with no authority cited. A careful examination of the charge reveals no basis for this attack, and the assignment is accordingly overruled.

[13] In Case No. 70-CR-2250 defendant was convicted of armed robbery as charged. In Case No. 70-CR-2250A defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, a felony punishable by imprisonment up to ten years. See G.S. 14-32(a) and G.S. 14-2. He was only convicted, however, of assault with a deadly weapon inflicting serious injury, a felony punishable by imprisonment up to five years under G.S. 14-32(b). Defendant contends the latter conviction is a lesser included offense of armed robbery and, relying on *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970), assigns as error submission of

the assault charge and pronouncement of a separate judgment on the verdict in that case. This is his sixth assignment of error.

Defendant's position is unsound. An assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of the armed robbery charge. It is only when *all* essentials of the lesser offense are included among the essentials of the greater offense that the law merges them into one and treats the less serious charge as a "lesser included offense." Chief Justice Bobbitt, writing for the Court with his usual clarity, recently treated the question of lesser included offenses with finality in *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971). That case is controlling here. Defendant's sixth assignment is overruled.

Defendant has failed to show prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

Justice HIGGINS concurring in Case No. 70 CR 2250 charging armed robbery; dissenting in Case No. 70 CR 2250A charging felonious assault.

Prior to 1919 our statute law provided in cases of assault, with or without intent to kill, any person convicted thereof shall be punished by fine or imprisonment, or both, at the discretion of the courts; provided, where no deadly weapon is used and no serious damage is done, the punishment shall not exceed a fine of fifty dollars or imprisonment for thirty days, but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape, or to cases of assault by any man or boy over eighteen years of age on any female person.

By Chapter 101, Public Laws, Session 1919, the General Assembly provided: "That any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the State prison or be worked on the county roads for a period of not less than four months nor more than ten years."

In cases in which the indictment charges a felonious assault, the jury, as it finds the facts to be from the evidence,

may convict of a felonious assault as above defined, or an assault with a deadly weapon, or a simple assault. Upon failure to find either the use of a deadly weapon, or the intent to kill, or serious injury, the verdict at most could be guilty of assault with a deadly weapon (a misdemeanor); or if the jury should fail to find the use of a deadly weapon, then at most the verdict could be guilty of assault. *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633; *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27; *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1; *State v. Cody,* 225 N.C. 38, 33 S.E. 2d 71.

The offense in this case occurred in February, 1970, and must be tried according to the law in effect as of that date. The 1971 statutes are not applicable.

Without question, however, in this case the robbery and the assault are parts of a single transaction. This Court has held in *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892, and in *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496, that an assault with a deadly weapon committed in the course of a robbery is a part of and included in the indictment for armed robbery. If a verdict of guilty of assault with a deadly weapon is returned and judgment entered thereon, the judgment will be arrested on the ground of double jeopardy.

Wharton's Criminal Law and Procedure, Vol. 1, Sec. 148, states the rule:

> "It is generally agreed that if a person is tried for a greater offense, he cannot be tried thereafter for a lesser offense necessarily involved in, and a part of, the greater, at least when, under the indictment for the greater offense, the defendant could have been convicted of the lesser offense."

Justice Moore in *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838, stated the rule:

> " . . . (W)hen an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution to the other."

Chief Justice Stacy in *State v. Bell,* 205 N.C. 225, 171 S.E. 50, stated the rule:

> "The principle to be extracted from well-considered cases is that by the term, 'same offense,' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment.
>
> When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater."

Further authorities are cited and discussed in the dissenting opinion in *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102.

Assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death is a felony. However, if the injury is not serious, all other elements being present, the offense is only a misdemeanor. In the Hatcher and Parker cases the Court held a misdemeanor assault was included in the armed robbery indictment and a separate judgment for assault with a deadly weapon should be arrested. In this case, as in Richardson, the Court is holding a felonious assault is not included in the armed robbery indictment and the judgment should not be arrested. A mite more or less injury makes the difference.

Under the present holdings, the trial judge will have some difficulty charging the jury in assault cases which constitute a part of armed robbery. I anticipate the charge must go something like this: If you return a verdict of guilty on the armed robbery charge, you will then consider the felonious assault charge. If you find from the evidence beyond a reasonable doubt the defendant assaulted the victim with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, you will return a verdict of guilty of felonious assault. But if you do find the defendant assaulted the victim with a deadly weapon with intent to kill, but failed to find the defendant inflicted serious injury, you will acquit him because the misdemeanor assault was a part of the armed robbery charge.

Heretofore in other felonious assault cases, the Court has charged that if you fail to find the defendant guilty of a felonious assault, as the Court has defined that offense, you would then determine whether the defendant is guilty of the lesser

included offense of assault with a deadly weapon. You cannot convict of assault with a deadly weapon in this case. The Supreme Court in its wisdom has said in an armed robbery case the misdemeanor assault is included, but the felonious assault is not included.

The maximum punishment for armed robbery is the same as it is in the most aggravated case of murder in the second degree. It is three times the maximum for common law robbery. It is three times the maximum for assault with a deadly weapon with intent to kill inflicting serious injury. One of the Senators who assisted in the passage of the armed robbery statute in 1929 thought the punishment provided was sufficient to enable the court to impose adequate punishment for all the injury resulting from the use of the weapon in armed robbery unless the victim's death resulted, in which event the prosecution would be for first degree murder.

Other legal authorities which fortify my belief the judgment in the assault case should be arrested, are cited and analyzed in the dissent to *State v. Richardson.* These include cases from other jurisdictions.

Justice LAKE concurring in part and dissenting in part.

I concur as to the conviction of and sentence for armed robbery in Case No. 70-CR-2250.

I dissent as to the conviction of and sentence for assault with a deadly weapon inflicting serious injury in Case No. 70-CR-2250A for the reasons set forth in my concurring opinion in *State v. Richardson,* 279 N.C. 621, 633, 185 S.E. 2d 102, 115.

Here, the shooting of Harrelson occurred while the robbery was in progress and as part of it, which distinguishes this case from *State v. Richardson, supra,* where the robbery was complete before the shooting of the victim occurred. Harrelson being named in the indictment for armed robbery, as a victim thereof whose life was endangered by the defendant's use of the pistol as the means of perpetrating the robbery, the State cannot, in my opinion, use the same assault again as an element of another criminal offense against Harrelson.

STATE OF NORTH CAROLINA v. McKEITHAN JONES; PHILLIP JONES; REDELL LOCKLEAR; JAMES EDWARD LOCKLEAR, ALIAS, JIMMY LOCKLEAR; AND STERLING JONES

No. 132

(Filed 28 January 1972)

1. **Criminal Law § 92— consolidation of charges against multiple defendants**

Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense.

2. **Criminal Law § 92— charges against six defendants — consolidation for trial**

Where five defendants were jointly charged in two indictments with safecracking, felonious breaking and entering and felonious larceny, and a sixth defendant was separately charged in two indictments with the identical crimes, there was no error in the consolidation *per se* of the charges in the four indictments for the purposes of trial.

3. **Constitutional Law § 30; Criminal Law § 95— codefendant's confession implicating defendant — due process**

The admission of a testifying codefendant's extrajudicial statements which incriminated defendant under instructions limiting their competency to the codefendant did not deny defendant due process of law where there was sufficient competent evidence admitted against defendant to minimize or remove such prejudice as might otherwise have been caused by the statements attributed to the codefendant.

4. **Constitutional Law § 31; Criminal Law § 95— confession implicating codefendant — declarant who took the stand**

Extrajudicial statements made by defendants which implicated a codefendant were not rendered inadmissible by the decision of *Bruton v. United States*, 391 U.S. 123, where each declarant took the stand and testified that the substance of the statements attributed to him was false.

5. **Constitutional Law § 30; Criminal Law § 95— confession implicating codefendant — confrontation of declarant — due process**

Even when the right of confrontation is afforded to a defendant implicated in the out-of-court declarations of a codefendant, the prejudicial impact of testimony of the codefendant's declarations must be evaluated in the light of the competent evidence admitted against the nondeclarant defendant, since the gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process.

6. **Criminal Law §§ 162, 169— admission of incompetent evidence — failure to object — defendant unrepresented by counsel**

The admission of incompetent evidence is ordinarily not ground for a new trial where there was no objection at the time the evidence was offered, even though defendant asserts on appeal that the evidence was obtained in violation of his constitutional rights; unless necessary to obviate manifest injustice, this rule applies to an unrepresented nonindigent defendant as well as to a defendant represented by counsel.

7. **Constitutional Law § 31; Criminal Law § 95— nontestifying codefendant's extrajudicial statements — incrimination of defendant — harmless error**

The admission of extrajudicial statements attributed to a nontestifying codefendant — e.g., that "there were six of us involved" and that "they got the safe" — did not violate defendant's right of confrontation since the statements did not in fact incriminate defendant; if defendant was obliquely incriminated by such statements, the constitutional error was harmless beyond a reasonable doubt in light of the mass of competent and admitted evidence against defendant.

BELATED appeal (permitted by our writ of *certiorari)* by Phillip Jones, James Edward Locklear and Sterling Jones from *Braswell, J.,* October 1970 Regular Criminal Session of ROBESON Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b) (4).

Appellants Phillip Jones and James Edward Locklear, alias Jimmy Locklear, together with McKeithan Jones, Frank Jacobs, Jr., and Redell Locklear, were charged in a one-count indictment (70CR11266) with "safecracking" in violation of G.S. 14-89.1, and in a separate two-count indictment (70CR11343) with (1) felonious breaking and entering and (2) felonious larceny.

Appellant Sterling Jones was charged in a separate one-count indictment (70CR10373) with "safecracking" in violation of G.S. 14-89.1, and in a separate two-count indictment (70CR10374) with (1) felonious breaking and entering and (2) felonious larceny.

The charges in the separate indictments against Sterling Jones were the same as those in the indictments against Phillip Jones, James Edward Locklear, McKeithan Jones, Frank Jacobs, Jr., and Redell Locklear.

The record indicates that McKeithan Jones, represented by J. C. Ward, Esq., and Redell Locklear, represented by E. E.

Page, Esq., were placed on trial with appellants. The record is unclear as to whether Frank Jacobs, Jr., was also placed on trial with appellants. The record is silent as to the verdicts or other disposition of the cases against McKeithan Jones, Redell Locklear and Frank Jacobs, Jr.

At trial, appellant James Edward Locklear was represented by F. L. Musselwhite, Esq., privately employed, and appellant Sterling Jones was represented by W. C. Watts, Esq., privately employed. At trial, appellant Phillip Jones was not represented by counsel. His request for court-appointed counsel was denied on the basis of findings that he was "financially able to provide the necessary expense of legal representation" and was not an indigent within the meaning of the law.

On motion of the State, and over objections made on behalf of appellants James Edward Locklear and Sterling Jones (Sterling) by their respective counsel, the four indictments were consolidated for trial. Appellant Phillip Jones was not represented by counsel and made no objection.

Uncontradicted evidence offered by the State tends to show: Between 5:00 p.m. on June 2, 1970, and 7:00 a.m. on June 3, 1970, the building occupied by the Robeson County Department of Social Services was broken into and articles of personal property of Robeson County were stolen therefrom, to wit: A safe containing food stamps valued at $67,824.00, $62.00 in cash, and $373.50 in cashier's checks; also a Remington electric typewriter; and a Burroughs adding machine. Officers found the safe "during the month of June," 1970, in the woods, about three miles east of Maxton, off of U. S. 74. The bottom of the safe was completely cut out and the contents of the safe had been removed.

On June 1-3, 1970, McKeithan Jones (McKeithan), age 33, lived in a trailer at the I-95 Trailer Park. The other occupants of his trailer were Phillip Jones (Phillip), his nephew, and Clara Mae Clark and her seven-year-old son. State's witness Bobby Strickland (Strickland) and his wife then lived in another trailer at the I-95 Trailer Park. Sterling, brother of McKeithan, lived on Highway #710 between Rowland and Pembroke, about fifteen miles from Lumberton and about twelve miles from I-95.

Strickland, age 29, worked for McKeithan from "around the first of 1970" until the last part of July or the first of

August. During the first week in June, McKeithan, a steel erector, was subcontractor on a textile institute and school building being built "two miles out of New Bern." Strickland, Phillip and others were working for McKeithan on the New Bern job. McKeithan, Phillip and Strickland would leave the I-95 Trailer Park between 4:00 and 5:00 a.m. and get back from the New Bern job in the evening.

Sterling was not working anywhere during the first week in June, 1970. From June 15, 1970, Sterling worked for State's witness William Woodrow Brown, Jr. (Brown) on a steel erection job at a hospital in Charleston, S. C. While on this job Sterling and co-workers stayed at a motel at Moncks Corner, S. C., going from there each work day to the Charleston job.

Summarized except when quoted, the testimony of Strickland, Brown, Deputy Sheriff Stone, and Edison DeLane Lee (Lee), offered by the State, is set forth below.

Strickland testified:

Strickland, McKeithan and Phillip worked at the New Bern job on Monday, June 1st, but not on Tuesday, June 2nd, or on Wednesday, June 3rd. About 4:30 a.m. on Tuesday, June 2nd, Strickland saw McKeithan, Sterling, Phillip, and "three other fellows" he could not identify, leave the I-95 Trailer Park. Later, about 8:00 a.m., McKeithan came to Strickland's trailer; and, in response to Strickland's inquiry why they did not go to work that morning, McKeithan said "he had made a big hustle." When asked what he had hustled and who had helped him, McKeithan replied "[t]hat he, McKeithan, Phillip, Sterling, Jimmy and Redell and Frank, Jr. Jacobs had went in, had broken into Robeson County Social Services and carried away a safe and stamps in the safe." (The court admitted the testimony as to what McKeithan said to Strickland only against McKeithan. The admission thereof is the basis of Sterling's Exceptions Nos. 18 and 19.) Shortly thereafter, in Strickland's presence, McKeithan opened the trunk of his car. Strickland saw "two boxes of stamps in the car, twenty dollar books, five dollar stamps," which they carried to McKethan's trailer. About two hours later, McKeithan, accompanied by Strickland, went "on the other side of where Sterling lives" to a trash pile where McKeithan said "the stamps were," but "they were not there." McKeithan and Strickland then located Phillip, who told

McKeithan that "he had took the stamps." (This testimony as to what Phillip said was admitted only against McKeithan and Phillip.) McKeithan, Phillip and Strickland went in McKeithan's car and Phillip directed them to the place where he had hidden the stamps, "down some side roads, back of the paved road, to Smiling's house in the woods." They stopped there, got out of the car and walked about fifty yards to "where Phillip had the stamps laying on the ground, except ten thousand McKeithan had at his trailer." Phillip said "that Sterling had sale for the stamps, was to meet him at the crossroads where the stamps was."

After waiting "a half hour" Sterling came along in a truck and conversed with McKeithan and Phillip. Sterling said he had a sale for the stamps. Phillip took the truck, went back in the woods, brought the stamps and truck back to Sterling and Sterling took the truck and left. Then McKeithan and Strickland took Phillip to his house and thereafter went back to the I-95 Trailer Park. (The testimony as to statements attributed to them on this occasion was admitted only against McKeithan, Phillip and Sterling.)

Two days later McKeithan, accompanied by Strickland, picked up Phillip, Redell, James Edward Locklear and Frank Jacobs, Jr. He drove to a location "down I-94 and 74" and parked. McKeithan got out, unlocked the car, and dumped stamps from a burlap bag on the ground, and said, "let's divide them up and let each one get rid of his own." (This testimony was admitted against all defendants except Sterling.) McKeithan put on the ground "blank tickets and six thousand dollars worth of stamps." "The boys said they would leave the rest and let McKeithan get rid of them." McKeithan left the group and took what was left of the stamps and hid them. He came back about twenty minutes later and picked up the others. Later McKeithan told Strickland that "he was going to carry the stamps to South Carolina to his brother."

McKeithan and his wife, and Sterling's wife, riding in McKeithan's car, and Strickland, accompanied by his wife, riding in a truck which "pulled the trailer," "went to South Carolina to carry the stamps." The women knew nothing about the real purpose of the trip, the stated purpose being that they were going to "pick up the car Oceanus [co-worker of Sterling's] had wrecked that night." Twenty miles before they got to Moncks

Corner, McKeithan stopped at "the big bridge across the river" and pulled into a side road to the right. After driving along this side road, they came to a wooded area and there McKeithan tossed the stamps out of the car into the woods. All then proceeded to Moncks Corner where Frank Jacobs, Jr., Sterling and Oceanus Lowery were living in a motel.

Strickland parked the trailer next to a service station near the motel. Then he, McKeithan, Sterling, Frank Jacobs, Jr., and Oceanus Lowery got in McKeithan's car and drove back to the river where McKeithan showed "Sterling where he had throwed the stamps." They drank some vodka and McKeithan "got high and couldn't drive." The trailer and wrecked car were left in Moncks Corner. They returned to North Carolina that night.

Some three or four days after the safe was broken into, clippings from the papers indicated that a small amount of money had been in the safe. McKeithan, Phillip and Sterling said that they had not gotten any money out of the safe, and they wanted to go back to the safe to check it. Strickland carried them there in his car, drove back into the woods and parked the car beside a canal. They walked farther down the road to where the safe was lying in a small ditch on the left. They turned it over, looked in it with a flashlight to see if there were any drawers in it with any money, but did not find anything. McKeithan, Phillip and Sterling "were talking about the night the safe was gotten that morning" and said that they "took the safe up there in the woods and dropped it off." Sterling, McKeithan and Phillip were doing the talking at that time. "They were talking about when they carried the safe up in the woods that morning, [and] left Frank Junior Jacobs and Redell with the safe, and Jimmy," while they went to look for tools to open the safe. They said that they had two crowbars and an axe and that while they were gone Redell, Jimmy and Frank, Jr., stayed there with the safe. McKeithan remarked that the money in the safe "had to have been gotten out by Jimmy, Redell and Frank Junior, while they were gone to get tools to open the safe with." (This testimony as to statements attributed to them was admitted only against McKeithan, Phillip and Sterling.)

Sitting in the woods on the ground, Strickland heard a conversation when Phillip, Frank Jacobs, Jr., Redell Locklear

and Jimmy Locklear were present. (Objection by Sterling was sustained.) Phillip was discussing with Redell and Jimmy Locklear how they opened the safe and whether there was money in it. They kept saying there was no money in the safe when they opened it. They stated they opened the safe by cutting the bottom off. Phillip said there was money in it; that he thought they had found a lot of money.

Strickland saw two crowbars and an axe under McKeithan's trailer. Phillip picked up the tools and threw them into the woods. Phillip "said he wanted [Strickland] to help him take the tools away from the trailer, that he was scared the law might come and find the tools and get the markings from the tools that would correspond with some on the safe."

Strickland testified that he worked for McKeithan a day or two during each of the two weeks following June 3rd; that he quit because McKeithan "wouldn't pay [him] for working for him" and "had been running his mouth about [him]"; and that he had voluntarily reported what he knew to Deputy Sheriff Stone "the latter part of July or first of August, at which time [he] was not in custody."

Brown testified:

In June, 1970, Brown was engaged in the erection of steel at the Charleston (S.C.) Hospital. He hired Sterling on June 15th and on June 18th hired Oscar Lowery, Frank Jacobs, Jr., and Donald Jones. On June 19th, Sterling went to Brown's office and told him he had food stamps of a value of approximately $24,000.00 for which he would take $5,000.00. Later, on June 23rd, about 6:00 p.m., Brown asked to see the stamps. Sterling said he did not have them but said he could get them and went to Brown's house about 9:30 that night. Sterling had some of the stamps in a bag and left them with Brown. On June 29th, Brown asked Sterling if he had the rest of the stamps. Sterling told Brown that, instead of the $24,000.00, "[they had] approximately twenty-eight thousand" but would take the same amount in exchange. Sterling also told Brown he had an electric typewriter and a "printing machine" he wanted to sell.

In reply to Brown's inquiry about the other stamps, Sterling said he would have to make a telephone call. Later Brown met Sterling at Sterling's motel and asked if he had gotten the stamps. Sterling replied that he had not but the stamps would

be there soon. Later Sterling advised Brown that he had the stamps but they were on the other side of Jamestown; that his car was wrecked; and that Brown would have to take him there. They went to Jamestown, crossed the Santee River bridge and then drove onto a little dirt road. While Brown was turning around, Sterling went into the woods and came back with a wet brown bag. Inside it there was a plastic bag which contained stamps. The bag was put in the truck and Brown drove to Moncks Corner.

The stamps were not counted but those first delivered to Brown by Sterling ($9,960.00 worth of stamps) and those now delivered ($18,000.00) were supposed to complete the transaction. The stamps were put in a Havoline Oil box by Brown. He told Sterling he could not get $5,000.00 for the stamps but only $3,000.00. Sterling told Brown to go ahead and take them and he would give him $600.00 for delivering the stamps to the man in charge. Brown received possession on or about June 30th and was arrested by federal officers on July 1st. He had paid Sterling at the Berkley Restaurant. Brown had checks made up "for all four."

Brown told Sterling that he had been caught with the stamps. In response to Brown's inquiry, Sterling told him "that the stamps were stolen out of a safe in Lumberton, where they got some office supplies he was trying to sell me at the same time." (This testimony was admitted only against Sterling.)

Deputy Sheriff Stone testified:

He had seen the safe prior to his first conversation with Strickland, which occurred "about the second week in July," at which time Strickland told him "that the persons who broke into the Department of Social Services were Frank Jacobs, Redell Locklear, Jimmy Locklear, Phillip Jones, Sterling Jones and McKeithan Jones." No warrants were issued until after his second conversation with Strickland, which was on August 13th. Strickland then made a full statement which was offered and admitted in evidence only as it might tend to corroborate Strickland's testimony at trial. (No objection or motion to strike was made by any defendant to the admission of the quoted statement from Strickland to Stone, which was admitted only to corroborate the testimony of Strickland.) Strickland took him to the wooded area off from the intersection of 74 and I-95 where they

found the axe and some cardboard food stamp boxes and some plastic bags.

Lee testified:

In August, 1970, Lee was in the Robeson County jail charged with armed robbery. In a discussion with Sterling in the jail, Sterling told Lee that he (Sterling) was in jail "for safecracking"; that "they didn't have anything on him, but the police came out and got some paint off his truck"; that "they had to use a truck, but they couldn't drive it, and he used it"; that "he could get a man to come up and say his truck was in the shop at the time"; that "they got the safe"; that "there was approximately seventy dollars in the safe, a lot of food stamps, about sixty-eight thousand dollars worth"; and that "he went to South Carolina with about eighteen thousand dollars worth of stamps, thinking he was going to sell them for twenty thousand, [but] that they had numbers on them and had to be gotten rid of." (This testimony as to what Sterling told Lee was admitted only against Sterling.)

Later, in the Robeson County Jail, Lee had a conversation with McKeithan and Phillip. McKeithan said that he had heard Lee's name called in court and Phillip asked what Lee "knowed on them." McKeithan told Phillip all Lee knew was what had been told him and he did not think "it would hold up in court." Then McKeithan told Lee he would give him $10,000.00 if he would say that he "was going to testify for the State and then testify for them." (This testimony as to what McKeithan and Phillip said to Lee was admitted only against McKeithan and Phillip.)

Lee also testified to statements made by McKeithan when Phillip was not present and statements made by James Edward Locklear and Redell Locklear. (When objections were made, this testimony was admitted only against the persons referred to as having made the statements.)

The State offered other evidence which tended to show that paint scrapings from the safe corresponded to paint scrapings from Sterling's truck; that food stamps negotiated by McKeithan to a grocer and that food stamps delivered by Sterling to Brown were stamps which had been removed from the safe of the Robeson County Department of Social Services; and that the safe found in the woods was the safe of the Robeson County Department of Social Services.

Evidence offered by or on behalf of defendants included the testimony of McKeithan, Phillip, James Edward Locklear and Redell Locklear. Sterling did not testify. The testimony of McKeithan and of Phillip, in direct contradiction of Strickland's testimony, tended to show that they and Strickland worked on the New Bern job on Monday, June 1st; on Tuesday, June 2nd; and on Wednesday, June 3rd. McKeithan testified that he, Strickland, and others, made a trip to Moncks Corner, South Carolina, for the purpose of taking "a trailer to O. D. Lowery," and that they returned home after delivering the trailer. McKeithan denied any connection with the crimes charged and denied having made any statements either to Strickland or to Lee with reference thereto. Phillip denied any connection with the crimes charged, denied having made any statement to Lee and denied being present on any occasion when McKeithan made a statement to Lee.

Evidence offered on behalf of Sterling tended to show his truck was in process of being repaired and was not in use during June 1st, June 2nd, and June 3rd of 1970.

A review of other evidence for the State and for defendants is unnecessary to consideration of the questions presented for decision.

The agreed case on appeal, tendered by F. L. Musselwhite as counsel for all appellants, states: "VERDICT: The jury returned a verdict that the defendants, and each of them, are guilty of felonies as charged in the Bills of Indictment."

Judgments imposing the following prison sentences upon appellants were pronounced:

As to Sterling Jones: For "safecracking," twenty years; for felonious breaking and entering, ten years; for felonious larceny, ten years; all sentences to run concurrently.

As to Phillip Jones: For "safecracking," fifteen years; for felonious breaking and entering, ten years; for felonious larceny, ten years; all sentences to run concurrently.

As to James Edward Locklear: For "safecracking," ten years; for felonious breaking and entering, five years; for felonious larceny, five years; all sentences to run concurrently.

After verdicts, judgments and appeal entries, the court, upon findings that each of the appellants was "financially un-

able to provide the necessary expenses of legal representation" incident to their appeals, appointed F. L. Musselwhite, Esq., to represent all appellants in connection with their appeals.

It appears from a death certificate attached to a motion filed in this Court by F. L. Musselwhite, Esq., that appellant James Edward Locklear died October 2, 1971. In accordance with the motion, the action against appellant James Edward Locklear and his appeal to this Court are abated.

Attorney General Morgan and Assistant Attorney General Rich for the State.

Musselwhite & Musselwhite, by Fred L. Musselwhite, for defendant appellants.

BOBBITT, Chief Justice.

Preliminary to consideration of the specific questions presented by the surviving two appellants, it is noted: First, that much of the evidence at trial and in the record before us relates to codefendants who are not parties to this appeal; second, that no objection was made by Phillip or on his behalf at trial to the consolidation of the cases for trial or to the admission of any of the evidence proffered by the State; and third, that defendants' counsel did not bring forward the charge to the jury, stating that he had "been unable to find prejudicial error" therein.

A joint brief was filed in behalf of the three appellants prior to the death of James Edward Locklear. Hereafter, unless otherwise specified, the word "appellants" will refer to Sterling Jones and to Phillip Jones.

Appellants contend the court erred by consolidating for trial the charges in the four indictments. Pertinent to this contention, the record shows: "Motion by the State to consolidate Cases Nos. 70 Cr 11226, 70 Cr 11343, 70 Cr 10374, 70 Cr 10373, involving five (5) defendants growing out of the same transaction and at the same time. Objection by James Edward Locklear and by Sterling Jones." The case on appeal states, "This constitutes appellants' Exception No. 1."

[1, 2] We adhere to "the general rule that whether defendants jointly indicted [should] be tried jointly or separately [is] in

the sound discretion of the trial court, and, in the absence of a showing that a joint trial [has] deprived the movant of a fair trial, the exercise of the court's discretion [will] not be disturbed upon appeal." *State v. Fox,* 274 N.C. 277, 288, 163 S.E. 2d 492, 500 (1968). Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense(s). Nothing appears to indicate that either appellant asserted any fact or stated any reason in support of his general objection. Clearly, there was no error in the consolidation *per se* of the charges in the four indictments for the purposes of trial.

The two indictments (#70CR11266 and #70CR11343) against McKeithan Jones, Phillip Jones, Frank Jacobs, Jr., Redell Locklear and James Edward Locklear, and the two indictments (#70CR10373 and #70CR10374) against Sterling Jones, charged identical offenses. The trial judge, in granting the motion to consolidate, rightly considered the four indictments the same as if there were a single indictment charging six defendants jointly with (1) "safecracking," (2) felonious breaking and entering and (3) felonious larceny.

At no time during the trial did either appellant move for a separate trial. Whether the evidence presented at trial prejudiced appellants to such extent that the failure to order separate trials, though no motions for separate trials were made, constituted a denial of due process of law, will be discussed below.

Counsel for appellants direct our attention to *State v. Cotton,* 218 N.C. 577, 12 S.E. 2d 246 (1940), and *State v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45 (1942), for the proposition that their cases should not have been consolidated, or, if consolidated, they should have been severed when it became apparent that certain of the State's witnesses had testified, and would continue to testify, about statements attributed to one defendant which implicated other defendants.

In *Cotton,* husband and wife were separately indicted for the same homicide. Over their objections, the cases were consolidated for trial. The State's case against the wife consisted of testimony as to her confession in which she stated she had killed her mother under circumstances related by her in detail.

As a witness in her own behalf, the wife testified to facts tending to show that her husband had killed his mother-in-law and that her confession had been coerced by her husband and was untrue. As to the husband, the jury returned a verdict of guilty of murder in the first degree; as to the wife, the jury returned a verdict of not guilty. Upon the husband's appeal, a new trial was awarded. The reason was this: In *Cotton,* the wife's confession did not incriminate the husband at all; it was her testimony at trial, repudiating her confession, which incriminated him. Since the statute, C.S. 1802 (now G.S. 8-57), provided that a wife was not a competent witness against her husband, she could not testify to any facts which tended to incriminate him. On this ground, it was held that the court erred by the denial of the husband's motions at the conclusion of the evidence for severance and mistrial and therefore the husband was awarded a new trial.

Consideration of *State v. Todd,* 222 N.C. 346, 23 S.E. 2d 47 (1942), is necessary to an understanding of *State v. Bonner, supra.* Bonner, Fowler, McDaniel and Todd were prosecuted upon separate bills of indictment, each charging the defendant named with the murder of one Ira L. Godwin. Overruling appellants' motions for separate trials, the four indictments were consolidated for trial and tried together. McDaniel was acquitted. Bonner, Fowler and Todd were convicted of murder in the first degree. The joint appeal of Bonner and Fowler was considered by this Court in *State v. Bonner, supra.* The separate appeal of Todd was considered in *State v. Todd, supra.*

The State offered evidence that Godwin was shot and killed in the perpetration of a robbery. To identify the defendants as the persons who committed the robbery-murder, the State offered and relied *solely* upon in-custody statements made by the several defendants. The statement of each defendant was admitted in evidence only against him. Thus, the statements of Bonner, Fowler and McDaniel, although they tended to incriminate Todd, were not admitted in evidence against Todd. The only evidence admitted against Todd was his own written statement. This statement tended to *exculpate* Todd, not to incriminate him; thus, in *State v. Todd, supra,* his conviction was reversed. However, Todd's statement, although not competent or admitted against Bonner and Fowler, told in

explicit detail the manner in which Bonner and Fowler had committed the robbery and murder. Thus, *State v. Bonner, supra,* did not involve a factual situation in which a statement was admitted in evidence because it incriminated the person who made the statement *and* also incriminated a codefendant against whom the statement was not admitted. On the contrary, Todd's statement did not incriminate himself but included a full account of all circumstances pertaining to the robbery-murder of Godwin by Bonner and Fowler.

The general rule relating to the admission of the testimony of a codefendant under instructions limiting its competency to the declarant is stated and discussed below. The rationale thereof presupposes that the declaration in fact incriminates the declarant. *State v. Bonner, supra,* is to be distinguished from cases such as the present in which the declarant incriminates himself. Hereafter the appeals of Sterling Jones and of Phillip Jones will be considered separately.

APPEAL OF STERLING JONES

[3] Sterling contends the admission of evidence of statements made by McKeithan and by Phillip which incriminated Sterling was sufficiently prejudicial to constitute a denial of due process of law notwithstanding the court instructed the jury that such statements were for consideration only against the persons who made them.

Of the seventeen exceptions cited as the basis for this contention, only Exceptions Nos. 18 and 19 are discussed in the brief. According to Strickland, on June 2nd, between the time (4:30 a.m.) he saw McKeithan, Phillip and Sterling and three others leave I-95 Trailer Park and the time (later that morning) when he, Phillip and Sterling went to the place in the woods where the stamps had been hidden, McKeithan told him "[t]hat he, McKeithan, Phillip, Sterling, Jimmy and Redell and Frank Junior Jacobs had went in, had broken into Robeson County Social Services and carried away a safe and stamps in the safe." Strickland's testimony that McKeithan made the quoted statement, which was admitted only against McKeithan, constitutes the basis of Sterling's Exceptions Nos. 18 and 19. The prejudicial impact, if any, of the testimony to which Exceptions Nos. 18 and 19 relate, notwithstanding the court's instruction that this evidence was not to be considered against Sterling,

can be evaluated only when considered in the light of the competent incriminating evidence admitted against Sterling.

Strickland's testimony included the following: About 8:00 a.m. on Tuesday, June 2nd, McKeithan had returned to the I-95 Trailer Park and had a quantity of food stamps in his possession. Two hours or so later, Strickland accompanied McKeithan and Phillip to a place in the woods where Philip had hidden the stamps, and they waited until Sterling drove up in his truck. Sterling said he had a sale for the stamps. Sterling had a portion of the stamps in his possession when he drove away in his truck. Strickland was present on another occasion when McKeithan, Phillip and Sterling were looking for the safe: He heard them talking about where they had taken the safe "in the woods and dropped it off," about procuring tools to open the safe, and about whether money as well as stamps had been removed from the safe.

Brown's testimony included the following: "Sterling Jones told me that the stamps were stolen out of a safe in Lumberton, where they got some office supplies he was trying to sell me at the same time."

Lee's testimony included the following: Sterling told Lee when both were confined in the Robeson County Jail that he (Sterling) was in jail for safecracking and that "they didn't have anything on him, but the police came out and got some paint off of his truck." Lee testified: ". . . I asked him about the safe. He said they had to use a truck, but they couldn't drive it, and he used it. That he could get a man to come up and say his truck was in the shop at the time." Lee also testified: "He said they got the safe, lots of stamps in it, wasn't much money, about seventy dollars in money."

[3] The foregoing indicates that there was sufficient competent admitted evidence against Sterling to minimize or remove such prejudice as might otherwise have been caused by the statements attributed to McKeithan on which Exceptions Nos. 18 and 19 are based. The issue turned largely on whether the jury would give credence to the testimony of Strickland, Brown and Lee. Evidence offered in behalf of defendants tended to show that the persons charged were not involved in any way in the alleged safecracking, felonious breaking and entering and felonious larceny.

It is apparent why Sterling's counsel emphasized Exceptions Nos. 18 and 19, since the testimony referred to therein implicated Sterling more directly than any other testimony. We have examined each of the other exceptions cited by Sterling but not discussed in the brief. The pertinent matters referred to in these other exceptions when considered in the light of the entire testimony are not significantly prejudicial, if prejudicial at all.

Prior to the decisions of the Supreme Court of the United States in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), and *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921 (1968), the general rule in North Carolina governing admission of declarations of one defendant in a joint trial was stated in *State v. Lynch,* 266 N.C. 584, 588, 146 S.E. 2d 677, 680 (1966), as follows: "Where two or more persons are jointly tried, the extrajudicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, *but only when,* the trial judge instructs the jury that the confession so offered is admitted in evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s). *S. v. Bennett,* 237 N.C. 749, 753, 76 S.E. 2d 42, and cases cited; *S. v. Arnold,* 258 N.C. 563, 573-574, 129 S.E. 2d 229; Stansbury, North Carolina Evidence, Second Edition, § 188. 'While the jury may find it difficult to put out of their minds the portions of such confessions that implicate the codefendant(s), this is the best the court can do; for such confession is clearly competent against the defendant who made it. Compare: *Paoli v. United States,* 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed. 2d 278.' *S. v. Kerley,* 246 N.C. 157, 161, 97 S.E. 2d 876." Accord, *State v. Fox, supra* at 289, 163 S.E. 2d at 500-01.

In *State v. Fox, supra,* this Court interpreted *Bruton v. United States, supra,* and *Roberts v. Russell, supra,* to require reversal of the appellants' convictions for first degree burglary and first degree murder. None of the three appellants, Roy Lee Fox, Donald Fox and Carson McMahon, had testified (except on *voir dire)* at the trial. The fourth defendant, Arrlie Fox, did testify at the trial in his own behalf and was cross-examined by the solicitor and by counsel for each of the other defendants. The State offered evidence as to statements made by each de-

fendant which incriminated himself and incriminated his codefendants. It was held that admission of declarations made by one nontestifying defendant which incriminated another denied the latter's constitutional right of confrontation. The opinion of Justice Sharp in *State v. Fox, supra,* includes the following: "In *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965), it was held that 'the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.' *Id.* at 403, 13 L.Ed. 2d at 926, 85 S.Ct. at 1068." With reference to the statement attributed to Arrlie Fox, the opinion notes this distinction: "If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation. See *State v. Kerley, supra* at 160, 97 S.E. 2d at 879. In this case, Arrlie Fox testified and was cross-examined by his codefendants. His statement, therefore, did not come within the ban of *Bruton.*" *State v. Fox, supra* at 291, 163 S.E. 2d at 502.

In *Nelson v. O'Neil,* 402 U.S. 622, 29 L.Ed. 2d 222, 91 S.Ct. 1723 (1971), the Supreme Court of the United States held that *Bruton* did not apply in a factual situation substantially the same as that in the present case. O'Neil and Runnels were tried jointly and convicted in a California state court. The State's evidence included the testimony of a police officer that Runnels, in the absence of O'Neil, had made an oral out-of-court statement in which he admitted the crimes charged and implicated O'Neil as his confederate. The trial judge ruled the officer's testimony was competent against Runnels but instructed the jury not to consider it against O'Neil. Runnels, testifying in his own defense, denied having made the statement and asserted that the substance of the statement imputed to him was false. The decision in *Bruton* was confined to the holding that the right to confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution "is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination." *Nelson v. O'Neil, supra* at 627, 29 L.Ed. 2d at 227, 91 S.Ct. at 1726. The opinion further states: "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied

no rights protected by the Sixth and Fourteenth Amendments." *Id.* at 629-30, 29 L.Ed. 2d at 228, 91 S.Ct. at 1727.

[4] Sterling asserts prejudice on account of the admission of portions of statements attributed to McKeithan, Phillip and James Edward Locklear which tended to incriminate Sterling. McKeithan, Phillip and James Edward Locklear took the stand and each testified that the substance of the statements imputed to him was false. Under these circumstances, as held in *Nelson v. O'Neil, supra, Bruton* does not apply. *Cf. California v. Green,* 399 U.S. 149, 26 L.Ed. 2d 489, 90 S.Ct. 1930 (1970), and *Dutton v. Evans,* 400 U.S. 74, 27 L.Ed. 2d 213, 91 S.Ct. 210 (1970).

[5] Except as modified by *Bruton v. United States, supra,* and *Roberts v. Russell, supra,* we adhere to the general rule (quoted above) stated in *State v. Lynch, supra.* Even so, in each case the prejudicial impact of testimony of out-of-court declarations of a codefendant, even when the right to confrontation is afforded, must be evaluated in the light of the competent admitted evidence against the nondeclarant defendant referred to in such declarations. We do not foreclose the possibility that the gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. No such gap exists in the present case.

APPEAL OF PHILLIP JONES

Phillip contends the admission of evidence of statements made by Sterling violated Phillip's right to confrontation as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

[6] The evidence in the record supports the finding that Phillip was "financially able to provide the necessary expense of legal representation." He did not and does not now challenge the court's findings or the supporting evidence. Although financially able to do so, Phillip was not represented at trial and no objections were interposed by him or in his behalf. Unless necessary to obviate manifest injustice, the rule applicable to a represented defendant applies equally to an unrepresented nonindigent defendant. As stated in *State v. Mitchell,* 276 N.C. 404, 409-10, 172 S.E. 2d 527, 530 (1970): "It is elementary that,

'nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.' . . . An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule."

[4, 7] Apart from the foregoing, we find no merit in Phillip's appeal. For the reasons stated above in relation to the appeal of Sterling Jones, *Bruton* does not apply to statements attributed to McKeithan and James Edward Locklear which implicated Phillip. Since Sterling did not testify, Phillip contends that *Bruton* does apply to statements attributed to and admitted against Sterling. However, the brief fails to point out, and our examination of the record fails to disclose, any instance in which a witness testified to a statement made by Sterling which in fact implicated Phillip. The following indicate the type of statement attributed to Sterling which Phillip contends implicated him. Brown testified that Sterling told him that "there are six of us involved" and that "the stamps were stolen out of a safe in Lumberton." Lee testified that Sterling told him that "they had to use a truck" and that "they got the safe, lots of stamps in it, wasn't much money." No statement attributed to Sterling contains a reference to Phillip by name nor identifies him in any other way. The *sine qua non* for application of *Bruton* is that the party claiming incrimination without confrontation at least be incriminated.

[7] If it were conceded that Phillip was obliquely incriminated by the above statements attributed to Sterling, the constitutional error was harmless "beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24, 17 L.Ed. 2d 705, 710-11, 87 S.Ct. 824, 828 (1967); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969). Any incrimination of Phillip by statements attributed to Sterling was of insignificant probative value in relation to the mass of competent and admitted evidence against him, a portion of which is included in our preliminary statement and also in our review of evidence in connection with the appeal of Sterling Jones.

The conclusion reached is that neither appellant has shown prejudicial error. Hence, the verdicts and judgments will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. VERLON T. SPILLARS

No. 72

(Filed 28 January 1972)

1. **Robbery § 2— indictment — ownership of property taken**

An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and to negate the idea that the accused was taking his own property.

2. **Indictment and Warrant § 17; Robbery § 4— armed robbery — ownership of property taken — variance**

There was no fatal variance where the indictment charged an armed robbery in which money was taken from "Ice Service Store, a corporation," and the evidence showed that the name of the company was "Ice Service, Incorporated," it not being necessary that the ownership of the property be laid in a particular person in order to allege and prove armed robbery.

3. **Searches and Seizures § 3— affidavit for search warrant — evidence before magistrate**

It is not necessary that an affidavit for a search warrant contain all the evidence properly presented to the magistrate.

4. **Searches and Seizures § 3— affidavit for search warrant — evidence before magistrate**

The requirement of G.S. 15-26(b) that the affidavit for a search warrant indicate the basis for the finding of probable cause does not impose a duty upon the magistrate to transcribe all the evidence before him supporting probable cause.

5. **Searches and Seizures § 3— search warrant — incompetent information in affidavit**

A valid search warrant may be issued on the basis of an affidavit containing information which may not be competent as evidence.

6. **Searches and Seizures § 3— search warrant — affidavit based on hearsay**

An affidavit for a search warrant may be based on hearsay information if the magistrate is informed of the underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible.

7. Searches and Seizures § 3— probable cause to issue search warrant — sufficiency of evidence before magistrate

There was sufficient evidence before the magistrate, including the officer's affidavit and testimony, to establish probable cause for the issuance of a warrant to search for money taken in an armed robbery and articles used in connection with the robbery.

8. Searches and Seizures § 3— search warrant — presumption of regularity

A search warrant will be presumed regular if irregularity does not appear on the face of the record.

9. Searches and Seizures § 3— attachment of affidavit to warrant — presumption of regularity of warrant

Defendant failed to rebut the presumption of regularity of the search warrant, and his contention that the warrant was irregular in that the affidavit was not attached to the warrant as required by G.S. 15-26(b) is without merit, where the only evidence offered by defendant in support of his contention was the statement obtained on cross-examination of a police officer that the officer did not see the affidavit at the time another officer read and served the warrant.

10. Criminal Law § 84; Searches and Seizures § 3— validity of warrant and search — question for court

The validity of a search warrant, the legality of a search, and the admissibility of evidence obtained by the search are not questions for the jury but are matters of law to be determined by the trial judge.

11. Criminal Law § 73; Searches and Seizures § 3— admission of search warrant and affidavit — hearsay evidence

It is error to admit in evidence a search warrant together with the affidavit to obtain the warrant because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his right of confrontation and cross-examination.

12. Criminal Law § 34— evidence of other offenses

In a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense.

13. Criminal Law § 158; Evidence § 28— admission of documents — presumption that contents shown to jury

It is presumed that the contents of documents admitted into evidence were made known to the jury.

14. Criminal Law § 34; Searches and Seizures § 3— admission of affidavit for search warrant — evidence of another crime — prejudicial error

The trial court in an armed robbery prosecution committed prejudicial error in the admission of a search warrant and the accompanying affidavit where the affidavit contained hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime.

State v. Spillars

APPEAL by defendant from *Bowman, S.J.*, 1 February 1971 Criminal Session of BUNCOMBE Superior Court.

Defendant was tried on a bill of indictment charging him with armed robbery.

The State offered evidence, in substance, as follows:

Mrs. Florence Browning testified that she and Mrs. Katie Stepp were working in the Black Mountain Ice Service Store on the evening of 10 December 1970. Upon returning from the stockroom around 9:45 that evening, she saw a tall slender man enter the store. He wore a blue-green or blue-grey jacket, blue jean-type denim dungarees, brown gloves, and tan shoes with gold buckles. Two ladies' nylon stockings covered his head and neck. He pointed a small pistol at the ladies and ordered Mrs. Browning to lie on the floor, and at his direction Mrs. Stepp opened the cash register and gave him the contents except for some pennies. He ran from the store after ordering Mrs. Stepp to lie on the floor. Mrs. Browning could not identify the defendant as the man who came into the store and took the money.

David Crisp testified that he lived across the street from the Black Mountain Ice Service Store. David drove a school bus, which he parked at night in the parking lot beside the Ice Service Store. On 10 December 1970 he was upstairs in his home observing his school bus and the parking lot, hoping to discover who had been stealing gasoline from the school bus. Sometime after 9:30, he saw a light blue Chevrolet automobile pull into the parking lot, stop for a few minutes and drive off. The car returned moments later, cut its lights, and drove into the darkened area of the parking lot near the school bus. David proceeded to investigate. As he approached the school bus he saw someone tall and slender come around the corner of the store carrying a bag. This person drove off in a light blue Chevrolet. David could not identify the defendant as the man who drove off. He did not see the rear of the vehicle as it departed.

Oscar Crisp, David's father, testified that he stood in the doorway of his home and watched his son go over to the parking lot. He saw a light blue Chevrolet pull out of the parking lot of the Ice Service Store and drive away. One of the left rear taillights of this vehicle was broken out, leaving a place through which a white light was shining.

Deputy Sheriff Charles Medford testified that he stopped a light blue 1965 model Chevrolet between 12:30 and 12:45 a.m. on 11 December 1970. One of the left rear taillights was broken out. He stopped this vehicle some thirteen miles from the Ice Service Store in Black Mountain. Mrs. Louise Owens was driving the vehicle and defendant was sitting in the right-hand front seat. Mrs. Owens stated to Deputy Medford that she and defendant were going to the Hot Shot in Biltmore to get something to eat.

Mrs. Louise Owens testified that prior to 1 December 1970 she and her five children had been living for some eight weeks with defendant in his trailer at Enka, North Carolina. On 10 December 1970 around 8:00 o'clock p.m., defendant told her that he was going to get some cigarettes and to his mother's home to borrow some money. He left in her 1965 light blue Chevrolet and returned between 11:00 and 11:30 p.m. At that time he was wearing blue jeans and a blue shirt. Upon his return he gave her children some change and talked to them about going to Florida during the Christmas holidays. He then changed clothes and she and defendant left to go to the Hot Shot to get something to eat. On the way to the eating place they were stopped by Deputy Sheriff Medford. At that time the left taillight was out on her car. On the next day she and defendant went shopping for groceries and Christmas presents.

Eugene Owens, the 14-year old son of Mrs. Louise Owens, testified that he was living with his mother in defendant's trailer on 10 December 1970. On that day defendant returned to the trailer between 11:00 and 11:30 p.m. and poured some change out onto a bar in the kitchen. Defendant gave Eugene a $50 bill and told him that the money was his Christmas present. Defendant had been wearing a green jacket when he left earlier in the evening.

Douglas Carver, owner of the Ice Service Store, testified that his audit of the cash register showed that $102.75 was missing. The corporate name of his business was Ice Service, Incorporated.

Defendant offered no evidence.

The jury returned a verdict of guilty of armed robbery. Defendant appealed from judgment imposing a prison sentence of 25 to 30 years.

This case is before us pursuant to our general referral order effective 1 August 1970.

Attorney General Morgan and Assistant Attorney General Richmond for the State.

Hendon & Carson, by George Ward Hendon, for the defendant.

BRANCH, Justice.

Defendant assigns as error the failure of the trial judge to grant his motion for nonsuit.

[1, 2] The indictment charges that defendant "unlawfully . . . and feloniously . . . with the use and threatened use of firearms, . . . to wit: small hand pistol whereby the life of Mrs. Katie Stepp was endangered and threatened, did . . . steal and carry away money of the value of $103 from the presence, person, place of business, Ice Service Store, a corporation, . . ." The manager of the corporation testified that the corporate name of the company was "Ice Service, Incorporated." In support of his contention that this was a fatal variance between the indictment and the evidence, defendant cites *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46. *McKoy* relates to an arrest of judgment on a charge of larceny where there was no allegation of ownership of the money allegedly stolen. It is true that a fatal variance results in larceny cases where title to the property is laid in one person by the indictment and proof shows it in another. *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699; *State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920. However, it is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525; *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14; *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34.

The trial judge properly overruled defendant's motion for nonsuit.

Defendant strongly contends that the trial judge committed prejudicial error by admitting into evidence the property seized

under the search warrant and by allowing into evidence testimony concerning the seized property. He specifically alleges (1) that the statements in the affidavit to obtain the search warrant were not sufficient to allow the magistrate to find probable cause for the issuance of the search warrant, (2) the affidavit was not attached to the search warrant pursuant to G.S. 15-26(b), and (3) the search warrant failed to describe with reasonable certainty the premises or the objects sought, and that reference to the affidavit did not cure this defect since it was not attached to the search warrant. We first quote portions of applicable statutory law, and will then consider each of these contentions in numerical order.

AFFIDAVIT FOR SEARCH WARRANT:

G.S. 15-25(a) provides:

> Any . . . magistrate of the General Court of Justice may issue a warrant to search for any contraband, evidence or instrumentality of crime upon finding probable cause for the search.

G.S. 15-26 provides:

> (a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made.
>
> (b) An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.
>
> (c) The warrant must be signed by the issuing official and bear the date and hour of its issuance above his signature.

G.S. 15-27 provides:

> (a) No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial.
>
> (b) No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required.

Were sufficient facts before the magistrate to establish probable cause for the issuance of the search warrant?

The affidavit executed by Officer Roland and the search warrant issued by the magistrate appear in the record as follows:

> C. W. ROLAND, Deputy Sheriff, Buncombe County, being duly sworn and examined under oath, says under oath that he has reliable information and reasonable cause to believe that VERLON SPILLARS and LOUISE SAMS OWENS, have on their premises, on their persons, and in an automobile registered in the name of Louise Sams Owens certain property, to wit: instrumentalities and fruits of crimes committed on December 10, 1970, that is to say, stockings used to cover the face, articles of clothing, shoes, small short barrelled hand gun, money, letters pertaining to the crime, which were used in the commission of a felony, to wit: Armed Robbery, committed on the 10th day of December, 1970, at the following places: (1) Ice Service Store in Black Mountain; (2) Ice Service Store in Enka, North Carolina. The property described above is located on the premises, in the vehicle, and on the persons of Verlon Spillars and Louise Sams Owens described as follows:
>
> PREMISES: Two bedroom house trailer located at 394A Asbury Road on the North side of the road, white and green in color, 12 feet by 55 feet in dimensions, down a dirt road, 1/4 mile from Asbury Road in front of Enka High School, in Enka, N. C.
>
> AUTOMOBILE: 1965 Chevrolet Impala, light blue in color, two door, license number, N. C. 1970, BE-6575, with broken left rear tail light.
>
> PERSONS: Verlon Spillars, and Louise Sams Owens.
>
> The facts which establish reasonable grounds for issuance of a Search Warrant are as follows:
>
> (1) Mr. Oscar Crisp, Old U. S. 70, Black Mountain, identified a 1965 Chevrolet with broken left rear tail light leaving the scene at Ice Service Store Black Mountain, at about 10:30 PM about the same time as the robbery of the store December 10, 1970;

(2) Mrs. Carolyn Sparks, Black Mountain, observed a 1965 Chevrolet with broken left rear tail light in her place of business, a package store two doors from the robbed Ice Service Store on December 10, 1970; and the car made several trips around her building prior to the robbery;

(3) The 1965 Chevrolet was stopped by Deputy Sheriff Charles Medford on I-40 east of I-26 overpass about 12:30 AM December 11, 1970 with Mrs. Louise Owens operating and a man slumped down in the right front seat;

(4) The 1965 Chevrolet has been seen at the trailer, above described, by your affiant since December 10, 1970 and it does have a broken tail light;

(5) Alfred Owens, husband of Louise Owens, told your affiant that Verlon Spillars has been living in the above described trailer for some weeks and that his wife, Mrs. Owens has been staying there also.

s/ C. W. Roland,
Affiant

(Sworn to on 12th day of December, 1970)

SEARCH WARRANT:

NORTH CAROLINA
BUNCOMBE COUNTY

To the Sheriff or Other Lawful Officer Empowered to Enforce the Criminal Laws—

GREETINGS:

Whereas Information has been funished me by the affiant named on the attached affidavit (and by the witnesses whose names are listed below), who stated under oath that Verlon Spillars and Louise Sams Owens have property described in the attached affidavit and connected in the manner described in the attached affidavit with the commission of felonious of Robbery, December 10, 1970, further described in the attached affidavit. Such property is located as described in the attached affidavit. Whereas I have examined under oath the affiant and such other witnesses as are named below and am satisfied that there is probable cause to believe that the named person has such property

on the premises of Verlon Spillars, Louise Sams Owens, on their person, and in the vehicle, 1965 Chevrolet, described in the attached affidavit;

You are hereby commanded to search the premises, the 1965 Chevrolet, the persons of Louise Sams Owens, for the property in question. If this property is found seize it and keep it subject to court order. Herein fail not and of this warrant make due return. Search pursuant to the attached affidavit.

ISSUED THIS 12th day of December, 1970 at 1:00 P. M. upon information furnished under oath by the affiant and other witnesses named below:

C. W. Roland
Name of Affiant

Everett Penland
Witness

/s/ (Illegible)
Magistrate, District Court
Buncombe County
28th Judicial District

In addition to the affidavit, this record discloses that the officers also advised the magistrate that they had received $74 from Mrs. Owens (which she had received from defendant), and that Mrs. Owens had told them she would show them where other money was located in the trailer.

[3, 4] It is not necessary that the affidavit contain all the evidence properly presented to the magistrate. *State v. Elder*, 217 N.C. 111, 6 S.E. 2d 840. G.S. 15-26(b) requires only that the affidavit indicate the basis for the finding of probable cause. We do not interpret this portion of the statute to impose a requirement upon the magistrate to transcribe all the evidence before him supporting probable cause. Such an interpretation would impose an undue and unnecessary burden upon the process of law enforcement.

[5, 6] A valid search warrant may be issued on the basis of an affidavit containing information which may not be competent as evidence. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755. The affidavit may be based on hearsay information if the magistrate

is informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible. *Jones v. U. S.*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725. Probable cause deals with probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act, *Brinegar v. U. S.*, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302, and if the facts before the magistrate supply "reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender," it is sufficient basis for the issuance of the search warrant. *State v. Vestal, supra.* The magistrate's determination of probable cause should be paid great deference by the reviewing court. *Jones v. U. S., supra.*

[7] Upon application of the above stated principles of law, we conclude that there were sufficient facts before the magistrate to establish probable cause for the issuance of the search warrant.

It is not necessary that we decide whether under G.S. 15-26(b) the affidavit to obtain the search warrant must at all times be attached to the search warrant in order to insure its efficacy.

This record discloses that the affidavit was executed according to the statutory requirements. When the State was called upon to produce the search warrant by defendant's objection, it produced the search warrant *and the affidavit.*

[8] "A search warrant will be presumed regular if irregularity does not appear on the face of the record." Strong, North Carolina Index 2d, Searches and Seizures, § 3, p. 9. *State v. Rhodes,* 233 N.C. 453, 64 S.E. 2d 287; *State v. Elder, supra.*

G.S. 15-27(b) provides: "No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required."

It is noted that here the search warrant repeatedly refers to the "attached affidavit."

[9] The only evidence offered by defendant to rebut this presumption of regularity was the statement obtained on cross-examination from Officer Calloway that he did not *see* the affidavit at the time Officer Roland read and served the search warrant. Defendant's further cross-examination reveals that Officer Calloway heard Officer Roland read to Mrs. Owens material contained only in the affidavit (reference to the house trailer), which strongly suggests that the affidavit accompanied the search warrant and therefore reinforces the presumption of its regularity.

Defendant did not offer sufficient evidence to rebut the presumption that the search warrant was regular.

We hold that the trial judge properly admitted into evidence the seized property under the search warrant and properly allowed into evidence testimony concerning the seized property.

Defendant contends that the trial judge erred by admitting the search warrant into evidence.

In this connection, the State's evidence shows that on the night of the robbery defendant left his trailer-home with $30 and returned later in the night with at least $388.35. The Ice Service Store, Inc., at Black Mountain lost only $102.75 as a result of the alleged robbery.

Defendant argues that by admission of the search warrant into evidence the prosecution, by hearsay evidence, erroneously (1) offered an explanation as to the discrepancy in the amount of money in defendant's possession by tending to show that it was obtained by robbery of the Ice Service Store at Enka, North Carolina, and (2) allowed Officer Roland to state that he had reasonable cause to believe that defendant had committed another crime.

[10] The validity of a search warrant, the legality of a search, and the admissibility of evidence obtained by the search are matters of law to be determined by the trial judge. Determination of these questions is not for the jury's consideration. *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755; *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674; *State v. Moore,* 240 N.C. 749, 83 S.E. 2d 912.

[11] It is error to allow a search warrant together with the affidavit to obtain search warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. See *State v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206.

Here, the trial judge erred when he admitted the search warrant and the accompanying affidavit into evidence. We need only to determine if the error was prejudicial.

[12] It is well recognized in this jurisdiction that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense. *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410; *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. We think it appropriate to here note that this Court now holds that even on cross-examination an accused may not, for the purpose of impeachment, be questioned as to whether he has been indicted or arrested for an unrelated crime. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174; *State v. Stimpson,* 279 N.C. 716, 185 S.E. 2d 168.

[13] The record does not affirmatively show that the search warrant and affidavit were exhibited to or read to the jury. We are unable to find specific authority in this jurisdiction stating that the record on appeal must affirmatively show that documentary evidence was read to or exhibited to the jury in order for it to be considered on appeal. However, the preponderance of authority, supported by better reasoning, is that when documentary evidence is regularly admitted, it is presumed that its contents are made known to the jury. 5 C.J.S., Appeal and Error, § 1557, p. 1143; *Illinois Central R. R. Co. v. Swisher,* 61 Ill. App. 611 (1895); *Leary et al. v. New et al.,* 90 Ind. 502 (1883); *Hefling v. Van Zandt,* 162 Ill. 162, 44 N.E. 424 (1896); *Mercantile Trust Co. v. Doe,* 26 Cal. App. 246, 146 P. 692; *Barnard Bus Lines v. Weeks,* 156 Va. 465, 158 S.E. 870 (1931); *McAllister v. City of Frost,* 62 S.W. 2d 232 (1933).

We find the following in Stansbury's North Carolina Evidence 2d § 91, p. 209—Other Offenses as Evidence of the Offense Charged:

> Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.
>
> * * * * *
>
> Often, however, the doing of the first act has a logical tendency to prove some relevant fact other than mere character or disposition. When it does, it may be shown by competent evidence.

[14] Here, the evil in the admission of the search warrant and the accompanying affidavit is that the affidavit contains hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime. Further, the effect of admitting the search warrant and affidavit into evidence was to allow the State to strengthen its case by the use of obviously incompetent evidence.

Under the circumstances of this case we think that the erroneous admission of the search warrant resulted in error prejudicial to defendant.

Defendant assigned as error the court's denial of his motions to strike the testimony of Officer Roland which was offered to corroborate the testimony of witness Owens.

We do not deem it necessary to discuss this and the remaining assignments of error since there must be a new trial. We note, without deciding whether its admission was prejudicial, that there was some variance in the testimony of the two witnesses.

For the reasons stated, there must be a

New trial.

CITIZENS NATIONAL BANK, CONCORD, NORTH CAROLINA, AND JOHN A. CUNNINGHAM, TRUSTEES UNDER THE WILL OF JOSEPH F. CANNON (JR.) v. GRANDFATHER HOME FOR CHILDREN, INCORPORATED; OBSERVER FRESH AIR CAMP, INCORPORATED; CITY OF CHARLOTTE, NORTH CAROLINA, AND B. IRVIN BOYLE, GUARDIAN AD LITEM

No. 98

(Filed 28 January 1972)

1. **Wills § 28— construction of a will — intent of testator**

It is the duty of the court to construe provisions of a will so as to discover the intent of the testator and to give effect to that intent if it is not in contravention of some established rule of law or public policy; such intention is to be determined by an examination of the will, in its entirety, in the light of all surrounding facts and circumstances known to testator.

2. **Trusts § 5— construction of trust — distribution of portion of trust property**

Where an item of testator's will provided for the manner in which trustees should "administer the remaining *principal*" of a trust upon the death of testator's wife, and Paragraph (c) thereunder provided that "Twenty-five percent *thereof* shall be paid over to the City of Charlotte, North Carolina, to be used by it in furnishing facilities for and in the furtherance of aviation," it was *held* that testator intended for the trustees to transfer to the city, free and clear from further control by the trustees, twenty-five percent of the trust properties held by them at the time of the death of testator's wife.

3. **Trusts § 1— transfer of trust assets to beneficiary for specific use — accountability to trustees**

Provision of a will directing trustees, upon the death of testator's wife, to transfer a portion of the trust properties to a city "to be used by it in furnishing facilities for and in the furtherance of aviation" did not impress a further trust upon the properties so as to require the city to account to the trustees for its use of the properties.

4. **Trusts § 10— extraordinary expenses in trusts administration — payment out of principal**

Apart from statute and apart from a contrary provision in the trust instrument, extraordinary expenses incurred in the administration of a trust, including the expense of a proceeding brought by the trustee to obtain a construction of the trust instrument and the direction of the court as to the distribution of the trust properties, are usually payable out of principal.

5. **Costs § 3; Trusts § 10— trustees' action to construe trust — payment of costs — discretion given trustees**

In this action instituted by trustees to obtain a declaratory judgement directing them in the administration of a trust created by a will, the trial court erred in directing that the costs of the

action be paid "out of the assets constituting the corpus or principal of the trust estate," where the will authorized the trustees to determine "how receipts and disbursements shall be credited, charged or apportioned as between income and principal," since the court has deprived the trustees of the discretion conferred upon them by the testator in accordance with G.S. 37-2.

APPEAL by plaintiffs and by guardian ad litem from *Collier, J.*, at the 8 February 1971 Session of CABARRUS, heard prior to determination by the Court of Appeals.

Plaintiffs, as trustees under the will of Joseph F. Cannon, Jr., instituted this action for a declaratory judgment directing them in the administration of the trust created by the will. The defendant Boyle was appointed guardian ad litem to represent unknown persons who may be or become interested in or entitled to assets of the trust.

The testator died 2 October 1942. He was not survived by any lineal descendant. His wife, who survived him, died 13 April 1970. At her death the trustees were in possession of trust assets, consisting of corporate stocks and bonds, then valued at $1,740,659.06.

The will devised and bequeathed to the trustees seventy-five percent of the testator's residuary estate and provided for the disposition of the income from the trust properties during the life of the testator's wife. The provision of the will here in question reads as follows:

"(3) After the death of my wife, Nella Douglas Cannon, if there be none of my children or grandchildren capable of taking under the foregoing provisions, my Trustees shall administer the then remaining principal of this seventy-five percent portion then remaining in their hands in the following manner:

"(a) One-half thereof shall be set aside in trust for the benefit of the Grandfather Orphanage for Children, located at Banner Elk, North Carolina, and the income therefrom shall be paid in quarterly installments to the proper officials of said Orphanage so long as the Orphanage continues to operate and function as an Orphanage for children, and in the event that the Orphanage shall discontinue operation, then the proceeds of the trust then in the hands of said Trustees, shall be paid to the City of

Charlotte, North Carolina, to be used by it as set forth in Subparagraph (c) hereof.

"(b) Twenty-five percent thereof shall be held for the benefit of the Observer Fresh Air Camp, Inc., of Charlotte, North Carolina, and the income therefrom shall be paid over in quarterly installments to the proper officials thereof so long as said organization operates a camp for boys on a charity basis, and in the event that the Observer Fresh Air Camp, Inc., shall discontinue operation, then the proceeds of the trust then in the hands of said Trustees shall be paid to the City of Charlotte, North Carolina, to be used by it as set forth in Subparagraph (c) hereof.

"(c) Twenty-five percent thereof shall be paid over to the City of Charlotte, North Carolina, to be used by it in furnishing facilities for and in the furtherance of aviation, and in the event any portion of the trust estates mentioned in the Subparagraphs (a) and (b) next above set forth, shall be payable to the City of Charlotte, the same shall be used in a similar manner."

The matter being submitted to the superior court on stipulations as to the facts, the court entered judgment finding the facts to be as stipulated and setting forth conclusions of law.

Among the facts so stipulated and found are these (summarized and renumbered):

1. In 1914, there was established at Banner Elk, North Carolina, an orphanage called "Grandfather Orphanage for Children." It operated under that name until approximately 1945, when its name was changed to "Grandfather Home for Children." (The testator's will was executed 2 May 1942.) In 1957, it was incorporated under the name "Grandfather Home for Children, Inc." The defendant, Grandfather Home for Children, Inc., continued to operate the orphanage as an eleemosynary institution, in the same location and in the same manner as its predecessors, and presently has 63 children in residence therein. There has never been another institution operating in Banner Elk, North Carolina, under the name of "Grandfather Orphanage for Children," "Grandfather Home for Children," or any other name similar thereto.

2. In 1937, Curtis B. Johnson, publisher of the Charlotte Observer, acquired land and established thereon a camp for

boys called "The Observer Fresh Air Camp." In the same year he and others organized and incorporated the "Observer Fresh Air Camp, Incorporated," which presently exists as a corporation of this State. The records of the Secretary of State do not disclose the incorporation in this State of a corporation by the name of "Observer Fresh Air Camp, Inc." Also, in 1937, the land on which the above mentioned camp was established was conveyed to Observer Fresh Air Camp, Incorporated, and is presently owned by it. In 1946, all of the outstanding memberships in Observer Fresh Air Camp, Incorporated, were transferred to the Y.M.C.A. of Charlotte. The Observer Fresh Air Camp, Incorporated, is now operating a camp for boys without profit to the corporation and is conducting a camping program which is designed to provide wholesome outdoor recreation beneficial to the physical and mental development of the campers.

3. The City of Charlotte presently owns and operates, upon land owned by it, a municipal airport in Mecklenburg County known as Douglas Municipal Airport.

Upon its findings of fact, the court concluded as follows (summarized and renumbered):

1. The defendant, Grandfather Home for Children, Incorporated, is the same entity as the "Grandfather Orphanage for Children" referred to in the will and is entitled to all benefits provided for "Grandfather Orphanage for Children" thereby. It now operates and functions as an orphanage for children so as to entitle it to be paid the income from the portion of the trust estate provided by the above quoted Paragraph (3) (a) of the will.

2. Observer Fresh Air Camp, Inc., one of the beneficiaries named in the will, is the same entity as the defendant Observer Fresh Air Camp, Incorporated. This defendant operates a camp for boys on a charity basis and is entitled to be paid the income from the portion of the trust estate provided in the above quoted Paragraph (3) (b) of the will.

The court further concluded as follows:

"7. That the City of Charlotte, North Carolina, is entitled to the benefits conferred by Item VI, A (3) (c) [above quoted] of said Will, and that said City of Charlotte is entitled to a distribution in kind of that portion of the prin-

cipal or corpus of the trust estate referred to therein remaining in the hands of the aforesaid Trustees at the time of the death of Nella Douglas Cannon."

The court thereupon ordered and adjudged as follows:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

"1. That after paying or providing for the payment of the costs of this action the Trustees shall administer the then remaining principal of the seventy-five per cent (75%) portion specified in Paragraph VI, A(3) of the Will, as of the date of death of Nella Douglas Cannon on April 13, 1970, together with the accruals of the principal and net income since said date, in the following manner:

"(a) One-half (½) thereof shall be set aside in kind IN TRUST for the benefit of Grandfather Home for Children, Incorporated, located at Banner Elk, North Carolina, and the net income attributable to such share subsequent to April 13, 1970, shall be paid in quarterly installments to the proper officials of said orphanage so long as the Orphanage continues to operate and function as an orphanage for children, in accordance with the provisions of the Will of Joseph F. Cannon (Jr.).

"(b) Twenty-five per cent (25%) thereof shall be set aside in kind IN TRUST for the benefit of Observer Fresh Air Camp, Incorporated, of Charlotte, North Carolina, and the net income attributable to such share subsequent to April 13, 1970, shall be paid over in quarterly installments to the proper officials thereof so long as said organization operates a camp for boys on a charity basis in accordance with the provisions of the Will of Joseph F. Cannon (Jr.).

"(c) That the remaining twenty-five per cent (25%) of the principal shall be distributed and paid in kind to the City of Charlotte, free and discharged of trust, together with twenty-five per cent (25%) of the net income accumulated thereon by said trust subsequent to April 13, 1970, for use by it in accordance with the terms of the Will of Joseph F. Cannon (Jr.).

"(d) That the costs of this action as finally determined shall be paid by the Trustees out of the assets

constituting the corpus or principal of the trust estate being administered under Item VI, A of the Will, and the Trustees are authorized and directed to liquidate such of said principal assets as they may deem necessary in the exercise of their discretion to pay such costs.

"(e) That the costs of this action shall be taxed by separate order of the Court.

"(f) That this cause be retained for further order of Court."

From this judgment the plaintiffs appealed, assigning as error the above quoted Conclusion of Law No. 7, the above quoted Paragraph (c) of the judgment, the above quoted Paragraph (d) of the judgment and the signing of the judgment.

The defendant guardian ad litem also appealed, assigning as error the above quoted Conclusion of Law No. 7, the above quoted Paragraph (c) of the judgment and the signing of the judgment. He contends that the provisions of Paragraph (c) of the above quoted portion of the will are inconsistent with the provisions of Paragraphs (a) and (b) thereof and that the judgment is erroneous in that it fails to make provisions requiring the city to make a future accounting with reference to its use or disposition of the portion of the trust funds directed by the judgment to be distributed to the city.

Carson and Reynolds for Grandfather Home for Children, Incorporated.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston for Observer Fresh Air Camp, Incorporated.

Henry W. Underhill, Jr., and W. A. Watts for City of Charlotte.

B. Irvin Boyle, Guardian ad Litem.

Williams, Willeford & Boger and Clyde L. Propst, Jr. for Citizens National Bank and John A. Cunningham, Trustee.

LAKE, Justice.

[1] It is elementary that it is the duty of the court to construe provisions of a will so as to discover the intent of the testator and to give effect to that intent if it is not in contravention

of some established rule of law or public policy. Such intention is to be determined by an examination of the will, in its entirety, in the light of all surrounding facts and circumstances known to the testator. *Trust Co. v. Dodson,* 260 N.C. 22, 131 S.E. 2d 875; *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689; *Moore v. Langston,* 251 N.C. 439, 111 S.E. 2d 627; *Trust Co. v. Taliaferro,* 246 N.C. 121, 97 S.E. 2d 776; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17.

Item VI of the will before us divides the residuary estate into two parts and devises and bequeaths these to the plaintiffs upon two separate trusts. The trust here in question is established by Part A of Item VI, the properties of this trust consisting of seventy-five percent of the residuary estate. After making provisions for the distribution of the income from these trust properties during the life of the testator's wife, Nella Douglas Cannon, and for the distribution of the income and principal thereof after her death if she should be survived by children or grandchildren of the testator, Paragraph (3) of Item VI directs what is to be done by the trustees upon the death of Mrs. Cannon if, as proved to be the case, there were no children or grandchildren of the testator "capable of taking under the foregoing provisions." No other portion of the will sheds light upon the intent of the testator as expressed in this Paragraph (3) of Part A of Item VI of the will. The portion pertinent to this appeal reads as follows:

> "(3) After the death of my wife, Nella Douglas Cannon, * * * my Trustees shall administer the then remaining *principal* of this seventy-five percent portion then remaining in their hands in the following manner: (Emphasis added.)
>
> "(c) Twenty-five percent *thereof* shall be paid over to the City of Charlotte, North Carolina, to be used by it in furnishing facilities for and in the furtherance of aviation * * *." (Emphasis added.)

[2] Very plainly this portion of the will directs the trustees to pay over to the city, upon the death of Mrs. Cannon, twenty-five percent of the principal of the trust properties then in the hands of the trustees. In contrast, Subparagraph (a) directs that one-half of the principal held by the trustees at the death of Mrs. Cannon be "set aside in trust" for the benefit of the

Grandfather Orphanage for Children [Grandfather Home for Children, Incorporated] and that the income therefrom be paid to it. Similarly, Subparagraph (b) directs that twenty-five percent of the principal held by the trustees at Mrs. Cannon's death be "held for the benefit of" the Observer Fresh Air Camp, Inc., [Observer Fresh Air Camp, Incorporated] and that the income therefrom be paid over to the officials thereof. The testator chose his words carefully in these three subparagraphs. Obviously, he intended for the trustee to transfer to the city, free and clear from further control by these trustees, twenty-five percent of the trust properties held by them at the time of Mrs. Cannon's death. Subsequently received income, attributable to such twenty-five percent of the properties would, of course, follow this portion of the properties and be properly distributable to the city.

[3] The statement in Subparagraph (c) that the properties so paid over to the city are "to be used by it in furnishing facilities for and in the furtherance of aviation" do not have the effect of impressing a further trust upon the properties so as to require the city to account to these plaintiffs for its use of the properties. This provision in the will is not sufficient to create a new trust. *Williams v. Thompson,* 216 N.C. 292, 4 S.E. 2d 609. Consequently, there was no error in the court's Conclusion of Law No. 7 or in Subparagraph (c) of the judgment ordering that this twenty-five percent of the principal be paid to the city "free and discharged of trust," together with the income accumulated thereon subsequent to the death of Mrs. Cannon.

We come now to the portion of the judgment directing that the costs of this action be paid "out of the assets constituting the corpus or principal of the trust estate being administered under Item VI, A of the Will." The judgment directs the costs to be paid from the principal in the hands of the trustees prior to transfer of properties to the city. Thus, one-fourth of the burden of this expense is to be borne by the city.

G.S. 6-21 provides that costs, including reasonable attorneys' fees determined and allowed by the court, "shall be taxed against either party, or apportioned among the parties, in the discretion of the court" in "any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder."

Item VII, Paragraph (2), of the will of Mr. Cannon provides that the trustees "are hereby empowered to determine how receipts and disbursements shall be credited, charged or apportioned as between income and principal and their decision in this respect shall be final and not subject to question by any beneficiary under this trust."

G.S. 37-2, which is part of the Uniform Principal and Income Act, provides:

> "*Application of chapter; powers of settlor.*—This chapter shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with, or, unless otherwise stated hereinafter, without the interposition of a trust; *except that* in the establishment of the principal provision may be made touching all matters covered by this chapter, and *the person establishing the principal may himself* direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or *grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this chapter.*" (Emphasis added.)

Consequently, G.S. 37-12, providing for the allocation of expenses, including court costs and attorneys' fees as between income and principal, has no application to the present case.

G.S. 1-263 provides: "In any proceeding under this article [declaratory judgments] the court may make such award of costs as may seem equitable and just." This section of G.S. Chapter 1 was not repealed by the enactment of G.S. Chapter 1-A. See: Session Laws of 1967, Chapter 954, §§ 4 and 5; G.S. 1A-1, Rule 57.

[4] Apart from statute and apart from a contrary provision in the trust instrument, extraordinary expenses incurred in the administration of a trust are usually payable out of principal. Scott on Trusts, 2d Ed, § 233.3, p. 1755. The expense of a proceeding brought by the trustee to obtain a construction of the trust instrument and the direction of the court as to the distribution of the trust properties is, ordinarily, such an extraordi-

nary expense. See, Bogert, Trusts and Trustees, 2d Ed, § 809, p. 180.

Little v. Trust Co., supra, was a suit for a declaratory judgment to construe the provisions of a will establishing a trust. The will, like the one now before us, authorized the trustees named therein to determine "what expenses or other charges shall be charged against income and what against principal." The trial court ordered the costs of the proceeding, including attorneys' fees, paid out of the corpus of the trust. The trustee, appellant, excepted to the allowance of attorneys' fees as part of the costs so to be paid. As to that point, this Court said: "In the case *sub judice* the taxing of costs, the inclusion therein of attorneys' fees and the fixing of reasonable counsel fees are matters within the sound discretion of the trial court. * * * We find no grounds upon which to disturb the orders of the court with respect to costs and attorneys' fees."

It appears from the report of the decision in *Little v. Trust Co., supra,* see pp. 254-255, that the question there presented to this Court concerning costs and attorneys' fees related to the amount of the fees allowed, rather than to the allocation of the expense to income or to principal. As the court pointed out, *Little v. Trust Co., supra,* was "fraught with unusual difficulties." The principal points of contention were other than the allocation of the costs of the litigation between principal and income. Concerning the propriety of the trustee's allocation to principal of property received by it, by virtue of a subtraction from a beneficiary's distributive share of income pursuant to a provision of the will, this Court said:

> "We agree that the allocation of this fund to the *corpus* of the trust estate was proper. 'Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' Restatement of the Law on Trusts, sec. 187, p. 479. '. . . . [I]n general, where a will or trust instrument purports to confer upon an executor or trustee the power to determine what is income and what is principal, the courts . . . have sustained the exercise of the power by such executor or trustee, in the absence of fraud or arbitrary action . . .' Annotation: 118 A.L.R., Income or Principal, p. 843."

Scott on Trusts, 2d Ed, § 233.5, p. 1775, states:

"Terms of the Trust.

"By the terms of the trust the trustee may be empowered to determine what receipts should be treated as income and what receipts as principal or to apportion receipts between income and principal, and may be empowered to determine what expenditures should be paid out of income and what expenditures out of principal or to apportion expenditures between income and principal. Where such a power is conferred upon the trustee, his determination is controlling unless he has abused the discretion conferred upon him. Whether there is an abuse of discretion depends upon the extent of the power conferred upon him. The mere fact that the trustee does not follow the rules which would be applicable if no such power were conferred upon him does not constitute an abuse of discretion. Indeed, the very purpose in conferring the power upon him is to enable him to depart from the usual rules."

In Bogert, Trusts and Trustees, 2d Ed, § 802, it is said:

"Control by Settlor.

"The settlor may make provisions as to the sources from which the trustee should pay expenses and these will be controlling, unless the court finds that they frustrate or handicap the trustee in achieving the accomplishment of the trust purposes and therefore it permits or directs the trustee to act otherwise.

"Effect of Grant of Discretion to Trustee.

"If a trustee is given discretion by the terms of the trust or a statute or court order as to the charging of expenses to the income or capital account, a decision reached by him will be binding, unless there was an abuse of the discretion by reason of the fact that the trustee acted arbitrarily, in bad faith, for the benefit of others than the cestuis of the trust, or otherwise in opposition to the settlor's purposes."

[5] G.S. 37-2, above quoted, expressly authorizes the settlor of a trust to provide therein that the trustee may in his discretion direct the apportionment of expenses as between income and principal. The will creating the trust now before us

so provided. The court, without any finding of an abuse of discretion by the trustees or any bad faith on their part, has deprived them in this instance of the discretion conferred upon them by the testator. In this there was error. Any intimation to the contrary in *Little v. Trust Co., supra,* is hereby disapproved.

In oral argument of the appeal, we were advised that there are accumulations of income presently in the hands of the trustees from which the costs of this action can be paid. Since the funds directed to be paid to the City of Charlotte include both its share of the principal and its share of the accumulated income, it can make no difference to the City of Charlotte how the costs of this proceeding are allocated as between income and principal. The only practical effect of such allocation is with reference to the trusts for the benefit of the Grandfather Home for Children, Incorporated, and the Observer Fresh Air Camp, Incorporated. We detect no reason for depriving the trustees of the discretion which the testator conferred upon them with reference to these two continuing trusts.

Nothing herein shall be deemed to deprive the court of the authority conferred upon it by G.S. 6-21 to tax the costs to the plaintiff trustees and to determine the amount of attorneys' fees which are to be made a part of the costs.

The judgment of the superior court is hereby modified by deleting from Paragraph (d) thereof the words, "constituting the corpus or principal," and the words, "and the Trustees are authorized and directed to liquidate such of said principal assets as they may deem necessary in the exercise of their discretion to pay such costs." So modified, Paragraph (d) of the judgment will read: "(d) That the costs of this action as finally determined shall be paid by the Trustees out of the assets of the trust estate being administered under Item VI, A of the Will." Except as herein modified, the judgment of the superior court is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. FRANK GAINEY

No. 120

(Filed 28 January 1972)

1. **Constitutional Law § 32; Criminal Law § 21— waiver of counsel and preliminary hearing — trial on more serious charge**

Defendant's waiver of counsel and preliminary hearing in the district court on a charge of common law robbery was not rendered invalid by the fact that defendant was not tried in the superior court for common law robbery but was thereafter indicted and tried for armed robbery.

2. **Constitutional Law § 32; Criminal Law § 21— necessity for preliminary hearing — appointment of counsel**

While a preliminary hearing is not an essential prerequisite to a bill of indictment, an indigent defendant is entitled to the appointment of counsel if such a hearing is held. G.S. 7A-451.

3. **Criminal Law § 161— form of assignments of error**

An assignment of error "To the court's overruling of defendant's objection to questions by the solicitor concerning defendant's previous arrest" does not comply with Supreme Court Rule 19(3) since it does not itself specifically show the questions sought to be presented.

4. **Criminal Law §§ 86, 89— impeachment of defendant — arrest or indictment for other crimes — commission of specified criminal acts**

For purposes of impeachment, a witness, including the defendant in a criminal case, may no longer be asked if he has been arrested or indicted for a specific offense, but he may be asked whether he has *committed* specific criminal acts or been guilty of specified reprehensible conduct.

5. **Criminal Law § 86— cross-examination as to other criminal charges — new trial**

Whether a violation of the rule against impeachment by evidence of criminal charges as distinguished from convictions will constitute sufficient ground for a new trial depends upon the circumstances of a particular case.

6. **Criminal Law § 86— cross-examination of defendant — arrest for another crime — harmless error**

In this armed robbery prosecution, the admission of evidence on cross-examination of defendant with reference to defendant's arrest for assault the day before the robbery was inconsequential and constitutes no ground for a new trial.

7. **Criminal Law §§ 102, 170— absence of defense witness — objectionable question by solicitor — harmless error**

Where defendant testified that a certain defense witness was not in court and had not been subpoenaed because "he didn't want

to come to court," the solicitor's question, "He didn't want to go on the stand and perjure himself, did he?", while objectionable, could not have effected the outcome of the case and was not prejudicial error.

8. **Criminal Law § 86— cross-examination of defendant — other parole violations**

For the purpose of impeachment, it was competent for the solicitor to ask defendant if he had been guilty of other parole violations.

9. **Criminal Law §§ 99, 170— remark by trial court — harmless error**

Trial judge's erroneous comment, in passing upon a defense objection to the solicitor's cross-examination of defendant, that "the jury is the judge" *held* not prejudicial.

10. **Criminal Law § 86— cross-examination of defendant — number of prison sentences served**

The solicitor was properly allowed to cross-examine defendant as to the number of prison sentences defendant had served.

APPEAL by defendant from *Bickett, J.*, 3 November 1969 Schedule "B" Session of CUMBERLAND (belated appeal allowed 5 May 1971 by writ of certiorari from the Court of Appeals), transferred for initial appellate review by the Supreme Court under the general referral order of 31 July 1970, entered pursuant to G.S. 7A-31(b)(4) (1969).

Defendant was arrested upon a warrant which charged that on 1 February 1969 he feloniously took $145.00 from the person of Cleveland Graham by making a felonious assault upon him which put him "in bodily fear and danger of his life." On 18 February 1969 at a regular session of the District Court, Judge Joseph E. Dupree explained to defendant the nature of the charges against him and the statutory punishment therefor, his right to have counsel appointed to represent him if he was indigent, and his right to a preliminary hearing. Defendant stated to the court that he did not desire the appointment of counsel and signed a written waiver.

Defendant also waived preliminary hearing, and Judge Dupree bound him over to the Superior Court for action by the grand jury. At the 10 March 1969 Session defendant and Charles W. Robinson were indicted for feloniously taking $145.00 from Cleveland Graham by the use of a pistol whereby his life was endangered and threatened.

On 26 February 1969, eight days after he was bound over, Judge Bickett appointed Attorney Marion C. George, Jr., to

represent defendant. However, "for good cause shown," on 27 August 1969, he permitted Mr. George to withdraw and appointed Attorney J. A. Bouknight, Jr., in his stead. On 29 September 1969 "for good reasons, including Defendant Gainey's wishes that Movant withdraw and other reasons, the revelation of which would violate Defendant Gainey's privileges," Mr. Bouknight moved to withdraw. Judge Bickett allowed the motion and appointed Mr. J. William Anderson, defendant's present attorney, to represent him.

Upon the trial, which began 3 November 1969, the evidence for the State tended to show:

On 1 February 1969 Cleveland Graham, Hubert Bennett, and David Grice were members of the United States Army, stationed at Fort Bragg. Between 12:45 and 1:30 a.m. the three men left the Savoy Club in Fayetteville and got into the automobile belonging to Graham, which was parked off the edge of the street about a car's length from the entrance to the Savoy. The entrance was lighted and a street light was "in touching distance from the bumper of [the] car." There was "enough light there to read a newspaper."

Graham got in the driver's seat with Grice beside him; Bennett got in the back. As Graham was about to start the car two men approached. One of them, Frank Gainey, "snatched the door open," and pointed a pistol with a white handle at his face. He ordered Graham to get out, face the automobile, and put his hands on top of the car. Graham did as he was told. Gainey held the gun to the back of Graham's head while he removed his wallet, containing $145.00, from his pocket. The other man, who was Charles Wayman Robinson, jerked Bennett out of the car. Grice was already out. When Robinson discovered that neither Grice nor Bennett had any money, Gainey told Robinson to take the watch from Grice's arm. Gainey left Graham to take the watch himself.

While the two men were occupied with Grice, Bennett ran into the Savoy Club to get help. However, "he walked in and circled right back out . . . when the man inside wanted to charge two dollars for running in there." (Bennett knew that the Savoy ticket sellers were armed with pistols and inclined to suspect "gate-crashers.") As he ran down the street Bennett heard two shots fired and "figured they were probably shoot-

ing Graham." He finally met an M. P., who "couldn't go over in that area" but who called for some help. By that time Bennett "had shocked nerves and everything"; so he caught the bus back to Fort Bragg without ascertaining the fate of his companions.

After defendant and Robinson had obtained Grice's watch they returned to Graham, who had hidden his watch back of the front seat in the meantime. When they did not find his watch they beat him about the head, knocked him down into a mud puddle, and began to kick him. Grice came from around the rear of the car and told them to leave Graham alone; that they had already taken his money. When they turned their attention to Grice, Graham ran down the street. Being unable to find help or to get any response from any house, he retraced his steps. From two houses back he observed that the street was empty. He returned to the Savoy where he found David Grice requesting permission from one of the ticket sellers to call the police.

About 2:00 a.m. Police Officer DeVane met Graham and Grice at the Savoy. On the way to the police station DeVane stopped at the home of Robinson's grandmother, who gave him her family album of photographs. From this album Graham identified Robinson as one of the men who had robbed him, and he went to the police station to sign a warrant for him. From there the two officers, Graham, and Grice went looking for the two men; Graham rode with DeVane and Grice with Acker. As the police cars approached the home of Robinson's grandmother, Robinson and Gainey were getting out of an automobile. As soon as one of the officers turned the spotlight on the two, Graham immediately told DeVane that they were the men who had robbed him, and Grice said to Acker, "Stop the car." Acker approached and ordered the men not to move. Robinson stopped, but Gainey struck the officer on the head and ran. DeVane arrested Robinson. Acker pursued Gainey and arrested him. The two were then taken to the police station where they were placed in a room with three other Negro men who had been arrested and were being booked. When Grice entered the room he said to the police officers, "These are the two men that robbed us. This man here (Gainey) has my watch on."

In response to a call from the police about 5:00 a.m., Bennett went to the booking room of the police station where de-

fendant and Robinson were with "a lot of guys . . . public drunks and everything . . . all Negroes." Bennett pointed to Robinson and Gainey as the men who had staged the robbery.

At the time of the trial Grice had been transferred to Hawaii. Graham and Bennett testified, and both positively identified Gainey and Robinson as the men who had attacked them and robbed Graham and Grice. Graham could not remember what kind of clothing the two men were wearing. Bennett said they both had on trench coats. He thought Robinson was wearing a dark one and Gainey a light one, "a white or beige or something," but he was not sure.

The testimony of defendant Gainey, as a witness in his own behalf, tended to show: On the evening of 31 January 1969 he remained at his home with his wife, his brother Jesse, and Meng Harris from 8:00 p.m. until 2:00 or 2:30 a.m. on 1 February 1969, when he left with Wayman Robinson to go to the home of Robinson's mother. On the way they caught a ride with Willie Ray and were getting out of his car when they "got arrested." Defendant has never owned a light-colored trench coat or a white-handled automatic pistol. On 1 February 1969 he did own an eighteen-jewel, silver-colored wristwatch, which he had bought while he was in prison in Raleigh serving a sentence for an assault on a female. When the police approached and ordered him not to move he ran because he was on parole, and he was not supposed to be out after 12:00. He didn't rob Graham, Grice, and Bennett because he "didn't rob nobody." On cross-examination defendant said that he had been "convicted of nothing but assault cases." He could not say "right off" how many times, but one case involved shooting at a man with a .22 pistol, a revolver.

Defendant's brother, Jesse James Gainey, and his wife testified that defendant was with them on 1 February 1969 until sometime between 1:00 and 2:00 a.m., when he left to go to the home of Robinson's mother; that he owned a wristwatch; and had been paid that day by Thomasson Plywood. Defendant testified that the officers found $80.00 of his wages on him.

The jury's verdict was guilty of armed robbery as charged. From a sentence of 20-25 years, defendant appealed. The court entered an order permitting him to appeal at public expense and continuing Mr. Anderson as his attorney for that purpose.

Mr. Anderson failed to perfect the appeal in apt time. On 21 May 1970 Judge Edward B. Clark entered an order in which he found that defendant's counsel had not perfected his appeal in apt time; "that there was excusable neglect" for the failure; and that defendant was lawfully entitled to appeal and was an indigent. Judge Clark thereupon entered an order reappointing J. William Anderson as defendant's attorney for the purpose of preparing a petition for a writ of certiorari to the North Carolina Court of Appeals. Presumably this order was entered as a result of defendant's petition, filed in December 1969 with the judge presiding in the Superior Court of Cumberland County, that defendant himself be furnished the transcript of his trial and copies of the documents constituting the record proper. Approximately one year later, on 4 May 1971, the petition for certiorari was filed with the Court of Appeals, which allowed the petition on 5 May 1971. In due course the appeal was docketed in the Court of Appeals and transferred to us under the general referral order then in effect.

Attorney General Robert Morgan and Staff Attorney Burley B. Mitchell, Jr., for the State.

J. William Anderson for defendant appellant.

SHARP, Justice.

Defendant's case on appeal contains seven assignments of error, one of which he expressly abandons in his brief. His first two assignments relate to Judge Dupree's findings that, prior to defendant's waiver of counsel and preliminary hearing, he had explained to him the nature of the charges against him, the statutory punishment therefor, and his constitutional rights in connection therewith.

[1] Defendant was bound over to the Superior Court upon a warrant charging him with common-law robbery, a crime punishable by imprisonment not exceeding ten years. G.S. 14-2 (1969). In the Superior Court he was tried upon an indictment charging robbery with firearms for which the punishment is not less than five nor more than thirty years. G.S. 14-87 (1969). Defendant argues that the crime for which he was tried was not the one which Judge Dupree had explained to him and, therefore, he could not have knowingly and understandingly

waived either counsel or a preliminary hearing. However, defendant does not project this argument further. He points to no prejudice whatever resulting to him from the absence of counsel at the time he waived preliminary hearing, and the record neither discloses nor suggests any. Nothing prejudicial to defendant is shown to have taken place at any time. He made no statements with reference to the charge against him until he testified in the Superior Court, where he was represented by counsel. No preliminary hearing was required and none was held.

[2] Under our law a preliminary hearing is not an essential prerequisite to a bill of indictment. *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740, *cert. den.* 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423 (1968), and cases therein cited. However, since G.S. 7A-451 (effective 1 July 1969) declares a preliminary hearing to be "a critical stage of the action," it follows that an indigent defendant would be entitled to the appointment of counsel if such a hearing is held. *See Coleman v. Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct 1999 (1970). We hold that none of defendant's constitutional rights were violated during the proceedings in the District Court; that his waiver of counsel was valid; and that he sustained no prejudice either by reason of his waiver of counsel or preliminary hearing. *State v. Clark,* 272 N.C. 282, 158 S.E. 2d 705.

[3] Defendant's third assignment of error is: "To the court's overruling of defendant's objection to questions by the solicitor concerning defendant's previous arrest. (R p 41)" As we have repeatedly pointed out, such an assignment does not comply with Rule 19(3) of the Rules of Practice in the Supreme Court. 254 N.C. at 783, 798-800. *See Grimes v. Credit Company,* 271 N.C. 608, 157 S.E. 2d 213; *State v. Staten,* 271 N.C. 600, 607-608, 157 S.E. 2d 225, 231. Although the assignment of error does not itself specifically show the questions sought to be presented as required by the rule, we have reviewed the record and ascertained the question. On cross-examination, after defendant denied that he had seen Officer Acker "earlier that day" (31 January 1969), he testified without objection that Acker had arrested him on a Thursday night—presumably on 30 January 1969. The solicitor's next question was, "What did he arrest you for"? Defendant's objection was overruled, and he answered that he had been arrested for an assault upon a person whose name he did not know, just somebody he was "fighting with."

[4] It is no longer the rule in North Carolina that, for purposes of impeachment, a witness may be asked if he has been arrested or indicted for a specified offense. In *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174, this Court overruled *State v. Maslin,* 195 N.C. 537, 143 S.E. 3; *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297, and other cases which permitted such questions for impeachment. Chief Justice Bobbitt, writing the opinion of the Court, said: "We now hold that, *for purposes of impeachment,* a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial. . . . *A fortiori* we hold that, *for purposes of impeachment,* a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *accused,* either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been *arrested for* such unrelated criminal offense." *Id.* at 672, 185 S.E. 2d at 180.

[4] The trial of this case occurred before the decision in *Williams.* Although no longer permissible, the solicitor's questions with reference to defendant's arrest were then competent. However, the decision in *Williams* did not change the rule that for purposes of impeachment a witness may be asked whether he has *committed* specific criminal acts or been guilty of specified reprehensible conduct. *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785; *State v. Bell,* 249 N.C. 379, 106 S.E. 2d 495; Stansbury, N. C. Evidence § 111 (2d Ed. 1963). Had the solicitor's question been whether defendant had engaged in an affray on Thursday night instead of "What were you arrested for?" it would have been permissible.

[5, 6] As the opinion in *Williams* pointed out, "Whether a violation of the rule [against impeachment by evidence of criminal *charges* as distinguished from convictions] will constitute sufficient ground for a new trial will depend upon the circumstances of a particular case." *Id.* at 674, 185 S.E. 2d at 181. Therefore, even under *Williams,* the admission of the evidence with reference to defendant's arrest was inconsequential and constitutes no ground for a new trial.

[7] Assignment of error No. 4 purports to raise the question whether the court erred "in overruling defendant appellant's

objections to questions by the solicitor concerning defendant's failure to have certain defense witnesses in court." This assignment likewise does not comply with our Rule 19(3). The record page reference to which the assignment refers shows defendant to have testified without objection that Willie Ray, the man who (he said) had given him and Robinson a ride to the home of Robinson's mother, was not in court. When the solicitor asked defendant if he had subpoenaed Ray as a witness, defendant answered that Ray "didn't want to come to court." The solicitor's next question was, "He didn't want to go on the stand and perjure himself, did he?" There was no objection to this question, which defendant answered by saying, "He didn't have no reason to tell no lie."

Defense counsel then objected "about where he [Ray] is and what he was going to say." The objection was overruled, and the solicitor dropped the subject. Defendant not only made no objection to the question which elicited this testimony, but there was no motion to strike it. However, such a motion would have been addressed to the discretion of the court. *State v. Herndon,* 223 N.C. 208, 25 S.E. 2d 611, *cert. denied* 320 U.S. 759, 88 L.Ed. 456, 64 S.Ct. 67 (1943). *See* 4 Strong, N. C. Index *Trial* § 15 (1961). The solicitor's question with reference to Ray's motives was objectionable. However, it is inconceivable that it affected the outcome of the case, and under all the circumstances, it cannot be held prejudicial error. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839; *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598.

The foregoing comments with reference to assignment of error No. 4 are equally applicable to assignment No. 5. On direct examination defendant had explained his flight from Officer Acker at the time of his arrest by saying that he was on parole and was not supposed to be out after midnight. On cross-examination the solicitor asked him how many times he had broken the terms and conditions of his parole. There was no objection and defendant answered, "That is the first time that I can recall." Defense counsel then objected "to this line of questioning" on the ground that defendant "is not charged with a violation of probation, your Honor, and that is not the issue here." No motion to strike the answer was made. Judge Bickett did not understand counsel's statement. His reply to it was that he could not hear a word and that "the jury is the judge."

[8, 9] For the purpose of impeachment it was competent for the solicitor to ask defendant if he had been guilty of other parole violations and, had objection been timely made, it would have been properly overruled. Therefore, the judge's failure to evaluate this question and answer was immaterial. Indubitably, the competency and admissibility of evidence is for the court and not the jury. However, it is beyond belief that the judge's erroneous statement that "the jury is the judge," when considered in context, could have influenced the jury's verdict one way or the other. Assignment of error No. 5 is overruled.

After defendant had testified on cross-examination that he had bought the watch, which Grice identified as his, from another inmate while he was in prison in Raleigh, the solicitor asked this question: "You've had a lot of experience in prison, haven't you?" Defendant's objection was overruled, and he answered that he had "been convicted of nothing but assault cases . . . on one charge they had me for attempt to kill; I was shooting at one."

[10] The solicitor's question was inexactly phrased, but in effect it was, as defendant understood, an inquiry as to the number of prison sentences defendant had served. As such, it was proper cross-examination, and the court's ruling was not erroneous. Assignment of error No. 6 is overruled.

In his brief, defendant properly abandoned his seventh and final assignment of error. It was based upon his only exception to the judge's charge, and it pointed to no error.

We have carefully examined the entire record in this case. It discloses that defendant has had a fair trial, free from prejudicial error, and it leaves no reasonable doubt of his guilt. While defendant's appeal appears to have been unnecessarily delayed, since his sentence must be affirmed, no prejudice has resulted to him from the delay. He has been in custody since 4 November 1969 and, all the while, he has been serving the sentence from which he appealed. G.S. 15-186.1 (1971).

In the trial below we find

No error.

L. E. JOHNSON v. JAMES MASSENGILL

No. 143

(Filed 28 January 1972)

1. **Evidence § 15; Witnesses § 5— character evidence**

Ordinarily, evidence as to the good or bad character of a party to a civil action who has not become a witness is not admissible, being irrelevant to the issues.

2. **Witnesses § 6— plaintiff's evidence of defendant's character — admission before defendant testified**

It was not reversible error to admit evidence offered by the plaintiff, otherwise competent, to show defendant's general character and reputation where defendant's counsel had announced that defendant would be a witness and indicated his intent to offer evidence as to defendant's reputation, which he subsequently did, since it is within the discretion of trial court to allow the examination of a witness out of the customary order.

3. **Witnesses § 5— character evidence — reputation in the community**

The general rule is that a witness, offered to prove the character of another person, may not testify as to his personal opinion concerning the character of such other person but is limited to testimony concerning the reputation of such person in the community.

4. **Witnesses § 5— character evidence — specific acts**

A witness called to prove the character of another person may not, on direct examination, be questioned with reference to specific acts of such person as indicative of his character.

5. **Appeal and Error § 52— testimony elicited by appellant — ground for new trial**

Defendant is not entitled to a new trial by reason of testimony which he, himself, elicited on cross-examination.

6. **Contracts § 26; Witnesses § 6— breach of contract — character evidence — evidence of defendant's breach of another contract — door opened by cross-examination**

In this action for breach of contract for the sale of potatoes, defendant's cross-examination of plaintiff's witness as to the basis for the witness' evaluation of defendant's character opened the door for testimony by the witness on redirect examination that defendant had previously broken a contract with the witness concerning the sale of potatoes.

7. **Witnesses § 6— character evidence — reputation with the witness**

While testimony of plaintiff's witness that "With us it [the defendant's character] is bad" was incompetent and should have been stricken upon motion by defendant, failure to strike such testimony was harmless error in the light of testimony by the witness' husband which was properly before the jury.

8. **Contracts § 25— breach of contract — issue of whether contract was entered**

In this action for breach of contract for the sale of potatoes, the trial court did not err in failing to submit an issue as to whether the parties had entered into a contract as alleged in the complaint, where defendant did not deny plaintiff's allegations as to the making of the contract or the terms thereof and did not allege a different contract, and where defendant made no demand for the submission of such an issue. G.S. 1A-1, Rule 49(c).

ON *certiorari* to the Court of Appeals to review its decision, reported in 12 N.C. App. 6, 182 S.E. 2d 232, finding no error on appeal by defendant from *Hall, J.*, at the 15 January 1971 Session of JOHNSTON.

The plaintiff sues for breach of contract of sale. The complaint alleges in Paragraph 2: "That on or about the 9th day of January 1969, the plaintiff entered into a contract with the defendant wherein and whereby the plaintiff agreed to purchase 15,000 bushels of potatoes at $4.00 a bushel or a total of $60,000.00; and the defendant agreed to sell to the plaintiff 15,000 bushels of potatoes at $4.00 a bushel." The complaint further alleges that the plaintiff paid the defendant the agreed purchase price but the defendant delivered to the plaintiff only 12,233 bushels, whereby the plaintiff was damaged in the amount of $11,068.

Answering the complaint, the defendant alleged: "Paragraph Two is not denied." He denied the allegation of short delivery and the allegation of damages. For further answer, the defendant alleged that, on 9 January 1969, he had in excess of 15,000 bushels of sweet potatoes stored in the plaintiff's warehouse, that he paid the storage charges thereon and "on said date sold to the plaintiff all of said sweet potatoes * * * the sale price to cover 15,000 bushels at $4.00 per bushel." Payment by the plaintiff to the defendant of $60,000 "for said potatoes" is admitted. The further answer denies that the defendant made any warranty or guaranty that "said lot of potatoes would measure out at least 15,000 bushels, or any given number of bushels, after shrinkage and loss by rot and other causes," and denies any breach of contract.

The evidence of both parties shows that at the time of harvesting his crop, the defendant stored in the plaintiff's warehouse 15,000 boxes or crates of sweet potatoes, each box being

designed to hold approximately one and one-ninth bushels as an allowance for the normal shrinkage of potatoes after digging. In the potato trade a box and a bushel are synonymous. The potatoes were loaded on the defendant's trucks by his employees in his fields, being placed in the trucks on pallets, on each of which rested 30 boxes. Upon arrival at the warehouse, the plaintiff's employees unloaded the potatoes by pallets and stacked the pallets in an area of the warehouse by use of a fork-lift truck. At that time no sale by the defendant to the plaintiff was contemplated. The resulting stack of boxes was substantial in height, width and length, so that the contents of boxes at the bottom and in the interior of the stack could not be inspected without disturbing the stack. Storage charges, computed on the basis of 15,000 bushels, were paid by the defendant. On 9 January 1969, the defendant sold and the plaintiff bought the potatoes at the price of $4.00 per bushel and the plaintiff paid the defendant $60,000. The boxes were open at the top and the top layer of boxes were filled with potatoes of good quality.

The plaintiff's evidence is to the effect that when he began to "run" the potatoes after the purchase he found many boxes only one-third full, some empty and some with only a few potatoes therein. After giving the defendant full credit for all rotted potatoes, the stack contained only 12,126 bushels.

The defendant's evidence was to the effect that all boxes delivered by him to the plaintiff's warehouse were fully packed with high quality potatoes and that the extent of shrinkage in sweet potatoes after digging varies from crop to crop.

The jury found that the defendant did commit a breach of the contract and the plaintiff was damaged thereby in the amount of $8,644.

The defendant appealed, assigning as error: 1. The admission, over objection, of testimony of witnesses for the plaintiff to the effect that the defendant's character was bad, this evidence being based upon the witnesses' own opinion of his character, based, in turn, as to each witness upon transactions between the witness and the defendant; and (2) the court's instruction to the jury that the defendant admitted the contract and its failure to submit an issue as to whether the plaintiff "entered into a contract with the defendant as alleged in the complaint."

The Court of Appeals found no prejudicial error.

N. Leo Daughtry and J. R. Barefoot for plaintiff.

Grady & Shaw by Philip C. Shaw; and George B. Mast, P.A. for defendant.

LAKE, Justice.

In the oral argument it became clear that the printed record did not disclose the setting in which the evidence, to the admission of which the defendant excepts, was introduced. By stipulation of the parties, the stenographic transcript of the entire trial was filed "as the correct statement of case on appeal as appropriate." Under the special circumstances of this case, we have so considered it.

Mrs. Garland Barefoot, called as a witness for the plaintiff prior to the offering of any evidence by the defendant, testified that she and her husband operate the Meadow Farm Storage and have been in the potato business "for quite a while." She knows the defendant and has had dealings with him in potatoes over the past several years. She knows his general reputation and character in the community. In response to the question, "What is it?" she replied, "With us it is bad." The defendant moved to strike. The witness then stated, "With us, I don't know I am not going to say about other people. I don't have anything to do with other people." The defendant's motion to strike was overruled. The witness then said she dealt with Mr. Massengill in 1968 and purchased his potatoes.

The court sustained defendant's objection to the plaintiff's question to this witness, "What was the agreement on his part with reference to the quality of the potatoes?" The ground for the ruling was that the plaintiff was not inquiring about the transaction involved in the present action. The court also sustained the defendant's objection to this question by the plaintiff, "Mrs. Barefoot, did he false pack any potatoes on you?"

On cross-examination, this witness testified that she doesn't have anything against the defendant. She knows nothing about the transaction involved in the present action. She purchased a crop of potatoes from the defendant in the past. Employees of the witness and her husband picked up these potatoes, put them in boxes, loaded them and "took them in."

On re-direct examination, this witness testified that those potatoes were all right "because our crew picked them up." The court sustained the defendant's objection to this question by plaintiff: "Was the potatoes that his crew picked up all right?"

Mrs. Barefoot was succeeded on the witness stand by her husband, Garland Barefoot, who testified on direct examination that he has been in the business of growing sweet potatoes and operating a warehouse for the storage of potatoes twelve or fifteen years and had business dealings with the defendant over that period of time. In response to the question, "What has been the extent of the business you have done with him?" the witness replied, "It turned out to be satisfactory." The defendant objected that the answer was not responsive. The court sustained this objection and stated that the witness might answer the question. Thereupon, the witness testified that he did business with the defendant on two occasions. He knows the defendant's general reputation and character in the community. "It generally is not good." The first time he knew the defendant the witness and his wife purchased some potatoes from him.

The court sustained objections by the defendant to the following questions: "Did that transaction turn out satisfactory?" and, "Was there any false packing of potatoes?" This concluded the direct examination of this witness.

On cross-examination, Mr. Barefoot testified that the defendant has stored potatoes with him. Sometimes the witness buys potatoes stored by others in his warehouse. On one occasion the defendant first sold potatoes stored in the witness' warehouse to the plaintiff in the present lawsuit. The witness did not like this because the defendant "didn't stand up to the agreement." He protested vigorously and, as a result, "got" those potatoes.

To the defendant's question, "And they were stored in your warehouse and you wanted the potatoes, didn't you?" the witness responded, "There is a big detail about that." The defendant's counsel said, "Answer my question." Thereupon, plaintiff's counsel, out of order, interposed: "All right. Go ahead and explain it? He's asked for it, explain it."

Thereupon, the witness, still on cross-examination, testified that on that occasion the defendant tried to sell his pota-

toes to the witness for a price which the witness was not willing to pay, so the defendant stored the potatoes in the witness' warehouse and they agreed that at the appropriate time the defendant and the witness would sell the potatoes and would "split the profit" realized over and above the price which the defendant had asked the witness to pay.

At this stage, the plaintiff's attorney, out of order, injected this question, "Did he keep the agreement?" The witness replied, "No, he didn't." To this there was no objection by the defendant, whose counsel continued the cross-examination after the court admonished counsel to examine the witness one at a time.

On such further cross-examination, the witness testified that the potatoes in question were the property of the defendant and he had a right to sell them "but he didn't have a right to break a promise." The witness "got the potatoes" at the price which the plaintiff in the present action had then offered the defendant for them. The witness paid the defendant such price because "I had to do it or not get the potatoes." Defendant's counsel then asked, "And you fell out with Mr. Massengill because of that transaction, didn't you?" The witness replied, "Well, I told him I never weren't going to have anything else to do with him." Defendant's counsel then asked, "And that is what you based your character-opinion on, isn't it?" The witness answered, "Well, there is a big tale in before that if you want me to tell you?" The plaintiff's counsel then interjected, again out of order, "Go ahead and explain what it is?" Defendant's counsel, however, said: "Wait a minute, answer my question. You based your character question and answers, they were based on what you have just described here to the jury?" The witness said, "I will say yes."

On re-direct examination by the plaintiff, this witness was asked, "Was there anything in addition to that you based it [his opinion] on?" Over objection, he answered that the time he met the defendant he went to the defendant's field and looked at the potatoes being dug. He agreed to buy the defendant's whole crop "if he would do his job as good as he was doing it then." The defendant dug potatoes for two or three more days and the witness stacked them in the warehouse. One morning the defendant sent three truckloads to the warehouse. The witness looked at them and told the defendant's sons, who had

brought them: "Them ain't the kind of potatoes we'd agreed on. You will have to leave with them." This the defendant's sons did. The objection to those potatoes was, "There were potatoes in there that shouldn't be in there and they were slack packed and I told the boys, I said I don't want no such potatoes in my house taking room when they are supposed to be good ones."

On re-cross-examination, the defendant's counsel asked: "I will ask you again now, if the business transaction that you yourself have had with Mr. Massengill if that isn't what you based your character evidence on?" The witness replied: "That's right, and I was told by people or people told me beforehand that you'd better not deal with him, but I went ahead and did." The witness got "upsot" because the defendant didn't stand up to the agreement.

At this stage, the defendant moved to strike the testimony of this witness, which motion was overruled.

The defendant testified in his own behalf at length. In the course of his testimony on direct examination, he set forth his version of the transaction with the witness Garland Barefoot. The defendant also offered, through several other witnesses, evidence of his own good character and reputation.

[1, 2] Ordinarily, evidence as to the good or bad character of a party to a civil action who has not become a witness is not admissible, being irrelevant to the issues. *Pearce v. Barham,* 267 N.C. 707, 149 S.E. 2d 22; *Merrill v. Tew,* 183 N.C. 172, 110 S.E. 850; *Marcom v. Adams,* 122 N.C. 222, 29 S.E. 333; Stansbury, North Carolina Evidence, 2d Ed., § 103. We need not determine whether the nature of the present action is such as to bring this case within an exception to the general rule. See, *Marcom v. Adams, supra.* Evidence of the plaintiff's good character was offered and received without objection from the defendant prior to the calling of Mr. and Mrs. Barefoot as witnesses. At that time, the defendant's counsel announced that the defendant would be a witness and indicated his intent to offer evidence as to the defendant's reputation, which he subsequently did. Under these circumstances, it would not be reversible error to admit evidence offered by the plaintiff, otherwise competent, to show the defendant's general character and reputation. It is within the discretion of the trial court to allow the examination of a witness out of the customary order.

State v. Smith, 218 N.C. 334, 11 S.E. 2d 165; *Earnhardt v. Clement,* 137 N.C. 91, 49 S.E. 49; Stansbury, North Carolina Evidence, 2d Ed., § 24.

[3, 7] The general rule is that a witness, offered to prove the character of another person, may not testify as to his personal opinion concerning the character of such other person but is limited to testimony concerning the reputation of such person in the community. *Edwards v. Price,* 162 N.C. 243, 78 S.E. 145; Stansbury, North Carolina Evidence, 2d Ed., § 110. A witness who testifies that he does not know the general reputation of the person in question may not properly testify as to the character of such person. *State v. Ellis,* 243 N.C. 142, 90 S.E. 2d 225; *State v. Coley,* 114 N.C. 879, 19 S.E. 705. Measured by these standards, the testimony of Mrs. Barefoot concerning the character of the defendant was incompetent and the motion of the defendant to strike her answer, "With us it is bad," should have been allowed.

[4] It is also the rule that a witness called to prove the character of another person may not, on direct examination, be questioned with reference to specific acts of such persons as indicative of his character. *Tillotson v. Currin,* 176 N.C. 479, 97 S.E. 395; *Nixon v. McKinney,* 105 N.C. 23, 11 S.E. 154; Stansbury, North Carolina Evidence, 2d Ed., § 111. Thus, nothing else appearing, it would not have been competent for the plaintiff, on the direct examination of his witness, Mr. Barefoot, to introduce evidence that the defendant, on an entirely different occasion than the one here in controversy, had broken a contract with Mr. Barefoot concerning a sale of potatoes.

[5, 6] The difficulty with the defendant's contention on this appeal concerning the testimony of this witness is that the plaintiff did not do that, though his questions to this witness, to which the court sustained objections, were aimed in that direction. It was the defendant, on cross-examination, who drew from Mr. Barefoot the testimony concerning the transaction between him and the defendant. He is not entitled to a new trial by reason of testimony which he, himself, elicited on cross-examination. *Justice v. Justice,* 25 N.C. 58. By his question as to the basis for the witness' evaluation of the defendant's character, he opened the door to the question propounded by the plaintiff on re-direct examination. Thus, there was no error in admitting the exceedingly damaging testimony brought forth thereby.

[7] The defendant is not entitled to a new trial by reason of the testimony of Mr. Barefoot. That testimony being properly before the jury, the error above noted in permitting Mrs. Barefoot to testify, "With us it [the defendant's character] is bad," fades into the realm of harmless error and does not justify the granting of a new trial. "Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on the appellant to show this." *Perkins v. Langdon,* 237 N.C. 159, 178, 74 S.E. 2d 634. We find no basis for the belief that had Mrs. Barefoot's testimony been stricken, as it should have been, the verdict would have been different, Mr. Barefoot's testimony remaining, properly, in the record.

[8] There was no error in the failure of the trial court to submit an issue as to whether the plaintiff "entered into a contract with the defendant as alleged in the complaint" or in the instruction to the jury that the defendant admitted the contract. Paragraph 2 of the complaint alleged the making of the contract and the terms thereof as contended by the plaintiff. Paragraph 2 of the answer states, "Paragraph Two is not denied." The further answer does not allege a different contract. Rule 8(d) of the Rules of Civil Procedure provides, "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

The issues to be submitted to the jury are those raised by the pleadings and supported by the evidence. *Wheeler v. Wheeler,* 239 N.C. 646, 80 S.E. 2d 755. In *Fairmont School v. Bevis,* 210 N.C. 50, 185 S.E. 463, this Court said: "The defendant in her answer admitted the contract sued on by the plaintiff, as alleged in the complaint. No issue was raised by the pleadings with respect to the contract. For that reason, it was error for the court to submit to the jury, over the objection of the plaintiff, the first issue [Was there a contract entered into between the plaintiff and the defendant, as alleged in the complaint?], and to charge the jury that the defendant contended that they should answer the issue 'No.' "

Furthermore, Rule 49(c) of the Rules of Civil Procedure provides:

"(c) Waiver of jury trial on issue.—If, in submitting the issues to the jury, the judge omits any issue of fact *raised by the pleadings or by the evidence,* each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered." (Emphasis added.)

Neither the record on appeal, nor the transcript supplied in supplement thereof, discloses any demand by the defendant for the submission of an issue as to whether a contract as alleged in the complaint was made by the parties.

No error.

PERFORMANCE MOTORS, INC. v. ALVA JANE RIGGS ALLEN

No. 84

(Filed 28 January 1972)

1. Uniform Commercial Code § 13— parol evidence of additional consistent terms of sale

Security agreement in which the buyer of a mobile home acknowledged delivery of the mobile home "in good condition and repair" was not intended as a "complete and exclusive statement of the terms of the agreement" within the meaning of G.S. 25-2-202(b), where the evidence of both parties showed that the mobile home was to be delivered and set up on defendant's lot and where the security agreement was signed by the buyer before the mobile home was delivered and installed, and the buyer's testimony with respect to the defective condition of the mobile home after it was installed was competent as evidence of additional consistent terms of the sale.

2. Sales § 10; Uniform Commercial Code § 22— seller's action to recover purchase price — prima facie case

In this action to recover the balance allegedly due on a secured promissory note executed by defendant incident to the purchase of a mobile home, plaintiff's allegation of the sale and delivery of the mobile home at the agreed price, and defendant's admission that she purchased the mobile home, executed the note and security payment, and refused to pay a portion of the purchase price agreed upon, makes out a *prima facie* case entitling plaintiff to go to the jury and, nothing else appearing, to recover the balance due on the note.

3. Sales § 5; Uniform Commercial Code § 15— express warranty— "puffing of wares"

Seller's statement that a mobile home "was supposed to last a lifetime and be in perfect condition" is merely an expression of opinion in "the puffing of his wares" and does not create an express warranty. G.S. 25-2-313(2).

4. Sales § 6; Uniform Commercial Code § 15— implied warranty of fitness

The sale of a mobile home carried with it an implied warranty that the mobile home was fit for the purpose for which it is ordinarily used, *i.e.*, residential purposes, where the seller is a merchant with respect to the sale of mobile homes, and the security agreement executed by the buyer incident to the sale contains no language, as permitted by G.S. 25-2-316, excluding or modifying the implied warranty of merchantability.

5. Sales § 6; Uniform Commercial Code §§ 15, 19— implied warranty— inspection by buyer

While there is no implied warranty when the buyer, before entering the contract, examines the goods as fully as he desires and has knowledge equal to that of the seller, the buyer's inspection of a mobile home at the seller's place of business did not destroy the implied warranty of fitness imposed by law upon the sale where the contract of sale imposed on the seller the obligation to deliver the mobile home and "block it up" on the buyer's lot, since until that was completed the fitness of the mobile home for use as a home could not be ascertained by the buyer's examination and inspection. G.S. 25-2-316(3)(b).

6. Uniform Commercial Code § 19— inspection after delivery

Unless otherwise agreed, when the seller is required to send the goods to the buyer, the inspection may be after their arrival, and the buyer is entitled to a reasonable time after the goods arrive at their final destination to inspect and reject them if they do not comply with the contract. G.S. 25-2-513(1).

7. Uniform Commercial Code § 19— making of down payment — right to inspect

The buyer's down payment on a mobile home would not impair his right to inspect following delivery. G.S. 25-2-512(2).

8. Uniform Commercial Code § 20— acceptance of goods

Under the Uniform Commercial Code, acceptance of goods is ordinarily signified by language or conduct of the buyer that he will take the goods, but this does not necessarily indicate that the goods conform to the contract, G.S. 25-2-606(1)(a); acceptance may also occur by failure of the buyer to make an effective rejection after a reasonable opportunity to inspect. G.S. 25-2-606(1)(b).

9. Uniform Commercial Code § 20— acceptance of goods — knowledge of nonconformity — revocation of acceptance

Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it

unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. G.S. 25-2-607(2).

10. Uniform Commercial Code § 20— revocation of acceptance

The buyer may revoke his acceptance if (1) the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured, and (2) the nonconformity substantially impairs the value of the goods. G.S. 25-2-607(2); G.S. 25-2-608(1).

11. Uniform Commercial Code § 20— revocation of acceptance

Revocation of acceptance must be made within a reasonable time after the buyer discovers, or should have discovered, the ground for it, and is not effective until the buyer notifies the seller of it. G.S. 25-2-608(2).

12. Uniform Commercial Code § 21— revocation of acceptance — breach of implied warranty — election of remedies

A buyer who properly revokes his acceptance is not required to elect between revocation of acceptance and recovery of damages for breach of implied warranty of fitness, both remedies being available to him. G.S. 25-2-608.

13. Uniform Commercial Code § 21— rejection of goods — revocation of acceptance — implied warranty of fitness — measure of damages

If the buyer of a defective mobile home (1) made an effective rejection of the mobile home or (2) justifiably revoked her acceptance of it, she may recover so much of the price as has been paid plus any incidental and consequential damages she is able to prove, G.S. 25-2-711(1); if the buyer accepted the mobile home and did not revoke such acceptance, she is obligated to pay the balance due on the contract price and is limited on her counterclaim to recovery of damages for breach of implied warranty of fitness.

14. Uniform Commercial Code § 21— breach of implied warranty of fitness — measure of damages

The measure of damages for breach of implied warranty of fitness is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless circumstances show damages of a different amount, plus incidental damages and such consequential damages as were within the contemplation of the parties. G.S. 25-2-714(2); G.S. 25-2-715.

15. Uniform Commercial Code § 20— rejection of goods — insufficiency of evidence

Defendant's evidence was insufficient to support a finding that she rejected a mobile home where it showed that, after telling plaintiff's agent when the mobile home was installed that "this is not right and I do not want it," defendant moved into the mobile home and made three monthly payments under the terms of the contract.

16. Uniform Commercial Code § 20— revocation of acceptance — sufficiency of evidence

Defendant's evidence was sufficient to permit a jury finding that she initially accepted a mobile home on the reasonable assumption that plaintiff would correct the nonconforming defects, and that because of plaintiff's failure to do so, defendant revoked her acceptance by continually complaining to plaintiff of the defects from September to December and thereafter ceasing to make payments under the contract.

ON *certiorari* to the Court of Appeals to review its decision (11 N.C. App. 381, 181 S.E. 2d 134) vacating judgment of *Parker, J.*, October 1970 Session of JONES Superior Court, and awarding plaintiff a new trial.

Plaintiff instituted this action on 5 May 1969 to recover the balance allegedly due on a promissory note executed by defendant incident to the purchase of a mobile home and secured by a security interest (conditional sales agreement) in the mobile home.

Plaintiff alleges defendant executed a promissory note for $10,097.64 payable to plaintiff in eighty-four monthly installments of $120.21 and signed an agreement granting plaintiff a security interest in the mobile home in the amount of the note; that after making two monthly payments defendant defaulted and, notwithstanding demand, has failed, neglected and refused to make further payments; that plaintiff rightfully repossessed the mobile home by claim and delivery proceedings and resold it at public auction for $9,115 which was duly credited on the note after deduction of necessary expenses incident to the repossession and sale; and that plaintiff is entitled to recover the deficiency which the parties stipulated could not exceed $855.

Defendant answered admitting execution of the note and conditional sales agreement but denying all other material allegations of the complaint. Further answering by way of counterclaim, defendant alleges that, prior to the execution of the note and conditional sales agreement, plaintiff, through its agents, expressly warranted and represented that said mobile home was of sound construction, free from all defects of workmanship and material, and would remain in first-class condition for a period of many years after its purchase, and further represented that plaintiff "would properly install and set up

said mobile home on the lot designated by the defendant and would properly wire the same and connect the same to proper commercial outlets and would connect the septic tank by pipe leading from said mobile home"; that all such warranties and representations by plaintiff were false when made, known by plaintiff to be false, made with intent to deceive defendant and to induce her to purchase the mobile home, and in fact did deceive defendant; that in reliance upon them she purchased the mobile home and executed the note and conditional sales agreement.

Defendant further alleged in her counterclaim that plaintiff delivered said mobile home to defendant on a designated lot in Maysville, North Carolina; that plaintiff did not properly wire and connect said mobile home to commercial outlets, did not furnish the pipe and connect the same to the septic tank as a result of which plaintiff spent $75 to have the house wired and connected and $78.60 in connecting said home to the septic tank. She further alleged that the said mobile home was not well made, not free from defects in workmanship and material, and was installed incorrectly on its foundation so that it was never level; that the ceilings sagged throughout the home, the carpeting had been cut, the front door was installed out of line and refused to close properly, sofa springs were broken, plastic counter tops were chipped, cabinet doors and shelves did not function correctly, walls throughout the home became warped, bowed and loose, toilet tanks and seats were broken, door facings throughout the trailer became loose, vinyl floors were cut, scarred and installed without a proper subfloor, all heating vents protruded from their proper location, and the heating unit did not operate properly.

Defendant further alleged that, relying on plaintiff's express and implied warranties, she made a down payment of $4,000 on the mobile home and three monthly payments of $120.21 each which, when added to her expenditures for wiring and septic tank connection, total $4,514.23; that by reason of the enumerated defects the mobile home was completely unfit and unserviceable for use as a home; that defendant repeatedly notified plaintiff of the defects and was reassured that said defects would be repaired but such repairs were never made; that defendant elected before the commencement of this action, and now elects, to rescind said contract on account of plaintiff's

breach of warranties, both express and implied; that defendant is entitled to recover of plaintiff $4,360.63 paid on the purchase price plus $153.60 for the wiring and septic tank connection, a total of $4,514.23, with interest from 21 December 1968.

The parties stipulated that if defendant owed plaintiff anything she would not owe more than $855 and that if defendant is entitled to recover anything she would not be entitled to recover more than $4,514.23.

Defendant's testimony tends to show the defective conditions alleged in her counterclaim. After cataloging the defects set out in her counterclaim, she testified that the mobile home had never been leveled; that you could see the ground through the floor; that "when they were putting it up, I told those men, 'Now this is not right and I do not want it' "; that after the mobile home was installed in such fashion, she complained to the plaintiff's president continually "from September to the last of December when he hung up on me and said Happy New Year"; that she ceased making monthly payments by reason of plaintiff's failure to make the necessary repairs to place the trailer in a usable condition; that she lived in the mobile home from September to May when plaintiff repossessed it by claim and delivery.

Julian T. Peel, President of Performance Motors, Inc., testified that defendant selected the mobile home she wished to buy, inspected it, and chose it in preference to others which were available; that "we did not imply any warranty other than the home would be as she saw it at that time"; that plaintiff only agreed to sell it to her "and block it up on her lot. If she had placed it in a mobile home park we would have hooked up the power and the water, but since she was putting it on a lot which had no facilities we could not do that as our people are not licensed electricians or plumbers."

Mr. Peel further testified that he inspected the home at defendant's request "to see what she was complaining about"; that the only thing he saw "worth noting" was a buckled panel in the hallway "which is just a sheet of four by eight plywood that had bowed off the wall"; that he agreed to repair it but defendant insisted on many other things being done at the same time and said she couldn't be bothered by men coming and going repairing defects one at a time; that she promised to send a

list of all alleged defects but never did so; that the mobile home in question had over twelve hundred square feet of floor space and the cash sale price was $10,000; that the contract signed by the parties contained the entire agreement—"[n]o warranty was implied otherwise. We set it up on her lot as she saw it sitting on our sales lot. We did not agree to keep it up for her or maintain it. Just like any other home, the person living there has to keep it up."

Plaintiff requested the following special instructions to the jury:

> "Ordinarily, the measure of damages for breach of warranty in the sale of personal property is the difference between the market value of the goods at the time and place of delivery, as delivered, and such value if the goods had complied with the warranty. Special damages may be recovered provided they were within the contemplation of the parties at the time the contract was executed and are properly pleaded. Where the purchaser does not allege the reasonable value of the chattel as warranted and its reasonable value as delivered, the damages are restricted to special damages pleaded and proved."

The trial judge refused to give the instruction requested, "except as incorporated in the charge," and charged the jury as follows: "Now, the court instructs you that the measure of damages on this issue, if you come to consider this issue, is as follows: Ordinarily the measure of damage to the contract is the amount of loss which a party to a contract would naturally and probably suffer from its nonperformance and which would in the minds of the parties at the time of its making reasonably and proximately flow from the breach of the contract. . . . " Again, later in the charge, the court stated: "Now the court instructs you that the measure of damage there is the amount which . . . the defendant, would naturally and probably suffer by reason of the non-performance of the contract and which would reasonably and proximately flow from the breach of the contract, that being the measure of damage. . . . "

Issues were submitted to and answered by the jury as follows:

> "1. What amount, if any, is the defendant indebted to the plaintiff?
>
> Answer: None.

2. Did the plaintiff breach the warranty as alleged in the answer?

Answer: Yes.

3. If so, what amount, if any, is the plaintiff indebted to the defendant?

Answer: $4,000.00 plus interest."

From judgment based on the verdict plaintiff appealed. The Court of Appeals awarded a new trial for failure and refusal of the trial judge to give the special instruction as requested by plaintiff and for charging the jury on the issue of damages as above set out. We allowed certiorari to review that decision.

Donald P. Brock, Attorney for defendant appellant.

Darris W. Koonce, Attorney for plaintiff appellee.

HUSKINS, Justice.

[1] The security agreement signed by defendant contains the following language as part of the "provisions" printed on the reverse side of the instrument itself: "Buyer further warrants and covenants that: 1. The Buyer admits, upon examination, that the Collateral is as represented by Seller and acknowledges acceptance and delivery thereof in good condition and repair." Plaintiff contends the security agreement was intended by the parties as a final expression of their agreement and that the quoted language constitutes a waiver by defendant of all warranties and renders incompetent her testimony with respect to the defective condition of the mobile home after it was installed on defendant's lot. Admission of her testimony is assigned as error.

Plaintiff's position on this point is unsound. Obviously, the security agreement was signed by defendant at plaintiff's place of business *before* the mobile home was delivered and installed. In light of that fact, the buyer at that time could not acknowledge "delivery thereof in good condition and repair." As a part of the contract of sale, plaintiff agreed to deliver the mobile home "and block it up on her lot." Until that was done plain-

tiff's obligations under the contract remained unfulfilled. Defendant's testimony was competent, not to contradict the terms of a written contract, but as evidence of additional consistent terms of the sale. "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented . . . (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." G.S. 25-2-202. Here, the evidence of both parties shows that the mobile home was to be delivered and set up on defendant's lot. Hence the security agreement was not intended "as a complete and exclusive statement of the terms of the agreement." This assignment is overruled.

[2] Plaintiff's allegation of the sale and delivery of the mobile home at the agreed price, and defendant's admission that she purchased the goods, executed the note and security agreement, and refused to pay a portion of the purchase price agreed upon, makes out a prima facie case entitling plaintiff to go to the jury and, *nothing else appearing,* to recover the balance due on the note. *Joyce v. Sell,* 233 N.C. 585, 64 S.E. 2d 837 (1951). "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." G.S. 25-2-301.

Here, to negate her obligation to pay the balance due on the note, defendant alleges (1) fraudulent representations inducing the purchase, (2) breach of express warranty, (3) breach of implied warranty of fitness, and (4) rescission of the contract due to plaintiff's breach of the warranties. We now examine her degree of success in proving these allegations.

[3] There is no evidence of fraud, and the evidence is insufficient to show an express warranty by the seller. The only evidence in this respect is defendant's testimony that "the trailer was supposed to last a lifetime and be in perfect condition." A seller's language to that effect, if used in negotiating a sale, is ordinarily regarded as an expression of opinion in "the puffing of his wares," and does not create an express warranty. G.S. 25-2-313(2); *Hollenbeck v. Fasteners Co.,* 267 N.C. 401, 148

S.E. 2d 287 (1966). Our prior decisions are in accord with the current provisions of the Uniform Commercial Code with respect to the creation of express warranties. G.S. 25-2-313; *Wrenn v. Morgan,* 148 N.C. 101, 61 S.E. 641 (1908); *Swift & Co. v. Aydlett,* 192 N.C. 330, 135 S.E. 141 (1926); *Potter v. Supply Co.,* 230 N.C. 1, 51 S.E. 2d 908 (1949).

[4] The ordinary purpose for which a mobile home is used is residential. Here, the mobile home was sold and purchased for that purpose. "Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . (2) Goods to be merchantable must be at least such as . . . (c) are fit for the ordinary purposes for which such goods are used. . . . " G.S. 25-2-314(1), (2). Plaintiff is a merchant with respect to the sale of mobile homes, and the security agreement executed by defendant contains no language, as permitted by G.S. 25-2-316, excluding or modifying the implied warranty of merchantability. Hence, the sale under discussion carried with it an implied warranty that the mobile home was fit for the purpose for which such goods are ordinarily used, *i.e.,* residential purposes. The Uniform Commercial Code in this respect accords with prior decisions of this Court on the subject. *Aldridge Motors, Inc. v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469 (1940); *Swift & Co. v. Aydlett, supra; Swift & Co. v. Etheridge,* 190 N.C. 162, 129 S.E. 453 (1925); *Jewelry Co. v. Stanfield,* 183 N.C. 10, 110 S.E. 585 (1922); *Ashford v. Shrader,* 167 N.C. 45, 83 S.E. 29 (1914); *Medicine Co. v. Davenport,* 163 N.C. 294, 79 S.E. 602 (1913).

[5-7] While there is no implied warranty when the buyer, before entering into the contract, examines the goods as fully as he desires, G.S. 25-2-316(3)(b), and has knowledge equal to that of the seller, *Driver v. Snow,* 245 N.C. 223, 95 S.E. 2d 519 (1956), this principle is not applicable to the facts here because the contract of sale imposed on the seller the obligation to deliver the mobile home and "block it up" on defendant's lot. Until that was properly done, fitness or unfitness for use as a home could not be ascertained by the buyer's examination and inspection of the goods on the seller's premises. Unless otherwise agreed, "[w]hen the seller is required . . . to send the goods to the buyer, the inspection may be after their arrival," G.S. 25-2-513(1); and the buyer is entitled to a reasonable time

after the goods arrive at their destination in which to inspect them and to reject them if they do not comply with the contract. *Parker v. Fenwick,* 138 N.C. 209, 50 S.E. 627 (1905). Moreover, defendant's down payment would not impair her right to inspect following delivery. G.S. 25-2-512(2). Here, delivery was not accomplished until plaintiff "blocked it up" on defendant's lot. Plaintiff could have cured the defects which rendered the mobile home unfit for the use for which it was sold by repairing the defective product it delivered, G.S. 25-2-508, but it failed to do so. For these reasons plaintiff may not now contend that defendant's inspection of the mobile home at plaintiff's place of business destroyed the implied warranty of fitness imposed by law upon the sale.

What remedies are available to defendant for breach of implied warranty of fitness? The answer to this question turns on whether defendant *accepted* the mobile home. This requires consideration of the Uniform Commercial Code's concept of rejection, acceptance, and revocation of acceptance.

[8-12] Acceptance is ordinarily signified by language or conduct of the buyer that he will take the goods, but this does not necessarily indicate that the goods conform to the contract. G.S. 25-2-606(1)(a). Acceptance may also occur by failure of the buyer "to make an effective rejection" after a reasonable opportunity to inspect. G.S. 25-2-606(1)(b). Effective rejection means (1) rejection within a reasonable time after delivery or tender and (2) seasonable notice to the seller. G.S. 25-2-602. Acceptance precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. G.S. 25-2-607(2). Thus, the buyer may *revoke his acceptance* if (1) "the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured," G.S. 25-2-607(2), and (2) the nonconformity substantially impairs the value of the goods. G.S. 25-2-608(1). Revocation of acceptance must be made within a reasonable time after the buyer discovers, or should have discovered, the ground for it, *Hajoca Corp. v. Brooks,* 249 N.C. 10, 105 S.E. 2d 123 (1958), and it is not effective until the buyer notifies the seller of it. G.S. 25-2-608(2). A buyer who so revokes his acceptance is no longer required to elect between revocation of acceptance on the one

hand and recovery of damages for breach of implied warranty of fitness on the other. Both remedies are now available to him. G.S. 25-2-608.

The Uniform Commercial Code does not speak of rescission, as such. We need not now decide whether a buyer may still obtain a judicial rescission of the contract by virtue of pre-Code concepts of law or equity which have not been displaced and therefore continue under the Code as an "invalidating cause" supplementing the provisions of the Code within the meaning of G.S. 25-1-103. Assuming without deciding that rescission remains available to the buyer as a remedy by virtue of G.S. 25-1-103, defendant's allegation of "rescission" will be given effect here as an allegation of "revocation of acceptance" since that Code concept more nearly reflects the claims asserted by the defendant. 2 R. Anderson, Uniform Commercial Code, § 2-711:19 at 420 (2d Ed., 1971). *See Lanners v. Whitney*, 247 Ore. 223, 428 P. 2d 398 (1967).

[13, 14] Applying the foregoing principles to the evidence in this case, if defendant (1) made an effective rejection of the mobile home, or (2) justifiably revoked her acceptance of it, she has a right to recover "so much of the price as has been paid" plus any incidental and consequential damages she is able to prove. G.S. 25-2-711(1); G.S. 25-2-715. On the other hand, if defendant did not reject but accepted the mobile home, and there has been no revocation of acceptance, she is obligated to pay the balance due on the contract price, and she is limited on her counterclaim to recovery of damages for breach of implied warranty of fitness. The measure of damages in that event is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless circumstances show damages of a different amount," G.S. 25-2-714(2), plus incidental damages and such consequential damages as were within the contemplation of the parties. G.S. 25-2-715; *Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448 (1955); *Harris v. Canady*, 236 N.C. 613, 73 S.E. 2d 559 (1952).

[15, 16] Here, defendant's evidence is insufficient to support a finding that she *rejected* the mobile home. She testified that when the mobile home was installed she told plaintiff's agent "now this is not right and I do not want it." While this statement could have been effective as a rightful rejection, G.S. 25-2-

601(a), she did not pursue that remedy. Instead, her evidence tends to show she moved into the mobile home, all the while complaining of numerous defects—some of which plaintiff attempted but failed to correct—and made three monthly payments under the terms of the contract. She complained of the defects "continually from September to the last of December [1968] when he [plaintiff] hung up on me and said Happy New Year." Thereafter defendant made no further payments, and plaintiff made no further attempt to correct the defects or to collect the monthly payments until May 1969 when the mobile home was repossessed and sold at public auction for $9115. This evidence, considered in the light most favorable to defendant, would permit a jury to find that she initially accepted the mobile home on the reasonable assumption that plaintiff would correct the nonconforming defects and subsequently revoked her acceptance by reason of plaintiff's failure to do so. Constant complaints from September to December with cessation of payment would seem to constitute sufficient notice of revocation of acceptance. "Any conduct clearly manifesting a desire of the buyer to get his money back is a sufficient notice to revoke." 2 R. Anderson, Uniform Commercial Code, § 2-608:16 at 245 (2d Ed., 1971). Furthermore, "[a] tender of the goods by the buyer to the seller is not an essential element of a revocation of acceptance. All that is required by the Code is a notification of revocation." Ibid., § 2-608:18 at 246.

Since there must be a new trial, we have made no attempt to consider *seriatim* plaintiff's several assignments of error. With respect to the court's charge as given on the measure of damages, and plaintiff's request for special instructions on the issue of damages which the court declined to give, it suffices to say that both are incomplete and inadequate and neither should have been given. At the next trial issues should be submitted to determine, among other things: (1) whether defendant accepted the goods; (2) whether plaintiff breached the implied warranty of fitness; (3) whether defendant justifiably revoked her acceptance; (4) the amount, if any, plaintiff is entitled to recover of defendant on the purchase price; and (5) the amount of damages, if any, defendant is entitled to recover of plaintiff. We have already stated the correct measure of damages upon the permissible alternative findings.

The parties may be permitted to amend their pleadings, if they so desire, to conform to the evidence. G.S. 1A-1, Rule 15, Rules of Civil Procedure.

The decision of the Court of Appeals awarding a new trial is modified to conform to this opinion and, as modified, affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JAMES LEWIS COLE

No. 126

(Filed 28 January 1972)

1. **Homicide § 21— first degree murder — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury as to defendant's guilt of first degree murder or lesser included offenses where it tended to show that defendant provoked an altercation with decedent's two sisters in a club near the grocery store where decedent worked, that decedent went to the club, exchanged angry words with defendant, and returned to the grocery store, that defendant later entered the grocery store and swung at decedent with an open knife, and that defendant acquired possession of decedent's pistol in a scuffle with decedent and fatally shot him.

2. **Homicide § 26— erroneous definition of second degree murder — correction by court**

The trial court's erroneous instruction that second degree murder is the unlawful killing of a human being "*without* malice and without premeditation and deliberation" was rendered harmless when the court immediately followed the erroneous instruction with the statement that malice is a necessary element of second degree murder and at the conclusion of the charge again called the jury's attention to the corrected definition of second degree murder.

3. **Homicide § 28— instructions on self-defense**

In this homicide prosecution, the trial court's instructions were sufficient to give defendant the benefit of his claim of self-defense.

APPEAL by defendant from *Clark, J.*, "Second May, 1971 Regular Criminal Session of WAKE County Superior Court."

In this criminal prosecution the defendant, by grand jury indictment, was charged with the first degree murder of Alex Gray Bryant. The killing occurred in Wake County on January

23, 1971. Upon arraignment, the defendant, through privately employed counsel, moved to quash the indictment. When the motion was overruled, the defendant entered a plea of not guilty. A jury of twelve and one alternate was selected and passed without objection.

The State's evidence is here summarized except when quoted. On and prior to January 23, 1971, the deceased, Alex Gray Bryant, was employed in the Price Is Right Grocery Store at the corner of Fayetteville and Walnut Streets in Raleigh. Entry into the store was from Fayetteville Street. In the same building, but with the entrance on Walnut Street, was located the Torch Club which is described in the evidence as " . . . (A) place where people dance and drink beer."

A few minutes before nine o'clock on the evening of January 23, 1971, Rozelle Bryant and Mozelle Bryant, sisters of the deceased, entered the Torch Club and sat down at a table. The defendant, who had been drinking throughout the afternoon, stopped at the table and provoked a difficulty with Rozelle Bryant. Rozelle accused him of drinking and he said, "You damn right." A witness said he saw, " . . . Rozelle hit Cole over the head with a chair. She hit him because he was going after her."

Further evidence disclosed that the deceased, Alex Gray Bryant, came from the grocery store to the Torch Club wearing his apron. He and the defendant engaged in a somewhat angry discussion about the trouble between the defendant and the Bryant sisters. However, the deceased returned to the grocery store where Cole appeared shortly thereafter. Charles Dolby testified: "The next thing I knew, James Cole came in with a knife and said, 'Don't nobody f . . . over Cole.' At that time he went into Alex Bryant with a knife. I saw him swing and Bryant went down. I heard a gun go off and Bryant slumped over. . . . After the shot was fired and Alex Bryant fell, Cole went on up the street . . . at which time I heard some more shots."

Dr. Edwards, a pathologist, testified he performed a postmortem on the deceased. He found two small lacerations in the chest, small abrasions on the left arm, and a gunshot wound in the right posterior neck area. Dr. Edwards gave as his opinion that death resulted from the gunshot wound. Dr. Ed-

wards removed a 25 caliber bullet from the body. Ballistics tests disclosed the bullet removed from the body of the deceased had been fired from the pistol taken from the defendant at the time of his arrest.

At the close of the State's evidence the defendant moved to dismiss all charges embraced within the indictment. The court denied the motion. The defendant excepted.

The defendant testified he was on weekend leave from Wake Advancement Training Center. On January 23, 1971, he had been drinking prior to his difficulty with the Bryant girls at the Torch Club. During the difficulty he knocked one of the girls down because she hit him with a chair. He testified the deceased appeared at the Club and pointed a pistol at him. However, the difficulty did not extend beyond words. The deceased went back to work. Later the defendant went to the grocery store, according to his statement, to secure a Band-Aid for his injury. After the defendant entered the grocery store, the dispute with the deceased was renewed. Here is the defendant's version as taken from the record of his testimony.

> "He was still arguing with me and I said 'Well, if you want to do me a job, now is the time.'
>
> I swung all the way around with my knife in my hand. . . . (H)e started fumbling and came out with a gun. I grabbed his wrist and we started struggling. I don't know whether I was stabbing or not. . . . He was trying to cock the gun with his left hand . . . . As soon as he got it cocked, he took his left hand and pushed it down in my face. When he did I pushed up and the gun went off.
>
> * * * * * * *
>
> I picked the gun up out of Alex's hand after he was shot and left . . . . "

On cross-examination, defendant admitted he had been sentenced for various assaults, including assault with intent to kill a police officer. One of his witnesses testified the deceased kept a pistol in a holster under his apron while he was at work. Another witness for the defendant gave testimony tending in part to corroborate the defendant with respect to the

scuffle over the pistol at the time the fatal shot was fired. The witness was a friend of the defendant and was on leave from a different prison camp where he was serving a sentence for possession of heroin. Another witness said he had seen the pistol, or one similar, in possession of the deceased. Another witness testified the deceased carried a pistol at night.

At the close of all the evidence the defendant renewed his motion that all charges embraced within the bill of indictment be dismissed. The motion was again overruled.

At the conclusion of the arguments and the court's charge the thirteenth juror was excused. The jury consisting of twelve, after deliberating, agreed upon and returned into court a verdict finding the defendant guilty of murder in the second degree. From the sentence of imprisonment for not less than twenty nor more than thirty years, he appealed.

Robert Morgan, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the State.

Sanford, Cannon, Adams & McCullough by John H. Parker for defendant appellant.

HIGGINS, Justice.

By brief, the defendant presents four questions for review: I. Did the trial court err in its instructions on second degree murder and appellant's defenses? II. Did the trial court err in denying the defendant's motion for judgment of nonsuit? III. Did the trial court err in denying the defendant's motion for a new trial? IV. Did the trial court err in signing and entering the judgment as set out in the record? Obviously Questions III and IV are formal. Answers to them depend upon the answers to Questions I and II.

In logical sequence the first question is the sufficiency of the evidence to go to the jury on the charge of murder in the first degree, or on any of the lesser included offenses. On the question of sufficiency, the evidence must be viewed in the light most favorable to the State. Any inconsistencies or contradictions must be resolved in favor of the State. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858; *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

The evidence disclosed the defendant first picked a fight with Mozelle and Rozelle Bryant who were sitting at a table in the Torch Club. He first assaulted one of the girls. The other hit him with a chair. During the commotion which followed, Alex Bryant appeared at the Club wearing his work apron. The evidence is silent, but it appears probable someone notified him of the difficulty involving his sisters. Angry words but no blows were exchanged between Cole and Bryant. The latter returned to his work.

Within a few minutes the defendant appeared at the grocery store. On entering, he made a vulgar announcement not repeated here. The State contends the defendant entered the grocery store for a further confrontation. The defendant contended he entered the store in search of a Band-Aid to stop the bleeding from his head wound which was inflicted by Rozelle's chair. He admitted, however, he opened and concealed his knife before entering the store. The defendant further contended he and the deceased were scuffling over the deceased's pistol at the time it was discharged.

[1] The defendant's contentions are contradicted by the evidence and by his conduct. The opening and concealing of his knife and the vulgar announcement were consistent with a search for trouble rather than a search for a Band-Aid. The entry of the bullet from the rear of the neck would be a difficult and unusual result from a scuffle over the pistol while the parties were facing each other. The fact the pistol was in the defendant's possession when he left the scene, indicates that perhaps he acquired possession in the scuffle and then fired the fatal shot. At all events, the evidence was sufficient to go to the jury on the charge of murder and the lesser included offenses. The motion to dismiss was properly overruled. *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541; *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447; *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638; *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889.

[2] The first objection to the charge involves the following: "Second degree murder is the unlawful killing of a human being *without* (emphasis added) malice and without premeditation and deliberation." *Malice is a* necessary element of murder in the second degree. If unexplained, this error in the charge would require a new trial since the jury found murder in the

second degree. However, the court immediately followed the erroneous instruction with the statement malice is a necessary element of murder in the second degree. At the conclusion of the charge, the court gave this additional instruction:

> "I did make one mistake at the beginning which I corrected but I want to call that to your attention so there won't be any question about it. I believe, it was when I first began to state to you what second degree murder was. I again repeat . . . that second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation; and that manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation."

The corrected instruction was sufficient to remove all harmful effect of the first definition of murder in the second degree. The erroneous definition was a slip of the tongue *(lapsus linguae)* and amply corrected, removing any harmful effect. *State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158.

[3] The defendant objected to the charge on the ground he was not given the benefit of his claim of self-defense. The court gave the following final instruction on self-defense:

> ". . . (B)ut if you find that the deceased Bryant was the aggressor and initially made a murderous assault upon the defendant with a pistol and the defendant in defending himself from such assault struggled for the pistol during which struggle the gun fired, whether in the hand of the deceased or whether in the hand of the defendant, resulting in the wounding and death of the deceased Bryant, then the defendant would not be guilty of any offense and your verdict would be not guilty."

The jury was fully warranted in finding the defendant guilty of murder in the second degree. *State v. Jennings, supra; State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Redfern,* 246 N.C. 293, 98 S.E. 2d 322; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

The motion in arrest of judgment was properly denied. In the trial, verdict, and sentence we find

No error.

STATE OF NORTH CAROLINA v. R. C. (DICK) McCLUNEY, SR.

No. 37

(Filed 28 January 1972)

1. **Statutes § 11— repeal of statute by subsequent enactment**

When a statute creating a criminal offense is repealed by a law subsequently enacted, the former will be held inoperative even as to offenses committed before the passage of the latter act, unless a contrary intent on the part of the legislature appears from the language in the repealing statute.

2. **Criminal Law § 127; Obscenity; Statutes § 11— disseminating obscenity — conviction under repealed statute — arrest of judgment**

Defendant is entitled to have arrested the judgment imposed upon his conviction of disseminating obscenity in violation of [former] G.S. 14-189.1, where that statute was unqualifiedly repealed by the enactment of Ch. 405, Session Laws of 1971 while defendant's appeal was pending in the Supreme Court.

APPEAL by defendant under G.S. 7A-30(1) from the decision of the Court of Appeals reported in 11 N.C. App. 11, 180 S.E. 2d 419.

Defendant was tried at the 24 November 1969 Session of GASTON upon an indictment which charged that, in violation of G.S. 14-189.1, he purposely and unlawfully disseminated obscenity by selling and offering for sale certain specifically designated magazines and pictures, described as obscene in the words of the statutory definition of obscenity. Before pleading defendant moved to quash the indictment on the ground, *inter alia,* that G.S. 14-189.1 is unconstitutional in that it violates the first amendment to the U. S. Constitution, the due process clause of the fifth and fourteenth amendments, and the equal protection clause of the fourteenth amendment. The motions to quash were overruled and defendant pled not guilty.

The State offered evidence; defendant offered none. The verdict was guilty as charged. With the consent of the solicitor and the defendant, prayer for judgment was continued until 25 June 1970, when a sentence of six months' imprisonment was imposed and suspended for two years upon defendant's compliance with certain conditions. Defendant appealed to the Court of Appeals. In an opinion filed 28 April 1969 that court held that G.S. 14-189.1 was constitutional and that defendant had received a fair trial, free from prejudicial error. Defend-

ant, on the ground that substantial constitutional questions had been decided against him, appealed to this Court as a matter of right.

Attorney General Robert Morgan, Assistant Attorney General Burley B. Mitchell, Jr., and Associate Attorney General Charles A. Lloyd for the State.

Norman B. Smith and Michael K. Curtis for defendant appellant.

SHARP, Justice.

Defendant was indicted for a violation of G.S. 14-189.1, a codification of Chapter 1227 of the Session Laws of 1957 as amended by Chapter 164 of the Session Laws of 1965. On 1 July 1971, while this case was pending before us on appeal, the General Assembly enacted Chapter 405 of the Session Laws of 1971 (referred to hereafter as the 1971 Act), which specifically repealed G.S. 14-189.1 and three other related sections. No saving clause was provided.

By the same Act, in an obvious effort to draft a statute in which the United States Supreme Court would find no constitutional infirmity, the General Assembly rewrote the North Carolina law defining obscenity and making its dissemination unlawful. This rewrite, now codified as G.S. 14-190.1 through G.S. 14-190.8, made material and substantial changes in our law prohibiting the dissemination of obscenity.

The 1971 Act, which repealed G.S. 14-189.1, did not substantially reenact it. Therefore it was not continued in effect under the rule that "[t]he re-enactment by the Legislature of a law in the terms of a former law, at the same time it repeals the former law, is not in contemplation of law a repeal, but is a reaffirmance of the former law, whose provisions are thus continued without any intermission." *State v. Williams,* 117 N.C. 753, 754, 23 S.E. 250; *accord, State v. R. R.,* 125 N.C. 666, 34 S.E. 527. See annot., 77 A.L.R. 2d 336 (1961), where the cases are collected.

Whereas G.S. 14-189.1 made it unlawful "to purposely, knowingly, or recklessly disseminate obscenity [except as provided in subsection (c)]," G.S. 14-190.1 prohibits the dissemination of obscenity to adults "in a public place" only. The former

law exempted from its application art museums and public or private libraries. The changes made in the 1971 Act—some of which eliminated provisions and supplied omissions which defendant contended rendered G.S. 14-189.1 unconstitutional—evidence the legislature's apprehension that G.S. 14-189.1 did not meet the requirements of the Federal Constitution as interpreted by the United States Supreme Court in *Roth v. United States,* 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957), and subsequent cases. The outright repeal of this penal statute without any saving clause further evidences this misgiving. It is also in sharp contrast with that provision of the 1957 enactment, G.S. 14-189.1(g), which declared that the "provisions of this section do not repeal but supplement existing statutes relating to the subject matter herein contained."

[1] The rule is that when a statute creating a criminal offense is repealed "by a law subsequently enacted, the former will be held inoperative even as to offenses committed before the passage of the latter act, unless a contrary intent on the part of the lawmakers appear . . . from the language in the repealing statute." *State v. Massey,* 103 N.C. 356, 358-59, 9 S.E. 632-33.

We can find nothing in the 1971 Act, which repealed G.S. 14-189.1 outright and enacted G.S. 14-190.1, "to indicate an intent to leave the old law unrepealed, or to reaffirm it." *State v. Massey, supra* at 359, 9 S.E. 633. On the contrary, the clear implication is that the legislature intended to get rid of a law of dubious constitutionality and to prevent the post-conviction problems which would immediately result were this Court or the United States Supreme Court to hold the law unconstitutional. The enactment of G.S. 14-190.1 was an obvious attempt to provide a new law which would meet the latest tests enunciated by the United States Supreme Court in order that State law enforcement officers might proceed with assurance against the rampant public dissemination and pandering of obscenity.

This legislative purpose is manifested in Section 2 of the 1971 Act [printed under G.S. 14-190.1 (Supp. 1971) as "Interpretation of §§ 14-190.1 to 14-190.8,"] which declares: "Every word, clause, sentence, paragraph, section, or other part of this Act [1971 Act] shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina will permit." It is also significant that the 1971 Act, unlike the 1957 Act, contains a severance

clause providing, "If any word, clause, sentence, paragraph, section, or other part of this act" shall be adjudged invalid, "such judgment shall not affect, impair, and invalidate the remainder thereof."

[2] The unqualified repeal of G.S. 14-189.1 renders moot the question of its constitutionality, which defendant contests in the name of first amendment guarantees of freedom of speech and press. "The rule is that when a criminal statute is expressly and unqualifiedly repealed after the crime has been committed, but before *final judgment*—even though after conviction—, no punishment can be imposed. A judgment is not final as long as the case is pending on appeal." (Citations omitted.) *State v. Pardon,* 272 N.C. 72, 75, 157 S.E. 2d 698. We, therefore, express no opinion as to the constitutionality of repealed G.S. 14-189.1.

The constitutionality of the 1971 Act does not arise on this appeal. That question will be decided if and when it is presented. In the meantime, no statement contained herein is to be considered as bearing upon its validity.

Decision on this appeal is based solely on the ground that the statute under which defendant was indicted has been repealed. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to that court to the end that it direct the Superior Court to arrest its judgment.

Reversed.

STATE OF NORTH CAROLINA v. JOE BRYANT, JOHN KNOLL, DON CHILDS AND B. R. QUEEN

No. 162

(Filed 28 January 1972)

1. Courts § 14; Obscenity— former obscenity statutes — preliminary determination of obscenity — jurisdiction of superior court

Where defendants were charged with unlawful display of obscene literature for the purpose of sale in violation of [former] G.S. 14-189 and with dissemination of obscenity in violation of [former] G.S. 14-189.1, the superior court did not have jurisdiction to make a preliminary determination of whether materials seized at the time of defendants' arrest upon those charges were obscene and to order those items it determined to be obscene held pending defendants' trial in the

district court, since both statutes created misdemeanors for which the district court had exclusive orginial jurisdiction. G.S. 7A-271(a)(5); G.S. 7A-272.

2. **Criminal Law § 148— orders appealable — void preliminary determination of obscenity**

Defendants could appeal from a superior court order that determined that 95% of the materials seized from defendants were obscene and could be retained by the police pending trial of defendants in the district court for disseminating obscenity, where the order was void in toto because the superior court had no jurisdiction of the parties and subject matter. Ch. 405, Session Laws of 1971.

3. **Obscenity— charges under repealed obscenity statutes**

Defendants cannot be tried on warrants charging unlawful display of obscene literature for the purpose of sale in violation of [former] G.S. 14-189 and disseminating obscenity in violation of [former] G.S. 14-189.1, since those statutes were repealed as of 1 July 1971 and all prosecutions based upon them ended on that date.

APPEAL by defendants under G.S. 7A-30(1) from the decision of the Court of Appeals reported in 12 N.C. App. 530, 183 S.E. 2d 824.

The four defendants operate three book stores in the City of Raleigh. Queen and Bryant operate the Adult Book Store at 208 S. Wilmington Street; Knoll operates the J & J Book Store at 123 W. Martin Street; and Childs operates the J & J Book Store at 107 Fayetteville Street.

On 18 May 1971 defendants were arrested upon individual warrants issued from the District Court Division of the General Court of Justice in Wake County. Knoll, Childs, and Queen were separately charged with unlawfully exhibiting obscene literature for the purpose of sale in violation of G.S. 14-189 (1969). Bryant, Knoll, and Childs were each charged with unlawfully selling two or more specifically designated publications featuring sexual activities in violation of G.S. 14-189.1 (1969).

As an incident to the arrest of defendants upon these warrants, police officers in the City of Raleigh seized approximately 1,450 magazines, films, pictures and other items of merchandise from the J & J Book Store on Fayetteville Street; 1,755 such items from the Adult Book Store on Wilmington Street; and 790 similar items from the J & J Book Store on W. Martin Street. The inventory shows that a total of approximately 4,000 items were seized from the three stores. Many of the items taken

were duplicates; from ten to fourteen copies of some books were seized.

On 25 May 1971 a detective of the Raleigh Police Department swore out warrants in which he charged that in violation of G.S. 14-189.1 each defendant did, on 18 May 1972, unlawfully "offer for sale obscenity" as indicated by the "inventory hereto attached." This inventory listed the items which the police had seized from the respective stores on 18 May 1971.

On 19 May 1971, the day following defendants' arrest and the seizure of the material from their stores, the solicitor of the Tenth District and the State's Attorney General filed with Judge Edward B. Clark, one of the judges presiding in the Superior Court of Wake County, a "motion for injunction hearing." The motion stated that "an adversary proceeding to determine preliminarily the obscenity of the materials held is necessary in order to afford the defendants due process in the further retention of the seized materials. . . ." Judge Clark granted the motion and conducted a hearing on 25 May 1971, at which both the State and defendants offered evidence, made oral arguments, and submitted written briefs. Thereafter Judge Clark examined all the items seized in the three stores. On 2 June 1971 he entered an order in which he found, *inter alia,* that the materials taken constituted "substantially the entire inventories" of the three stores; that the items on the list by which he had placed an *X* were obscene; that those he had marked *Return* were not obscene. Less than five percent of the items seized were marked *Return.*

Judge Clark held as a matter of law that the Superior Court had jurisdiction of the parties and the subject matter; that the seizure of the materials from the stores "was proper, lawful and not unconstitutional"; that all items marked *X* were obscene and that those marked *Return* were not. Pending the trial of defendants upon the warrants charging them with the dissemination of obscenity, or further orders "by a Court having jurisdiction over the parties and the subject matter," he ordered the Raleigh Police Department to hold as evidence the items marked *X.* The items marked *Return* he ordered delivered to the operator of the store from which they were taken.

Defendants excepted to the findings of fact and conclusions of law and appealed to the Court of Appeals. In an opinion filed

20 October 1971 that court dismissed the appeal upon the grounds that Judge Clark's Order Retaining Evidence was interlocutory and did not impair any substantial right of appellants; that the seizure of the defendants' merchandise was lawful and they had been afforded their constitutional rights by the adversary hearing which Judge Clark conducted.

Defendants appealed to this Court on the ground that a substantial constitutional question had been decided adversely against them. At the same time they petitioned for certiorari under G.S. 7A-27(d)(1) (1969). The Attorney General moved to dismiss the appeal and resisted the petition for certiorari. On 9 December 1971 we denied the motion to dismiss and allowed certiorari.

Attorney General Morgan, Assistant Attorney General Denson for the State.

Smith and Patterson and Michael K. Curtis for John Knoll and Don Childs, defendant appellants.

Earle R. Purser for Joe Bryant and B. R. Queen, defendant appellants.

SHARP, Justice.

Appellants argued in the Court of Appeals that the items seized, "based on their content and on the manner in which they were distributed and offered for sale, are not obscene." However, no exhibits were made a part of their case on appeal. The Court of Appeals did not consider this question and, in this Court, appellants do not argue it.

Here, defendants pose three interlocking questions: (1) Could the State constitutionally seize "substantially the entire inventories" of defendants' three stores as an incident to their arrest upon charges of disseminating obscenity *prior* to a judicial determination that the materials seized were obscene? (2) Did the Superior Court have jurisdiction to make a preliminary determination whether the material seized at the time of defendants' arrest was obscene and to order those items it determined to be obscene held until defendants' trial in the District Court upon the pending charges? (3) Do defendants have a right to appeal from Judge Clark's "interlocutory order"?

The answer to question (3) is that an appeal will lie if Judge Clark's order "may destroy or impair or seriously imperil some substantial right of the appellant." *State v. Childs,* 265 N.C. 575, 578, 144 S.E. 2d 653, 655. Indubitably, if "substantially the entire inventories" of defendants' three stores were *unlawfully* seized in violation of the constitutional guaranty against unreasonable searches and seizures, Judge Clark's order, which directed the Raleigh Police Department to retain ninety-five percent of the seized items pending final determination of the charges against defendants, would destroy, impair, or seriously imperil their substantial rights. Furthermore, if Judge Clark had no jurisdiction of the parties and the subject matter, his order was void in toto. In either event defendants would be entitled to appeal, and the dismissal of their appeal would be error.

The question whether police officers may make a massive seizure of reading materials, pictures or films *before* their obscenity has been established in a properly constituted adversary hearing is a serious one indeed. See *A Quantity of Books v. Kansas,* 378 U.S. 205, 12 L.Ed. 2d 809, 84 S.Ct. 1723 (1964) and cases therein cited; *Freedman v. Maryland,* 380 U.S. 51, 13 L.Ed. 2d 649, 85 S.Ct. 734 (1965). However, we do not reach that constitutional question because Judge Clark had no jurisdiction to make the order from which defendants appealed.

[1] The prosecution of defendants was instituted under G.S. 14-189, which, *inter alia,* made it unlawful to display obscene literature for the purpose of sale, and G.S. 14-189.1, which made it unlawful to disseminate obscenity knowingly and purposely. Both statutes created misdemeanors, for which "the district court has exclusive, original jurisdiction." G.S. 7A-272 (1969). Until defendants were tried and convicted in the District Court and appealed to the Superior Court for a trial *de novo* that court had no jurisdiction of the cases. G.S. 7A-271(a)(5) (1969).

Seemingly the solicitor and the Attorney General, both of whom signed the motion in which Judge Clark was requested to make a "preliminary adjudication of obscenity," anticipated G.S. 14-190.2 (Supp. 1971). However, this statute, which is a part of Chapter 405 of the Session Laws of 1971, did not become effective until 1 July 1971, twenty-eight days after Judge Clark made his order. Furthermore, Section (a) of G.S. 14-190.2

states that its purpose "is to provide an adversary determination of the question of whether books, magazines, motion pictures or other materials are obscene *prior to their seizure.*" (Italics ours.) Clearly, this statute evidences the legislative intent to prevent wholesale seizures such as occurred here *prior* to an adversary judicial determination that the materials seized were obscene. Section (c) requires that any law enforcement officer who has reasonable ground to believe that obscenity is being disseminated in a public place "shall, *without seizing such material,* notify the solicitor for the judicial district. . . . " Section (h) makes it clear that G.S. 14-190.2 does not prohibit a law enforcement officer "from seizing for evidentiary purposes *single copies* of . . . printed material which he reasonably believes to be obscene within the meaning of G.S. 14-190.1, when such seizure is made pursuant to a lawful arrest." (Emphasis added.)

[2] The Attorney General argues in his brief (1) that Judge Clark's order determining that he had jurisdiction of the cause, that the items seized were obscene, and that the seizure was lawful, "was a mere interlocutory order" not binding on the trial court and, therefore, not presently appealable even if erroneous; and (2) that a defendant's remedy at this point is to note his exception and perfect his appeal along with the appeal of the case in event of conviction." This argument is patently without merit. Judge Clark's order is void in toto, and defendants' right to have it so declared may not thus be delayed.

[3] Finally, the property in suit was seized as an incident to defendants' arrest on warrants upon which they cannot now be tried. These warrants charge offenses created by G.S. 14-189 and G.S. 14-189.1 (1969). Chapter 405 of the Session Laws of 1971 repealed these statutes as of 1 July 1971, and all pending prosecutions based upon them ended on that date. *State v. McCluney, ante,* p. 404; *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698, and cases therein cited.

The decision of the Court of Appeals is reversed, and this cause is remanded to that court to the end that it direct the Superior Court to vacate the order of Judge Clark made in this case and enter an order releasing the materials described therein to the defendants.

However, we are constrained to point out that the order releasing the material seized will constitute no adjudication that it is not obscene. If defendants thereafter intentionally disseminate any part of it in a public place the question of obscenity may be determined in proceedings instituted under G.S. 14-190.1 or G.S. 14-190.2 (Supp. 1971), statutes which have been in effect—and available for that purpose—since 1 July 1971.

Reversed and remanded.

STATE OF NORTH CAROLIINA v. DAVID EARL BEST

No. 137

(Filed 28 January 1972)

1. **Criminal Law § 100; Solicitors— private prosecutor — role of solicitor**

G.S. Ch. 7A, Article 9, did not change the role of the solicitor in a criminal case to that of an impartial officer of the court and does not prohibit the practice of employing private counsel to assist the solicitor.

2. **Criminal Law § 100— private prosecutor**

In this rape prosecution, the trial court did not abuse its discretion in the denial of defendant's motion to prevent a private prosecutor employed by the prosecutrix from assisting the solicitor in prosecuting the case.

3. **Criminal Law § 99— voir dire — court's comment in excusing jury**

Where the jury was excused so that the court could conduct a voir dire hearing, and, shortly after the jury returned, it became necessary to excuse the jury again for the same reason, the trial court's statement, "Ladies and Gentlemen, step into your room. I hate to bother you," was simply an apology for having to excuse the jury so soon after their return to the courtroom and did not tend to reflect an opinion that defendant's position was unsound and not worthy of the inconvenience being imposed upon the jury.

4. **Criminal Law § 89— prior consistent statements — corroboration**

In this rape prosecution, the trial court properly admitted for corroborative purposes evidence of prior consistent statements made by the prosecutrix notwithstanding she had not been impeached on the stand.

5. **Criminal Law § 123— acceptance of verdict**

The verdict is not complete until accepted by the court.

6. Criminal Law § 124; Rape § 7— rape prosecution — sufficiency of jury's verdict

The jury's verdict in this rape prosecution was sufficient where the foreman stated that "we make a recommendation that the defendant be found guilty as charged and recommend a life imprisonment," the clerk then asked, "Guilty of rape with recommendation that his punishment be life imprisonment; is that your verdict so say you all?" and all the jurors responded that this was their verdict.

APPEAL by defendant from *Hubbard, J.*, at the 24 May 1971 Criminal Session of CRAVEN Superior Court.

The bill of indictment, proper in form, charges defendant with the forcible rape of Dollie M. Sumrell on 7 February 1971, a violation of G.S. 14-21.

The State's evidence—defendant offered none—tends to show that the prosecutrix, Dollie M. Sumrell, and her husband were residents of Augusta, Georgia, but were visiting relatives in Craven County. On the night of 6 February 1971 the prosecutrix and her husband attended a late movie in New Bern, after which they returned to the home of the husband's parents. The prosecutrix and her husband had some argument and about 2 a.m. the prosecutrix left to go to her mother's house which was about one mile away. As she was walking along the road, a car containing four men stopped and one of the men got out and forced her to get inside. The car then drove to the New Bern Jaycee Park where the other men got out leaving the prosecutrix with the driver who raped her. Shortly thereafter the defendant returned. The prosecutrix tried to escape, jumped out of the car, and ran down the road. The defendant ran after her and knocked her down. The defendant then forced the prosecutrix to go with him to a nearby building where he raped her. While this was occurring, the other men left in the car. During the course of the night, defendant raped the prosecutrix three more times. About 6 a.m. defendant fell asleep. The prosecutrix ran to a nearby house and told one of the occupants, Katy Mae Garfield, what had happened. Katy Mae Garfield called the prosecutrix' husband and the police. The prosecutrix was then taken to the hospital and treated for torn ligaments and muscles. Defendant was identified by the prosecutrix from a group of photographs shown to her by the police. She later identified him at the preliminary hearing and at the trial.

Before the trial the prosecutrix employed Mr. Robert Bowers, an attorney, to assist the solicitor in prosecuting the action.

After the jury had been selected but before it was impaneled, defendant moved that Mr. Bowers not be allowed to appear as private prosecution in the case. The solicitor stated that he was prepared to try the case himself and that he did not know until the day before the trial that Mr. Bowers had been employed to assist. The solicitor further stated, however, that he consented to the appearance of Mr. Bowers as private prosecution. The court overruled the motion on the ground that it came too late.

At the trial the solicitor announced that he would not seek the death penalty but would seek a verdict of guilty of rape with recommendation of life imprisonment. Defendant entered a plea of not guilty, and the jury returned a verdict of guilty of rape with recommendation that punishment be life imprisonment. From judgment imposed in accordance with the verdict, defendant appealed.

Attorney General Robert Morgan and Deputy Attorney General Andrew A. Vanore, Jr., for the State.

J. Troy Smith, Jr., for defendant appellant.

MOORE, Justice.

Defendant first assigns as error the denial of his motion to prevent private counsel from appearing to aid the solicitor in prosecuting the case. Defendant concedes that the practice of allowing private prosecution is deeply rooted in North Carolina practice. However, he urges that with the enactment of Article 9 of Section 7A of the General Statutes, effective January 1, 1971, the role of the solicitor has changed from that of an advocate to an impartial officer of the court who is concerned with obtaining justice.

[1] G.S. 7A-61 provides that the solicitor shall prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district and shall devote his full time to the duties of his office and shall not engage in the private practice of law. G.S. 7A-63 provides for the appointment of assistant solicitors on a full-time basis, and G.S. 7A-64 provides for temporary assistance to the solicitors when the dockets are overcrowded by the assignment of an assistant solicitor from another district, or by the temporary appointment of a qualified attorney to assist the solicitor. Article 9 of Section 7A of the General Statutes made the office of solicitor

a full-time job and spelled out the duties of that office. It also provided for permanent and temporary assistance for the solicitor in preparing and prosecuting cases. It did not, however, contrary to defendant's contention, change the role of the solicitor in criminal cases or prohibit the practice of employing private counsel to assist the solicitor.

This Court, in *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), recognized the practice of employing private counsel to assist in prosecuting criminal cases and stated the proper role of the solicitor or privately employed counsel as follows:

> "The prosecution of one charged with a criminal offense is an adversary proceeding. The prosecuting attorney, whether the *solicitor* or *privately employed counsel,* represents the State. It is not only his right, but his duty, to present the State's case and to argue for and to seek to obtain the State's objective in the proceeding. That objective is not conviction of the defendant regardless of guilt, not punishment disproportionate to the offense or contrary to the State's policy. It is the conviction of the guilty, the acquittal of the innocent and punishment of the guilty, appropriate to the circumstances, in the interest of the future protection of society. In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand." (Emphasis added.)

The discretion vested in the trial judge to permit private counsel to appear with the solicitor has existed in our courts from their incipiency. *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594 (1943); *State v. Carden,* 209 N.C. 404, 183 S.E. 898 (1936), cert. den. 298 U.S. 682, 80 L.Ed. 1402, 56 S.Ct. 960 (1936); *State v. Lea,* 203 N.C. 13, 164 S.E. 737 (1932). It should also be noted that when these three cases were decided, the solicitor was directed by the statute then in force "to prosecute on behalf of the State in all criminal actions in the superior courts." See N. C. Code of 1931 § 1431; N. C. Code of 1935 § 1431; N. C. Code of 1939 § 1431.

In *State v. Carden, supra,* Justice Clarkson quoted with approval from 22 R. C. L. (Prosecuting Attorneys), p. 93:

" ' . . . While under the present practice officers are appointed or elected for the express purpose of managing criminal business, the old practice survives in most jurisdictions to the extent that counsel employed by the complaining witness or by other persons desirous of a conviction are permitted to assist the prosecuting attorney in the conduct of the prosecution, and, as a general rule, no valid objection can be raised by the accused to allow the prosecuting attorney to have the assistance of private members of the bar. . . . (p. 94) It is within the discretion of the trial court to allow special counsel to aid the prosecuting attorney in the prosecution of a case, and such discretion will be interfered with only on a showing of abuse thereof. . . . In all such cases it is within the discretion of the court to appoint competent counsel to assist, or to permit counsel employed by private parties, or even volunteers, to appear for that purpose.' "

[2] In the present case, the solicitor consented to the employment of private counsel. The solicitor continued in charge of the prosecution. He announced in open court that he would seek a conviction of rape but that he would not ask for the death penalty, and the solicitor examined all the State's witnesses with the exception of one. Under these circumstances, the appearance of private counsel for the prosecution was a matter under the control and in the sound discretion of the presiding judge. No abuse of discretion appears, and this assignment is overruled.

[3] At the beginning of the trial the court excused the jury to conduct a *voir dire*. Shortly after the jury returned, the jury was again excused for a similar reason. At that time the judge stated: "Ladies and Gentlemen, step into your room. I hate to bother you." Defendant contends that this comment by the judge tends to reflect an opinion of the judge that the defendant's position was unsound and not actually worthy of the inconvenience being imposed upon the jury by the necessity of having to leave the courtroom.

The duty of absolute impartiality is imposed on the trial judge by G.S. 1-180. *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861 (1966).

In *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951), it is stated:

"Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entilted to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. . . .

* * *

"The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. . . .

"The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. . . . The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. . . . In applying this test, the utterance of the judge is to be considered *in the light of the circumstances under which it was made.* This is so because 'a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' *Towne v. Eisner,* 245 U.S. 418, 38 S.Ct. 158, 62 L.Ed. 372." (Emphasis added.)

Accord, State v. Holden, 280 N.C. 426, 185 S.E. 2d 889 (1972); *State v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281 (1960); *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950).

Considering the remark of the judge "in the light of the circumstances under which it was made," it is apparent that the trial court was simply apologizing to the jury for having to excuse them again so soon after their return to the courtroom. To hold otherwise would be to misconstrue a courteous statement made by the trial court to the jury. This assignment is without merit.

[4] Defendant next contends the court erred when it allowed the State to introduce evidence of prior consistent statements made by the prosecutrix when she had not been impeached on the stand. Evidence of this character was competent as cor-

roborative evidence, and the trial court was careful to limit it to that purpose. *State v. Rose,* 270 N.C. 406, 154 S.E. 2d 492 (1967), and cases cited; Stansbury, N. C. Evidence §§ 50 and 52 (2d Ed. 1963). This assignment is overruled.

[5, 6] Finally, the defendant contends that the verdict rendered by the jury failed to find the facts or disclose the intention of the jury on the issue of guilt of defendant and is therefore insufficient as a matter of law.

The following exchange took place after the jury agreed that they had reached a verdict:

> "MRS. MCLAWHORN: (Clerk) Raise your right hand. David Earl Best, members of the jury, look upon the prisoner. What say you, is he guilty of rape with recommendation that his punishment be life imprisonment or not guilty?
>
> "MR. SALEEBY: Your Honor, we make a recommendation that the defendant be found guilty as charged and recommend life imprisonment.
>
> "MRS. MCLAWHORN: Guilty of rape with recommendation that his punishment be life imprisonment; is that your verdict so say you all?
>
> "JURORS: Yes."

The verdict is not complete until accepted by the court. *State v. Sumner,* 269 N.C. 555, 153 S.E. 2d 111 (1967); 3 Strong, N. C. Index 2d, Criminal Law § 124. It is the practice in North Carolina that before the court accepts and records the verdict of the jury, the clerk repeats to the jury its verdict as understood by the court. "When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: 'So say you all?' At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual." *State v. Young,* 77 N.C. 498 (1877). See also *State v. Webb,* 265 N.C. 546, 144 S.E. 2d 619 (1965). Here, the clerk of the court repeated to the jurors the verdict of the jury as understood by the court. That verdict was "Guilty of rape with recommendation that his punishment be life imprisonment." All the jurors responded that this was their verdict.

There was no possibility that there was any mistake in this verdict. Had there been any doubt, the defendant had the right to have the jury polled. *State v. Cephus*, 241 N.C. 562, 86 S.E. 2d 70 (1955). This assignment is overruled.

A careful consideration of the entire record discloses no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. MARY WINECOFF

No. 11

(Filed 28 January 1972)

1. **Homicide § 16— instructions — dying declarations — consideration by by jury**

It is not prejudicial error for the trial judge to fail to instruct the jury that dying declarations should be considered with caution absent a request for such an instruction.

2. **Homicide § 15— testimony that witness sold shotgun to defendant**

In this homicide prosecution, the trial court properly admitted testimony that about six months prior to the crime the witness had sold defendant a single barrel 12-gauge shotgun which was found in a woodpile at defendant's home; even if erroneously admitted, such testimony was not prejudicial to defendant, but tended to prejudice the State's case, since an eyewitness testified that a double barrel shotgun was used in the shooting and the trial court refused to admit the single barrel shotgun in evidence.

3. **Homicide § 24— instructions — reduction of crime to manslaughter — burden on defendant — expression of opinion**

The trial court in this homicide prosecution did not express the opinion that defendant was the person who inflicted the fatal wound in its instructions upon the burden of defendant to reduce the offense to voluntary manslaughter.

APPEAL by defendant from *Gambill, J.*, 1 October 1970 Session of CABARRUS Superior Court.

Defendant was charged in a bill of indictment with the murder of Frank Winecoff, Jr. The State elected to try her for the lesser included offense of second degree murder. Defendant entered a plea of not guilty.

The State's evidence, except where quoted, is summarized as follows:

Robert Roseboro testified that he went to Frank Winecoff's home about 10 o'clock a.m. on Sunday, 19 April 1970. He went into the kitchen, where he sat and talked to Frank for about thirty minutes. He testified: "I did not see Mary Winecoff at the time, she was in the back room. I was there about one-half hour before I saw her. She came out of the back room into the room I was in. She was arguing with Frank, just fussing at him. She did not say anything when she first came out; she went back in and came out again and had a gun—a double barrel, what I call a shotgun. I do not know what she was quarreling at her husband about; they had been out that morning and came back in, and I was not there. When she came back out of the room with the shotgun, she just told him she'd blow his brains out and throwed it up at him and shot him. He was still in the kitchen; they were about as far apart as you and me—I do not know how far in feet. She shot one time. She did not say a thing. He was sitting down. Frank Winecoff, Jr., did not say a thing. I went next door and told the people to call up the ambulance and the cops because he was shot. Some officers arrived; Mr. Atwood was one."

Captain Ray Atwood of the Cabarrus Sheriff's Department, testified that he went to the Winecoff home on 19 April 1970 pursuant to a call received about 12:15 p.m. When he arrived, Frank Winecoff was lying on the kitchen floor and defendant was standing in the living room about 12 feet away. We quote an excerpt from Captain Atwood's direct testimony:

> When I arrived at the Winecoff home Frank Winecoff, Jr., was alive. He made a statement to me at that time.
>
> Q. What statement did he make?
>
> OBJECTION OVERRULED EXCEPTION
>
> EXCEPTION No. 1.
>
> When I went in Frank was lying on the kitchen floor partially under the table beside a turned over chair. I spoke and Frank said, "Mr. Atwood, please help me, I'm dying." I asked what happened. He said, "Mary shot me," no, he said, "My wife shot me." I told him that we had an ambulance on the way, to lay still, that the more he

moved, the more he bled. He was lying on his right side and he had a hole about two inches across under his ribs. Some of the flesh was out over his clothes. He was bleeding a good bit at that time.

On cross-examination Captain Atwood testified that defendant Winecoff was "pretty high" and that she first told him her husband had not been shot, and that he was sick. She later said that Robert Roseboro shot him.

Captain Atwood identified a single barrel shotgun as the gun found in a woodpile at the Winecoff home.

R. M. Faggart testified, over objection, that on 24 October 1969 he sold to Mary Winecoff the 12-gauge single barrel shotgun marked as Defendant's Exhibit "A." The court refused to admit the shotgun into evidence.

Dr. William J. Reeves testified that on 19 April 1970 he performed an autopsy on the body of Frank Winecoff, Jr., and that in his opinion Frank Winecoff, Jr., died as a result of wounds caused by shotgun pellets which penetrated his stomach and liver.

Defendant offered no evidence.

This case is before us pursuant to our general referral order effective 1 August 1970.

Attorney General Morgan and Assistant Attorney General Icenhour for the State.

James C. Davis and Clarence E. Horton, Jr., for defendant.

BRANCH, Justice.

Defendant contends that the trial judge committed prejudicial error in failing to charge that the jury should receive the alleged dying declarations of Frank Winecoff, Jr., with caution.

Defendant did not specifically request such instructions.

In the case of *State v. Collins,* 189 N.C. 15, 126 S.E. 98, it is stated:

> The eleventh exception, which relates to the instruction pertaining to the alleged dying declarations of the

deceased, is not tenable. We have held that the evidence as to these declarations was competent; and while the court might properly have told the jury to consider this evidence with due caution, the failure to do so in the absence of a special request will not be held for reversible error. We have repeatedly said that as to subordinate features or particular phases of the evidence proper request should be made for appropriate instructions. *S. v. O'Neal,* 187 N.C. 22.

Defendant cites and relies on the cases of *State v. Williams,* 67 N.C. 13, *State v. Kennedy,* 169 N.C. 326, 85 S.E. 42, and *State v. Whitson,* 111 N.C. 695, 16 S.E. 332, as authority to support his contention. These cases are distinguishable.

The case of *State v. Williams, supra,* contains the equivocal statement that "Several eminent judges have felt it a duty to say that they [dying declarations] should be received with much caution, and that the rule which authorizes their admission should not be extended beyond the reasons which justify it." The quoted statement is dicta since the statement was directed only to the admissibility of dying declarations and to the reasons for receiving such declarations. The case did not consider or turn upon proper cautionary instructions to the jury. In each of the remaining cases cited by defendant a specific request was made for the cautionary instruction.

[1] We conclude that when request is made for such instruction, the judge must instruct the jury to receive a dying declaration with caution. *State v. Whitson, supra; State v. Kennedy, supra; State v. Williams, supra.* Absent such specific request, it is not prejudicial error for the trial judge to fail to give a cautionary instruction as to dying declarations. *State v. Collins, supra; State v. O'Neal,* 187 N.C. 22, 120 S.E. 817.

This assignment of error is overruled.

[2] Defendant assigns as error the admission into evidence of statements by the witness R. M. Faggart that on 24 October 1969 he sold her the single barrel 12-gauge shotgun which was marked State's Exhibit "A."

It is well settled in this jurisdiction that in a criminal action any object having a relevant connection with the case is

admissible in evidence. *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4.

In the case of *State v. Macklin,* 210 N.C. 496, 187 S.E. 785, it is stated: "It was competent to show the possession of a shotgun by defendant about the time of the homicide . . . . " State's Exhibit "A" was found in the woodpile at the Winecoff home with a discharged shell in it on the same day that deceased was shot. The testimony that defendant had purchased this very gun within a period of approximately six months was relevant and was properly admitted. Assuming, *arguendo,* that the evidence was erroneously admitted, defendant has failed to show that such error was prejudicial. The burden is on defendant not only to show error, but also to show that the error complained of affected the result of the trial adversely to her. *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364; *State v. Mumford,* 252 N.C. 227, 113 S.E. 2d 363.

Under the circumstances of this case the admission of the challenged evidence appears to favor defendant. This evidence shows that the gun sold to defendant was a single barrel gun. The eyewitness to the shooting testified that a double barrel gun was used to inflict the wounds. This evidence, particularly when considered with the trial judge's refusal to admit the shotgun into evidence, tends to create confusion in and prejudice to the State's case rather than defendant's.

For reasons stated, this assignment of error is overruled.

[3] Defendant next contends that the trial judge erred in his charge by expressing the opinion that defendant was the person who inflicted the fatal wound. She specifically points to the following portion of the charge:

> To reduce the offense of voluntary manslaughter, the defense must satisfy you of three things from the evidence offered by the defendant, or evidence offered by the State: First; Did the defendant kill the deceased? Second: Did she kill him intentionally? Third: Did she kill him unlawfully in the heat of passion by reason of anger suddenly aroused, and before such time had elapsed for passion to subside and reason to resume sway and habitual control?
>
> Prior thereto the trial judge had charged:
>
> Under our system of justice when a defendant pleads not guilty, he or she is not required to prove his or her

innocence, they are presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

. . . .

The State must prove beyond a reasonable doubt that the defendant intentionally shot, in this case, shot Frank Winecoff, Jr., with a deadly weapon and that Frank Winecoff died as a natural and probable result of such act.

In his final mandate to the jury the Judge instructed as follows:

I charge you, ladies and gentlemen of the jury, if you find from the evidence and beyond a reasonable doubt that on or about the 19th day of April, 1970, the defendant, Mary Winecoff, intentionally shot Frank Winecoff, Jr., with a deadly weapon, to wit, a shotgun; and that Frank Winecoff's death was a natural and probable result of the shot or act of Mary Winecoff, it would be your duty to return the verdict of guilty of second degree murder unless from the evidence you are satisfied that she killed, that is Mary Winecoff killed Frank Winecoff, Jr., in the heat of a sudden passion, which was produced by the acts of Frank Winecoff which had the natural tendency to produce said passion in the defendant, and this passion continued until she killed Frank Winecoff, in this case it would be your duty to return the verdict of guilty of manslaughter.

If the State has failed to prove from the evidence beyond a reasonable doubt that the defendant intentionally shot and killed Frank Winecoff or that Frank Winecoff's death was a natural and probable result of Mary Winecoff's act, it would be your duty to find the defendant not guilty.

So in this case you may return one of three verdicts. You may find the defendant guilty of second degree murder, manslaughter, or not guilty.

"The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous impressions may be inferred." *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274.

While we do not approve the interrogatory form of the charge challenged by defendant, we do not find in it an expres-

sion of opinion prejudicial to defendant. A contextual reading of the entire charge reveals a clear statement of the law regarding second degree murder and manslaughter, properly applied to the facts of the case. *State v. Rummage, ante,* 51, 185 S.E. 2d 221; *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512; *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

Nor do we find merit in defendant's contention that the trial judge erroneously submitted the charge on manslaughter to the jury. There was ample evidence to support a verdict of manslaughter.

A careful examination of this entire record discloses no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. EDWARD HOLDEN

No. 61

(Filed 28 January 1972)

1. Criminal Law § 99— expression of opinion by trial judge

G.S. 1-180 prohibits any opinion or intimation of the trial judge at any time during the trial which is calculated to prejudice the parties in the eyes of the jury.

2. Criminal Law § 99— remarks of court which belittle counsel

Remarks from the bench which tend to belittle and humiliate counsel, or which suggest that counsel is not acting in good faith, reflect not only on counsel but on the defendant as well and may cause the jury to disbelieve all evidence adduced in defendant's behalf.

3. Criminal Law §§ 99, 170— remarks of trial court — harmless error

In this homicide prosecution, defense counsel asked a State's witness on cross-examination, "Don't you know a knife was found on the foot of this bed when they were cleaning up there?", whereupon the trial court commented, "Now are you going to put on evidence to that effect or are you just making that up to ask the question," and thereafter told counsel, "Well, ask proper questions then." *Held:* Although the trial court's remarks were improper, they constituted harmless error where the evidence would support a conviction of second degree murder, defendant offered no evidence in explanation or mitigation, and defendant was only convicted of manslaughter.

State v. Holden

ON *certiorari* to review judgment of *Bailey, J.*, at 3 September 1969 Regular Criminal Session, WAKE Superior Court.

Defendant was charged in a bill of indictment with the first degree murder of Howard Carroll on 20 July 1969. When the case was called for trial, the solicitor announced the State would not seek a verdict of murder in the first degree but would ask for a verdict of murder in the second degree or manslaughter as the jury may find. The defendant entered a plea of not guilty.

Evidence for the State consisted of the testimony of Emma Carroll, wife of the deceased, and Mary Helen Jones, sister of the deceased. The defendant offered no evidence.

The State's evidence tends to show that on the morning of 20 July 1969 Howard Carroll went to the home of defendant Edward Holden to get a drink and returned a short time later with a half-gallon jar of home brew which he placed in the refrigerator. Around noon Mary Helen Jones came to the Carroll home and defendant arrived shortly thereafter. Emma Carroll was not feeling well and defendant agreed to take her to the doctor. They all got in defendant's pickup truck and, finding the doctor's office closed, took Emma to the Wendell-Zebulon Hospital. During the trip Howard Carroll was "playing" with a pocketknife which he rubbed against his sister Mary Helen Jones and pointed at the defendant. He was "playing with the knife and both of them was playing going all the way down there."

When they arrived at the hospital, defendant asked Mary Helen to keep a pistol for him, and she put it in her pocketbook. Emma Carroll was checked by a nurse at the hospital and released. They returned to the Carroll home, arriving about 5:30 in the afternoon, and Mary Helen Jones returned defendant's pistol to him at that time. Shortly after defendant entered the house he asked for the "jar" and sat on the couch drinking from it. Thereafter, there was a conversation about food. The Carroll children had eaten all the food, and defendant Holden said, "Go with me home and eat," and Howard Carroll replied, "He didn't have to go with him home, that he had something to eat there." Emma Carroll said she would fix something to eat. At that time her husband Howard Carroll spoke and said, "I'm bad," and defendant said, "Well I am bad too." Emma was lying on the bed, and "then Howard walked over there on the side of the bed

where I was" and—"All I know a shot fired. Holden fired it." Mary Helen Jones was in the bathroom when she heard the shot and heard Emma say, "Don't do that." She rushed out in time to see defendant again aim the pistol at deceased. Defendant fired again, and Howard Carroll died on the floor about ten minutes later as a result of gunshot wounds inflicted by defendant. Mary Helen Jones saw no weapon in her brother's hand. Both defendant and deceased had been drinking but neither appeared to be drunk.

The next day Emma Carroll's brother gave her a knife. He said he got the knife "out of the foot of the car, the back seat of the car." Emma testified that it was her husband's knife but stated that he had nothing in his hands when he left the house after the shooting.

Mary Helen Jones testified that defendant and deceased were good friends—"Always acted like brothers, went around together and all, but I ain't never known them to have no such stuff as they had that Sunday. I don't know why he shot him."

The jury convicted defendant of manslaughter, and he was sentenced to twenty years in prison. Defendant gave notice of appeal but failed to perfect his appeal within time. Thereafter, upon a finding of indigency, Clarence M. Kirk was appointed to perfect the appeal and petitioned for certiorari to bring up the late appeal. Certiorari was allowed by the Court of Appeals, and the case was transferred to the Supreme Court for initial review under the Court's general order entered on 31 July 1970 pursuant to G.S. 7A-31(b)(4).

Clarence M. Kirk, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Edward L. Eatman, Jr., Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

Mary Helen Jones stated on cross-examination that, although deceased had a knife on the trip to the hospital, he put it in his pocket and did not have a knife in his hand immediately after defendant shot him. "If he had a knife quick as he fell out, he'd had that knife in his hand or lying in the bed or somewhere close around him." This statement evoked the following exchange:

"Q. [by defense counsel] Don't you know a knife was found on the foot of this bed when they were cleaning up there?

"A. Nobody hadn't seen it.

"COURT: Now are you going to put on evidence to that effect or are you just making that up to ask the question?

"MR. KIRK [defense counsel]: Well, we have got some—

"COURT: Are you going to put on evidence to that effect?

"MR. KIRK: —on it, your Honor.

"COURT: Well, ask proper questions then."

Defendant argues the foregoing comments by the trial judge unmistakably indicated to the jury that defendant's contention about the knife was a fabrication unworthy of belief, amounted to an expression of opinion on the evidence, and was highly prejudicial. This constitutes defendant's first assignment of error.

[1, 2] The duty of absolute impartiality is imposed on the trial judge by G.S. 1-180. *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107 (1959). The statute has been construed to prohibit any opinion or intimation of the judge at any time during the trial which is calculated to prejudice the parties in the eyes of the jury. *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412 (1966). The respective functions of the judge and jury in criminal trials are clearly demarcated by G.S. 1-180; and by that demarcation the trial judge is denied the right, *in any manner or in any form,* to invade the province of the jury. *Everette v. Lumber Co.,* 250 N.C. 688, 110 S.E. 2d 288 (1959); *In re Will of Holcomb,* 244 N.C. 391, 93 S.E. 2d 454 (1956); *State v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378 (1946). Jurors respect the judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench. Consequently, the judge "must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury." *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951). Furthermore, remarks from the bench which tend to belittle and humiliate counsel, or which suggest that counsel is not acting in good faith, reflect not only on counsel but on the defendant as well and may cause the jury to disbelieve all evidence adduced in defendant's behalf. "Any remark of the presiding judge, made in the presence

of the jury, which has a tendency to prejudice the jury against the unsuccessful party is ground for a new trial." *Homes, Inc. v. Holt,* 266 N.C. 467, 146 S.E. 2d 434 (1966). *See* Annotation, Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 A.L.R. 2d 166 (1958); Annotation, Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 A.L.R. 2d 826 (1964); *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971).

[3] The judge's critical remarks were indiscreet and improper and should not have been made. In a different setting they could be prejudicial so as to require a new trial. Here, however, in light of the evidence and considering the totality of circumstances, we hold that the comments from the bench of which defendant complains constituted harmless error. Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, "and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950); *State v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281 (1960).

The facts and attendant circumstances in this case reveal a senseless killing, apparently without the slightest provocation. The evidence would support a conviction of murder in the second degree. Defendant offered no evidence in explanation or mitigation. There is nothing, save defense counsel's question which evoked the trial judge's ill-advised rejoinder, that the deceased was threatening defendant with a knife, or in any other manner, at the time and place the fatal shots were fired. Even so, defendant was only convicted of manslaughter. In this setting it is apparent that the words of the judge here under attack had no prejudicial effect on the result of the trial and must therefore be considered harmless. Unless it appears "with ordinary certainty that the rights of the prisoner have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error." *State v. Browning,* 78 N.C. 555 (1877). *Accord, State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971). On this record, there is no reason to believe that

another trial would produce a different result more favorable to defendant. This assignment is overruled.

The matters complained of in defendant's remaining assignments of error are without significance and had no effect on the result of the trial. Further treatment of them is not required, and we overrule them without discussion.

Defendant having failed to show prejudicial error, the verdict and judgment will be upheld.

No error.

STATE OF NORTH CAROLINA v. WILLIAM C. GREEN

No. 133

(Filed 28 January 1972)

1. **Criminal Law § 161— necessity for exceptions**

An assignment of error is ineffectual unless based on an exception duly noted in apt time.

2. **Criminal Law § 161— appeal as exception to judgment**

The appeal itself is an exception to the judgment and presents the case for review only for errors appearing on the face of the record.

3. **Burglary and Unlawful Breakings § 8— burglary conviction — face of record**

No error appears on the face of the record in this appeal from a conviction of second degree burglary.

APPEAL by defendant from *Crissman, J.*, October 1969 Session of RICHMOND Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging first degree burglary. When the case was called for trial, the solicitor announced the State would not insist upon a verdict of first degree burglary but would ask for a verdict of second degree burglary. Defendant was represented by Norman T. Gibson, attorney, and entered a plea of not guilty. The jury returned a verdict of guilty of second degree burglary, and from sentence imposed defendant gave notice of appeal to the Court of Appeals. The appeal was not perfected.

On 6 April 1971 Judge Harvey Lupton appointed James H. Pittman, attorney, to represent defendant on a post-conviction hearing. On 8 April 1971 Judge James Long denied defendant's request for a post-conviction hearing for the reason that defendant had failed to exhaust his appellate remedies and ordered Mr. Pittman to file a petition for *certiorari* in the Court of Appeals. That court allowed *certiorari*, and the case was transferred to the Supreme Court under its general order of 31 July 1970.

The evidence for the State tends to show that on 23 July 1969 Willie McNair and his wife were occupying living quarters in a tavern which they owned and which McNair operated. About 3 a.m. on that date McNair and his wife were awakened by the sound of someone breaking the padlocks on the front door of the tavern. After the locks were broken, two men, one of whom was identified as defendant, entered the front door of the tavern. Defendant saw McNair inside the building and shot at him with a pistol. McNair returned the fire with a shotgun, hitting defendant, who fell to the floor of the tavern. He managed to stagger out of the building to his car where he fell again. Pursuant to a call from McNair, Robert Taylor, a deputy sheriff of Richmond County, arrived at the tavern about 3:20 a.m. He found the wounded defendant lying next to his car. Taylor followed a trail of blood from the spot where defendant was lying to a large pool of blood about four feet inside the tavern. A .32 caliber pistol containing four live shells and one spent shell was found eighteen inches from this pool of blood. Two broken padlocks were found outside the door.

Defendant and his wife testified. Their evidence tends to show that defendant worked as a laborer and was a part-time preacher on weekends. On the night in question he had been to a church service in Bennettsville, South Carolina. He left this service about 12:30 a.m. and drove to Wadesboro, North Carolina, to see a Reverend Ingram. Not finding Ingram at home, defendant left for Gibson, North Carolina, to see his employer. On the way to Gibson, defendant's car overheated and he stopped to get some water at McNair's tavern. The tavern was closed and defendant could not find a spigot. He drove down the road about a quarter of a mile but as his car continued to overheat, he returned to the tavern. When he arrived there this time, the front door was slightly open and a light was on inside.

Defendant did not break any locks and did not enter the tavern, but while he was standing outside in the parking lot, McNair shot him.

Attorney General Robert Morgan, Assistant Attorney General Eugene Hafer, and Associate Attorney Ann Reed for the State.

Pittman, Pittman & Pittman by James H. Pittman for defendant appellant.

PER CURIAM.

Under the heading "Grouping of Exceptions and Assignments of Error," defendant lists five assignments of error. There are no exceptions in the record and none of the five assignments are based upon exceptions.

[1, 2] An assignment of error is ineffectual unless based on an exception duly noted in apt time. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789 (1971); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *Vance v. Hampton,* 256 N.C. 557, 124 S.E. 2d 527 (1962); 1 Strong, N. C. Index 2d, Appeal and Error § 24. Questions not embraced in an exception duly taken at the trial may not be presented on appeal. Nevertheless, the appeal itself is an exception to the judgment and presents the case for review only for errors appearing on the face of the record. *State v. Jackson,* 279 N.C. 503, 183 S.E. 2d 550 (1971); 3 Strong, N. C. Index 2d, Criminal Law § 161.

The indictment in this case, proper in form, charged defendant with burglary in the first degree. When the matter came on for trial, prior to the taking of any testimony, the solicitor announced that he would not try defendant for first degree burglary but for second degree burglary. Defendant did not object and took no exception. Defendant entered a plea of not guilty, and the trial proceeded upon the charge of burglary in the second degree. *State v. Allen,* 279 N.C. 115, 181 S.E. 2d 453 (1971). The jury found defendant guilty of second degree burglary, and the court imposed sentence of not less than 30 nor more than 40 years in the State's prison. This sentence is within the limits prescribed by G.S. 14-52 for burglary in the second degree.

[3] The indictment sufficiently charged the crime for which defendant was tried in a properly organized court, and the sentence was within statutory limits. We have carefully examined this record and find no error.

No error.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1972

STATE OF NORTH CAROLINA v. MICHAEL BASS AND GREGORY ALEXANDER BARRETT

No. 78

(Filed 9 February 1972)

1. **Constitutional Law § 32— capital case — waiver of counsel by indigent**

At all times pertinent to this rape case, an indigent defendant in a capital case could not waive the right to counsel either orally or in writing. [Former] G.S. 7A-457.

2. **Constitutional Law § 32— right to counsel at lineup**

A pretrial in-custody lineup for identification purposes is a critical stage in the proceedings, and by statute in this State an accused so exposed is entitled to the presence of counsel. G.S. 7A-451(b)(2).

3. **Criminal Law § 66— illegal pretrial lineup — in-court identification — independent origin**

Rape victim's in-court identification of defendant was not tainted by an illegal lineup and was properly admitted, where the trial court found upon competent supporting evidence that the victim's in-court identification was based on her observation of defendant during the assault and originated independently of the lineup.

4. **Criminal Law § 66— evidence of illegal lineup identification — harmless error**

Although the trial court erred in the admission of evidence of the identification of defendant in a February 1971 lineup at which defendant was not represented by counsel, such error was harmless beyond a reasonable doubt in light of the State's strong evidence of defendant's guilt and the fact that the victim's identification of defendant was not based on the lineup identification but was independent in origin.

5. Criminal Law § 66— admissibility of identification testimony — written findings filed after evidence admitted

Defendants were not prejudiced if, as defendants contend, the trial court's findings and conclusions as to the admissibility of identification testimony were reduced to writing and filed after the testimony had been admitted before the jury where the findings were supported by competent evidence on voir dire and the testimony was competent, although it is the better practice to make such findings at the time the evidence is tendered and before it is admitted.

6. Criminal Law § 21— preliminary hearing — function of district court judge

In his capacity as examining (or committing) magistrate in a felony case, the district judge is concerned only with determining (1) whether a felonious offense has been committed and (2) whether there is probable cause to charge the prisoner therewith. G.S. 15-94; G.S. 15-95.

7. Criminal Law § 21— preliminary hearing — failure to reduce testimony to writing

The requirement of G.S. 15-88 that an examining magistrate reduce to writing "the evidence given by the several witnesses examined" is directory only and not mandatory, and defendants were not prejudiced by failure of the district judge who conducted the preliminary hearing to reduce to writing the testimony before him.

8. Criminal Law § 86— credibility of defendant — impeachment on voir dire

In this rape prosecution, the solicitor was properly permitted to examine defendant on voir dire respecting the admitted fact that he was then on parole from a sentence previously imposed for assault with intent to commit rape, since defendant's credibility as a witness was subject to impeachment before the judge in the same manner as it would have been had he taken the stand and testified before the jury.

9. Criminal Law §§ 66, 87— in-court identification — leading questions on voir dire

The trial court did not abuse its discretion in permitting the solicitor to ask a rape victim leading questions on voir dire as to whether her identification of defendant was based on a pretrial lineup.

10. Criminal Law § 42; Rape § 10— testimony that jacket was "similar" to one worn by assailant

The trial court did not err in allowing a rape victim to testify that a green military-type jacket admitted in evidence was "similar" to the coat worn by defendant when he raped her.

11. Rape § 10— clothing worn by defendant when arrested

A blue sweat shirt and a red T-shirt defendant was wearing when arrested were properly admitted in a rape case, the prosecutrix having testified that defendant was wearing a red T-shirt when he raped her, and there being evidence that hairs on the blue sweat shirt matched in microscopic detail hairs taken from the prosecutrix.

12. Criminal Law § 39— evidence to rebut codefendant's alibi — admission against defendant — harmless error

In a rape prosecution, the admission of testimony of a State's witness offered to rebut a codefendant's alibi evidence, if erroneous as to defendant, did not prejudice defendant since the exclusion of such evidence as to him would not have affected the result of his trial.

13. Criminal Law § 92— consolidation of rape charges against two defendants

The trial court did not err in consolidating for trial indictments charging two defendants with identical crimes of rape.

14. Indictment and Warrant § 14— grounds for quashing indictment

A bill of indictment may be quashed for want of jurisdiction, for irregularity in the selection of the grand or petit jury, or for defect in the bill of indictment.

15. Indictment and Warrant § 14— motion to quash

A motion to quash lies only for a defect appearing on the face of the warrant or indictment.

16. Indictment and Warrant § 14— motion to quash

A motion to quash does not lie unless it appears from an inspection of the warrant or indictment that no crime is charged or that the warrant or indictment is otherwise so defective that it will not support a judgment.

17. Indictment and Warrant § 14— motion to quash — consideration of extraneous evidence

In ruling on a motion to quash, the court is not permitted to consider extraneous evidence; therefore, when the defect must be established by evidence aliunde the record, the motion must be denied.

18. Indictment and Warrant § 14— motion to quash — alleged arrest without probable cause — recitals in motion and affidavit by counsel — court's failure to consider

In ruling on defendant's motion to quash a rape indictment on the ground that defendant was arrested without probable cause, the trial court properly ignored defendant's recitals in the motion, based on information and belief, that the victim failed to identify photographs of him and that the police refused to place him in a lineup, and an affidavit of defendant's counsel that he had demanded a lineup for defendant and that the prosecutrix stated on oath at the preliminary hearing that she was not certain of her identity of defendant, since evidence foreign to the record may not be used to establish a defect in the indictment.

19. Criminal Law § 66— identification at preliminary hearing — impermissble suggestiveness

The preliminary hearing was not impermissibly suggestive so as to render incompetent the testimony of a rape victim that she identified defendant at the preliminary hearing as one of her assail-

ants, where there was no evidence of impermissible suggestiveness by the officers or the court, and the victim testified that she recognized defendant without prompting as soon as she entered the courtroom.

20. Criminal Law § 66— evidence of identification at preliminary hearing

The fact that a rape victim failed to identify defendant from photographs and the fact that there were discrepancies and contradictions in her testimony at the preliminary hearing goes to the weight of rather than the competency of her testimony that she identified defendant at the preliminary hearing as one of her assailants.

21. Criminal Law §§ 99, 170— remarks of trial court — harmless error

In this rape prosecution, the following remarks of the trial court to defense counsel, while improper, did not constitute prejudicial error when considered in context and in the setting in which they occurred: (1) "It [question by defense counsel] must not have been important then. If you don't care to restate it, we won't move into it."; (2) "Just a minute that wasn't what she said at all. You know there are not six Saturdays in February. And you know this witness knows there are not six Saturdays in February."; (3) "You are not to lecture this witness. I mean what I say. Now, you cross-examine him."

Justice LAKE concurring in result.

DEFENDANTS appeal from *Johnston, J.*, 24 May 1971 Session, GUILFORD Superior Court. This case was docketed as No. 138 and argued at the Fall Term 1971.

Defendants were tried upon separate bills of indictment, proper in form, charging them with the rape of Sandra K. Garner on 6 February 1971. Defendant Barrett's motion for a separate trial was denied, and defendants were tried together over Barrett's objection. Bass was adjudged indigent and was represented by the public defender. Barrett was represented by privately employed counsel.

The State's evidence tends to show that Sandra Garner, a sixteen-year-old high school girl, went to the Buckaroo Steak House on 6 February 1971 at 9:30 p.m. to pick up Cathy Edgerly, a girl friend who worked there. Sandra was driving a black and white 1963 Plymouth Fury four-door sedan. She parked it in front of the Steak House in a well-lighted area near the door. She observed two young colored men standing nearby. She had never seen them before but now knows them as Michael Bass and Gregory Alexander Barrett. She entered the Steak House to let Cathy know she was there and waiting for her. When she returned and entered her car, defendant Bass opened the right front passenger door, grabbed her hair, pulled her head down to the seat and struck her on the head. Defendant Bar-

rett entered her car by the left front door and pulled a gun. Bass took her car keys from her pocketbook, and Barrett drove the car away while Bass held her head down on the seat. She screamed and struggled to no avail. As they traveled along Summit Avenue in Greensboro, she could see their faces under the street lights and recognized them as the same two young colored men she had seen before entering the Steak House.

One defendant asked Sandra her name and where she went to school. "I gave him a fake name, and they got my driver's license out of my pocketbook and read my name and address and said they knew who I was and where I lived, and if they read anything about it in the paper or anything happened to either one of them, they knew who I was and where I lived and wouldn't be afraid to come after me and kill me."

The driver, Barrett, turned left off Summit Avenue onto a dirt road. Sandra was then pushed headfirst over the front seat into the rear seat and landed with her face against "the back of the back seat." Bass followed her into the back seat, forcibly removed her boots, her panties and panty hose, and had intercourse with her by force and against her will. Barrett stopped the car, opened the door and got into the back seat. The dome light came on and Sandra again saw their faces and recognized them as the two young men she had seen earlier before she entered the steak house. Bass stood outside the car by the right rear door, and Barrett had intercourse with Sandra by force and against her will. Then Bass reentered the car and raped the girl a second time. Then Barrett raped her a second time. While this was taking place Bass got under the wheel and started driving.

The rear window of the car had fogged over and "Bass told Barrett to get up and clear the back window so he could see if there was a police car behind us. . . . Barrett raised up and cleared the back window with his hands so he could see if it was a police car behind us. Then he said 'It might be a police car. It doesn't have any lights. Turn down this road, and if it follows us, we know it is.' " When the car continued to follow them as they turned into various side streets, Bass said: "Get ready because we are going to have to jump." Both men then jumped from the car while it was still moving and ran away. Bass was dressed in a green army jacket, a red T-shirt and was wearing boots. Barrett had on a beige jacket. Sandra could remember nothing else about their dress.

Peyton Murray, with his wife and daughter, had supper at the Buckaroo Steak House on 6 February 1971. They finished eating about 9:30 p.m. and went to their car. They saw two colored boys "back up a little bit" when they came out. These young men were fifteen to twenty feet away. The Murrays sat in their vehicle about five minutes and watched the two subjects peeping in the windows and staying in the dark behind some columns. About 9:40 p.m. a girl came out and entered her car and the two boys rushed her, one on each side of her car. "The light skinned boy had that girl's head pounding her down on the seat. I jumped out and hollered and cursed them. And they just backed out like this and went up Summit Avenue." They were in a Plymouth with a white top and a dark bottom, license number BD-7521. Mr. Murray went into the Steak House and told Cathy Edgerly to call the girl's father, as a result of which the police were also alerted. One of the assailants was wearing an army jacket with bright buttons, similar to State's Exhibit 4, the jacket Bass was wearing when arrested, but the Murrays were unable to identify defendants as the men they saw at the Steak House that night.

In response to a radio call about 10 p.m., Officer Simpson drove to the Buckaroo Steak House area looking for the black and white Plymouth bearing license number BD-7521. He saw the car at approximately 10:40 p.m. in a line of traffic at a stop light at Market and Laurel Streets. He followed the car and saw a Negro male wipe off the back glass. The car then made various right and left turns along unpaved streets and alleys and was momentarily out of view when it rounded blind corners. When the officer finally jumped from his car and ran to the slowly moving Plymouth near a dead-end alley, Sandra Garner was its only occupant. She was crying and, except for a white sweater shirt, naked and said she had been raped. She told the officer her assailants ran south toward the railroad tracks. Officer Downs and Officer Hightower were patrolling in separate cars in the area, and each was alerted by radio about 10:40 p.m. Officer Downs left his car and went to the railroad tracks where he saw two colored males running across the tracks. He pursued them through a wooded area and into a clearing back of a churchyard. Officer Hightower approached the railroad tracks in the opposite direction from Officer Downs and saw two Negro males running toward him. He saw them run into the woods and then across a parking lot behind the

church. One disappeared in a patch of woods and the other ran toward Nocho Street where defendant Bass lived with his mother. Officer Downs searched the area and found defendant Bass hiding in a Dempster Dumpster under the garbage and trash with only his eyes showing. "I told the man to get up. He stood up and made the statement that I had nothing on him and no one could identify him. . . . As he was getting out of the dumpster, I observed his belt was undone and his fly was partially unzipped." He had on a green army-type jacket and was wearing a blue sweat shirt with a red T-shirt underneath and military-type boots.

The officers knew that Michael Bass and Gregory Barrett were friends and ran together. When Bass was taken into custody an alert was put out for Barrett. Officer McNair learned from Ronald Bass, a brother of Michael Bass, that these defendants were together on the night in question and left the house together between 8 and 9 p.m. Gregory Barrett was duly arrested at 2:30 a.m. on February 8 in a room at the O'Henry Hotel where he lived. State's Exhibit 5, a light beige jacket-type coat, was hanging on the closet door.

Following his arrest, defendant Bass was warned of his constitutional rights as required by *Miranda v. Arizona,* 384 U.S. 436, and, with full knowledge and understanding of his right to counsel, orally waived such right and agreed to participate in a lineup without a lawyer present, saying he would call his lawyer in the morning. Accordingly, around 3:30 a.m. on the morning of 7 February 1971, Sandra Garner viewed a lineup of seven Negro males including Bass and identified him as one of her assailants. Defendant Barrett was never placed in a lineup following his arrest. Sandra next saw him at the preliminary hearing. She testified: "I recognized him as soon as I came into the room. He was sitting over on one side of the room against the wall. Nobody prompted me or pointed him out in any way."

Sandra Garner positively identified both defendants at the preliminary hearing and in court at the trial. She testified that she based her in-court identification "on the times I saw them the night it took place; outside the Buckaroo, and when I came out of the Buckaroo I saw them; in the car, and just the times I saw them that night."

Defendants duly objected to all in-court identification testimony, and a voir dire hearing was conducted prior to its admission. The State and both defendants offered evidence on the voir dire following which the trial judge found as a fact: (1) That Bass was duly warned of his constitutional rights; (2) that Bass freely and voluntarily, knowingly and understandingly waived his right to counsel orally before going into the lineup and thereafter freely participated in it; (3) that the lineup consisted of seven Negro males, including Bass, and that at least two other participants were wearing army-type jackets or coats, green in color; (4) that Sandra Garner identified one of her assailants as the fourth man from the left in the lineup, and Bass was standing fourth from the left; (5) that no one prompted Sandra Garner or suggested to her in any way who Bass was or where he was standing in the lineup; (6) that Sandra had seen defendants Bass and Barrett about 9:30 p.m. on 6 February 1971 when she first went to the Buckaroo Steak House, and saw them again when she left her car and entered the Steak House, and saw them again when she left the Steak House and returned to her car, and saw their faces from time to time when they drove under street lights and when the dome light came on in the car; (7) that Sandra Garner's in-court identification of both defendants originated independently of the lineup; (8) that the pre-trial out-of-court identification procedures in which Bass participated were not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification; (9) that Sandra recognized defendant Barrett at the preliminary hearing on 12 February 1971 as soon as she entered the courtroom and saw him seated in a group with other persons, including several Negro males, and there was no suggestiveness on the part of the officers or anyone else as to who Barrett was or where he was seated; (10) that her identification of Barrett was based on her observation of him as she entered and left the Buckaroo Steak House, and at the time he forced his way into her car, and upon seeing him before and during the attack on her; (11) that her in-court identification of Barrett "was independent of and untainted by outside influences and is based solely on her seeing Barrett before and during his attack on her and is of independent origin and not from any pre-trial confrontation"; and (12) that her identification of Barrett at the preliminary hearing was not impermissibly suggestive so as to give rise to a substantial likelihood of irreparable misidentification on her part. The court

thereupon concluded that her in-court identification of both defendants was competent. Defendants' motions to suppress were thereupon denied, and the in-court identification of each defendant by Sandra Garner was admitted over objection.

Michael Bass did not testify and offered no evidence.

Gregory Barrett testified in his own behalf. His evidence tends to show that he attended a movie with his girl friend Brenda Brown on Saturday night, the 6th day of February 1971, arriving at the theater about 7:30 p.m. and leaving the theater about 9:30 p.m.; that he then sent his girl friend home on a bus and went to Michael Bass' house, arriving there "about a quarter of ten to ten thirty"; that Bass was not at home and he watched television until about 11 p.m. at the Bass residence; that he then called Brenda Brown and they rode a cab to the O'Henry Hotel, where they had been living together for about four months, and went to bed. Barrett stated that he did not see Michael Bass at all on 6 February 1971.

Brenda Brown corroborated Barrett's testimony. She testified they arrived at the theater at 7:30 p.m. on 6 February 1971, saw the movie completely through, and left at 9:30 p.m.; that she then rode a bus to her grandmother's home and Barrett left, saying he was going to Michael Bass' house; that Barrett telephoned her about 11 p.m. as a result of which she caught a cab, went to the Bass home, and she and Barrett watched Shock Theater on television until midnight or later and then rode a cab to the O'Henry Hotel where they retired for the night; that Michael Bass never came home during the time she was there. She admitted on cross-examination that she gave a statement (S-10) to the police, written in her own handwriting and signed by her, that she and Barrett went to the theater at 5:30 p.m., got out about 7:30 p.m., and she caught a bus to Paulette Knox's house. She asserted, however, that she had the time mixed up and the written statement was not true.

Defendant Barrett offered other witnesses whose testimony tends, in some measure, to support his alibi.

The State offered rebuttal evidence which tended to show, among other things, that Brenda Brown gave the police a statement in her own handwriting that she and Gregory Barrett went to the Carolina Theater at 5:30 p.m. on 6 February 1971 and left about 7:30 p.m.; that she went to Paulette Knox's

house and Gregory Barrett said he was going down to Michael Bass' house; and that upon receiving a phone call from Barrett around 11 p.m. she went to Michael Bass' house. As a State's rebuttal witness, Paulette Knox testified that she went to Brenda Brown's home before noon on 6 February 1971 and took Brenda to her house and they stayed there together all that day; that "[a]fter dark, we left my house and went to the Paradise Drive-In. I don't know what time it was, but the two of us were together, and we got back between the hours of 11:00 or 11:30." Paulette Knox further testified that Brenda Brown had called her on numerous occasions, including the day of the trial, and urged her to change her testimony. "She told me to tell the court it was on a Friday, but it wasn't. It was on a Saturday."

The jury convicted both defendants of rape and recommended life imprisonment. Judgment was pronounced accordingly and defendants appealed, assigning errors noted in the opinion.

Wallace C. Harrelson, Public Defender, and J. Dale Shepard, Assistant Public Defender, Attorneys for Defendant Appellant Bass.

Alston, Pell, Pell & Weston, by E. L. Alston, Jr., Attorneys for Defendant Appellant Barrett.

Robert Morgan, Attorney General, and Millard R. Rich, Jr., Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice:

The first assignment of defendant Bass is based on the contention that since he did not sign a written waiver of his right to counsel at the lineup when he was exhibited to the prosecuting witness for identification, the lineup was illegal and his subsequent in-court identification by Sandra Garner was tainted and inadmissible. He therefore argues that his motion to suppress her in-court identification should have been allowed.

[1] At all times pertinent to this case, an indigent defendant in a capital case could not waive the right to counsel either orally or in writing. See 1969 Session Laws, Chapter 1013, Section 1, codified as G.S. 7A-457; *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971).

[2] A pretrial in-custody lineup for identification purposes is a critical stage in the proceedings, and by statute in this State

an accused so exposed is entitled to the presence of counsel. G.S. 7A-451(b)(2). Defendant Bass, an indigent charged with a capital offense, thus had the constitutional right to the presence of counsel at the lineup, and the in-court identification of the accused by a lineup witness was incompetent unless the trial court first determined on voir dire that the in-court identification had an independent origin and was not tainted by the illegal lineup. *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507 (1970).

[3] Here, the court conducted a voir dire examination in the absence of the jury following which it found as a fact, upon supporting evidence, that Sandra Garner's in-court identification of Bass and Barrett was based on her observation of them during the assault upon her and originated independently of the lineup. These findings of fact by the trial judge are conclusive when, as here, they are supported by competent evidence. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971). In light of these principles, it follows that the victim's in-court identification of Bass was not tainted by the lineup and was properly admitted.

[4] Even so, due to absence of counsel at the lineup, the court erred in admitting evidence of the *lineup identification;* and if there is a reasonable possibility that this erroneously admitted evidence might have contributed to the conviction of Bass, a new trial is required. If not, it was harmless error. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). "One who, because of the statute, is precluded in a capital case from waiving the right to counsel during an in-custody, pretrial lineup stands in the same position as an accused who did not knowingly, understandingly and voluntarily waive the right to counsel before the enactment of Chapter 7A, Article 36 of the General Statutes." *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971). Therefore the determinative question, simply stated, is whether the erroneously admitted evidence of the lineup identification of Bass contributed to his conviction or was harmless beyond a reasonable doubt. This requires a brief review of the evidence.

Here, Sandra Garner was with defendants for at least forty-five minutes. She observed them in a well-lighted area before and at the time they entered her car. She observed them while riding along a well-lighted street. She observed them when the car door was opened and the dome light came on. She talked with them from time to time during her abduction. Two Negro males were seen running from the point where she was found toward the point where Bass was arrested, a distance of only two and one-half blocks. When arrested, Bass was hiding in a Dempster Dumpster with his belt undone and his fly partially unzipped. When apprehended, Bass exclaimed to the officer that he "had nothing on him and no one could identify him." Bass was wearing a green army-type jacket, a blue sweat shirt over a red T-shirt, and army-type boots—clothing similar to the victim's description of one of her assailants. Hairs found on the blue sweat shirt Bass was wearing and hairs taken from the prosecutrix were "microscopically alike in all identifiable characteristics." On this record there is little chance that another trial with the lineup evidence excluded would produce a different result more favorable to defendant Bass. "To warrant a new trial it should be made to appear by defendant that the admission of the evidence complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued if the evidence had been excluded." *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206 (1967); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969).

In light of all the evidence, fortified by the fact that Sandra Garner's identification of Bass was not based upon the lineup identification but was independent in origin, we conclude that there was no reasonable possibility that evidence of the lineup identification of Bass contributed to his conviction. Its admission was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971). The first assignment of defendant Bass is overruled.

[5] Both defendants contend it was also error for the trial judge to file his findings of fact upon the voir dire examination after the evidence had already been admitted before the jury.

Defendants argue that the voir dire was conducted on May 24 and 25 and the judge's findings of fact were filed on June 3 at 2:30 p.m. after all testimony before the jury had been taken. We fail to see how defendants have been prejudiced. The findings of fact are dated May 25 and were filed on June 3. The judgments pronounced bear date of June 5, 1971. Obviously the findings were made and filed during the trial. The record does not show with any degree of clarity the sequence of events following the voir dire. If it be conceded *arguendo* that the court's findings and conclusions were reduced to writing after the evidence was admitted before the jury, defendants were not prejudiced. The findings were supported by competent evidence offered on the voir dire, and the evidence was competent before the jury. As stated in *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971), "it is better practice for the court to make such findings at some stage during thre trial, preferably at the time the [evidence] is tendered and before it is admitted." This assignment is not sustained.

Defendants' next assignment is grounded on the failure of the district judge who conducted the preliminary hearing to reduce to writing the testimony of the witnesses examined before him. Both defendants contend they were prejudiced on the trial in the superior court by reason of such failure.

[6, 7] G.S. 7A-272(b) confers jurisdiction on the district court "to conduct preliminary examinations and to bind the accused over for trial . . . upon a finding of probable cause, making appropriate orders as to bail or commitment." When performing such duties the district judge sits only as an examining magistrate in all felony cases, *State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363 (1967), because the trial of felonies is beyond the jurisdiction of the district court. In his capacity as examining (or committing) magistrate, the district judge is concerned only with determining (1) whether a felonious offense has been committed and (2) whether there is probable cause to charge the prisoner therewith. G.S. 15-94; G.S. 15-95. Although G.S. 15-88 requires an examining magistrate to reduce to writing "[t]he evidence given by the several witnesses examined," this requirement is directory only and not mandatory. It was so held in *State v. Irwin,* 2 N.C. 112 (1794) and reaffirmed in *State v. Parish,* 44 N.C. 239 (1852). Further discussion of the point raised would serve no useful purpose. This assignment is overruled.

[8] The solicitor was permitted over objection to cross-examine defendant Bass on the voir dire respecting the *admitted* fact that he was then on parole from a sentence previously imposed for assault with intent to commit rape. He argues the judge was prejudiced by such evidence and assigns as error its admission on voir dire. The assignment has no merit and requires little discussion. Bass took the witness stand during the voir dire, and his credibility was subject to impeachment before the judge in the same manner as it would have been had he taken the stand and testified before the jury.

[9] During the voir dire examination of Sandra Garner, the solicitor was permitted to ask, and the witness to answer, over objection, as follows:

"Q. Is your identification here of Bass in any way based on that lineup?

"A. I recognized him from the times I saw him before the lineup.

"Q. In the absence of attendance at the lineup, would you still be able to recognize him here today?

"A. Yes, sir. I would still be able to recognize him."

Defendant Bass assigns the court's ruling as error.

The trial court has discretionary authority to permit leading questions in proper instances, *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965), and upon defendant's failure to show prejudice such discretionary action of the trial court will not be disturbed. *State v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353 (1953). "The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal, at least in the absence of abuse of discretion." Stansbury, N. C. Evidence (2d ed.) Witnesses § 31; *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251 (1962). No abuse of judicial discretion is shown. This assignment is overruled.

[10] When Bass was arrested he was wearing a green military-type jacket. It was offered in evidence as State's Exhibit 4. This jacket was exhibited to Sandra Garner while she was on the witness stand and she was permitted to testify, over objection, that it was "similar" to the coat worn by Bass on the night he raped her. Bass assigns the admission of this testimony as error.

The assignment merits no discussion and is overruled. *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936). "Any evidence which is relevant to the trial of a criminal action is admissible." *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). The relevancy of "similarity" between State's Exhibit 4 and the jacket worn by the man who raped the witness should be apparent to all.

[11] Likewise, the blue sweat shirt (S-7) and the red T-shirt (S-8) Bass was wearing when arrested were properly allowed in evidence. The prosecutrix testified that Bass was wearing a red T-shirt when he raped her, and hairs on the blue sweat shirt matched, in microscopic detail, hairs taken from the prosecutrix. In this setting, the relevancy of these exhibits on the question of identity is so readily apparent that the assignments of error based thereon seem trivial. "There was no violation of the defendant's right in requiring him, while in custody under a valid arrest upon the charge in this case, to change his clothing and in taking from him the clothing which he wore at the time of his arrest immediately after the alleged offense. There was no error in permitting the State to introduce in evidence the shirt so taken from the defendant and the hair found thereon." *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967).

[12] Defendant Bass objected to the testimony of Paulette Knox, offered by the State to rebut the testimony of Defendant Barrett and his girl friend Brenda Brown. Paulette Knox testified, among other things, that Brenda Brown had been with her "from before noon on 6 February 1971 until some time after eleven o'clock that evening" when Brenda made a phone call and left, saying she was going "over to Michael's house." Bass contends this evidence, as to him, was incompetent and its admission prejudicial.

We perceive no prejudice to Bass by the admission of this evidence. If the evidence had been excluded as to Bass, it would not have changed the result of his trial. "It is not enough for the appellant to show error, and no more. He must make it appear that it was prejudicial to his rights, and that a different result but for the error would have likely ensued." *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364 (1963); *State v. Williams, supra; State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970). The error, if such it be, was entirely harmless. Stansbury, N. C. Evidence (2d Ed.) § 9. *State v. Franklin,* 248

N.C. 695, 104 S.E. 2d 837 (1958), relied on by defendant Bass, is factually distinguishable and provides no authority for defendant's position. This assignment is not sustained.

[13] Defendant Barrett moved for a separate trial and assigns as error the denial of his motion.

There is no merit in this assignment. These defendants were charged in separate bills of indictment with identical crimes. The offenses charged are of the same class, relate to the same crime, and are so connected in time and place that most of the evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other. Under such circumstances the trial judge was authorized by G.S. 15-152, in his discretion, to order their consolidation for trial. *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245 (1964); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965); *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966); *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970). The cases were properly consolidated for trial and the foregoing assignment is overruled.

Before pleading to the merits defendant Barrett filed a written motion to quash the bill of indictment against him on the ground that he was arrested without probable cause. He asserted in his motion, *on information and belief,* that the victim had failed to identify photographs of him and that the police had refused to place him in a lineup for identification. His counsel, by affidavit in support of the motion to quash, swore he had demanded a lineup for Barrett and, further, that the prosecuting witness stated on oath at the preliminary hearing that she was not certain of her identity of defendant Barrett. The trial judge did not formally rule on the motion, as he should have done, but proceeded with the trial of Barrett upon the true bill of indictment returned by the grand jury. Barrett assigns error. We now examine the validity of his position.

[14-17] A bill of indictment may be quashed for want of jurisdiction, *State v. Sloan,* 238 N.C. 547, 78 S.E. 2d 312 (1953), or for irregularity in the selection of the grand jury, *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513 (1953), or for irregularity in the selection of the petit jury, *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84 (1947), or for defect in the bill of indictment. *State v. Mayo,* 267 N.C. 415, 148 S.E. 2d 257 (1966). Thus a motion to quash is an appropriate method of testing the suffi-

ciency of the warrant, information, or bill of indictment to charge a criminal offense. It lies only for a defect appearing on the face of the warrant or indictment. *State v. Turner,* 170 N.C. 701, 86 S.E. 1019 (1915). The defect to which the motion is addressed must appear on the face of the record. *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476 (1948); *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686 (1947). A motion to quash does not lie unless it appears from an inspection of the warrant or bill of indictment that no crime is charged, *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166 (1946), or that the warrant or indictment is otherwise so defective that it will not support a judgment. *State v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140 (1943). "The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied." *State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663 (1949). *Accord State v. Cooke, Wolfe, et al,* 248 N.C. 485, 103 S.E. 2d 846 (1958); *State v. Brewer,* 180 N.C. 716, 104 S.E. 655 (1920). "At least since the decision in *State v. Turner,* 170 N.C. 701, 86 S.E. 1019, in 1915, it has been the settled rule in North Carolina that '[a] motion to quash . . . lies only for a defect on the face of the warrant or indictment.' . . . The rule that a motion to quash cannot rest on matters dehors the record proper has, so far as investigation reveals, been rigidly adhered to in all subsequent North Carolina decisions. [Citations omitted] In the present case the state court simply followed this settled rule of local practice." *Wolfe v. North Carolina,* 364 U.S. 177, 4 L.Ed. 2d 1650, 80 S.Ct. 1482 (1960).

[18] It appears from the record in this case that defendant Barrett, by grand jury indictment proper in form, is charged with committing the capital felony of rape upon Sandra Garner on 6 February 1971. Evidence foreign to the record may not be used to establish a defect in the bill of indictment. The recitals in Barrett's written motion to quash and in his counsel's affidavit were properly ignored by the trial court. His action in that respect was equivalent to denial of the motion and we so regard it. Barrett's assignment of error based thereon is overruled.

[19] Barrett next assigns as error that Sandra Garner was permitted to testify over his objection that she identified him at the preliminary hearing. Barrett asserts that since he had not

been identified by the victim prior to the preliminary hearing, in a lineup or by photograph or otherwise, this evidence should have been excluded. He equates the preliminary hearing to "a lineup in the courtroom without any advice as to the right of counsel and without the presence of counsel," and contends the proceedings were so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate due process guaranteed by the Fourteenth Amendment.

The record does not support the contention that the preliminary hearing was "rigged" for purposes of identifying Barrett. There is no evidence of impermissible suggestiveness by the officers or the court. Sandra Garner testified that she was subpoenaed as a witness to testify at the preliminary hearing and recognized Barrett "as soon as I came into the room. He was seated over on one side of the room against the wall. Nobody prompted me or pointed him out in any way." She said there was no question in her mind that her identification was correct. She further testified that her in-court identification was based on the times she saw defendants the night she was raped. The trial court so found on voir dire and further found, in effect, that the preliminary hearing was not an impermissibly suggestive procedure which likely led the victim into misidentification of her assailants. These findings were based on competent evidence and rendered the victim's in-court identification properly admissible. *State v. Gray, supra.* We hold there has been no denial of due process contemplated by the Fourteenth Amendment.

[20] Furthermore, the record shows that both defendants, and especially Barrett's counsel, cross-examined this young victim at the preliminary hearing and again at the trial with unusual vigor, calling into question her ability to identify Barrett and suggesting many discrepancies and contradictions in her testimony—all of which she denied or attributed to counsel's rapid-fire questions and overreaching tactics. Her positive in-court identification of Barrett suffices to carry the case to the jury. The fact that she failed to identify him from photographs and the fact that there were discrepancies and contradictions in her testimony at the preliminary hearing, if such there were, goes to the weight rather than the competency of the testimony and is thus a matter to be considered by the jury. *Lewis v. United States,* 417 F. 2d 755 (1969), cert. den. 397 U.S. 1058, 25 L.Ed.

2d 676, 90 S.Ct. 1404; *Parker v. United States,* 404 F. 2d 1193 (1968); *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21 (1971). This assignment is overruled.

[21] Barrett's next assignment of error is grounded on the court's comments on three occasions during the trial.

On the first occasion the court directed counsel to restate a question because it was confusing, and counsel refused, saying he was unable to do so. The court replied: "It must not have been important then. If you don't care to restate it, we won't move into it. Now, Mr. Alston, I have told you to ask this witness a question and then wait for an answer. Now, that question is a confusing question for any witness. So you restate your question."

On the second occasion, the State's rebuttal witness Paulette Knox had testified that she was with Barrett's girl friend Brenda Brown on Saturday night, 6 February 1971, during the hours when Brenda Brown and Barrett had testified she was with Barrett. On cross-examination Barrett's counsel asked Paulette Knox: "Which Saturday night in February was it, the first, second, third, or fourth?" The witness answered: "The sixth." Counsel then said: "You say there are six Saturdays in February?" The court interposed: "Just a minute that wasn't what she said at all. You know there are not six Saturdays in February. And you know this witness knows there are not six Saturdays in February." The witness was never afforded an opportunity to say whether she was referring to the sixth *day* or the sixth *Saturday* of February.

On the third occasion the court instructed counsel: "You are not to lecture this witness. I mean what I say. Now, you cross-examine him."

As stated by Mr. Justice Black in *Illinois v. Allen,* 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057 (1970): "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of conduct should not and cannot be tolerated."

Standards of conduct imposed on trial judges and trial counsel are discussed by Justice Sharp in *State v. Lynch, supra,* and the reciprocal duties of each are summarized in the follow-

ing language: "In every trial the judge and the defendant's counsel share the twofold responsibility of enforcing a defendant's right to a fair trial and of keeping the trial moving at a reasonable speed. The judge, however, is in charge of proceedings." Had the standards enunciated by Justice Sharp in *Lynch* been courteously observed in the trial of this case, the record would reflect more favorably on all concerned. A failure on the part of counsel to show appropriate respect for the judge almost invariably evokes similar treatment in return.

Considered in context and in the setting in which they occurred, we are inclined to the view that the words of the judge here under attack had no prejudicial effect on the result of the trial. Unless it appears "with ordinary certainty that the rights of the prisoner have been in some way prejudiced by the remarks or conduct of the court, it cannot be treated as error." *State v. Browning,* 78 N.C. 555 (1877). Trial judges must be given sufficient discretion to meet the circumstances of each case. This assignment is overruled.

Barrett's remaining assignments, five in number, relate to the admission of inconsequential evidence, *i.e.,* testimony that the prosecuting witness "was quite nervous," appeared "to be confused," and similar expressions. A careful review of these assignments impels the conclusion that the matters complained of were not prejudicial.

Defendants having failed to show prejudicial error, the verdict and judgment as to each defendant must be upheld.

No error.

Justice LAKE concurring in result.

Had the superior court erred, as the majority opinion states, in admitting evidence of the lineup identification, I would concur in the majority's conclusion that this was harmless error and not ground for granting Bass a new trial. In my opinion, there was no error in the admission of this evidence.

The majority opinion states:

> "At all times pertinent to this case, an indigent defendant in a capital case could not waive the right to counsel

either orally or in writing. See 1969 Session Laws, Chapter 1013, § 1, codified as G.S. 7A-457; *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971)."

I am unable to concur in this statement by the majority which is the foundation for its conclusion that there was error in admitting testimony of identification of Bass by Miss Garner at the lineup. Notwithstanding the amendment to G.S. 7A-457 by Chapter 1243 of the Session Laws of 1971, this statement in the majority's opinion may well have a far reaching effect in other cases in which the offense occurred prior to the amendment.

In no case has this Court ever set aside a conviction in reliance upon G.S. 7A-457. In *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561, cited by the majority in support of its statement herein, a new trial was ordered for the reason that the trial judge, by his method of overruling objections made by the defendant's counsel, may have expressed an opinion as to the credibility of witnesses and thus prejudiced the defendant's cause with the jury. The discussion of G.S. 7A-450 et seq., in the *Lynch* opinion, was not necessary to that decision. The *Lynch* case may not, therefore, be deemed a decision of this Court as to the validity or the effect of those statutes. In *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671, this Court said that the trial court had erred in admitting a statement made by the defendant at an in-custody interrogation following his written waiver of counsel at such interrogation, the court saying that such waiver was in violation of G.S. 7A-457(a). However, in the *Doss* case, as here, this Court affirmed the sentence on the ground that the error was harmless. In *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227, the State did not offer, in the presence of the jury, evidence that the victim had identified the accused at a lineup. The question was as to the admissibility of the victim's in-court identification of the accused as her assailant. This Court took note of the existence of G.S. 7A-457, but held that the trial court was correct in its conclusion that the in-court identification in that case was competent and said that, in any event, the alleged error was harmless.

Following the proper holding of a voir dire, the trial court found that Bass was specifically advised by the officer of his right to have a lawyer present before going into the lineup, that he indicated to the officer that he was willing to partici-

pate in the lineup without a lawyer present and "would call his lawyer in the morning," and that he "freely and voluntarily, knowingly and understandingly waived his right to counsel before going into the lineup and thereafter did in fact go into said lineup." As the majority opinion states, these findings of fact by the trial judge are conclusive, being supported by competent evidence.

It is my view that G.S. 7A-457 does not require and does not support a holding that there was error in the admission of the testimony of the identification of Bass at the lineup. There are two reasons for this: (1) The statute does not so require; and (2) the statute, itself, is unconstitutional in forbidding the waiver of counsel by an indigent charged with a capital offense.

Assuming the validity of G.S. 7A-457, it does not declare evidence obtained at an in-custody lineup to be inadmissible by reason of the defendant's not having counsel present to represent him at the lineup, he having freely, voluntarily and understandingly waived his right to counsel orally.

We are not here concerned with any violation of the right of the defendant under the Constitution of the United States or under the Constitution of this State to have counsel present to advise and represent him at such lineup. It is established, as the majority observes, that the defendant Bass freely, voluntarily and with full understanding of his constitutional right to counsel, waived that right. Neither *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, nor any other decision of the Supreme Court of the United States, nor of this Court, declares an oral waiver of the constitutional right to counsel invalid. We are here concerned solely with the provisions of the State statute.

Miranda v. Arizona, supra, and *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, do not hold that state courts may not admit evidence obtained in violation of a state statute. The effect of those cases is limited to the admissibility of evidence obtained in violation of the defendant's rights held guaranteed by the Federal Constitution. The effect of a disregard of G.S. 7A-450 et seq., upon the admissibility of evidence so obtained must, therefore, be determined by the law of this State.

It is well established that the common law of North Carolina does not forbid the admission of evidence unlawfully ob-

tained but otherwise competent. *State v. Colson,* 274 N.C. 295, 305, 163 S.E. 2d 376, cert. den., 393 U.S. 1087, 89 S.Ct. 876, 21 L.Ed. 2d 780; *State v. Smith,* 251 N.C. 328, 111 S.E. 2d 188; *State v. Vanhoy,* 230 N.C. 162, 52 S.E. 2d 278; *State v. McGee,* 214 N.C. 184, 198 S.E. 616; Stansbury, North Carolina Evidence, 2d Ed, § 121. See also: Wigmore on Evidence, 3d Ed, §§ 2183-2184a; McCormick on Evidence, § 137; 29 AM. JUR. 2d, Evidence, § 408. A myriad of cases recently decided, relating to the admissibility of evidence obtained by an unlawful search are not in point, first, because these raised a constitutional question under the authority of *Mapp v. Ohio, supra,* and, second, because G.S. 15-27 and G.S. 15-27.1 expressly provide that evidence obtained in a search made under an illegal search warrant, or without a legal search warrant under conditions requiring a search warrant, is incompetent in the trial of any action.

Of course, the Legislature, in an otherwise valid statute, has the authority to change a common law rule as to the competency of evidence. However, there is no provision in G.S. Chapter 7A declaring evidence obtained in disregard of its provisions to be incompetent. In *State v. McGee, supra,* this Court refused to extend, to evidence obtained by a search without any warrant at all, a statute declaring incompetent evidence obtained by a search under an illegally issued warrant. Pursuant to *State v. McGee, supra,* we should not interpolate into G.S. 7A-450, et seq., a change of the common law rule of evidence not expressly declared therein by the Legislature.

If, however, it be thought that G.S. Chapter 7A should be construed as a legislative declaration that evidence is incompetent if obtained at an in-custody lineup in a capital case, prior to which an indigent defendant knowingly, understandingly and voluntarily waived his right to the presence of counsel, and at which he had no counsel present, the evidence here in question would, in my opinion, nevertheless be admissible for the reason that G.S. 7A-457 is unconstitutional insofar as it forbids such defendant to waive his right to counsel and to represent himself.

The defendant's constitutional right to have counsel at an in-custody lineup or interrogation is now clearly established. *Miranda v. Arizona, supra.* It is, however, equally well settled that a defendant has a constitutional right to handle his own

case without interference by, or the assistance of, counsel forced upon him against his wishes.

In *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667, Justice Parker, later Chief Justice, said:

> "The United States Constitution does not deny to a defendant the right to defend himself. Nor does the constitutional right to assistance of counsel justify forcing counsel upon a defendant in a criminal action who wants none. *Moore v. Michigan,* 355 U.S. 155, 2 L.Ed. 2d 167; *Carter v. Illinois,* 329 U.S. 173, 91 l.Ed. 172; *United States v. Johnson,* 6 Cir. (June 1964), 333 F. 2d 1004."

In *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797, Justice Higgins said:

> " 'The constitutional right (to counsel), of course, does not justify forcing counsel upon an accused who wants none.' *Moore v. Michigan* [supra]; *Herman v. Claudy,* 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126."

In *State v. Morgan,* 272 N.C. 97, 157 S.E. 2d 606, this Court said:

> "Having been fully advised by the court that an attorney would be appointed to represent him if he so desired, he [the defendant] had the right to reject the offer of such appointment and to represent himself in the trial and disposition of his case."

In *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503, this Court affirmed a death sentence imposed for murder in the first degree upon a defendant who was tried without counsel, pursuant to his declaration that he did not want counsel. Our decision was reversed by the Supreme Court of the United States, but upon another ground and without mention of the defendant's having been tried without counsel.

It not infrequently happens that a defendant is dissatisfied with the counsel appointed for him by the court. While he may not insist that the court appoint a different counsel to represent him, the defendant has the right to insist that his case not be handled by an attorney in whom he has no confidence. If he so desires, he has the right, in that situation, to represent himself. In this there is no distinction between a

capital case and any other case. See *State v. Williams, supra.* If he may represent himself through the intricacies of an actual trial, he surely has the right to look after his own interest at a lineup or at an interrogation free from threats and duress. This right the Legislature may not deny him.

Furthermore, G.S. 7A-457 makes an unconstitutional discrimination between indigent defendants and defendants having enough funds to pay for counsel. The statute forbids waiver of counsel by an indigent but leaves untouched the rights of one who is not an indigent to waive counsel in any case, either in writing or orally. Indigency is obviously a sufficient basis for classification with reference to the right to court appointed, publicly paid counsel if desired, but it is not a reasonable basis for classification as to the right to represent one's self. Poverty is not synonomous with lack of intelligence or even with limited education, and possession of funds does not necessarily mean possession of good judgment or of knowledge of legal procedure.

The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the legislative power. When a special class of persons (indigents) is singled out by the Legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927; *Power Mfg. Co. v. Saunders,* 274 U.S. 490, 47 S.Ct. 678, 71 L.Ed. 1165; *State v. Glidden Corp.,* 228 N.C. 664, 46 S.E. 2d 860; 16 AM. JUR. 2d, Constitutional Law, § 501.

The defendant, with full knowledge of his constitutional right to have counsel at the lineup and not to enter the lineup without the presence of his counsel, waived that right, thereby electing to represent himself at that stage of the pre-trial proceedings. Having so elected, his constitutional right to represent himself was recognized and granted by the officers. Having so asserted his desire to proceed at that stage without counsel, he may not now be heard to say that, because he was permitted to do so, the evidence so obtained by the State was unlawfully

obtained and is, therefore, inadmissible. Surely, he may not now be heard to say that the lineup, otherwise conducted free from any error, makes inadmissible the positive, in-court identification by the victim of his alleged criminal act.

Consequently, it is my view that there was no error in admitting the testimony that Miss Garner identified the defendant Bass at the lineup and clearly no error in admitting her in-court identification of him, the latter identification being independent in origin and unaffected by the identification at the lineup.

BROADUS E. SINGLETON v. JACK STEWART, CHAIRMAN; J. DAVID ARMSTRONG, VICE-CHAIRMAN; P. F. DESAIX, ROBERT S. WEBB, ROBERT V. MATHISON, BOARD MEMBERS OF ASHEVILLE HOUSING AUTHORITY AND THE ASHEVILLE HOUSING AUTHORITY

No. 86

(Filed 9 February 1972)

1. **Rules of Civil Procedure § 56— motion for summary judgment — when made**

The broad statutory limitation that the motion for summary judgment may be made "at any time" allows the motion to be made after responsive pleadings have been filed or before filing of responsive pleadings.

2. **Rules of Civil Procedure § 56— motion for summary judgment — what court may consider**

When a motion for summary judgment comes on for hearing, the court may consider pleadings, affidavits meeting the requirements of Rule 56(e), depositions, answers to interrogatories, admissions, oral testimony, documentary materials, facts which are subject to judicial notice and such presumptions as would be available upon trial.

3. **Rules of Civil Procedure § 56— summary judgment — issues of fact**

In ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact.

4. **Rules of Civil Procedure § 56— motion for summary judgment — burden of proof**

The party moving for summary judgment has the burden of clearly establishing the lack of a triable issue of fact by the record properly before the court; his papers are carefully scrutinized and those of the opposing party are indulgently regarded.

5. Appeal and Error § 24— grouping of exceptions — assignments of error

Supreme Court Rule 19(3) requires that the appellant group his exceptions and state clearly and briefly his individual assignments of error.

6. Municipal Corporations § 4— low-rent housing — site selection by housing authority

A housing authority is by statute given wide discretionary power in the selection of a site for a low-rent housing project, and the exercise of this discretion may not ordinarily become an issuable question, determinable by the court, except upon allegations of arbitrary and capricious conduct amounting to an abuse of discretion.

7. Municipal Corporations § 4— low-rent housing — site selection by housing authority

Plaintiff failed to raise a genuine issue of triable fact as to whether defendant housing authority acted arbitrarily, capriciously and in abuse of its discretion in the selection of a site for a low-rent housing project, where plaintiff offered no evidence to support his allegations that the land is unsuitable for that purpose because it is not accessible to public transportation, public recreation areas, commercial areas and schools, and for other reasons, and defendant housing authority offered affidavits and exhibits showing that the site was selected and approved by the proper authorities after a duly advertised public hearing.

8. Rules of Civil Procedure § 56— motion for summary judgment — affidavit — personal knowledge of affiant — legal conclusion of affiant

In ruling on a motion for summary judgment, the trial court could not consider portions of plaintiff's affidavit not based on the affiant's personal knowledge and a paragraph of the affidavit stating the affiant's legal conclusion.

9. Municipal Corporations § 4— low-rent housing — purchase price of land

Plaintiff failed to raise a material issue on the question of whether defendant housing authority acted arbitrarily and capriciously and in abuse of its discretion by agreeing to pay an excessive purchase price for the land in controversy.

10. Municipal Corporations § 4— housing authority — site selection — presumption of good faith

It is presumed that a housing authority acted in good faith and in accord with the spirit and purpose of the law in selecting a site for a low-rent housing project.

11. Municipal Corporations § 4— low-rent housing — portion of property subject to railroad easement

Property is not unsuitable as a matter of law for use as a site for a low-rent housing project because of an existing easement in favor of a railroad on a portion of the property which will not be used for construction of housing units.

12. Municipal Corporations § 4— low-rent housing project — violation of local and federal regulations

Plaintiff presented no genuine issue of triable fact as to whether local and federal regulations were violated by defendant housing authority's plans for ingress to and egress from a row-rent housing project or by its plans for the project's streets, drainage, water and sewage disposal, and general topographical layout.

13. Rules of Civil Procedure § 56— summary judgment — findings of fact

Although the trial judge was not required to make and enter into the record detailed findings of fact in ruling on a motion for summary judgment, it was not error for the court to do so, since there is plenary evidence in the record to support his findings.

APPEAL by plaintiff from *Martin, J.*, April 1971 Non-jury Session of BUNCOMBE Superior Court. This case was docketed and argued as No. 156 at the Fall Term 1971.

Plaintiff, a citizen and taxpayer of the City of Asheville, on 11 September 1970 instituted this action against the Asheville Housing Authority and the individual members of the Authority. By this action plaintiff seeks to enjoin defendants from constructing low-rent housing project NC-7-11; to require defendants to abide by the laws of North Carolina and the ordinances of the City of Asheville; to restrain defendants from purchasing from the Asheville Oil Company, Inc., and Sea-Nic Enterprises, Inc., certain real property described as Lots Nos. 109, 110, 144, 145 and 145-1/4, Sheet 9, Ward 7, containing approximately 6.9 acres, and lots Nos. 94 and 108, Sheet 9, Ward 7, containing approximately 9.1 acres; to have the court order a grand jury investigation of defendants' activities; and to order a survey of the above described property.

Defendants filed, in the alternative, a motion to dismiss and a motion to strike certain allegations of the complaint. On 7 October 1970 Judge Hasty entered an order allowing plaintiff 30 days in which to amend his complaint, and allowing plaintiff to inspect defendants' file relative to Project NC-7-11. The judge held defendants' motion to dismiss in abeyance.

On 28 October 1970 plaintiff filed an amended complaint, attaching portions of the Asheville Zoning Code and the Asheville City Ordinances as exhibits.

This matter came on to be heard before Judge Martin at the April 1971 non-jury Session of Superior Court upon the duly

filed motions for summary judgment by defendants and plaintiff. After reviewing the pleadings, the supporting affidavits of the plaintiff and the defendants, and reviewing other evidence submitted, Judge Martin, on 16 April 1971, after finding facts, denied plaintiff's motion for summary judgment and allowed defendants' motion for summary judgment. Plaintiff appealed.

This appeal is before this Court under our General Referral Order effective 1 August 1970.

Cecil C. Jackson, Jr., for plaintiff appellant.

William C. Moore; Williams, Morris & Golding for defendant appellees.

BRANCH, Justice.

Rule 56 of Ch. 1A-1 of the General Statutes in part provides:

> (b) *For defending party.* A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) *Motion and proceedings thereon.*—The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. . . .
>
> (e) *Form of affidavits; further testimony; defense required.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to inter-

rogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Federal Rule 56 is substantially the same as our Rule 56, and we therefore look to the Federal decisions for guidance in applying our rule.

[1-3] The broad statutory limitation that the motion for summary be made "at any time" allows the motion to be made after responsive pleadings have been filed or *before filing of responsive pleadings. Chan Wing Cheung v. Hamilton* (1st Cir., 1962), 298 F. 2d 459; *Hartmann v. Time, Inc.,* (3rd Cir., 1947), 166 F. 2d 127; *United States v. William S. Gray & Co.,* (SDNY, 1945), 59 F. Supp. 665; *Lindsey v. Leavy* (9th Cir., 1945), 149 F. 2d 899. When the motion comes on for hearing, the court may consider pleadings, affidavits meeting the requirements of Rule 56(e), depositions, answers to interrogatories, admissions, oral testimony, and documentary materials; and the court may also consider facts which are subject to judicial notice and such presumptions as would be available upon trial. Rule 56; *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823; 6 Moore, Federal Practice § 56.11[10], at p. 2209 (2d ed. 1971); *Jameson v. Jameson* (D.C. Cir. 1949), 176 F. 2d 58. The use of these materials upon the hearing of the motion for summary judgment makes it clear that the real purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact. *Kessing v. Mortgage Corp., supra; William J. Kelly Co. v. Reconstruction Finance Corp.* (1st Cir., 1949), 172 F. 2d 865; *Securities Exchange Commission v. Payne* (SDNY, 1940), 35 F. Supp. 873; *United States v. 31 Photographs* (SDNY, 1957), 156 F. Supp. 350; *Cunningham v. Securities Investment Co. of St. Louis* (5th Cir., 1960), 278 F. 2d 600. It should be emphasized that in ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact. *Kessing v. Mortgage Corp., supra; United States v. Kansas Gas & Electric Co.,* (10th Cir., 1961),

287 F. 2d 601; *H. K. Ferguson Co. v. Nickel Processing Corp. of New York* (SDNY, 1963), 33 Federal Rules Decisions 268; *Hirsh v. Archer-Daniels-Midland Co.* (2d Cir., 1958), 258 F. 2d 44. The motion may only be granted where there is no such issue and the moving party is entitled to judgment as a matter of law. 6 Moore, Federal Practice, § 56.15 at p. 2281, 2282 (2d ed. 1971); *Chesapeake & Ohio Ry. Co. v. International Harvester Co.* (7th Cir., 1969), 272 F. 2d 139; *Riedel v. Atlas Van Lines, Inc.*, (8th Cir., 1959), 272 F. 2d 901; *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, (DNJ, 1961), 195 F. Supp. 85.

[4] "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore, Federal Practice, § 56.15[8], at p. 2439 (2d ed. 1971). See also *Kessing v. Mortgage Corp., supra;* Gordon, "The New Summary Judgment Rule in North Carolina," 5 Wake Forest Intramural Law Review 94.

[5] Plaintiff's case on appeal presents 34 assignments of error which fail to "pin-point" the question for decision. Rule 19(3) of the Rules of Practice of this Court requires that the appellant group his exceptions and state clearly and briefly his individual assignments of error. *Gilbert v. Moore,* 268 N.C. 679, 151 S.E. 2d 577; *Long v. Honeycutt,* 268 N.C. 33, 149 S.E. 2d 579. Appellant neglected to do this. Therefore, in order to apply the above-stated and other pertinent principles of law to the facts of this case, we have categorically grouped plaintiff's allegations and evidence and defendants' evidence for purpose of considering the sole question presented by this appeal, i.e., did the trial judge correctly allow defendants' motion for summary judgment?

Plaintiff contends that defendants' attempted purchase of the property described in the options was arbitrary, capricious and in abuse of their discretion because of the location of the property. In support of this contention he alleges that more suitable land could be obtained for less consideration; that the land is not accessible to public transportation facilities, public recreation areas, commercial areas, and schools; that defendants misrepresented the location of schools to the Department of Housing and Urban Development, and generally that the land

is located in an otherwise undesirable commercial and industrial section of the city.

Plaintiff offered no evidence to support these allegations and this general contention.

[6] A housing authority is by statute given wide discretionary power in the selection of a site for a low-rent housing project, and the exercise of this discretionary power may not ordinarily become an issuable question, determinable by the court, except upon allegations of arbitrary and capricious conduct amounting to an abuse of discretion. *Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E. 2d 101; *Philbrook v. Housing Authority*, 269 N.C. 598, 153 S.E. 2d 153.

Defendants offered evidence by affidavit, in proper form, and by exhibits which tended to show that the site plan had been submitted to and approved by the Asheville Planning and Zoning Commission; that the City Council of Asheville, after holding a duly advertised public hearing, accepted and approved the site plan; that the site plan was submitted to and approved by the Department of Housing and Urban Development.

[7] Defendants offered an affidavit based on the personal knowledge of the affiant and other exhibits, all of which tended to refute plaintiff's allegations that defendants acted capriciously, arbitrarily and in abuse of their discretion in selecting the location for the low-rent housing project. Plaintiff offered no evidentiary response which would raise an issue for trial.

A number of plaintiff's allegations in the Amended Complaint are directed to the contention that defendants arbitrarily and capriciously abused their discretion by contracting to pay an amount in excess of the appraised value of the property. A typical allegation of this contention is as follows:

> (14) That the defendants as required by law could not pay over and above the appraisal price for said real estate and knew or should have known the same because of the receipt of an appraisal report from Allen Butterworth dated November 17, 1969; and although the defendants were in receipt of said appraisal report entered into a contract accepted December 12, 1969, by their executive director agreeing to pay an amount in excess of the appraisal price; that at the time the defendants agreed to

pay an unlawful sum in excess of the appraisal price of $35,000.00, the defendants were in receipt and had knowledge of an estimate as follows: That it would cost $380.00 to clear the land for the said project; a cost of $4,740.00 for stripping the topsoil; a cost of $37,200.00 for grading the material left on the site; and the sum of $37,500.00 for the cost of filling the rough grade from materials off the site location; and that the cost for providing sanitary sewer would require the sum of $23,715.00; and the cost of $42,618.00 for providing storm sewers; and that the total cost of said land before any improvements are added for public housing would be $187,403.00.

The only evidence offered by plaintiff to support this contention is found in his own affidavit, to wit:

(3) . . . that the plaintiff is advised and informed that the seller never released the purchaser on the first contract, which is still a binding agreement obligating the defendants to pay the original purchase price of $37,500.

(5) That under the terms of the contract the seller must give notice to terminate the same and therefore the original contract dated December 12, 1969, is still binding.

[8] The above quoted portions of the affidavit could not have been properly considered by the trial judge in ruling on the motion for summary judgment. The evidence is incompetent because the portion of Paragraph 3 which plaintiff relied upon was not made on the affiant's personal knowledge, and Paragraph 5 of the affidavit was simply affiant's legal conclusion and not a fact "as would be admissible in evidence." Rule 56(e) of Ch. 1A-1 of the General Statutes; *Jameson v. Jameson, supra.*

On the other hand, defendants submitted an affidavit, proper in form, and exhibits which tended to show that the option dated 12 December 1969 had expired without being exercised; that the grantors had returned to defendants the full amount paid as purchase price for the option ($3,750) and had executed written releases discharging defendants from any claims or obligations incurred by them under that option. Plaintiff alleged that the appraised value of the property was $35,000, and defendants showed by proper affidavit that a new option to purchase the same property from the same parties for the sum of $35,000 had been obtained by defendants.

Defendants also offered exhibits tending to show that the Department of Housing and Urban Development approved the topographical and drainage plans for the lands as a construction expense rather than a purchase price expense.

[9] Thus plaintiff has again failed to raise a material issue on the question of whether defendants acted arbitrarily and capriciously and in abuse of their discretion by agreeing to pay an excessive purchase price for the land in controversy.

Plaintiff next argues that defendants contracted to purchase property from sellers who could not convey an absolute and fee simple title. The allegations in the Amended Complaint refer to the option dated 12 December 1969, which had expired prior to the filing of the Amended Complaint; however, by examining the prayer for relief and the affidavit filed by plaintiff we discover that this argument refers to an easement held by Southern Railway over a portion of the property in controversy.

Again, in support of this contention plaintiff's sole proof is his own affidavit, which contains the following:

> (2) That the title opinion of William C. Moore dated March 26, 1971, for the Housing Authority of the City of Asheville reflects and excepts Tax Lot 110, which is admitted therein the defendants cannot obtain a good, indefeasible title of all the property in question.
>
> (4) That the purchase price of $35,000.00, if there is a release of the original contract is still excessive and the defendants admitted that they do not get absolute title at that price and that the appraisal report obtained by the defendants would assume that the sellers, Asheville Oil Company and Sea-Nic Enterprises, Inc., have absolute and thus marketable title.

Defendants' evidence includes the certificate of title of William C. Moore, a practicing attorney of Buncombe County, showing an easement over a portion of the land in favor of Southern Railway. Defendants also offered by affidavit and exhibits evidence that no housing units will be constructed on the land subject to the easement. Defendants' Exhibit G, a letter from the Regional Office of the Department of Housing and Urban Development, contained the following statement: "The

General Conditions of your intermediate Specifications for the construction of the above-identified low-rent housing project have been reviewed for legal sufficiency and are hereby approved."

[10, 11] Since defendants admit the existence of the easement, there is no issue of fact. There remains only a question of law as to whether defendants' act in purchasing the property amounted to an arbitrary and capricious abuse of discretion. Defendants' primary objective is to make low-rent public housing available to persons now living in sub-standard dwellings. *Philbrook v. Housing Authority, supra.* It is presumed that defendants acted in good faith and in accord with the spirit and purpose of the law in selecting the project site. *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761. We find nothing in the record which indicates, as a matter of law, that the property in controversy is unsuitable as a site for a low-rent housing project because of an existng easement on that portion of the property which will not be used for construction of housing units.

[12] Plaintiff next contends that he should be granted relief because the ingress and egress to the project, the streets, the drainage, the availability of water and sewage disposal, and the general topographical layout as shown on defendants' project plans are inadequate and are in violation of local and federal regulations. Plaintiff's evidence offered in support of these contentions consists of his affidavit and a portion of the City Code which was attached to his complaint. The pertinent portion of the affidavit states:

> (6) That the plaintiff is advised, informed and so alleges that the defendants have failed to obtain a permit or easement to place and run various lines, drainage ditches and other construction items as shown on the plans.

Again, this portion of plaintiff's affidavit is without force since the offered statement is not made on affiant's personal knowledge. Rule 56(e); *Jameson v. Jameson, supra.*

Plaintiff specifically argues that the plans violate the requirements of the City Code providing that streets of the type proposed in the plans shall be 50 feet in width "measured from lot line to lot line." Apparently plaintiff interprets this wording to require a paved road 50 feet wide, rather than a right-of-way of 50 feet. Thus it seems that his own exhibit, defeats this argu-

ment. In connection with these allegations the record shows that defendants offered the affidavit of Charles Adams Clark, who stated on personal knowledge that the site plan for the project fully complies with the zoning ordinances of the City of Asheville, and that all streets in the project will be constructed upon rights-of-way of not less than 50 feet in width.

Defendants by affidavit and exhibits show that the Director of Public Works of the City of Asheville and the engineer for the Asheville City Water Department examined the site plan for the project; that both of these officials recommended certain changes in the site plan; that the Asheville Planning and Zoning Commission approved the recommended changes, and on 4 March 1971 the Asheville City Council, after holding a duly advertised public hearing amended the site plan so as to incorporate the recommended changes. The Department of Housing and Urban Development subsequently approved and accepted the site plan as amended.

Thus defendants' evidence effectively pierced plaintiff's pleadings so that these allegations present no genuine issue of fact.

[13] We do not think that the trial judge was required to make and enter into the record detailed findings of fact in ruling on this motion for summary judgment. However, the action of the careful and able trial judge was proper and was without error, since there is plenary evidence in the record to support his findings.

A careful examination of the entire record discloses that no genuine issue as to any material fact exists between the parties to this action. The judgment allowing defendants' motion for summary judgment and denying plaintiff's motion for summary judgment is

Affirmed.

AZALEA MATTOX AND HUSBAND, TOM MATTOX v. STATE OF NORTH CAROLINA AND NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

No. 85

(Filed 9 February 1972)

1. **Deeds § 16— fee on condition subsequent**

The law does not favor a construction of the language contained in a deed which would constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested.

2. **Deeds § 16— fee on condition subsequent — reservation of right to re-enter**

A fee upon condition subsequent is not created unless the grantor expressly reserves the right to re-enter or provides for a forfeiture or for a reversion or that the instrument shall be null and void.

3. **Deeds § 16— fee on condition subsequent — re-entry — action for possession**

In a fee upon a condition subsequent, there is no automatic reversion upon the happening of the stated contingency, but the grantor must exercise the right of re-entry for conditions broken; the bringing of a possessory action upon the breach of the condition subsequent is equivalent to a re-entry.

4. **Deeds § 16— creation of fee on condition subsequent**

A fee on condition subsequent was created by a deed conveying land "upon condition however," with the conditions fully set forth, followed by the provision that "if and when" the grantee fails to carry out the specified conditions, "the said land shall revert to, and the title shall vest in" the grantor, her heirs and assigns "with the same force and effect as if this deed had not been made."

5. **Deeds § 16— breach of condition subsequent — recovery of premises by grantor**

The grantor of land is entitled to recover the premises for breach of a condition subsequent that the State "perpetually and continuously keep, maintain and operate" the premises for a Highway Patrol Radio Station and Highway Patrol Headquarters, where Highway Patrol activities on the premises were abandoned for a period of time in 1968, and only four patrolmen used in connection with the revocation of drivers' licenses are now stationed in the building otherwise exclusively used for examining persons and issuing drivers' licenses, with the occasional use of an unmanned radio installed therein.

6. **Rules of Civil Procedure § 56— summary judgment — undisputed facts**

Summary judgment was properly entered where the facts were undisputed, the effect of the undisputed facts presenting a question of law for the court.

Mattox v. State

APPEAL by plaintiffs from *Grist, J.*, at the 19 April 1971 Session of MECKLENBURG Superior Court. This case was docketed and argued as case No. 153, Fall Term 1971.

Plaintiffs instituted this action against the State of North Carolina and one of its agencies, the Department of Motor Vehicles, to recover certain real estate plaintiffs had conveyed to the State of North Carolina in a deed dated 12 March 1949. This property is located on Wilkinson Boulevard, Charlotte, North Carolina.

Plaintiffs allege they are entitled to the property by virtue of a breach of the conditions contained in the deed. The conveyance was made on the following conditions:

> "TO HAVE AND TO HOLD the premises herein granted unto the party of the second part forever, upon condition however, that the said party of the second part shall, within sixty days from the date of this instrument, begin construction of a North Carolina Highway Patrol Radio Station and Patrol Headquarters Building upon the aforesaid granted premises, and shall complete the same within six months from date of this instrument, and shall from and after said period of six months, perpetually and continuously keep, maintain and operate said North Carolina Highway Patrol Radio Station and Patrol Headquarters upon said premises, and upon the further conditions that, if the said party of the second part, shall fail, neglect, or omit, to begin construction of said Radio Station and Patrol Headquarters Building upon said premises within sixty days from date of this instrument, or and fail to complete same within six months from date of this instrument, and if and when the said second party shall fail continuously and perpetually to keep, maintain and use such Radio Station and Patrol Headquarters, for the purposes aforesaid, after the expiration of the said six months from date of this instrument, and in any of such events, the said land shall revert to, and the title shall vest in the Grantor, Mrs. Azalea Mattox, her heirs and assigns, with the same force and effect as if this deed had not been made, executed or delivered."

The uncontradicted evidence and stipulated facts in this case show the following: The State built a Highway Patrol

Radio Station and Patrol Headquarters on the land within the time specified in the deed and fully complied with the conditions in the deed pertaining to the use of the land until the spring and summer of 1968. In 1959 an additional Highway Patrol facility was constructed on U. S. 29 North in Charlotte, North Carolina. From 1959 to 1968 there were two Patrol facilities in Mecklenburg County—one at the Wilkinson Boulevard location and one on U. S. 29 North. From the spring of 1968 to November or December 1968, the following series of events transpired: In the spring of 1968 the radio dispatcher assigned to the Wilkinson Boulevard facility resigned, and no dispatcher has been assigned for the operation of the radio located there since that time, although the radio itself was turned on and operational during the summer and spring of 1968. In April 1968 the gas pump located on the premises for the purpose of fueling State-owned vehicles was closed. In June 1968 the telephone located on the premises for official use by the Highway Patrol was disconnected. During the spring or summer of 1968 all Highway Patrol personnel assigned to the Wilkinson Boulevard headquarters were reassigned to the U. S. 29 North facility, pursuant to an order of Sergeant M. B. Lyerly, First Sergeant of the Charlotte District, with the approval of both Captain R. H. Nutt of the Highway Patrol and the Raleigh office of the Highway Patrol. Around Thanksgiving in 1968 plaintiffs met with Captain Nutt and Sergeant Lyerly concerning the suspension of the Patrol activities at the Wilkinson Boulevard location. Shortly thereafter, certain activities by defendants were resumed on these premises.

Joe W. Garrett, now Commissioner of Motor Vehicles, filed an affidavit on 16 April 1971 in which he stated that the Commissioner of Motor Vehicles in 1968 neither authorized nor approved of any slow down of Highway Patrol operations at the Highway Patrol station, and that when the Commissioner learned of this slow down he immediately issued an order that normal Patrol operations be resumed. As a result, the gas pump was reopened, the telephone was reinstalled, and four highway patrolmen, members of the License Revocation Division of the Highway Patrol, were assigned to the facility. These patrolmen operate and use the radio located on the premises occasionally in the course of their duties. They report to and are under the supervision of the U. S. 29 North office.

The North Carolina Highway Patrol is a division of the North Carolina Department of Motor Vehicles. At the time the deed was executed by the plaintiffs to the State, one of the functions of the North Carolina Highway Patrol was to examine persons for and issue drivers' licenses. Later this responsibility was transferred to another division, the Driver License Division of the Department of Motor Vehicles, and since that time the building located on the land in question has been continuously used for the purpose of conducting driver license examinations and issuing drivers' licenses. After the Highway Patrol personnel were reassigned to the U. S. 29 North facility in the spring and summer of 1968, the building was occupied exclusively by employees of the Driver License Division and was used exclusively for examining persons for and issuing drivers' licenses until the four patrolmen, members of the Revocation Division of the Highway Patrol, were reassigned to the Wilkinson Boulevard facility. The telephone listed for the State Highway Patrol is located in the U. S. 29 North facility. The telephone for the Driver License Division is listed for the Wilkinson Boulevard premises.

The case was heard before Judge William Grist on a motion by defendants for summary judgment and a cross motion by plaintiffs for summary judgment. Based on the pleadings, the depositions of Sergeant M. B. Lyerly and Officer C. E. Thomas of the Highway Patrol, and the affidavit of Joe W. Garrett, Commissioner of Motor Vehicles, the court made findings of fact substantially as set out above and concluded as a matter of law:

> "1. That the deed from plaintiffs to the State of North Carolina recorded in Book 1366, at page 153, Mecklenburg County Registry, created a valid fee upon condition subsequent estate.
>
> "2. That the unauthorized slow down in normal Highway Patrol activities at the Wilkinson Boulevard Station during the period from April to November or December of 1968 at most constitutes a mere technical breach of the conditions contained in said deed, which was immediately remedied by the Commissioner of Motor Vehicles after he became aware of same; that such unauthorized technical breach would not and did not work a forfeiture of defendants' estate in said lands.

"3. That at no time did the defendants willfully or intentionally abandon the premises for the uses and purposes required by the conditions contained in the deed.

"4. That at all times during 1968 and at all times thereafter until the filing of this action, defendants have substantially complied with the conditions contained in said deed."

The court then denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment, from which judgment plaintiffs appealed to the Court of Appeals. The case was transferred to this Court under our general order dated July 31, 1970.

Robertson & Brumley for plaintiff appellants.

Attorney General Robert Morgan, Assistant Attorney General T. Buie Costen, and Staff Attorney Roy A. Giles, Jr., for defendant appellees.

MOORE, Justice.

Plaintiffs contend that the court erred in denying plaintiffs' motion for summary judgment and in entering summary judgment for defendants. They assert that the deed from the plaintiffs to the State of North Carolina conveyed to the State a fee upon conditions subsequent, which conditions defendants have breached, and that plaintiff Azalea Mattox is entitled to recover the property in question.

[1] The law does not favor a construction of the language contained in a deed which would constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested. *Lassiter v. Town of Oxford,* 234 F. 2d 217 (4th Cir. 1956) ; *Board of Education v. Edgerton,* 244 N.C. 576, 94 S.E. 2d 661 (1956). G.S. 39-1 provides:

"When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word 'heir' is used or not, unless such conveyance in *plain and express words shows,* or it is *plainly intended* by the conveyance or some part thereof, that the *grantor meant to convey an estate of less dignity.*" (Emphasis added.)

In construing a deed, Justice Adams, speaking for the Court in *Willis v. Trust Co.*, 183 N.C. 267, 111 S.E. 163 (1922), said:

> "The rigid technicalities of the common law have gradually yielded to the demand for a more rational mode of expounding deeds. Hence, to discover the intention of the parties is now regarded as the chief essential in the construction of conveyances. The intention must be gathered from the whole instrument in conformity with established principles, and the division of the deed into formal parts is not permitted to prevail against such intention; for substance, not form, is the object sought. If possible, effect must be given to every part of a deed, and no clause, if reasonable intendment can be found, shall be construed as meaningless. *Springs v. Hopkins*, 171 N.C. 486; *Jones v. Sandlin*, 160 N.C. 155; *Eason v. Eason*, 159 N.C. 540; *Acker v. Pridgen*, 158 N.C. 337; *Real Estate Co. v. Bland*, 152 N.C. 231; *Featherston v. Merrimon*, 148 N.C. 199; *Gudger v. White*, 141 N.C. 513."

[2, 3] A fee upon a condition subsequent is not created unless the grantor expressly reserves the right to re-enter or provides for a forfeiture or for a reversion or that the instrument shall be null and void. *Williams v. Thompson*, 216 N.C. 292, 4 S.E. 2d 609 (1939); *Lassiter v. Jones*, 215 N.C. 298, 1 S.E. 2d 845 (1939); *Church v. Refining Co.*, 200 N.C. 469, 157 S.E. 438 (1931); *Braddy v. Elliott*, 146 N.C. 578, 60 S.E. 507 (1908); *Helms v. Helms*, 135 N.C. 164, 47 S.E. 415 (1904). However, if the deed contains both the apt words to create a condition and an express clause of re-entry, reverter, or forfeiture, an estate on condition subsequent has been created. *Bernard v. Bowen*, 214 N.C. 121, 198 S.E. 584 (1938); *Sharpe v. R. R.*, 190 N.C. 350, 129 S.E. 826 (1925); *Huntley v. McBrayer*, 169 N.C. 75, 85 S.E. 213 (1915); *Brittain v. Taylor*, 168 N.C. 271, 84 S.E. 280 (1915); *Church v. Young*, 130 N.C. 8, 40 S.E. 691 (1902). See 19 N.C.L. Rev. 334 (1941) for an excellent treatise on *Estates on Condition and on Special Limitation in North Carolina* by Professor Frederick B. McCall. In a fee upon a condition subsequent, there is no automatic reversion upon the happening of the stated contingency, but the grantor must exercise the right of re-entry for conditions broken. However, the bringing of a possessory action upon the breach of the condi-

tion subsequent is equivalent to a re-entry. *Brittain v. Taylor, supra.* See 19 N.C.L. Rev. 334, 347.

[4] Applying these principles to the present case, the words used in the deed "upon condition however,"—then fully setting out the conditions, followed by the provision that "if and when" the grantee fails to carry out the specified conditions, "the said land shall revert to, and the title shall vest in the Grantor, Mrs. Azalea Mattox, her heirs and assigns, with the same force and effect as if this deed had not been made, executed or delivered," —are sufficient to show the grantors intended to create a fee on condition subsequent, and by this language they did create such estate. *Sharpe v. R. R., supra.* The trial court so held.

[5] The real question involved in the present case then becomes: Did defendants' acts constitute such breach of the conditions as to entitle plaintiff Azalea Mattox to recover the premises? Plaintiffs contend that the acts of defendants in the spring and summer of 1968, when all Highway Patrol activities on the premises in question were suspended, were clearly a violation of the conditions that the State "perpetually and continuously keep, maintain and operate" the premises for a Highway Patrol Radio Station and Highway Patrol Headquarters, and that thereupon the land reverted to the grantor, Mrs. Azalea Mattox. Plaintiffs further contend that the Patrol activities resumed in the fall of 1968 were not sufficient to comply with the requirements that the premises be used for a Patrol Radio Station and Patrol Headquarters. The radio in the building was not manned in a regular manner, and only four patrolmen (usually only two) who were assigned to the License Revocation Division of the Highway Patrol were stationed there. These men were under the supervision of and reported to the U. S. 29 North office. A "headquarters" is defined as "the quarters of any chief officer, or head of a police force; the center of operations and of authority." Webster's New Collegiate Dictionary (1959). Patrolman Thomas in his deposition defined a District Highway Patrol Headquarters as a place where a first sergeant, a line sergeant, and a secretary were located, and a large room was provided for patrolmen to prepare and turn in their reports, with a mail box furnished each patrolman. None of these conditions were met at the Wilkinson Boulevard facility after 1968. Both Sergeant Lyerly and Officer Thomas stated that they considered the U. S. 29 North facility to be the District Patrol Headquarters in Mecklenburg County.

Plaintiffs conclude that the presence of four patrolmen used only in connection with the revocation of drivers' licenses, stationed in a building otherwise exclusively used for examining persons and issuing drivers' licenses, with the occasional use of an unmanned radio installed therein, could not possibly constitute a State Highway Patrol Radio Station and State Highway Patrol Headquarters.

At the time plaintiffs executed the deed to the State, the issuance of drivers' licenses was the responsibility of the North Carolina Highway Patrol. Subsequently, this responsibility was transferred to another division within the Department of Motor Vehicles. Defendants contend that under *Lassiter v. Town of Oxford, supra,* this continued usage for the issuance of drivers' licenses would constitute substantial compliance. In *Lassiter* property was conveyed to the town of Oxford, North Carolina, so long as it was used by the town as a golf course, and the deed provided for a reverter should the property cease to be used for such purpose. After about ten years, the town leased the property to the Oxford Golf Association for twenty-five years. The lease provided that the Association must at all times maintain a golf course upon the land, and that if it failed to do so, the lease would terminate. The grantor brought suit alleging the conditions were breached. The Court held that there was substantial compliance since the property was being maintained and operated as a golf course even though by an agent of the town rather than by the town itself, and therefore no forfeiture resulted. The present case is clearly distinguishable. Without question, the premises are no longer used as a Highway Patrol Headquarters, and it is doubtful if the location of a radio on the premises, unmanned and only used occasionally, would meet the requirements of a Highway Patrol Radio Station. The Highway Patrol completely abandoned the Wilkinson Boulevard building so far as Highway Patrol activities were concerned in the spring and summer of 1968 and only attempted token compliance with the conditions set out in the deed after plaintiffs met with Captain Nutt and Sergeant Lyerly concerning the suspension of Patrol activities there. Certainly the defendants did not comply with the conditions contained in the deed during the spring and summer of 1968. Neither are they doing so now. This is not merely a "technical breach" as found by the trial court.

[6] Procedurally, the question in the instant case is reduced to whether or not the pleadings, together with the depositions and affidavit, show there is any genuine issue as to any material fact and whether any party is entitled to a judgment as a matter of law. A careful review of the record reveals that the parties were in agreement as to all the factual particulars concerning the deed from the plaintiffs to the State and the use of the property thereafter. There was no "genuine issue as to any material fact," The effect of the undisputed facts was a question of law for the court to determine. G.S. 1A-1, Rule 56; *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971), and authorities therein cited.

Defendant State of North Carolina knew the conditions in the deed when it was accepted, and the State is bound by these conditions. *Story v. Walcott,* 240 N.C. 622, 83 S.E. 2d 498 (1954).

The State has had the use of the property for more than twenty years at no cost. Apparently the property is no longer suited for and is not being used for the purpose for which it was conveyed. Under these circumstances, plaintiff Azalea Mattox is entitled to recover the premises described in the deed.

The trial court erred in entering summary judgment for the defendants. The case is remanded to the Superior Court of Mecklenburg County with instructions that summary judgment be entered in favor of the plaintiffs in accordance with this opinion.

Error and remanded.

STATE OF NORTH CAROLINA v. MARVIN EDWARD BALLARD

No. 56

(Filed 9 February 1972)

1. Constitutional Law § 34; Criminal Law § 26— double jeopardy

The fundamental principle that no person can be twice put in jeopardy of life or limb for the same offense comes within the purview of the "law of the land" clause of Art. I, Sec. 17 of the N. C. Constitution.

2. **Constitutional Law § 34; Criminal Law § 26— double jeopardy**

The double-jeopardy clause of the Fifth Amendment to the U. S. Constitution is applicable to the states through the Fourteenth Amendment.

3. **Criminal Law § 110— nonsuit — not guilty verdict**

Whether correct or erroneous, a judgment of nonsuit in an armed robbery prosecution had the force and effect of a verdict of "not guilty" as to the armed robbery for which defendant was then being tried. G.S. 15-173.

4. **Criminal Law § 26— when jeopardy attaches**

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case.

5. **Robbery § 4— armed robbery — property taken — variance between indictment and proof**

In an armed robbery prosecution, variance between the allegations of the indictment and the proof in respect of the property taken is not material.

6. **Robbery § 2— armed robbery — indictment — ownership of property taken**

In an indictment for armed robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property.

7. **Robbery § 1— gravamen of armed robbery**

The gravamen of the offense of armed robbery is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery.

8. **Criminal Law § 26— double jeopardy — same evidence test**

A plea of former jeopardy bars a second prosecution when the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment, or when the same evidence would support a conviction in each case.

9. **Criminal Law § 26— armed robbery of A & P store — named employee — different employees named in second indictment — double jeopardy**

Judgment of nonsuit on the ground of variance was entered in defendant's trial upon an indictment charging armed robbery of an A & P store in which the life of a named employee of the store was endangered and threatened and in which money belonging to the store was taken "from the person" of the named employee. Defendant was subsequently prosecuted upon another armed robbery indictment for the same occurrence which alleged that the lives of two other employees were endangered and threatened and that the money was taken "from the presence and person" of the two other employees.

The evidence in both trials showed that the robbery was perpetrated by endangering and threatening all employees then present in the store, including those named in both indictments, but that the money was removed from the immediate presence of the two employees named in the second indictment. *Held:* The same evidence would support a conviction in both trials, and defendant's plea of former jeopardy prior to his second trial should have been allowed.

10. Robbery § 4— armed robbery of store — money taken from presence of all employees

The fact that one employee of a store happened to be farther from the store's money than two other employees when it was taken into possession by robbers does not negate the fact that the money was taken from the presence of that employee and all other employees then on duty in the store.

11. Robbery § 2— armed robbery of store — allegation of "from the person" — taking "from the presence"

An allegation charging robbery "from the person" of a store employee includes a taking of the employer's property from the presence of the employee.

Justices LAKE, BRANCH and HUSKINS dissent.

APPEAL by Marvin Edward Ballard from *Bailey, J.*, January 4, 1971 Criminal Session of CUMBERLAND Superior Court, transferred for initial appellate review by the Supreme Court under its general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4), docketed and argued as No. 32 at Fall Term 1971.

An indictment returned at the January 4, 1971 Session of Cumberland Superior Court charged that, on August 21, 1970, Marvin Edward Ballard (Ballard) "unlawfully, wilfully, and feloniously having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: *a pistol,* whereby the *lives of Pat Britt and Nolan Smith were* endangered and threatened did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away One Thousand, Five Hundred and One Dollars and Seventeen Cents ($1,501.17) in money to wit: United States Currency and Coins of the value of One Thousand, Five Hundred and One Dollars and Seventeen Cents ($1,501.17) *from the presence and person of Pat Britt and Nolan Smith* property of the Great Atlantic and Pacific Tea Company, Incorporated, ... " (Our italics.)

When arraigned on said indictment, Ballard moved to dismiss, basing his motion upon a plea of former jeopardy. The

court denied the motion and Ballard excepted. Thereupon, Ballard pleaded not guilty.

The indictment against Ballard and an indictment against Virgil Lee Gaines, which contained identical charges, were consolidated for trial and tried before Judge Bailey during the third week of the January 4, 1971 Session. At the conclusion of the State's evidence, the court granted the motion of Gaines for judgment as in case of nonsuit. Thereafter Ballard testified and offered evidence. As to Ballard, the jury returned a verdict of "Guilty as Charged," and judgment imposing a prison sentence of not less than sixteen years nor more than twenty years was pronounced. Ballard excepted and appealed.

Attorney General Morgan and Assistant Attorney General Weathers for the State.

William S. Geimer, Assistant Public Defender, for defendant appellant.

BOBBITT, Chief Justice.

[1] "It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. *S. v. Prince,* 63 N.C. 529, *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871. It was incorporated in the Bill of Rights of the Federal Constitution. (United States Constitution, Amendment V.) While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the 'law of the land' within the meaning of Art. I, sec. 17. *S. v. Mansfield,* 207 N.C. 233, 176 S.E. 761." *State v. Crocker,* 239 N.C. 446, 449, 80 S.E. 2d 243, 245 (1954).

[2] Overruling prior decisions, the Supreme Court of the United States held in *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969), that the double-jeopardy clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. Hence, federal as well as state double-jeopardy standards control decision.

Ballard's plea of double jeopardy is based on his trial before Judge McKinnon at December 7, 1970 Criminal Session of Cumberland Superior Court on an indictment returned at the October 12, 1970 Criminal Session which charged that, on

August 21, 1970, he "unlawfully, wilfully and feloniously, having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: *a .38 caliber pistol* whereby the *life of Kane Parsons was* endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal and carry away One Thousand, Five Hundred and One Dollars and Seventeen Cents ($1,501.17) in money, to wit: United States Currency and Coins of the value of One Thousand, Five Hundred and One Dollars and Seventeen Cents ($1,501.17) from the *person of Kane Parsons* property of the Great Atlantic and Pacific Tea Company, Incorporated, ... " (Our italics.)

An "Addendum to the Record" provides the only information before us as to what occurred at the trial at December 7, 1970 Criminal Session. This discloses that, upon Ballard's plea of not guilty to the above quoted indictment, the jury was duly selected, sworn and empaneled; that Ballard made a motion to dismiss as in case of nonsuit at the end of the State's evidence and again at the end of all the evidence but assigned no ground and presented no argument in support of the motions; that each of Ballard's motions was overruled; that later the court allowed Ballard's motion to dismiss as in case of nonsuit and stated the reasons therefor as follows:

"After the argument and at the beginning of the charge, the court for the first time read the Bill of Indictment and determined that it alleged that Kane Parsons was endangered and threatened and further it alleged the taking and carrying away of money from the person of Kane Parsons. Upon examination of the Bill of Indictment, the court being of the opinion that there is a fatal variance between the allegation and the proof, it is ordered that the defendant's motion for judgment as of nonsuit be allowed, with leave to the State to proceed upon a correct charge and Bill of Indictment. The defendant is to be held in lieu of Bail in the amount of five thousand dollars ($5000.00) pending the drawing of a new charge."

[3] Whether correct or erroneous, the judgment of nonsuit had the force and effect of a verdict of "not guilty" as to the armed robbery for which Ballard was then being tried, namely, the armed robbery charged in the indictment returned at the October 12, 1970 Criminal Session. G.S. 15-173; *State v. Stinson,* 263 N.C. 283, 286, 139 S.E. 2d 558, 561 (1965).

The question is whether this second prosecution of Ballard for the armed robbery allegedly committed by him in the A & P store on August 21, 1970, violates his constitutional guarantee against double jeopardy.

[4] "[J]eopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case." *State v. Bell,* 205 N.C. 225, 228, 171 S.E. 50, 52 (1933); *State v. Crocker, supra* at 449, 80 S.E. 2d at 245; *State v. Birckhead,* 256 N.C. 494, 504, 124 S.E. 2d 838, 846 (1962).

Unquestionably, at December 7, 1970 Criminal Session, jeopardy attached in respect of the crime charged in the indictment returned at October 12, 1970 Criminal Session. The judgment of nonsuit barred further prosecution *for that crime.*

Both indictments are based on G.S. 14-87 which, in pertinent part, provides: "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony . . . . "

The indictments returned at October 12, 1970 Criminal Session and at January 4, 1971 Criminal Session are identical except the italicized portions thereof. Each indictment charged all elements of the crime of armed robbery as defined in G.S. 14-87. Each charged the crime was committed on August 21, 1970, and involved the theft of $1,501.17 of the money of the Great Atlantic and Pacific Tea Company, Incorporated. The indictment returned at October 12, 1970 Criminal Session charged that the "life of Kane Parsons was endangered and threatened," and that the $1,501.17 was taken from the "person of Kane Parsons." The indictment returned at January 4, 1971 Session charged that the "lives of Pat Britt and Nolan Smith

were endangered and threatened," and that the $1,501.17 was taken "from the presence and person of Pat Britt and Nolan Smith."

[5-7] In respect of "armed robbery" as defined in G.S. 14-87, "[f]orce or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense." *State v. Mull,* 224 N.C. 574, 576, 31 S.E. 2d 764, 765 (1944). Accord: *State v. Sawyer,* 224 N.C. 61, 65, 29 S.E. 2d 34, 37 (1944); *State v. Lynch,* 266 N.C. 584, 586, 146 S.E. 2d 677, 679 (1966). Variance between the allegations of the indictment and the proof in respect of the ownership of the property taken is not material. *State v. Rogers,* 273 N.C. 208, 212-13, 159 S.E. 2d 525, 528-29 (1968). "[I]n an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property." *State v. Sawyer, supra* at 65-66, 29 S.E. 2d at 37. The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery.

[8] The double-jeopardy test applicable on the present record is the "same-evidence test," which is alternative in character. This test is defined in *State v. Hicks,* 233 N.C. 511, 516, 64 S.E. 2d 871, 875 (1951), in opinion by Justice Ervin, as follows: "Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment [citations], or whether the same evidence would support a conviction in each case. [Citations.]"

In the present case, the first alternative does not apply. Evidence sufficient to prove only *the facts alleged in the second indictment* would not have sustained a conviction under the first indictment. No fact concerning Kane Parsons was alleged in the second indictment.

The second alternative, whether *the same evidence* would support a conviction in each case, is the determinative test in the present case. Application of this test requires a review of the evidence offered at Ballard's trial on the second indictment.

The State's evidence, which consists of the testimony of five witnesses, is summarized below.

James Richard Strickland: On August 21, 1970, Strickland was an employee of the Ramsey Street A & P, and he observed defendants Marvin Ballard and Virgil Gaines, and a third man, "at the door for about five seconds." He "then turned back to do the work he was doing." Someone said "freeze." Strickland turned around and saw "Gaines standing at his side with a gun up in the air at a distance of about two feet." He "looked toward the office and saw a man up there with a gun pointed down in the office." That man was Marvin Ballard. Someone said, "Hurry up, chunk," Ballard got "the money out of the office." He told everyone to get on the floor, and Strickland complied. Ballard proceeded outside to a waiting car. The entire incident lasted "four or five minutes."

Nolan B. Smith: About 8:55 p.m. Smith and Mrs. Patricia Britt, fellow employees of the A & P, "had just finished counting the till." Smith "heard a voice say 'freeze,' and saw something move at a side window of the office inside which he was standing." "[Smith's] office was a raised area located at the opposite end of the line of cash registers from the one that has been referred to as the first cash register." Marvin Ballard was standing 3½ feet from him with a gun in his hand. Ballard first said, "Let me have it," and then, "Hurry up, I mean business, let me have the money." Smith stood there and Mrs. Britt "started getting the money together, someone brought a paper bag to her and she put money in the bag," amounting to approximately $175.00. Smith did not see Mrs. Britt actually give Ballard the money. He observed Ballard for a period of 20 to 30 seconds altogether. He looked in "the direction of the meat department and the produce department and saw another individual in that vicinity with a weapon." Smith was "looking around over the store when he heard someone say 'everybody hit the floor.' " When he heard this, he fell to the floor. The entire incident lasted "no more than three or four minutes."

Mrs. Patricia Britt: As "head cashier," Mrs. Britt had just "finished checking Mr. Smith's till for the day" when she saw Ballard. She had "about $1500 in the area." "Ballard had a gun in his hand and said, 'Give me the money.' " "[A] paper bag was handed to" Mrs. Britt and she put the money in it. She did not remember "who hollered for a bag." "[E]ither she or Nolan Smith" gave the bag over to Ballard. Mrs. Britt did not know

whether she was the one who gave Ballard the bag. She hit the floor upon the command to do so.

John William Gooding: "[T]hree colored males" entered the store together. Ballard went to the office window, located "about 35 feet" from the "first check-out register" where Gooding was bagging groceries for a customer, "the farthest [counter] down from the office." Ballard pulled a gun and laid it on the window ledge, pointing it toward the office. Another of the three came near Gooding and said, "Everybody freeze," pulling a pistol from under his shirt. This man was "in the vicinity of Richard Strickland, also, about 3 or 4 feet from him." "Someone" brought Ballard a paper bag. Gooding "did not actually hear [Ballard] ask for money." Gooding had a "side angle view" of Ballard, and observed him for "30 or 40 seconds." At some point Ballard turned and pointed his gun at Carl Brigman, another employee of the store. Someone yelled, "Hurry up, chunk." With that, Ballard "hurried and got out of the store and said, 'Everybody on the floor,' " with which command Gooding complied.

Kane Parsons: Ballard and two others entered the store and split up. Ballard came toward the "check-out counter, which is fartherest from the office," where Parsons, an employee of the A & P, was standing. Parsons's attention was diverted to another individual who was standing "right beside" Strickland. Parsons was able to observe Ballard "for not over 12 to 15 seconds." Ballard approached within 20 or 30 feet of Parsons. Parsons never saw Ballard "in the area of the office" and "never saw Ballard pull a pistol." "[I]t was approximately half a minute from the time [Parsons] observed the people coming in the door until he hit the floor."

Evidence offered by Ballard, which consisted of his own testimony and that of Leslie Scott, tended to establish an alibi.

As indicated, Ballard defended on the ground he was not involved in *any* alleged robbery of the A & P store on August 21, 1970, without regard to the identity of the employees present on such an occasion. Although nonsuit was granted on the ground of variance, it was a determination of not guilty in respect of the robbery of the A & P store on August 21, 1970, if Kane Parsons was one of several A & P employees whose lives were endangered and threatened by Ballard in the perpetration of the robbery.

The present record does not contain the testimony before the jury at the first trial. It does contain the testimony before Judge McKinnon at a *voir dire* hearing to determine the admissibility of identification testimony. This was, by stipulation, used in the trial before Judge Bailey in lieu of conducting a new *voir dire* hearing. Witnesses at the *voir dire* hearing before Judge McKinnon included James Richard Strickland, Nolan B. Smith, Mrs. Patricia Britt, John William Gooding and Kane Parsons. Their testimony was substantially the same as their testimony before the jury in the trial before Judge Bailey.

[9] Clearly, both indictments and the evidence at both trials relate to what occurred on the same occasion, namely, the robbery of the A & P store on August 21, 1970, allegedly by defendant and two others, perpetrated by endangering and threatening the lives of all employees then present. The evidence, on which Ballard was convicted at the second trial, tended to show that Ballard was one of three men who entered the store about 8:55 p.m. on August 21, 1970; that Ballard and one of his confederates were armed with and displayed pistols; that, in the perpetration of their crime, the robbers commanded all employees to "freeze" and for everybody to "hit the floor," which commands were promptly obeyed; that the employees in the store who heard and obeyed these commands included Pat Britt, Nolan Smith and Kane Parsons; that, although the money was removed from the immediate presence of Pat Britt and Nolan Smith, all employees in the store were confronted by the robbers and had responsibility for the custody and care of the employer's money; and that the life of each was threatened and would have been further endangered if any one or more of these employees had offered resistance to the armed robbers. We have concluded that this evidence was sufficient to have sustained the conviction of Ballard at the first trial and that the termination thereof in his favor supports his plea of double jeopardy.

[10, 11] The duty of Kane Parsons to his employer would have required him to intervene to protect the property if he could have done so without further endangering his life. (Kane Parsons testified on *voir dire* that he was the assistant manager of this A & P store.) The fact that he happened to be farther from the property than Pat Britt and Nolan Smith when it was actually taken into possession by the robbers does not negate the fact it was taken from the presence of Parsons and all other

employees then on duty in the store. The first indictment charged the robbery was "from the person" of Kane Parsons. However, the phrase "from the person" included a taking (of his employer's property) from the presence of Kane Parsons. Decisions in accord include those reviewed below.

In *Austin v. State,* 419 P. 2d 569 (Okl. Cr. 1966), the indictment charged robbery "from the possession and person" but the evidence indicated that the defendant removed money from a cash register unaided by the victim; the court found no material variance. In *Baugh v. State,* 211 Ga. 863, 89 S.E. 2d 504 (1955), variance between an indictment charging robbery "from the person" and evidence showing the money was taken from a drawer in the victim's bedroom was not deemed fatal. The same result obtained in *State v. Williams,* 183 S.W. 308 (Mo. 1916), in which the information charged robbery "from his person, in his presence," but it appeared that the victim was shot and lying in an adjoining room unable to see the defendant rifling the cash drawer. In *State v. Calhoun,* 72 Iowa 432, 34 N.W. 194, 2 Am. St. Rep. 252 (1887), although the Iowa robbery statute required the taking of property "from the person" of another, and the evidence showed the taking took place in a room of the house different from that in which the putting in fear occurred, conviction was affirmed.

In *Wright v. State,* 468 S.W. 2d 422 (Tex. Cr. 1971), the indictment charged robbery by assault on Josephine Meyer, and the defendant received a life sentence. Meyer's testimony, however, showed that Wolfe was the person counting the money when the robbers appeared and that Wolfe was the A & P store manager. The court said: "As we view the facts, they do not show such exclusive care, control and management in Wolfe so as to render an allegation in Mrs. Meyer fatal to conviction . . . . The fact that the money was taken from Mrs. Meyer's possession rather than from her person would not call for a contrary result. Further, . . . any possession of the victim which is superior to that of the robber is sufficient ownership or possession to be subject to robbery . . . . " *Id.* at 424.

In *Carreon v. State,* 90 Tex. Cr. 572, 236 S.W. 985 (1922), the indictment charged the robbery of Darbyshire, though the evidence tended to show that the money was taken from the more immediate presence of Nold. Both Darbyshire and Nold were officers in the same company. The court held that, since

the two had "joint possession," either could appropriately be named in the indictment as victim.

Although decision herein is based on the legal principle stated in *State v. Hicks, supra,* namely, that the plea of double jeopardy bars a second prosecution when the same evidence would have supported a conviction at the first trial, we are advertent to the holding of the Supreme Court of the United States that the principle of collateral estoppel, or *res judicata,* inheres in the Fifth Amendment's ban against subjecting any person "to be twice put in jeopardy." *Ashe v. Swenson,* 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970). For present purposes, it is unnecessary to define the differences, if any, between double jeopardy and collateral estoppel. Both are based on the concept that essentially the same issue was for determination in each trial.

This case is of first impression in this jurisdiction involving a factual situation in which several employees of a store or other place of business are confronted by armed robbers and the life of each employee is endangered and threatened. Decision on this appeal is that the judgment of nonsuit for variance was improvidently entered. Since it protects Ballard from the second prosecution, it may be that a guilty person will escape punishment. Even so, to hold otherwise would be to adopt a rule whereby failure to allege in the indictment the name or names of the employee or employees who were *nearest* the money or *most* threatened and endangered would necessitate nonsuit.

For the reasons stated, the judgment of the court below is arrested; and, unless confined on account of other charges, Ballard is entitled to his discharge.

Reversed.

Justices LAKE, BRANCH and HUSKINS dissent.

State v. Crump

STATE OF NORTH CAROLINA v. TOMMIE CRUMP

No. 84

(Filed 9 February 1972)

1. **Criminal Law §§ 68, 79; Kidnapping § 1— statements in furtherance of common design — competency against all defendants — testimony placing kidnappers and victim together**

In this kidnapping prosecution, testimony that one of the defendants asked the victim "if he had any jumping cables and would help start their car," and also asked the victim if he could take his car, *held* competent against both defendants, notwithstanding the witness testified that she did not know which defendant made the statements, since defendants were jointly engaged in an illegal mission and the statements were made in furtherance of a common design, and since the testimony was relevant on the question of identity in that it placed the kidnappers and their victim together at the time and place in question.

2. **Criminal Law §§ 73, 81— hearsay evidence — best evidence rule**

Testimony by a kidnap victim that he had told a police officer that he could recognize the kidnappers was not hearsay and did not violate the best evidence rule.

3. **Kidnapping § 1— sufficiency of evidence**

The State's evidence supports the jury's verdict finding the defendant guilty of kidnapping and judgment pronounced thereon.

DEFENDANT appeals from *Thornburg, J.*, 3 May 1971 Session, HENDERSON Superior Court. This case was docketed as No. 152 and argued at the Fall Term 1971.

Defendant was tried on a bill of indictment, proper in form, charging him with kidnapping Michael Penland on 19 April 1971.

The State's evidence—defendant offered none—tends to show that Michael Penland was employed in a grocery store in Hendersonville, owned and operated by Mrs. Helen Andrews. On 19 April 1971 at 10:40 p.m., Tommie Crump and Edward Scott went to the grocery store and inquired about a jumper cable to start their car. Michael Penland agreed to assist them and, when the store closed at 11 p.m., they got in his car and the three left together. Tommie Crump stuck a pistol in Michael's ribs and told him to follow Mrs. Andrews, the owner of the store who had just driven away. They asked Michael "if she had the money." Michael told them it wouldn't do any good because Mrs. Andrews had locked the money in the safe. The defendant and Edward Scott then abandoned the idea of follow-

ing her and told Michael to take them down the road to their car. Michael followed orders and eventually discovered they had no car and that their story about a dead battery was false. Defendant continued to hold the pistol on Michael, and he drove up and down various streets as directed, eventually arriving at a dirt road where Crump told him to stop the car and open the trunk. When he did so, defendant told him to get in the trunk and fired the pistol into the weeds to demonstrate the gun was real. When Michael pleaded with him, defendant changed his mind, put Michael in the front seat on the passenger side, and Edward Scott drove Michael's car from that point. Eventually, under orders of defendant, Michael resumed the driving duties. Defendant and Edward Scott told him they were going to rob a service station, and Michael drove them to a Shell station on the Chimney Rock Highway. Discovering people about the station, they did not stop but drove back toward Hendersonville, and defendant ordered Michael to drive him to Asheville. He still had the gun in his hand. They drove to Fletcher and defendant then ordered Penland to take him back to the Skyline Drive-In at Hendersonville. They sat in the car at the drive-in about three minutes and then drove to a wooded area near Boyd's Pontiac place where defendant and Edward Scott got out of the car. Michael went directly to Mrs. Andrews' house and told her what had occurred.

Penland testified that he drove his car to all the places enumerated because defendant was holding a gun on him and he was afraid.

This case was consolidated by consent with the case against Edward Scott who was also charged with kidnapping. The jury convicted both defendants. Edward Scott did not appeal, and the judgment as to him is not in the record. Defendant Crump was sentenced to State Prison for a period of fifteen years and appealed to the Court of Appeals at State expense and with appointed counsel. The case was transferred to the Supreme Court for initial appellate review under our general referral order dated 31 July 1970.

Redden, Redden & Redden, by Monroe M. Redden, Attorneys for defendant appellant.

Robert Morgan, Attorney General, and Donald A. Davis, Staff Attorney, for the State of North Carolina.

HUSKINS, Justice.

Mrs. Andrews was allowed to testify over objection: "I had never seen the boys before, but anyway in the conversation, they asked Michael, one of them, I don't know which,—if he had any jumping cables and would help them start their car. I told Michael it was too near time to close and he had too much work to do to leave." At another point in her testimony, she said over objection: "I don't know which one said it . . . but one said, 'Michael, can you take your car?' " Defendant's first assignment of error is predicated on the admission of this evidence. He contends it was incompetent "absent a finding of conspiracy."

The evidence shows that this defendant and Edward Scott were jointly engaged on an illegal mission. They were acting in unison in furtherance of a common design. The evidence gives rise to the permissible inference that they had conspired together to rob Mrs. Andrews and the kidnapping of Michael Penland was necessary to accomplish that objective—they needed transportation. Therefore, statements made in furtherance of the common design, whether by the defendant or his partner in crime, are competent. *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970). Moreover, the evidence objected to was relevant on the question of identity since it placed the kidnappers and their victim together at the time and place in question. "Any evidence which is relevant to the trial of a criminal action is admissible." *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). Furthermore, Michael Penland testified substantially to the same effect without objection, and the admission of this evidence from Mrs. Andrews was largely cumulative and could not have changed the result of the trial. An appellant must show that evidence alleged to be erroneous was prejudicial and that a different result but for the error would have likely ensued. *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364 (1963); *State v. Sanders, supra.* We hold the evidence was competent. Had it been incompetent, its admission would have been entirely harmless. Stansbury, North Carolina Evidence (2d Ed.) § 9.

Included as part of defendant's first assignment of error is the following question propounded to Michael Penland on direct examination and his answer thereto over objection:

"Q. Did you tell DeBois Edmundson whether or not you could recognize the two men who had been in your car during the course of that night?

"A. Yes, sir."

Defendant contends such testimony violates the hearsay rule and the best evidence rule. Michael Penland's testimony as to what he told Officer Edmundson *is* the best evidence, and the officer's testimony would have been competent only to corroborate what the victim told him. Furthermore, the testimony is not hearsay. Its probative force does not depend upon the competency and credibility of any person other than the witness himself. Hence it cannot be classified as hearsay. Stansbury, North Carolina Evidence (2d Ed.), Hearsay, § 138. We find no merit in any of the three exceptions upon which the first assignment of error is based.

Defendant's remaining assignments are formal and require no discussion. The uncontradicted evidence proves kidnapping beyond a reasonable doubt, *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971), and supports the verdict and judgment. The only error appearing in this record was committed by the defendant and his partner in crime when they embarked upon their unlawful mission which culminated in the kidnapping of Michael Penland.

In the trial below we find

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BRYANT v. BALLANCE

No. 109 PC.

Case below: 13 N.C. App. 181.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 February 1972.

IN RE CUSTODY OF MASON

No. 118 PC.

Case below: 13 N.C. App. 334.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 February 1972.

STATE v. BEST

No. 93 PC.

Case below: 13 N.C. App. 204.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 February 1972.

STATE v. FRY

No. 38.

Case below: 13 N.C. App. 39.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 February 1972. Appeal dismissed ex mero motu for lack of substantial constitutional question 9 February 1972.

STATE v. LASSITER

No. 9 PC.

Case below: 13 N.C. App. 292.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 February 1972.

STATE v. LITTLE

No. 31.

Case below: 13 N.C. App. 228.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 February 1972.

Smith v. County of Mecklenburg

ARTHUR SMITH AND DAVID P. REULE, ON BEHALF OF THEMSELVES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED v. THE COUNTY OF MECKLENBURG; ELIZABETH G. HAIR, CHAIRMAN, AND WALTER B. NIVENS AND ROBERT W. BRADSHAW, JR., MEMBERS, OF THE MECKLENBURG COUNTY BOARD OF ELECTIONS; JONES Y. PHARR, JR., CHAIRMAN, AND CHARLES E. KNOX AND FRED A. COCHRANE, MEMBERS, OF THE MECKLENBURG COUNTY BOARD OF ALCOHOLIC CONTROL; W. CHARLES COHOON, CHAIRMAN, AND HAROLD M. EDWARDS AND LAWRENCE C. ROSE, MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ALCOHOLIC CONTROL; AND ROBERT MORGAN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 90

(Filed 15 March 1972)

1. **Intoxicating Liquor § 1; Statutes § 2— Mecklenburg County liquor-by-the-drink statute — unconstitutionality**

Statute authorizing an election in Mecklenburg County to determine whether mixed beverages may be sold by the drink in that county is a local act regulating trade and is therefore void as violative of former Article II, Section 29, and of present Article II, Section 24, of the Constitution of North Carolina. Ch. 617, Session Laws of 1971.

2. **Statutes § 2— general or local act**

A statute is either "general" or "local," there being no middle ground.

3. **Statutes § 2— "local act" defined**

A "local act" is an act applying to fewer than all counties, in which the affected counties do not rationally differ from the excepted counties in relation to the purpose of the act.

4. **Statutes § 2— "trade" defined**

Trade within the meaning of Article II, Section 24, of the North Carolina Constitution is a business venture for profit and includes any employment or business embarked in for gain or profit.

5. **Intoxicating Liquor § 7; Statutes § 2— serving of alcoholic beverages by restaurateur — "trade" within meaning of N. C. Constitution**

The purchase, sale and serving of alcoholic beverages by a licensed restaurateur would constitute "trade" within the meaning of present Article II, Section 24(1)(j) of the North Carolina Constitution.

6. **Intoxicating Liquor § 1; Municipal Corporations § 4— Mecklenburg liquor-by-the-drink statute — power of governmental unit to engage in restaurant business**

Neither G.S. 160A-489 nor the act relating to the sale of liquor by the drink in Mecklenburg County confers implied authority to engage in the restaurant business on any municipal corporation or other governmental unit of Mecklenburg County.

Smith v. County of Mecklenburg

APPEAL by defendants County of MECKLENBURG, members of the Mecklenburg County Board of Elections, and members of the Mecklenburg County Board of Alcoholic Control, from *McLean, J.*, October 18, 1971 Schedule B Civil Session of MECKLENBURG Superior Court, certified, pursuant to G.S. 7A-31, for initial appellate review by the Supreme Court, docketed and argued as No. 160 at Fall Term 1971.

Plaintiffs instituted this action October 6, 1971, seeking to have declared void as violative of designated provisions of the State and Federal Constitutions a statute enacted June 21, 1971, by the General Assembly of North Carolina, entitled "AN ACT AUTHORIZING AN ELECTION IN MECKLENBURG COUNTY TO DETERMINE WHETHER MIXED BEVERAGES MAY BE SOLD BY THE DRINK UNDER RULES AND REGULATIONS PROMULGATED BY THE COUNTY BOARD OF ALCOHOLIC CONTROL," being Chapter 617 of the Session Laws of 1971. Plaintiffs prayed that this statute, hereafter referred to as the Mecklenburg Act, be adjudged unconstitutional and therefore void; and, pending final determination of this action, (1) that the Mecklenburg County Board of Elections be restrained from conducting an election on November 5, 1971, the date it had fixed therefor, and (2) that the Mecklenburg County Board of Alcoholic Control be restrained from issuing mixed-beverage licenses under the Mecklenburg Act.

An order to show cause was issued on October 6, 1971, and the hearing on return thereof was conducted by Judge McLean on October 20, 1971. The only evidence introduced at the hearing consisted of two affidavits of William B. A. Culp, Jr., Executive Secretary of the Mecklenburg County Board of Elections; the verified complaint; the joint affidavit of David P. Reule and Eldridge D. Lewis, "citizens, taxpayers and qualified voters" of Mecklenburg County; a certified copy of Chapter 617, Session Laws of 1971, the Mecklenburg Act; and a certified copy of Chapter 279, Session Laws of 1971, the Moore (County) Act. The only pleading filed by any of the defendants was a motion dated October 20, 1971, by Mecklenburg County and by the members of the Mecklenburg County Board of Elections, pursuant to G.S. 1A-1, Rule 12(b)(6), that the action be dismissed on the ground the complaint failed "to state a claim against these defendants upon which relief can be granted."

The provisions of the Mecklenburg Act are summarized (except when quoted) below.

Section 1 defines certain terms used in the Act.

Section 2 states the purpose is "to control the consumption of alcoholic beverages in places other than private residences by licensing certain persons to sell alcoholic beverages for consumption upon their premises . . . . " It contains declarations as to the position of Mecklenburg County in respect of its location, population, and status as a business, industrial, transportation, and communications center.

Section 3 authorizes *and directs* the Meckenburg County Board of Alcoholic Control "to promulgate a comprehensive plan for the administration, sale and enforcement of mixed beverages by the drink in the County." It also provides that, after approval thereof by the Chairman of the State Board of Alcoholic Control, and prior to September 15, 1971, "the Comprehensive Plan shall be adopted and filed with the Clerk of Superior Court in Mecklenburg County, and published in a newspaper with County-wide circulation."

Section 4 provides that "the Mecklenburg County Board of Elections shall submit to the voters of the County, as soon as practicable, the question of whether mixed beverages by the drink under the Comprehensive Plan adopted by the County Board of Alcoholic Control shall be permitted in the County." It also provides that "[t]wo issues shall be submitted on one ballot," namely, (1) for or against "mixed beverages by the drink and the Comprehensive Plan," *and* (2) for or against " 'brown-bagging' if the mixed beverages issue is passed."

Section 5 provides that if the voters disapprove "mixed beverages by the drink," nevertheless "brown-bagging" is to continue to be legal in the county. If both issues are approved, "no person . . . shall possess both a brown bag license and a mixed beverage license for the same premises at the same time."

Section 6 provides that the Comprehensive Plan shall become operative sixty days from the date it is approved by the voters. It further provides that the Comprehensive Plan "shall not be changed by the County Board of Alcoholic Control," but also states that "the Board shall have full authority to adopt additional or supplemental rules and regulations, with the approval of the Chairman of the State Board of Alcoholic Control, . . . to carry out the intent" of the Act. However, Section 19 provides that "[t]he State Board of Alcoholic Control shall

exercise no authority over the County Board of Alcoholic Control in the exercise of its power and authority to adopt rules and regulations for carrying out the intent of this act."

Section 7 provides that the County Board "may" grant mixed-beverage licenses only to persons operating the following types of establishments: (a) a Grade A restaurant "with a seating capacity at tables for not less than 50 persons and whose gross receipts from the sale of full meals cooked, prepared and served on the premises and non-alcoholic beverages served on the premises shall . . . exceed its gross receipts from the sale of alcoholic beverages"; (b) a hotel or motel with no fewer than 40 permanent bedrooms where food and beverage service is customarily provided in bedrooms and other private rooms by a restaurant, as above defined, located on the premises of and operated by such hotel or motel; (c) a private, non-profit social establishment (defined in section 1(d) to mean "a corporation or association organized and operated solely for objects of a social, recreational, patriotic, or fraternal nature, with duly elected officers or directors, which requires an application for membership and a minimum ten-day waiting period to attain membership, with minimum dues or charges to members of ten dollars ($10.00) per quarter year, which maintains a current membership list with the names and addresses of all members in good standing, and which is the owner, lessee, or occupant of premises upon which it regularly maintains and operates a dining room for the sale to its club members, and their authorized guests, of full meals cooked, prepared and served on the premises, which dining room has at least 50 seats"); and (d) an auditorium or convention center, served by a Grade A restaurant, with a seating capacity and receipts ratio as above delimited.

"Mixed Beverage" is defined in section 1(f) to mean "a drink composed in whole or in part of alcoholic beverages having an alcoholic content of more than fourteen per centum (14%) by volume and served to an individual in a sealed miniature container which shall contain one and six-tenths ounces of alcoholic beverage." Section 1(f) further provides that "the miniature container must be purchased and consumed on [the] premises licensed," that it must be "served with seal unbroken to the individual purchaser," and that "[t]he licensee shall mix the drink after the sealed miniature container has been served to the purchaser."

Section 8 provides that the licensee shall be liable for any violation of the Act or for any violation of any regulation of the County Board promulgated under the Act committed by his employees on his premises.

Section 9 provides that mixed beverages may be sold and consumed on the licensed premises during the hours it is lawful to sell malt beverages.

Section 10 requires all licensees to "keep such records concerning the purchase of alcoholic beverages, the sale of mixed beverages, and the sale of full meals and non-alcoholic beverages, as may be prescribed by the [County] Board," which records are to be open for inspection by the County Board at all times.

Section 11 directs the County Board to review annually the operations of each licensee "to determine whether during the preceding license year the gross receipts from the sale of full meals and non-alcoholic beverages at such establishment were less than the gross receipts from the sale thereat of alcoholic beverages and mixed beverages." When such an improper ratio is revealed, the County Board is directed to revoke the offender's license, not to be issued again for at least one year.

Section 12 gives the County Board discretion to revoke or refuse to grant licenses for violations of the Act or the regulations of the County Board itself. It is further given the discretion, in lieu of revocation, to impose a fine of fifty dollars to one thousand dollars for any violation of the Act or any of its own regulations.

Section 13 prohibits numerous activities, among them: Selling to an intoxicated person, employing or selling to a person under twenty-one, consuming or allowing an employee to consume any alcoholic beverage while on duty, knowingly allowing immoral conduct on the premises, knowingly employing a convicted prostitute (or homosexual, panderer, gambler, habitual law violator, or user or peddler of narcotics), tampering with the contents of any bottle or container of alcoholic beverage, and (in the case of a social establishment) refusing "to make available the current membership list to agents of the [County] Board upon request."

Section 14 provides that purchases of alcoholic beverages by licensees are to be made only from ABC stores located in

Mecklenburg County, and only in one and six-tenths ounce containers with stickers showing that such purchases are made pursuant to the Act and that the tax imposed by section 15 has been paid.

Section 15 provides that each licensee shall pay an annual license fee proportionate to the number of seats located in the licensed establishment and, in addition, a tax of five dollars per gallon of alcoholic beverage. The tax is to be collected by the Mecklenburg ABC stores and paid monthly into the General Fund of the County. "No city, town or other governmental unit" is permitted to levy any "license or privilege tax."

Section 16 provides that any licensee is subject to inspection by the County Board, the State Board, or "any county or city law enforcement officers."

Section 17 provides that any violation of the Act or of any County Board regulation is a misdemeanor punishable in the discretion of the court, except that upon conviction the court is directed to revoke the offender's license, not to be issued again within one year.

Section 18 declares that the provisions of the Act are severable and that the invalidity of any one provision shall not affect valid provisions thereof.

Section 19 provides that the Act "shall not be construed as repealing or modifying any provision of Chapter 18 of the General Statutes or the authority of the State Board of Alcoholic Control relating to those beverages defined in G.S. 18-64 and G.S. 18-60, except to the extent necessary to implement the provisions of this act."

Section 20 provides that the Act shall control in the event of conflict between its provisions and any existing laws and clauses of laws.

Section 21 provides that the Act shall become effective upon its ratification.

Undisputed facts incorporated in Judge McLean's findings include the folowing: On August 11, 1971, the Mecklenburg County Board of Alcoholic Control adopted a Comprehensive Plan, which was approved by the Chairman of the State Board, filed with the Clerk of the Superior Court of Mecklenburg

County and published in a newspaper with county-wide circulation in Mecklenburg County. Thereafter, the Mecklenburg County Board of Elections set November 5, 1971, as the date for the election, and complied with all formalities incident to the conduct thereof. In preparing and planning for the election to be held on November 5, 1971, the County Board of Elections had already spent from the public funds of Mecklenburg County the sum of $7,380.31; and, if the election were held on November 5, 1971, it would spend the further sum of $18,620.00 to defray the expenses thereof.

The Comprehensive Plan adopted August 11, 1971, by the Mecklenburg County Board of Alcoholic Control, is in evidence as Exhibit B of the complaint. Its provisions consist largely of a repetition of the provisions of the Mecklenburg Act.

Judge McLean entered judgment which, after setting forth findings of fact and conclusions of law, provided:

"IT IS NOW THEREFORE, THE JUDGMENT OF THIS COURT:

"(a) That the Motion of the defendants, the County of Mecklenburg and Elizabeth G. Hair, Walter B. Nivens and Robert W. Bradshaw, Jr., members of the Mecklenburg County Board of Elections, that this action be dismissed pursuant to the provisions of G.S. 1A-1, Rule 12(b)(6), of the North Carolina Rules of Civil Procedure on the grounds that the complaint fails to state a claim against said defendants upon which relief can be granted, be and the same is hereby denied.

"(b) That the application of plaintiff for an injunction prohibiting the defendants from holding and conducting the referendum election on November 5, 1971, be and the same is hereby denied.

"(c) That the following portion of Section 3 of Chapter 617 of the 1971 Session Laws, beginning after the word 'County' in line four (4), to wit: 'The Board shall have full authority, subject to and not in conflict with the provisions of this act, to adopt rules and regulations in the plan as to the qualifications of premises and persons to be licensed,' is unconstitutional and void.

"(d) That Section 7(a) [wherein persons operating certain restaurants, hotels and motels, or social establishments, are

described as permissible licensees] in its entirety is unconstitutional and void.

"(e) That Section 7(b) [wherein persons operating certain auditoriums or convention centers are described as permissible licensees] is unconstitutional and void except as it applies to the operation of auditoriums or convention centers by municipal corporations or other governmental units.

"(f) That that portion of Section 12, after the word 'Board' in line nine (9), reading as follows: 'The Board, in its discretion and with the consent of the licensee, may impose a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00) upon a licensee for each violation of this act or of the rules or regulations of the Board in lieu of a revocation or suspension of a license,' is unconstitutional and void.

"(g) That Section[s] 13(i) [prohibiting employment of persons under 21], (j) [prohibiting selling to persons under 21], (m) [prohibiting delivering of a bottle with unbroken seal], (r) [prohibiting employment of prostitutes, homosexuals, etc.] and (v) [requiring social establishments to make available upon request current membership lists] are unconstitutional and void.

"(h) That that portion of Section 17 following the word 'court' on line six (6), reading as follows: 'If any licensee is convicted of the violation of any of the provisions of this act, or any of the rules or regulations promulgated pursuant thereto, the court in which such conviction occurs is empowered to, and shall immediately declare the license revoked, and notify the Board accordingly, and no license shall thereafter be granted to the same persons within a period of one (1) year from the date of the conviction,' is unconstitutional and void; and

"(i) That the Mecklenburg County Board of Alcoholic Control be and it is hereby permanently enjoined, barred and prohibited from issuing any permits or licenses to any natural person, corporation, partnership, or fraternal or patriotic organization whatsoever under the authority of or by virtue of the provisions contained in Chapter 617 of the Session Laws of 1971, except, however, it may so issue permits and licenses to a municipal corporation or other governmental unit."

Appellants excepted to the judgment and to designated findings of fact and conclusions of law set forth therein.

[An appendix to appellants' brief contains a copy of a "STATEMENT OF RESULT OF THE SPECIAL ELECTION held in the COUNTY OF MECKLENBURG, NORTH CAROLINA, on November 5, 1971," which shows that "37,634 votes were cast FOR Mixed Beverages—Mecklenburg County (Comprehensive Plan) and 27,244 votes were cast AGAINST," and that "38,802 votes were cast FOR 'Brown-bagging' if the mixed beverages issue is passed and 25,501 votes were cast AGAINST."]

Bailey & Davis, by Gary A. Davis, for plaintiff appellees.

Ruff, Perry, Bond, Cobb, Wade & McNair, by James O. Cobb, for the County of Mecklenburg and Members of the Mecklenburg County Board of Elections, defendant appellants.

Ervin, Horack & McCartha, by William E. Underwood, Jr., for Members of the Mecklenburg County Board of Alcoholic Control, defendant appellants.

BOBBITT, Chief Justice.

Plaintiffs' status is solely that of "citizens, taxpayers and qualified voters of the County of Mecklenburg." In support of their motion to dismiss, appellants contended there was no evidence that implementation of the Mecklenburg Act would cause plaintiffs to suffer personal, direct and irreparable injury; hence, they contended, plaintiffs had no standing to test the constitutionality thereof in an action to enjoin its implementation. They cite decisions of this Court, including *Fox v. Commissioners of Durham,* 244 N.C. 497, 500-01, 94 S.E. 2d 482, 485-86 (1956), and *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 447-48, 168 S.E. 2d 401, 405-07 (1969), as authority for their position. However, although contending the denial of their motion to dismiss was erroneous, appellants do not now press that contention. On the contrary, they urge this Court to pass upon the constitutionality of the Mecklenburg Act notwithstanding defects, if any, in respect of plaintiffs' standing to maintain the action.

The public interest impels us to decide without further delay whether the Mecklenburg Act is unconstitutional in whole or in part and to decide the legal significance, if any, of the election held on November 5, 1971. Hence, in accordance with appellants' present position, we have elected not to consider questions relating to plaintiffs' standing to maintain the action.

The Mecklenburg Act was ratified on June 21, 1971, when Article II, Section 29, of the Constitution of North Carolina, in pertinent part, provided: "The General Assembly shall not pass any local, private, or special act or resolution . . . regulating labor, trade, mining, or manufacturing; . . . . Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

The revised Constitution of North Carolina was adopted by a vote of the people in the general election held November 3, 1970, and became effective July 1, 1971. Article II, Section 24, in pertinent part, provides: "(1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution: . . . (j) Regulating labor, trade, mining, or manufacturing; . . . . (4) *General laws.* The General Assembly may enact general laws regulating the matters set out in this Section."

The quoted provisions of former Article II, Section 29, and of present Article II, Section 24, are identical in all material respects. Decisions cited below which refer directly to former Article II, Section 29, apply equally to present Article II, Section 24.

[1] We hold, in accordance with plaintiffs' contention, that the Mecklenburg Act is *a local act regulating trade* and therefore void as violative of former Article II, Section 29, and of present Article II, Section 24, of the Constitution of North Carolina.

We think it clear that the Mecklenburg Act is a local act when tested by criteria established by our decisions. Reference is made to a comprehensive and scholarly article, "Local Legislation in the North Carolina General Assembly," by Joseph S. Ferrell, 45 N.C.L. Rev. 340-423 (1967), in which the author discusses the decisions of this Court relating to Article II, Section 29, in the three periods characterized as follows: "1917-1938, the period of strict constructions; 1939-1961, the period of reappraisal; and 1961 to the present, the period of *McIntyre v. Clarkson.*" Ferrell, *op. cit.* at 361.

[2, 3] "A statute is either 'general' or 'local'; there is no middle ground." *Surplus Co. v. Pleasants, Sheriff,* 264 N.C. 650, 656, 142 S.E. 2d 697, 702 (1965). Prior to *McIntyre v. Clark-*

son, 254 N.C. 510, 119 S.E. 2d 888 (1961), "local" was defined arbitrarily in terms of geography: if an act applied to fewer than fifty counties, it was local. *In re Harris,* 183 N.C. 633, 112 S.E. 425 (1922). Under that rule, the Mecklenburg Act would have been local because it applies solely to Mecklenburg County. In *McIntyre,* however, this Court amplified the definition of a "local act" to mean: an act applying to fewer than all counties, in which the affected counties do not rationally differ from the excepted counties in relation to the purpose of the act.

Under the *McIntyre* rule, which was approved and applied in *Treasure City, Inc. v. Clark,* 261 N.C. 130, 134 S.E. 2d 97 (1964), and in *Surplus Co. v. Pleasants, Sheriff, supra,* the Mecklenburg Act is unquestionably a *local* act.

Restaurants, hotels, motels, and "social establishments" are to be found in most counties of the State; municipally-operated auditoriums and convention or meeting centers are to be found in other counties than Mecklenburg. People who favor mixed beverages by the drink are to be found throughout the State. A majority of the people in many counties have voted in favor of opening ABC stores in their counties, just as have the citizens of Mecklenburg County. These people stand on the same plane with those in Mecklenburg County. The same General Assembly that enacted the Mecklenburg Act also enacted a statute (Chapter 279, Session Laws of 1971) giving the people of Moore County the same right, upon petition signed by 15% of the registered voters of that county; but no other citizens of the State other than those of Mecklenburg and Moore Counties have been given this right.

The Mecklenburg Act recites, in its statement of purpose in section 2, that "control of alcoholic beverages is not susceptible to a uniform system of control throughout all counties of the State" and that "[i]n particular, Mecklenburg County . . . has the State's largest population" and "[t]he City of Charlotte serves as a major trading area for the 2 million people in a 75-mile radius." We are unable to perceive in what way these features differentiate Mecklenburg County from other North Carolina counties with reference to the right of the citizens thereof to decide whether their county should have mixed beverages by the drink. We note that section 2 of the similar Moore Act, while also stating that "control of alcoholic beverages is not susceptible to a uniform system of control throughout all coun-

ties of the State," makes no mention of Moore County's unique features or of features it shares with Mecklenburg County. We further note that subsequent to the enactment of the Mecklenburg Act and the Moore Act, the same General Assembly enacted a comprehensive statute (Chapter 872, Session Laws of 1971, comprising G.S. Chapter 18A-1 to 18A-58, which superseded former G.S. Chapter 18) which, in G.S. 18A-1, declares its purpose as follows: "to establish *a uniform* system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina, and to provide administrative procedures to insure, as far as possible, the proper administration of this Chapter under *a uniform* system throughout the State." (Our italics.)

Our summary of its provisions discloses that the Mecklenburg Act *regulates* with particularity the manner in which a licensed restaurateur may purchase and sell alcoholic beverages. Moreover, such purchase and sale constitute *trade* within the meaning of former Article II, Section 29, and present Article II, Section 24.

[4] "Trade within the meaning of Article II, section 29 of our Constitution is a business venture for profit and includes any employment or business embarked in for gain or profit." *Surplus Co. v. Pleasants, Sheriff, supra* at 655-56, 142 S.E. 2d at 702. Accord: *State v. Dixon,* 215 N.C. 161, 164, 1 S.E. 2d 521, 522 (1939); *Taylor v. Racing Asso.,* 241 N.C. 80, 84 S.E. 2d 390 (1954); *Speedway, Inc. v. Clayton,* 247 N.C. 528, 533, 101 S.E. 2d 406, 410 (1958); *Treasure City, Inc. v. Clark, supra* at 133, 134 S.E. 2d at 99; *State v. Smith,* 265 N.C. 173, 177, 143 S.E. 2d 293, 296-97 (1965). In each of these cases, a local act was held to be an act *regulating trade* and therefore void as violative of former Article II, Section 29.

The *local* act involved in *State v. Dixon, supra,* provided for the licensing and regulation of real estate brokers and salesmen; that involved in *Taylor v. Racing Asso., supra,* provided for the operation of a pari-mutuel dog racing track for private profit by the licensee of a racing commission; that involved in *Speedway, Inc. v. Clayton, supra,* required a promoter of motorcycle or motor vehicle races for profit to obtain insurance coverage for drivers and spectators and also banned races on Sundays and evenings; that involved in *Treasure City, Inc. v. Clark, supra,* provided that "[a]ny person, firm or corporation who

engages on Sunday in the business of selling or sells or offers for sale on such day [certain articles of merchandise], shall be guilty of a misdemeanor"; that involved in *Surplus Co. v. Pleasants, Sheriff, supra,* authorized county commissioners to regulate and prohibit the sale of goods, wares and merchandise on Sunday; and that involved in *State v. Smith, supra,* authorized the Board of Commissioners of Forsyth County to regulate or prohibit the operation of public poolrooms, billiard parlors, dance halls and nightclubs located within three hundred yards of a church or school.

[5] Unquestionably, any restaurateur who elected to purchase, sell and serve alcoholic beverages in the manner prescribed by the Mecklenburg Act would be embarking upon a business venture for gain or profit. No limitation is placed upon what he may charge for the alcoholic beverages he sells and serves. The only limitation is that the gross receipts from the sales of alcoholic beverages must be less than the gross receipts from the sale of full meals and non-alcoholic beverages. We think it clear that the purchase, sale and serving of alcoholic beverages by such licensed restaurateur would constitute "trade" within the meaning of present Article II, Section 24(1)(j).

Appellants cite *Gardner v. Reidsville,* 269 N.C. 581, 153 S.E. 2d 139 (1967), and *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297 (1955), as authority for their contention that the Mecklenburg Act does not regulate trade. However, the activity regulated or proscribed by the local act involved in these cases was quite different from that regulated by the Mecklenburg Act.

In *Gardner v. Reidsville, supra,* the contested local act authorized an election by the qualified voters of the City of Reidsville to determine whether alcoholic beverage control stores should be established in that city. If favored by the majority, provision was made for the establishment of a City Board of Alcoholic Control. The act provided further "that the City Board shall have all the powers and duties imposed by G.S. 18-45 on County Boards; shall be subject to the same powers and authority of the State Board as are County Boards under G.S. 18-39; and the operation of any City Alcoholic Beverage Control Stores shall be subject to and in pursuance of the provisions of Article 3 of Chapter 18 of the General Statutes, except where in conflict with this Act." With reference to whether their operation constituted "trade" within the meaning of Article II,

Section 29, the ABC stores in Reidsville had the same status as the ABC stores established and maintained pursuant to county-wide elections under G.S. 18-61. The Court, two Justices dissenting, rejected the contention that the operations of the Reidsville ABC stores constituted *trade* within the meaning of Article II, Section 29. The opinion of Justice Branch, for the Court, marked the distinction in these words: " '[T]rade' refers to a business venture embarked in for gain or profit by a person or a business corporation. It refers to commerce engaged in by citizens of the State, and *not a restricted activity conducted by the State* itself." (Our italics.) *Gardner v. Reidsville, supra* at 591-92, 153 S.E. 2d at 148. *Private profit* was held an inherent element of the concept of trade as used in Article II, Section 29.

In *State v. Chestnutt, supra,* the defendants were tried on a warrant which charged that they engaged in, promoted and participated in a motor vehicle race in Wake County on a designated Sunday in violation of a statute which provided: "It shall be unlawful for any person, firm, or corporation to engage in, promote, or in anywise participate in any motorcycle or other motor vehicle race or races on Sunday in Wake County, North Carolina." The defendants appealed *solely* on the ground that this local act regulated labor and trade and therefore was void as violative of Article II, Section 29. The Court held that the act prohibited all motor vehicle races on Sunday wholly without regard to whether profit or other compensation was involved and thus did not regulate labor or trade. The opinion states: "Were the statute directed solely against labor, *e.g.*, compensated employment, or trade, *e.g.*, business ventures, for profit, in relation to the conduct of motor vehicle races on Sunday in Wake County, the question posed would be serious indeed. But where the statute in sweeping terms bans an activity, to wit, all motor vehicle races on Sunday in Wake County, making it a misdemeanor to promote or engage in the proscribed activity, without regard to the commercial or non-commercial character of the activity, the fact that these defendants promote and engage in such activity for profit and for compensation puts them in no better position than those who promote and engage in such activity without reference to profit or compensation." In contrast to the local act considered in *Chestnutt,* the local act considered in *Speedway, Inc. v. Clayton, supra,* applied only to motorcycle or motor vehicle races for profit and was held to be an act which regulated trade.

The court below adjudged that section 7(a) in its entirety is unconstitutional and void, and that section 7(b) is unconstitutional and void "except as it applies to the operation of auditoriums or convention centers by municipal corporations or other governmental units."

We take note of the following provisions of G.S. 160A-489: "Any city is authorized to establish and support public auditoriums, coliseums and convention centers. As used in this section, 'support' includes but is not limited to: acquisition, construction, and renovation of buildings and acquisition of the necessary land and other property therefor; purchase of equipment; compensation of personnel; and all operating and maintenance expenses of the facility. . . . " We find no statute which purports to confer on a county or on a municipal corporation power to engage in the restaurant business. Whether such a statute would be subject to successful challenge on constitutional grounds need not be considered.

[6] We hold that neither G.S. 160A-489 nor the Mecklenburg Act confers implied authority to engage in the restaurant business on any municipal corporation or other governmental unit of Mecklenburg County. "Neither counties nor municipalities have any inherent legislative powers. Counties are instrumentalities and agencies of the State government and are subject to its legislative control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them. [Citations.] A municipal corporation is a creature of the General Assembly, has no inherent powers, and can exercise only such powers as are expressly conferred by the General Assembly and such as are necessarily implied by those expressly given." *Surplus Co. v. Pleasants, Sheriff, supra* at 654, 142 S.E. 2d at 701.

Furthermore, we construe the provisions of section 7(b) as purporting to authorize the sale of alcoholic beverages by the drink at an auditorium or convention center only by *private* licensed restaurateurs. Hence, the court below erred by the implied holding that a municipality or other governmental unit of Mecklenburg County might become a licensed restaurateur under the Mecklenburg Act. Obviously, such a result was not intended or contemplated by the General Assembly. Moreover, the provisions relating to the sale of liquor by the drink at licensed restaurants located in civic centers and auditoriums are so

interrelated with those relating to such sales in restaurants located elsewhere as to preclude separation.

In view of our holding that the entire Mecklenburg Act is unconstitutional and void as violative of Article II, Section 24(1)(j), of the Constitution of North Carolina, it is unnecessary to consider whether particular provisions thereof would be invalid as violative of other constitutional provisions. Nor do we consider whether the Mecklenburg Act would be vulnerable to attack on other constitutional grounds by a restaurateur whose dining room had fewer seats than fifty or whose operations failed to comply in some other respect with the requirements for the mixed-beverage license.

"The wisdom and expediency of a statute are for the legislative department, when acting entirely within constitutional limits." *McIntyre v. Clarkson, supra* at 515, 119 S.E. 2d at 891. In the exercise of the sovereign police power of the State of North Carolina, the General Assembly may prohibit, regulate or permit the sale of alcoholic beverages. *Gardner v. Reidsville, supra* at 592, 153 S.E. 2d at 149. However, in its exercise of this power it cannot violate constitutional limitations. *State v. Smith, supra* at 179-80, 143 S.E. 2d at 298-99.

The Mecklenburg Act being void in its entirety, the election held November 5, 1971, is a nullity.

The foregoing leads to this conclusion: The judgment of the court below, to the extent it adjudges the Mecklenburg Act to be invalid, is affirmed; but, to the extent it adjudges any portion thereof to be valid, it is reversed. The cause is remanded to the Superior Court of Mecklenburg County for the entry of a judgment in conformity with this opinion.

Affirmed in part; reversed in part.

ANN F. KOONTZ, ADMINISTRATRIX OF THE ESTATE OF DALTON KLUTZ KOONTZ, DECEASED; ROLAND JEROME GAY; WILLIAM E. BATTS, III; PATRICIA SUMMIT COLTRANE, ADMINISTRATRIX OF THE ESTATE OF ROBERT McKINLEY COLTRANE, DECEASED; JANET BROWN CALHOUN, ADMINISTRATRIX OF THE ESTATE OF JOEL CALHOUN, JR., DECEASED; HAROLD FRANKLIN DUNEVANT; BODO U. J. BEER, STEPHEN SHORE, AND JOHNNY A. NAYLOR v. CITY OF WINSTON-SALEM

No. 76

(Filed 15 March 1972)

1. **Rules of Civil Procedure § 56— summary judgment**

A motion for summary judgment should be allowed and judgment entered when the evidence reveals no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

2. **Rules of Civil Procedure § 56— summary judgment — genuine and material issue**

An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action; an issue is "genuine" if it may be maintained by substantial evidence.

3. **Rules of Civil Procedure § 56— summary judgment — burden of proof**

The party moving for summary judgment has the burden of clearly establishing the lack of a triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded.

4. **Municipal Corporations § 4— powers of a municipality**

A municipality has only such powers as the legislature confers upon it.

5. **Municipal Corporations § 21— collection and disposal of garbage — governmental function — governmental immunity**

There can be no recovery for wrongful death or personal injury against a municipality for negligent acts of omission or commission by its agents or servants while engaged in the governmental function of collecting, removing and disposing of garbage within its territorial limits.

6. **Municipal Corporations § 21— landfill operation — disposal of garbage — governmental function — governmental immunity**

A landfill operation by a municipality for the purpose of disposing of garbage collected within its territorial limits is a governmental function; consequently, governmental immunity would ordinarily preclude recovery from the municipality for wrongful death or personal injuries caused by the negligent acts or omissions of the municipality's agents or servants in operating the landfill.

7. **Municipal Corporations § 21— city landfill — contract to dispose of county garbage — propriety function — governmental immunity**

A city was engaged in a proprietary function in operating a landfill for the disposal of garbage where the city had contracted with the county to dispose of county garbage for a fee, since (1) the city received "special corporate benefit" by use of the contract rather than the provisions of G.S. 160-234 for protection against accumulated garbage and refuse within a mile of its corporate limits, and (2) the revenues received by the city under its contract with the county amounted to more than incidental income; consequently, the city was not protected by the doctrine of governmental immunity in actions for wrongful death and personal injuries allegedly resulting from an explosion in a National Guard armory of accumulated methane gas which had been generated in and released from the city's landfill operation.

Chief Justice BOBBITT and Justice SHARP concur in result.

ON *certiorari* to the Court of Appeals for hearing prior to determination by that Court.

These civil actions were instituted by the personal representatives of Koontz, Coltrane and Calhoun for damages for wrongful death; and by plaintiffs Gay, Batts, Dunevant, Beer, Shore and Naylor for damages for personal injuries. The respective plaintiffs' intestates and plaintiffs were all severely burned as the result of an explosion in the supply room of the Winston-Salem National Guard Armory on the morning of 27 September 1969. Plaintiffs primarily allege that the injuries and deaths resulted from the tortious acts or omissions of defendant City in its proprietary operation and maintenance of a sanitary landfill on property belonging to the armory.

Defendant by its answer pleaded various affirmative defenses, including the defense of governmental immunity, and served with each answer notice that it would move for summary judgment.

Thereafter, plaintiffs moved to consolidate all the cases for the purpose of discovery, and defendant moved that the discovery be limited to the issue of governmental immunity. On 3 December 1970 Judge Frank Armstrong entered an order consolidating all cases for discovery on the issue of liability, including governmental immunity, and denied defendant's motions to limit discovery to the issue of governmental immunity. The cases came on to be heard on defendant's motions for summary judgment before Judge Harvey A. Lupton at the

3 May 1971 Session of Forsyth Superior Court on two grounds, to wit: (1) that the doctrine of governmental immunity barred any recovery by plaintiffs as a matter of law, and (2) that the complaint failed to state a claim upon which relief can be granted.

The attorneys for all parties, with the court's consent, agreed that the hearing would be limited to the question of governmental immunity, without waiving any party's right to be heard on the other issue if the case was not finally determined on the issue of governmental immunity. Judge Lupton heard the cases on the pleadings, answers to interrogatories, depositions of John M. Gold, Joe H. Berrier, Glenn W. Kilday, and Orville W. Powell, affidavit of Joe H. Berrier, affidavit of Alfred Francis Shaw, and documents and maps produced by defendant at plaintiffs' request.

These documents, in summary, tend to show that between 1913 and 1929 the City acquired all but 0.12 acres of the 83.47 acres of land that finally comprised the landfill site bordering on Silas Creek Parkway. The cost of all this land to the City was $22,019. After its acquisition, the City at various times maintained a sewage treatment plant, an abattoir, a disposal incinerator, and a fire-training tower on the land. Between 1930 and 1949 ashes and other incinerator residue were dumped on the land. In 1949 the City ceased using the incinerator and began disposing of garbage and other solid waste (hereinafter called garbage) by the sanitary landfill method. This method of disposing of garbage involves spreading out the garbage on the surface of a filled area in a layer about six inches thick, covering the garbage with a layer of fill dirt and then packing the dirt over the garbage. This operation is repeated until a desired grade of fill is achieved. The organic content of the garbage decomposes over a period of eight to ten years after the garbage is buried. This decomposition gives off a number of organic gasses, including methane. Methane gas, which is lighter than air, collects in hollowed-out places in the fill or permeates through the porous fill material and escapes into the atmosphere. Decomposition causes the filled area to shift and settle throughout the eight to ten year period. The generation of gas and the settling of the land are natural incidents to a landfill operation.

Defendant, through its agents and officials, knew that methane gas was an incident of a landfill garbage disposal, and

that methane gas had, prior to September 1969, collected on and in areas adjacent to the landfill, causing minor explosions and "flash fires." The City had installed a ventilator fan in a large culvert drainage system passing through the filled area to exhaust gasses collected in the drainage system. The landfill was the only known source of methane gas in the general area of the armory.

Beginning in 1947, the City conveyed several tracts of the land to various grantees. The total amount received for all the conveyances from the landfill property was $255,780. Among these were the following: (1) conveyance to the State of North Carolina, 9.1 acres to be used as an armory, for no consideration; (2) conveyance to Trustees of Forsyth Technical Institute, 6.24 acres, for the consideration of $85,000; and (3) conveyance to Ed Owens in July 1969 of 16.1 acres, for the sum of $162,000. This sale was made after public advertisement.

The City retained certain utility and drainage easements over the lands sold. The City presently retains approximately 38.8 acres of the original tract.

The record reveals that the City had planned to develop the landfill for a recreational area, but later decided to hold it for sale. In this connection, the City purchased dirt to put over the landfill site in order to cover refuse and to obtain better drainage before the land was offered for sale. In his affidavit, which was considered by the court, Mr. Joe Berrier, public works director for the City, stated: "It (landfill) is much more economical than incineration. It is a means by which otherwise undesirable or unuseful land can be made usable."

For several years prior to the explosion complained of by plaintiffs, the City had disposed of garbage at the Silas Creek Parkway landfill which came from outside the city limits. This garbage was collected from densely populated areas adjacent to the City by private collectors licensed by the County. The City disposed of this garbage pursuant to an agreement with Forsyth County. Under the terms of this agreement the City received compensation for this service at the rate of one dollar per ton for garbage delivered to the landfill. The records of the City show that the cost of operating the landfill during this period was approximately one dollar per ton of garbage disposed of at the fill. The City received the following revenues as a

result of this agreement with Forsyth County: Fiscal year 1965-66, $5,604.50; fiscal year 1966-67, $8,111.50; fiscal year 1967-68, $20,249.15; fiscal year 1968-69, $9,265.00; fiscal year 1969-70, $12,130.50.

Plaintiffs contend that the explosion causing the injuries and deaths resulted from a build-up of methane gas in the armory supply room-vault area. They seek to impose liability on defendant on several alternative theories, to wit: (1) negligence in the operation and maintenance of the landfill; (2) nuisance in the operation and maintenance of an ultra-hazardous activity, (3) fraudulent misrepresentation that the land used for armory purposes was fit for such use, (4) strict liability for the generation and release of the methane gas, and (5) constructive trespass in that the gasses generated on the lands of the City traveled onto armory property and harmed persons lawfully present in the armory.

Since the defense of governmental immunity bars recovery only in tort actions, plaintiffs' contentions directed to their alleged contractual relationships with the City will not be considered in this opinion.

After considering the evidence, all the briefs, and the entire record, Judge Lupton concluded that there was no genuine issue as to any material fact on the question of governmental immunity, and that defendant was entitled to judgment as a matter of law. Judge Lupton thereupon allowed defendant's motion for summary judgment on the ground that governmental immunity barred recovery from defendant. Plaintiffs gave notice of appeal, and Judge Lupton entered an order consolidating all cases for appeal.

We allowed writ of certiorari on 14 September 1971 prior to determination by the Court of Appeals.

White, Crumpler and Pfefferkorn, by William G. Pfefferkorn, for plaintiffs Coltrane and Calhoun.

Wilson and Morrow, by Harold R. Wilson, for plaintiffs Gay, Batts and Naylor.

Harper and Tisdale, by J. Clifton Harper, for plaintiff Koontz.

Hamilton C. Horton, Jr.; Archibald Scales, Jr.; Craige, Brawley, for plaintiff Beer.

R. Lewis Alexander for plaintiff Dunevant.

C. Edwin Allman; James Armentrout; Hatfield, Allman & Hall, for plaintiff Shore.

W. F. Womble, Allan R. Gitter, Eddie C. Mitchell for defendant. Of Counsel: Womble, Carlyle, Sandridge & Rice.

BRANCH, Justice.

This Court has extensively considered the entry of summary judgment pursuant to Rule 56 of Chapter 1A-1 of the General Statutes in the cases of *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823, and *Singleton v. Stewart, ante,* 460, 186 S.E. 2d 400. We therefore briefly review the rules of law applicable to entry of summary judgment under that rule.

[1] When there is a motion for summary judgment pursuant to Rule 56, the court may consider evidence consisting of admissions in the pleadings, depositions, answers to interrogatories, affidavits, admissions on file, oral testimony, and documentary materials. The court may consider facts which are subject to judicial notice, such presumptions as would be available upon trial, and any other materials which would be admissible in evidence at trial. The motion shall be allowed and judgment entered when such evidence reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.

[2] An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "genuine" if it may be maintained by substantial evidence.

[3] Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded. See also Gordon, "The New Summary Judgment Rule in North Carolina," 5 Wake Forest Intramural Law Review 94.

The record shows that plaintiffs allege and defendant admits, or competent evidence, without contradiction, shows: (1) that defendant is a municipal corporation; (2) that at the time of the negligence complained of defendant was engaged in a landfill operation for the purpose of disposing of garbage; (3) that this operation generated methane gas; (4) that for several years, by agreement with Forsyth County, defendant had been disposing of garbage collected outside its territorial limits in return for a payment by the County to defendant of one dollar per ton to dispose of the garbage at the landfill site; (5) that the City had purchased the land adjacent to Silas Creek Parkway, consisting of 84.37 acres, part of which was used for landfill and other municipal purposes, for the sum of $22,019; (6) that the City had sold approximately 26.5 acres for the sum of $255,780; and (7) that a portion of the total land sold by defendant was a 16.1 acre tract sold to Ed Owens during the year 1969 for the sum of $165,000.

Careful examination of the record reveals no genuine issue as to any material fact concerning defendant's landfill operations affecting the question of governmental immunity. Thus, the only question remaining for decision is whether the trial judge correctly ruled, as a matter of law, that defendant was excercising its governmental powers in operating the landfill at the time of the negligence complained of.

This Court has not departed from the rule of govermental immunity adopted in the year 1889 in the case of *Moffitt v. Asheville,* 103 N.C. 237, 9 S.E. 695. The rule set out in *Moffitt* and stated with approval by this Court in *Steelman v. New Bern,* 279 N.C. 589, 184 S.E. 2d 239, is as follows:

> "The liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the corporation is exercising, when the damage complained of is sustained. A town acts in the dual capacity of an *imperium in imperio,* exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit.
>
> "When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed

voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will enure to the general benefit of the municipality. . . .

"On the other hand, where a city or town in exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. . . . "

[4] A municipality has only such powers as the legislature confers upon it. *Moody v. Transylvania County,* 271 N.C. 384, 156 S.E. 2d 716; *Shaw v. Asheville,* 269 N.C. 90, 152 S.E. 2d 139.

In 1917 the General Assembly enacted C.S. 2799, which provides:

The governing body may by ordinance provide for the removal, by wagon or carts, of all garbage, slops, and trash from the city; and when the same is not removed by the private individual in obedience to such ordinance, may require the wagons or carts to visit the houses used as residences, stores, and other places of habitation in the city, and also may require all owners or occupants of such houses who fail to remove such garbage or trash from their premises to have the garbage, slops, and trash ready and in convenient places and receptacles, and may charge for such removal the actual expense thereof.

C.S. 2799, later codified as G.S. 160-233, remained effective until 2 January 1972.

[5] North Carolina is among the states recognizing the majority rule that the collection, removal and disposition of garbage by a municipality within its territorial limits constitutes a governmental function, and that there can be no recovery for wrongful death or personal injury against a municipality for negligent acts of omission or commission of its agents or servants while engaged in this governmental function. *Stephenson v. Raleigh,* 232 N.C. 42, 59 S.E. 2d 195; *Broome v. Charlotte,*

208 N.C. 729, 182 S.E. 325; *Parks-Belk Co. v. Concord,* 194 N.C. 134, 138 S.E. 599; *Scales v. Winston-Salem,* 189 N.C. 469, 127 S.E. 543; *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827; *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423; *Snider v. High Point,* 168 N.C. 608, 85 S.E. 15; 57 Am. Jur. 2d, Municipal, School, and State Tort Liability, Sec. 127; Annotation: "Collection and Disposal of Garbage and Rubbish as Governmental or Private Function as Regards Municipal Immunity from Liability for Tort," 156 ALR 714. However, North Carolina recognizes liability for a *taking or damaging of property resulting from the creation or maintenance of a nuisance* growing out of the disposal of garbage. *Hines v. Rocky Mount,* 162 N.C. 409, 78 S.E. 510; *Little v. Lenoir,* 151 N.C. 415, 66 S.E. 337.

[6] We therefore hold that a landfill operation by a municipality for the purpose of disposing of garbage collected within its territorial limits is a governmental function. Governmental immunity would ordinarily preclude recovery from the municipality for wrongful death or personal injuries caused by the negligent acts or omissions of the municipality's agents or servants. However, appellants contend that the City's operations at the landfill off Silas Creek Parkway were proprietary rather than governmental because (1) defendant contracted with Forsyth County to dispose of the county garbage at the landfill operation in return for the payment of one dollar per ton, and (2) defendant held the landfill property for sale for profit and sold portions thereof for profit.

Defendant contends that it did not depart from the exercise of its governmental powers by contracting with Forsyth County to dispose of county garbage for a fee. Defendant argues that it used the landfill primarily to dispose of garbage for its inhabitants, a governmental function, and that the City did not realize profit from that operation.

In support of its argument, defendant relies upon *James v. Charlotte, supra; McCombs v. City of Asheboro,* 6 N.C. App. 234, 170 S.E. 2d 169; *Osborn v. City of Akron,* 171 Ohio St. 361, 171 N.E. 2d 492; and McQuillin, 18 Municipal Corporations, § 53.46 (3d ed. 1963).

In *James v. Charlotte, supra,* the Court held that the City of Charlotte was engaged in a governmental function when it removed garbage *for its inhabitants* for a fee which covered

only its actual collection and disposal expenses. We note that in *James* it is stated that the City acted pursuant to C.S. 2799.

In *Osborn v. City of Akron, supra,* the city operated a landfill for the disposal of garbage and allowed individuals and other municipalities to use the landfill for a fee. The plaintiff sued for damages for alleged nuisance created by the city's landfill operation. The Supreme Court of Ohio rejected plaintiff's contention that the operation was proprietary, and stated:

> "However, the primary use of this land fill is for the disposition of the garbage and refuse of the inhabitants of the defendant, and the incidental use of such fill by other municipalities and private individuals for a fee does not change the governmental nature of this operation to one of a proprietary nature."

In *McCombs v. City of Asheboro, supra,* the Court of Appeals, in a dicta statement, said:

> "As has been stated frequently by courts of other jurisdictions, actual profit is not the test, and the city will not lose its government immunity solely because it is engaged in an activity which makes a profit. *Beard v. City and County of San Francisco,* 79 Cal. App. 2d 753, 180 P. 2d 744 (1947); *Watkins v. City of Toccoa,* 55 Ga. App. 8, 189 S.E. 270 (1936); *Hahn v. City of Ortonville,* 238 Minn. 428, 57 N.W. 2d 254 (1953); *Huffman v. Columbus,* 51 N.E. 2d 410 (1943); *Griffin v. Salt Lake City,* 111 Utah 94, 176 P. 2d 156 (1947); *Marshall v. Brattleboro,* 121 Vt. 417, 160 A. 2d 762 (1960). 'The underlying test is whether the act is for the common good of all without the element of special corporate benefit, or, pecuniary profit.' McQuillin, Municipal Corporations, 3d ed., § 53.29, p. 192 . . . ."

McQuillin, 18 Municipal Corporations § 53.46 (3d ed. 1963), at p. 247, in part, states:

> Although there is authority which points to a contrary conclusion, the character of the acts of collecting and disposing of garbage, generally conceded to be governmental functions, is not, it is held by some courts, changed by the fact that a charge is made for the services, or because the municipality derives incidental revenue therefrom.

Conversely, plaintiffs contend that defendant's landfill operation became proprietary when defendant entered into an agreement with Forsyth County to dispose of county garbage for a fee, and when defendant prepared and sold the landfill property for profit.

We examine representative authorities supporting this contention.

In *Oliver v. Worcester,* 102 Mass. 489, the plaintiff was injured by a fall into an excavated area which was dug incident to improvement and maintenance of a city-owned building. Prior to the repairs, the city had leased the basement for use as a city market. After repairs, the city used the building for city offices, board rooms, and meetings of the city governing body. Also, the city rented space to the county for use as a courtroom. The basement was used for police and jail purposes. In considering defendant's plea of governmental immunity, the Massachusetts Supreme Court held that, due to the receipt of rental income, the city was acting in a proprietary function in the operation and maintenance of the building, and that the doctrine of governmental immunity afforded the city no protection. The Court stated:

> ". . . [T]he plaintiff, while walking, using due care, upon a footpath which had been used by the public for more than twenty years, and had been laid out and graded from time to time and prepared and cared for by the town and city of Worcester, and was within the public common which had been used by the inhabitants of the town for a much longer period, fell into a deep excavation, made by direction of a joint committee of the city council, under the authority and at the expense of the city, in the course of repairing and improving a building standing within the common, used by the city principally for municipal purposes, but a substantial portion of which, both before and after the time of the accident, the city leased, and received rent for, either from private persons or from the county, and which was therefore held and used by the city, not for municipal purposes exclusively, but in considerable part as a source of revenue; . . ."

The Court apparently did not consider whether the city actually profited from leasing the building, nor did it discuss or define

its term "in considerable part" as used to describe the rental of the two rooms in the building.

In *Duggan v. Peabody,* 187 Mass. 349, 73 N.E. 206, the town owned and operated a quarry and stone crushing apparatus. The primary purpose of this operation was to provide stone for use in construction and maintenance of public streets. However, during the five-year period prior to the action the town received an average annual income of approximately $441 from sale of crushed stone from the quarry to private users. The Massachusetts Supreme Court held that these facts required application of the principle that "when property is used or business is conducted by a town, principally for public purposes under the authority of law, but incidentally and in part for profit, the town is liable for negligence in the management of it." *Collins v. Greenfield,* 172 Mass. 78, 51 N.E. 454; *Neff v. Wellesley,* 148 Mass. 487-493, 20 N.E. 111, 2 LRA 500; *Worden v. New Bedford,* 131 Mass. 23, 41 Am. Rep. 185.

In *Haley v. Boston,* 191 Mass. 291, 77 N.E. 888, the plaintiff was injured by a wagon hauling ashes picked up by the city from residences for the purpose of disposing of refuse. The city had two ordinances providing for the collection of ashes and garbage. City wagons and personnel picked up household ashes properly displayed by residents. The city performed this service for all residents without charge. City wagons and personnel picked up and disposed of ashes from steam engines for a fee of ten cents a barrel—the cost of collecting and removing the ashes. The Court made a distinction in the performance of the two services, and held that in the performance of the service to all of the householders or residents, the city was not liable for the negligent acts of its agents. Plaintiff's suit was barred because the wagon which struck the plaintiff was engaged solely in removing household ashes at no cost to the householder. However, in a dicta discussion, the Court indicated that there would be liability for negligence in the collection and removal of steam engine ashes because the service, even for a fee that equaled only the expense of collection, was "a matter of contract merely, though doubtless with a view to public convenience."

In *Brown v. City of Sioux City,* 242 Iowa 1196, 49 N.W. 2d 853, the city, incident to the operation of its municipal airport, leased property to various tenants. Plaintiff, one of the

tenants, maintained an apiary on leased property near the airport runways. The city sprayed the runways with chlordane to kill harmful insects. As a result of this spraying plaintiff's bees died and his honey was contaminated. Plaintiff sought to hold defendant liable for negligently killing the bees and destroying the honey. Defendant interposed a plea of governmental immunity. The jury returned a verdict in favor of plaintiff, but the trial judge entered a judgment *non obstante veredicto.* On appeal, the Supreme Court of Iowa reversed the judgment n.o.v. on the ground that the city, by receiving income from incidental use of municipal property otherwise properly engaged in a governmental service, became a proprietor and was liable just as a private individual or corporation would be. In so holding, the Court stated: "A municipality in the exercise of its purely governmental functions, is not liable for negligence. But this rule of governmental immunity is to be strictly construed. . . . Where there is doubt as to whether the city is liable, the question will be resolved against the municipality. . . The city cannot accept and exercise the special privilege of leasing its property to tenants without assuming the responsibilities and liabilities flowing from that relationship."

In *Guthrie v. City of Philadelphia,* 73 F. 688 (E.D. Pa. 1896) the plaintiff sued for damages to his boat caused by negligent operation of the city's ice boat. The ice boat was, by ordinance, entitled to receive compensation for breaking ice, but on this occasion was gratuitously clearing ice around a dock in the State of Delaware. There the Court stated:

> "The only defense urged is, in substance, that the city was engaged through its agents, in discharging a public municipal duty, and consequently that it is not responsible for the negligence which caused the injury. The answer to this, in my judgment, is twofold, first that the city owed no municipal duty in Delaware, and second that it was engaged in a private service for the benefit of the owners of the dock, for which it was entitled to compensation. It is unimportant that it performed the service gratuitously. . . ."

In *Town of Douglas v. York* (Wyo.), 445 P. 2d 760, the Court held the municipality liable for fire damage resulting from the negligent operation of the town dump. The basis of the holding was that the town was engaged in a proprietary

function because it charged citizens a fee for disposing of garbage.

We find the following statement in McQuillin, 18 Municipal Corporations § 53.90 (3d ed. 1963) at p. 367:

> The law in regard to liability for torts connected with public property, other than streets and sewers, may be briefly summarized as follows:
>
> 1. If an income is derived by a municipality from particular property owned or managed by it, it is liable for negligence in the care and management thereof. This is well settled and there are no conflicting decisions. Moreover, the amount of income is generally held to be immaterial as is, generally, the fact that the income is merely incidental.

In *Smith v. Winston-Salem; Thomas v. Winston-Salem,* 247 N.C. 349, 100 S.E. 2d 835, the city voluntarily contracted with persons outside its corporate limits for disposal by the city of sewage generated in households located outside the territorial limits of the municipality. The city allowed the sewage mains serving plaintiffs to become choked up and sewage to back through the service connections into plaintiffs' homes. On appeal this Court reversed a judgment for the plaintiffs on the then recognized doctrine of variance, in that the pleadings alleged a breach of contract and the proof established negligence. This Court, in discussing the powers of a municipality to serve the general public and the status of a municipality contracting to serve persons outside its territorial limits, stated:

> "A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory and the people embraced within these limits. *Lee v. Poston,* 233 N.C. 546, 64 S.E. 2d 835. Its charter is the legislative description of the power to be exercised and the boundaries within which these powers may be exercised. Neither city charter nor ordinance enacted pursuant thereto have extraterritorial effect unless authorized by legislative grant. *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624; *S. v. Eason,* 114 N.C. 787; *Dean Milk Co. v. Aurora,* 14 A.L.R. 2d 98; *Hyre v. Brown,* 49 A.L.R. 1230 and annotations; *Donable v. Harrisonburg,* 104 Va. 533, 7 Ann. Cas. 519; 37 Am. Jur. 736.

. . . .

"When plaintiffs, with the assent of defendant, connected their sanitary facilities with defendant's main, defendant impliedly contracted to furnish services reasonably suitable to plaintiffs' need and not to injure plaintiffs by a breach of their contractual obligation. *Defendant, in furnishing these services, was acting in a proprietary capacity. Asbury v. Albemarle,* 162 N.C. 247, 78 S.E. 146." (Emphasis added.)

Plaintiffs rely heavily on the case of *Glenn v. City of Raleigh,* 246 N.C. 469, 98 S.E. 2d 913. In that case the City of Raleigh operated a number of public parks. Plaintiff was injured at Pullen Park when struck by a rock thrown from a lawn mower operated by a municipal employee. The City charged a small fee for admission to the swimming pool, train, and merry-go-round located in the park. It received, during the year plaintiff was injured, approximately $18,000 in net revenue from this park. The cost of the maintenance and upkeep of the Raleigh parks was approximately $158,000 that same year. Plaintiff brought suit for damages for injuries sustained, and defendant moved for nonsuit on the ground of governmental immunity. This motion was overruled. The case was submitted to the jury, and plaintiff recovered. Defendant appealed. This Court granted a new trial for error in the charge, but upon the issue of governmental immunity stated:

"Considering plaintiff's evidence in the light most favorable to him, and disregarding defendant's evidence which tends to establish another and a different state of facts, or which tends to impeach or contradict his evidence, which we are required to do on the motion for judgment of nonsuit *(Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676), it is our opinion that the net revenue of $18,531.14 for the fiscal year 1 July 1952 to 30 June 1953 received by the city of Raleigh from the operation of Pullen Park for that period, which was used by the city for the capital maintenance of the park area, building items, paying salaries, buying fuel, etc., (the evidence that the $18,531.14 was spent in the amusement area only is the defendant's evidence) was such as to remove it, for the purposes of the consideration of a motion for judgment of nonsuit, from the category of incidental income, and to import such

> a corporate benefit or pecuniary profit or pecuniary advantage to the city of Raleigh as to exclude the application of governmental immunity. . . . "

On appeal from retrial, this Court affirmed a judgment for plaintiff. *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482.

The case law *defining* governmental and proprietary powers as relating to municipal corporations is consistent and clearly stated in this and other jurisdictions. However, application of these flexible propositions of law to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary. In this jurisdiction the cases of *Glenn v. Raleigh, supra,* and *James v. Charlotte, supra,* preserve this tradition of confusion by adopting apparently divergent views as to the effect of receiving income while performing an otherwise governmental service.

The *Glenn* cases do not disclose that this Court considered whether there was statutory authority for the city to charge a fee for the use of park facilities. It should be noted that in *James* the city was serving only those within its territorial limits and was acting pursuant to a statute which authorized it to remove garbage from habitations and other places from "the city . . . and to charge for such removal the actual expense thereof."

Under the provisions of G.S. 160-234, the City of Winston-Salem had authority "summarily to remove, abate or remedy . . . everything in the city limits, or within a mile of such limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default and, if not paid, shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes."

The City of Winston-Salem did not elect to rely on the provisions of G.S. 160-234, but chose instead to *contract* with the county for disposal of its garbage. By so doing, the City avoided the possibility of being forced to exercise its powers to remove, abate or remedy accumulated garbage which might have become dangerous or prejudicial to the public health of its citizens. Under the agreement between the county and the City, licensed private collectors picked up garbage in areas outside the city limits and delivered it to the city's landfill site. By use of the

contract, rather than the provisions of G.S. 160-234, the City could extend its protection against accumulated garbage and refuse for more than one mile from its territorial limits. Also, the City avoided the possibility of having to collect the cost of removal of garbage pursuant to the statute; and, further, avoided the very real possibility of litigation to enforce the lien provided by the statute. Thus, there were advantages under the contract with Forsyth County which inured to the City's special corporate benefit and thereby brought defendant within the often announced rule that a municipality acts in its proprietary capacity when it receives special "corporate benefit or pecuniary profit." McQuillin, 18 Municipal Corporations § 53.29 (3d ed. 1963) at p. 1692. *Bolster v. Lawrence,* 225 Mass. 387, 114 N.E. 722; *Smith v. Birmingham,* 270 Ala. 681, 121 So. 2d 867; *Dallas v. St. Louis* (Mo.) 338 S.W. 2d 39.

It would seem that the City has again assumed the same posture as in the case of *Smith v. Winston-Salem, supra,* where this Court stated that the City, by rendering its sewage disposal service to persons located outside its territorial limits on a contractual basis, "was acting in a proprietary capacity."

At this point we stand at a crossroads created by the courts' applications of the various rules of governmental immunity. Here, it is impossible not to be impressed by the striking factual similarities between the *Glenn* cases and instant cases. In *Glenn,* as here, the city was exercising a power generally recognized as governmental. In *Glenn,* as here, the city received income which was not an actual profit. In *Glenn* the city received 11.7% of the cost of maintenance of its parks. Here, for the period 1 July 1968 to 1 July 1969 (the fiscal period of the City of Winston-Salem immediately before the explosion in the ensuing month of September), the City received 9.39% of its cost for the landfill operations from payments made by Forsyth County for disposal of its garbage.

We again decline to abrogate the firmly embedded rule of governmental immunity. However, we recognize merit in the modern tendency to restrict rather than to extend the application of governmental immunity. This trend is based, *inter alia,* on the large expansion of municipal activities, the availability of liability insurance, and the plain injustice of denying relief to an individual injured by the wrongdoing of a municipality. A corollary to the tendency of modern authorities to restrict

rather than to extend the application of governmental immunity is the rule that in cases of doubtful liability application of the rule should be resolved against the municipality. *Gorman v. Adams,* 259 Iowa 75, 143 N.W. 2d 648 (1966); *Murphy v. City of Carlsbad,* 66 N.M. 376, 348 P. 2d 492; *Brown v. City of Sioux City,* 242 Iowa 1196, 49 N.W. 2d 853; *New Mexico Products Co. v. New Mexico Power Co.,* 42 N.M. 311, 77 P. 2d 634; *Barker v. City of Santa Fe,* 47 N.M. 85, 136 P. 2d 480; *Schultz v. City of Phoenix,* 18 Ariz. 35, 156 P. 75; *Erickson v. Fitzgerald,* 342 Ill., App. 223, 96 N.E. 2d 382.

[7] Applying the rules of law herein stated, we hold that the City of Winston-Salem was exercising powers voluntarily assumed for its own corporate benefit at the time of the negligence herein complained of, and that at the same time the City was receiving revenues over and beyond incidental income, which income "imports such a corporate benefit . . . or pecuniary advantage to the city as to exclude application of governmental immunity."

We hold that the City of Winston-Salem was acting in its proprietary capacity at the time of the negligence herein complained of.

The judgment of the Superior Court is

Reversed.

Chief Justice BOBBITT and Justice SHARP concur in result.

Blades v. City of Raleigh

ROBERT C. BLADES, EVE R. BLADES, JOHN D. BRADSHER, JR., JO ANN BRADSHER, J. MELVILLE BROUGHTON, JR., MARY A. C. BROUGHTON, SAMUEL B. DEES, HELEN DEES, CLARENCE R. DOLBY, JR., VIRGINIA DOLBY, JOHN N. DUNCAN, JR., JEAN C. DUNCAN, R. B. DUNN, DREAMA DUNN, J. ROGER EDWARDS, JR., PATRICIA EDWARDS, T. W. ELLIOTT, JR., MURIEL ELLIOTT, A. D. GURKIN, L. B. HARDISON, MARY L. HARDISON, PAUL A. HOOVER, DOROTHY D. HOOVER, ALBERT M. JENKINS, SUSAN S. JENKINS, DREWRY J. JONES, ELMA JONES, J. LYMAN KISER, ELIZABETH KISER, JOHN C. McCONNELL, JR., LYNDA R. McCONNELL, HUGH L. McMANUS, JR., KAYE C. McMANUS, J. C. MILLSAPS, BETTY S. MILLSAPS, SAM NORTHROP, JR., MARY LOU NORTHROP, J. T. PULLEN, LOIS PULLEN, D. B. VICK, AND MILDRED S. VICK, PLAINTIFFS v. THE CITY OF RALEIGH, NORTH CAROLINA, SEBY JONES, MAYOR AND MEMBER OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA, AND TOM BRADSHAW, JR., GEORGE B. CHERRY, CLARENCE E. LIGHTNER, JESSE O. SANDERSON, ROBERT W. SHOFFNER, AND ALTON L. STRICKLAND, MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA, AND WILLIAMS REALTY AND BUILDING COMPANY, INCORPORATED, DEFENDANTS

No. 71

(Filed 15 March 1972)

1. Declaratory Judgment Act § 1; Municipal Corporations § 30— validity of zoning ordinance

A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment, and the owners of property in the adjoining area affected by the ordinance are parties in interest entitled to maintain the action. G.S. 1-254.

2. Rules of Civil Procedure § 56— summary judgment

A summary judgment may be entered, when otherwise proper, upon the motion of either the plaintiff, G.S. 1A-1, Rule 56(a), or the defendant, G.S. 1A-1, Rule 56(b), in an action for a declaratory judgment.

3. Rules of Civil Procedure § 56— summary judgment against moving party

When appropriate, summary judgment may be rendered against the party moving for such judgment. G.S. 1A-1, Rule 56(c).

4. Declaratory Judgment Act § 2— validity of zoning ordinance — summary judgment

Summary judgment is proper in an action seeking a declaratory judgment as to the validity of a zoning ordinance where there is no substantial controversy as to the facts disclosed by the evidence, but the controversy is as to the legal significance of those facts.

5. **Municipal Corporations § 30— police power — zoning ordinance**

The police power, upon which zoning ordinances must rest, permits restriction of the owner's use of a specific tract when the legislative body has reasonable basis to believe that it will promote the general welfare by conserving the values of other properties and encouraging the most appropriate use thereof.

6. **Municipal Corporations § 30— amendment of zoning ordinance**

A city may, from time to time, amend its zoning ordinance so as to transfer an area from one use district to another, the enactment of a zoning ordinance not being a contract by the city with property owners to maintain the zoning pattern thereby established. G.S. 160-176.

7. **Municipal Corporations § 30— rezoning — changed conditions — increased traffic on abutting road**

Increased flow of traffic along a road abutting a 5-acre tract of land is not a changed condition which would warrant rezoning of the tract from single family residential to a less restrictive classification, the increased traffic being due largely to residential construction in the area and having been contemplated when the property was originally zoned and there being nothing to show that the increased traffic affects the 5-acre tract in a manner or degree different from all other properties in the area which remain zoned and used for single family residences.

8. **Municipal Corporations § 30— rezoning — change of conditions — abutting property**

Contention that rezoning of a 5-acre tract from a classification permitting only single residences to a classification permitting townhouse apartments was warranted by the commercial rezoning of abutting property is without merit, the record showing that there has been no rezoning of abutting properties but only that there has been a relatively insignificant nonconforming use of one abutting landowner's property which was in existence when the original zoning ordinance was adopted.

9. **Municipal Corporations § 30— rezoning — purported need for townhouses**

Purported need for additional luxurious townhouses in Raleigh is not a change in condition which would warrant the rezoning of a 5-acre tract from a single family residential classification to a classification permitting townhouses, there being nothing in the record to show a need for such land use in the area where the land is located.

10. **Municipal Corporations § 30— rezoning — unsuitability for single family residences**

In a hearing upon an application for the rezoning of a 5-acre tract of land from single family residential to a less restrictive classification, a statement by the applicant's president that the tract is not suitable for "the type of housing residence that we have been building" in the surrounding area is not a basis for finding that this particular property is not suitable for single family residential purposes.

11. Municipal Corporations § 30— spot zoning

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

12. Municipal Corporations § 30— spot zoning

Ordinance rezoning 5 acres of land from R-4 classification (single family residences) to a less restrictive classification constituted "spot zoning," where the rezoned property is surrounded by a very large area classified R-4 and extensively developed by the construction and occupancy of single family residences, and the record discloses no reasonable basis for granting the owner of the 5-acre tract freedom from restrictions imposed upon the owners of other properties in the surrounding area.

13. Municipal Corporations § 30— contract zoning — specified use of property

A municipal ordinance rezoning a 5-acre tract of land from an R-4 classification to a less restrictive R-6 classification constituted unlawful "contract zoning," where there is nothing in the record to indicate that the city council contemplated the opening of the 5-acre tract to all uses permissible under the R-6 classification, and it is apparent that the city council's action was based on its approval of the applicant's plans to construct specifically described townhouses on the property.

APPEAL by plaintiffs from *Clark, J.*, at the 12 April 1971 Regular Civil Session of WAKE, heard prior to determination by the Court of Appeals, docketed and argued as Case No. 113 at Fall Term 1971.

This is a suit for a declaratory judgment to determine the validity of Ordinance No. (1970) 28 ZC 91 of the City of Raleigh, insofar as it rezones from a Residential 4 (R-4) classification to a Residential 6 (R-6) classification approximately five acres owned by Williams Realty & Building Company, Inc., hereinafter called Williams, lying between Lassiter Mill Road and Old Lassiter Mill Road. The plaintiffs appeal from a summary judgment granted upon motion of Williams adjudging the ordinance valid.

The complaint alleges: The plaintiffs are owners of single family residences located across the street from and in other

locations near the property in question (Williams property); when Williams acquired its property, it was zoned R-4; and it was and is adaptable and usable for uses permitted in R-4 districts (single family residences); town houses (other than on tracts of fifty acres, or more), apartment houses, hospitals, sanitariums and rest homes are not permissible uses in R-4 districts but are permissible uses in R-6 districts; Williams having petitioned for the rezoning of its property from R-4 to R-6 and the plaintiffs and others having protested, the Planning Commission of the City and the City Council, meeting jointly, conducted a hearing, following which the Council adopted the ordinance; the ordinance constitutes unlawful spot zoning, is contrary to the comprehensive plan of the city, is arbitrary and capricious, does not preserve but diminishes the value of property in the same general area, denies the plaintiffs the equal protection of the laws, deprives them of their property without due process of law, constitutes unlawful contract zoning, having been adopted by the Council in exclusive reliance upon Williams' representations as to the specific use it would make of the property, is not supported by any change in the condition of the area or by any evidence of need for construction of apartment houses in the area; and for these and other reasons the ordinance is invalid.

The answer of Williams denies the asserted bases of invalidity of the ordinance. It alleges that the Council considered the matter and that it recited in the ordinance itself the things it considered. The answer incorporates the application filed by Williams, a transcript of the oral presentations at the hearing before the City Council, excerpts from the minutes of the meeting of the Council and the ordinance itself.

The answer of the city and members of the City Council admits the adoption of the ordinance in question but denies its invalidity and the alleged bases therefor set out in the complaint.

At the hearing upon its motion for a summary judgment dismissing the action, Williams offered in evidence, "merely to show what the Council had before it at the time the request for zoning was considered," certain exhibits, including a map of the area of which the Williams property is a part, the application of Williams for rezoning and a transcript of statements made at the hearing before the City Council. Counsel for the plaintiffs offered in evidence, in opposition to the motion for summary

judgment, excerpts from minutes of various meetings of the City Council and of the Planning Commission, contending that there were genuine issues of material fact, no specification of these being set forth in the record.

The following facts, appearing in the record, are not in controversy:

By Zoning Ordinance 765-ZC-42, adopted 20 October 1958, a very extensive area was classified R-4. In the intervening years, this entire area has been extensively developed by the construction and occupancy of single family residences, each on a substantial lot. It is, presently, one of the more desirable residential areas in the city. The five acre Williams tract is approximately in the center of it.

At the time the 1958 Ordinance was adopted, and for many years prior thereto, there was in operation on a small tract immediately between the Williams property and the north bank of Crabtree Creek a water powered grist mill, known as Lassiter's Mill, an historic landmark of the city and vicinity. There was also in operation on a small area, adjoining both the Lassiter Mill tract and the Williams property, an antique shop and, associated therewith, a small woodworking plant called the Lassiter Lumber Company, manufacturing such items as children's sandboxes, dog houses, and basketball goals. The Lassiter Mill site was zoned I-2 (industrial) and the Lassiter Lumber Company operation and antique shop were continued as a nonconforming use in the R-4 district.

A few months thereafter, the Lassiter Mill burned. Its owner proposed to rebuild it. The Planning Commission recommended, and the City Council adopted, an ordinance changing this property to the R-4 classification, except the mill site itself, approximately one acre, which was left in the I-2 classification to permit rebuilding of the mill. At that time (1959), the Planning Commission reported to the City Council, as a basis for its recommendation, "it [was] felt that this was one of the best residential sections in the city and to allow the existing zoning [Industrial-2] would do great damage to the surrounding area."

On 19 May 1969, another application was filed to rezone "approximately one acre of land at the Old Lassiter Mill site" from the I-2 to the R-4 classification. The Planning Commission recommended to the City Council that this request be denied

and its recommendation was followed, the minutes showing: "Although this request would represent a logical change of zoning to make this area conform to the overall development of the area, the commission recalled that in 1959 this area was allowed to remain in order for the owner to have an opportunity to rebuild the mill; and that present plans for the area, which indicate the city's purchase of this property for a park, would make the rezoning appear to be a deliberate attempt to devalue the property for future purchase."

The Lassiter Lumber Company operation and antique shop continue as a nonconforming use in the R-4 district.

The Williams property is a five acre tract bounded on the South by the Lassiter Mill and the Lassiter Lumber Company properties, on the West by Old Lassiter Mill Road, on the East by Lassiter Mill Road and on the North by a proposed but unopened extension of Marlowe Road.

Lassiter Mill Road, running on North beyond the Williams property for a considerable distance, leads to the North Hills Shopping Center, constructed after the adoption of the Zoning Ordinance of 1958, which construction, together with the construction of the many homes in this area, has substantially increased the traffic on Lassiter Mill Road.

Williams was a substantial factor in the development and sale of many lots in this general area, now occupied by single family residences, and continues to own other acreage and lots therein.

On 1 May 1967, as shown in the minutes, the City Council adopted a resolution providing:

> "WHEREAS, the complete zoning procedure heretofore followed has never been officially adopted by the City Council * * *
>
> NOW, THEREFORE, BE IT RESOLVED * * *
>
> "That the following procedure be followed with reference to filing rezoning applications and in holding zoning hearings: * * *
>
> "9. The Council will not rely upon specific use or plan proposals in its determinations, except in case of a require-

ment by the Council for special exceptions, such as shopping center plan approval. The arguments must be based on the need to change the zoning map in accordance with the comprehensive plan or to amend the plan for the benefit of the neighborhood or city, because of changed conditions."

The application filed by Williams for the rezoning of its property from R-4 to R-6 contains the following questions and answers, among others:

"15. What changed or changing conditions make the passage of this amendment necessary?

1. Traffic conditions along Lassiter Mill Road.
2. Commercial Zoning of abutting property.
3. Need for some 20 ultra luxurious townhouses in Raleigh."

(As above noted, there has been no commercial zoning of abutting property since this area was classified R-4 by the ordinance of 1958. The Lassiter Mill is not in operation and the Lassiter Lumber Company operation and antique shop are recognized as a nonconforming use in an R-4 district.)

"16. Describe briefly whether all the uses permitted by the proposed amendment would be appropriate in the area concerned:

"The zoning change from R-4 to R-6 is essentially one of greater density: to allow more than a single dwelling, the use of the area for a sanitarium, rest home, or temporary Christmas tree sales [permitted in R-6 but not in R-4] would be appropriate but not desirable by the owner."

* * * *

"18. Describe whether other areas designated for similar development in the vicinity of the subject property are likely to be so developed if the proposed amendment is adopted, and whether the designation for such future development should be withdrawn from such areas by further amendment of the Zoning Map.

"The area is unique in geographical location, the concept is reasonably new, and this applicant does not know of similar proposed developments in the area.

"19. Other circumstances which justify the amendment?

"The type of dwellings available in this area is limited. This amendment would allow comparable housing in style and quality without problems of house and lawn maintenance to those who would like to live in the neighborhood."

At the hearing before the City Council upon the Williams application, the attorney for Williams stated:

"In this particular piece of property, you've got a unique piece of land because of the geographical location. * * * [T]his is in effect an island. * * * The property lying immediately * * * west of the Old Lassiter Mill Road is still being developed by Williams Realty & Building as part of Williamsborough.

"Under the proposed zoning which is from R-4 to R-6, you can have additional items, they are a sanitorium, a hospital, a rest home. Mr. Williams doesn't feel this is the proper development, and what he proposes to put in there are luxury apartments. * * * The diagram, immediately back of the Mayor there, is a diagram showing the ground layout site plan of this particular thing, which I think gives a better idea than I could describe it to you."

A spokesman for the proposal, introduced to the Council by the attorney for Williams, stated:

"This is 20 units on approximately 5 acres. No increase in density, basically. All of the units would be inwardly oriented: facing a landscaped parking court yard. The court yard would contain approximately 50 parking spaces and would be lushly landscaped with trees and various types of plant material within the parking areas themselves. It is anticipated that a full-time gardener would be provided with this development. We are maintaining a buffer of trees between Lassiter Mill Road of approximately 95 feet and between Old Lassiter Mill Road of approximately 60 feet."

The architect for the proposed project, speaking in support of the application, said:

"Basically, I can only emphasize the character of this insofar as its individuality as an enclosed development with

no presentation on the street. Furthermore, a quick analysis of the value of the property which is approximately $115,000 to $120,000, divided by 20 units, brings in a ground cost which is at least three times the average so-called town house which is—should be called garden apartment. Therefore, there is no question but that the investment requirement here would be substantial units rather than minimum units, and it is geared entirely for people who live in houses and want to move to developments like this. That [sic] have large rooms and accommodate the furniture which they have had all their lives."

The president of Williams, in rebuttal of statements by protestants, said:

"Since that time [15 or 16 years ago] we have developed the some 300 acres of land, which originally comprised the Drewry property, and we have transposed this land into two subdivisions, Drewry Hills and Williamsborough, which I think are the equal to any subdivision in this town. I now find myself with this 5 acres of land along Lassiter Mill Road that is unsuitable to build the type of housing residence that we have been building in these two subdivisions we mentioned before, and I am here to ask you all to allow me to develop this property as I think it should be developed. I have talked to land planners, architects, engineers and realtors, and without exception, they are all in agreement that the property should be developed for high class high rental town house apartments."

Following the hearing, the Planning Commission recommended approval of the application, saying:

"The tract proposed is about 5 acres in size. We felt that it was not an illogical extension of the growth of the city and it would not necessarily involve, detrimentally, the neighbors in the single family homes to the North and East, and, therefore, the recommendation of the Planning Commission was for approval. * * * We felt that this particular development would have to be controlled to some extent, but that on the merits of this instance that it would not be detrimental to the neighborhood. * * * This particular proposal will not increase the density. * * * They [the proposed buildings] will be closer together but it would not increase the density on the property."

Following the recommendation of the Planning Commission, the City Council adopted the ordinance in question unanimously.

Other than the above quoted statement of the president of Williams to the City Council at the hearing, there is nothing in the record to suggest that the Williams property is not suitable for single family residences.

The ordinance under attack contains the following recital in its preamble:

"WHEREAS, in the passage of this ordinance the City Council of the City of Raleigh has specifically considered each of the following:

"(a) A comprehensive zoning plan of the City as evidenced by past actions of the City Council.

"(b) The officially adopted thoroughfare plan as the same will lessen traffic congestion.

"(c) The 'Land Development Plan 1980' of the City of Raleigh.

"(d) The securing of safety from fire, panic and other dangers.

"(e) The promotion of the public health, public safety, public morals and public welfare.

"(f) The providing of adequate light and air.

"(g) The prevention of overcrowding of land and avoidance of undue concentration of population.

"(h) The facilitation and availability of transportation.

"(i) The facilitation and availability of water, sewage, schools, parks and other public requirements.

"(j) The character of the district and its peculiar suitability for particular uses.

"(k) The conservation of land and building values and the encouragement of the most appropriate use of land in and around the city."

The ordinance then recites that the council found as a fact that the adoption of the ordinance "will serve to promote, preserve and is consistent with all considerations mentioned in (a) through (k) above."

The superior court set forth in its judgment many recitals which are not denominated "Findings of Fact," including the following:

"That it appears to the Court that said pleadings raise only a question of fact and there is no genuine issue as to any material fact * * *

"It appearing to the Court * * * that the City of Raleigh has maintained a Comprehensive Zoning Plan * * *

"It further appearing to the Court that in addition to its own collective knowledge and expertise, the Council has the advice of a Planning Commission * * *

"That among the matter presented for consideration by the City Council * * * were the following:

"a) That the land to be rezoned is a 5-acre parcel.

"b) The traffic situation along Lassiter Mill Road.

"c) The industrial zoning and commercial usage of the adjoining property.

"d) The right of an owner of property, which is zoned R-6, to use the property for a sanitorium, rest home or for temporary sale of Christmas trees.

"e) That there would be no increase in traffic on the road net around the property as a result of any of the uses permitted in an R-6 zone as compared with the uses permitted in an R-4 zone.

"f) The adequacy of utilities in the area for any use in either an R-4 or R-6 zone.

"g) The protection of surrounding R-4 areas from adjacent industrial or commercial usage by creation of a buffer R-6 zone.

"h) That other R-6 development in the area as a result of this ordinance would be possible but unexpected because of the unique nature of the subject parcel.

"i) The opinion of the Planning Commission that adoption of this ordinance was not an illogical extension of the growth of the city and would not necessarily involve detrimentally the neighbors and single-family homes.

"j) That Lassiter Mill Road had been relocated to its present location since this parcel was zoned R-4, which relocation, together with the retention of the Old Lassiter Mill Road rendered the subject parcel an island.

"k) That the subject parcel is an island surrounded by Old Lassiter Mill Road, Marlowe Road, heavily traveled Lassiter Mill Road, a parcel of land in nonconforming commercial use, and a parcel zoned Industrial 2.

"l) That R-4 zoning permits townhouse apartments, as does R-6 zoning, except that the landowner is required to have a fifty-acre parcel under the R-4 zone.

"m) That use of the property within the R-6 classification would produce an increase in traffic on the roads now around the property of approximately 1.8 per cent over the volume of traffic presently existing; with the property in its state of non-use.

"n) That the proliferation of driveways on the road net through use of the property for single-family dwellings within the R-4 classification would increase congestion of the traffic flow.

"o) That the change of the property to the R-6 classification would create no problem so far as provision of adequate light, air, privacy, utilities or fire protection.

"p) The issue of whether or not the rezoning would constitute 'spot zoning.'

"q) That the Planning Commission had attempted to coordinate the facts in this rezoning situation with the Comprehensive Zoning Plan."

The court then recited in its judgment fifteen "FINDINGS OF FACT," including:

"7. That subsequent to the zoning of this property as R-4, that North Hills, a regional shopping center, has been

developed on Lassiter Mill Road, creating a large volume of traffic on Lassiter Mill Road.

* * * *

"15. That the ordinance (28-ZC-91) states that, in the passage of this ordinance, the City Council of the City of Raleigh had given consideration to the following:

[The recitals set forth in the preamble of the ordinance as above quoted.]

The court then set forth in its judgment its conclusions of law, including the following:

"(2) The City of Raleigh has at all times maintained a Comprehensive Plan for zoning * * * and a zoning map in conformity therewith.

"(3) The 5-acre tract which is the subject of this legislative enactment is not best suited for development within the R-4 classification.

"(4) The City Council * * * had reasonable grounds upon which to conclude that enactment of the Ordinance * * * would serve the purposes of G.S. 160-174 * * *

"(5) Ordinance * * * was duly and validly adopted * * * after due notice and public hearing by unanimous vote of the Council of the City of Raleigh in accordance with the Charter and Code of the City of Raleigh, the General Statutes of North Carolina, the Constitution of North Carolina and the Constitution of the United States.

"(6) The City Council * * * did not act arbitrarily or capriciously but its action was in good faith, was reasonable and was in accord with its Comprehensive Zoning Plan.

"(7) Ordinance (1970) 28-ZC-91 bears a reasonable and substantial relation to the public safety, health, morals, comfort and general welfare."

The court thereupon adjudged that the motion of Williams for summary judgment be granted and that the ordinance was adopted in accordance with law and is valid and the plaintiffs are not entitled to the relief prayed for in the complaint.

The plaintiffs excepted to and assign as error all the foregoing recitals, findings of fact, conclusions of law and adjudications contained in the judgment.

John V. Hunter III for plaintiffs.

Broxie J. Nelson and Fred P. Baggett for the City of Raleigh.

Bailey, Dixon, Wooten & McDonald by Wright T. Dixon, Jr., and John N. Fountain for Williams Realty and Building Company.

LAKE, Justice.

[1] A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. G.S. 1-254; *Woodard v. Carteret County,* 270 N.C. 55, 153 S.E. 2d 809. The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action. *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78; *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325. The propriety of a summary judgment in such action is governed by the same rules applicable to other actions. G.S. 1A-1, Rules 56(a) and (b), and 57.

[2, 3] A summary judgment may be entered, when otherwise proper, upon the motion of either the plaintiff, Rule 56(a), or the defendant, Rule 56(b), in an action for a declaratory judgment. When appropriate, summary judgment may be rendered against the party moving for such judgment. Rule 56(c). Summary judgment may be entered, upon such motion, when there is no genuine issue as to any material fact and either party is entitled to a judgment as a matter of law. Rule 56(c). Upon the making of a motion for summary judgment, it is incumbent upon the adverse party resisting such procedure to set forth specific facts showing that there is a genuine issue for trial. Rule 56(e). Here, the defendant Williams moved for summary judgment and neither the plaintiffs nor the city made such showing of the existence of a genuine issue of fact for trial. The record discloses none. In *Kessing v. National Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823, we said:

> "The purpose of summary judgment can be summarized as being a device to bring litigation to an early de-

cision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial. * * * [U]nder Rule 56 the court may receive and consider various kinds of evidence. * * * Evidence which may be considered under Rule 56 includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken. * * * Oral testimony may also be received by reason of Rule 43(e)."

[4] Here, there is no substantial controversy as to the facts disclosed by the evidence. The controversy is as to the legal significance of those facts. Such controversy as there may be in respect of the facts presents questions of fact for determination by the court. See: *Allred v. City of Raleigh,* 277 N.C. 530, 178 S.E. 2d 432; *Zopfi v. City of Wilmington, supra; Armstrong v. McInnis,* 264 N.C. 616, 142 S.E. 2d 670.

The present is, therefore, a proper case for summary judgment determining the validity of Ordinance (1970) 28-ZC-91 of the City of Raleigh. We hold that the ordinance is invalid for the reasons hereinafter set forth and remand this proceeding to the Superior Court of Wake County for the entry of a summary judgment so declaring.

The record supports the conclusion of the superior court that the city has a comprehensive plan for zoning. See, *Allred v. City of Raleigh, supra.* G.S. 160-174 provides that municipal zoning regulations "shall be made in accordance with a comprehensive plan * * * and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality." This statute, obviously, does not contemplate that the zoning pattern must be, or should be, designed to permit each individual tract of land to be devoted to its own most profitable use, irrespective of the surrounding area.

[5] The whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him but detrimental to the value of other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole. The police power, upon which zoning ordinances must rest, permits such restriction upon the right of the owner of a specific tract, when the legislative body has reasonable basis to believe that it will promote the general welfare by conserving the values of other properties and encouraging the most appropriate use thereof. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303; *Schloss v. Jamison*, 262 N.C. 108, 136 S.E. 2d 691; *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E. 2d 817; *In Re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706, app. dis., 303 U.S. 569, 59 S.Ct. 150, 83 L.Ed. 358; *State v. Roberson*, 198 N.C. 70, 150 S.E. 674.

As the Supreme Court of the United States, speaking through Mr. Justice Sutherland, said in *Village of Euclid v. Ambler Realty Co., supra:*

> "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. * * * Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."

[6] Quite clearly, the city may, from time to time, amend its zoning ordinance so as to transfer an area from one use district into another, the enactment of a zoning ordinance not being a contract by the city with property owners to maintain the zoning pattern thereby established. *Zopfi v. City of Wilmington, supra; Walker v. Elkin*, 254 N.C. 85, 118 S.E. 2d 1; *Marren v. Gamble*, 237 N.C. 680, 75 S.E. 2d 880. G.S. 160-176 specifically authorizes amendments changing the boundaries of zoning districts.

G.S. 160-175 provides, "The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be * * * from time to time amended, supplemented or changed." By resolution of the City Council, the City of Raleigh has provided:

> "That the following procedure be followed with reference to filing rezoning applications and in holding zoning hearings:
>
> * * * *
>
> "9. The Council will not rely upon specific use or plan proposals in its determinations, except in case of a requirement by the Council for special exceptions, such as shopping center plan approval. The arguments must be based on the need to change the zoning map in accordance with the comprehensive plan or to amend the plan for the benefit of the neighborhood or city, because of changed conditions."

The application for the rezoning in the present case set forth these alleged changes in conditions since the adoption of the original ordinance placing this area in the R-4 district: "(1) Traffic conditions along Lassiter Mill Road; (2) commercial zoning of abutting property; and (3) need for some 20 ultra luxurious town houses in Raleigh." The record discloses no other claim of change in condition in the area.

[7] The increase in volume of traffic along Lassiter Mill Road is obviously due largely to the extensive residential construction throughout this area following the adoption of the original zoning ordinance. Thus, this is a change contemplated by the Council when the area was originally placed in the R-4 district. There is nothing in the record to suggest that the increased flow of traffic along Lassiter Mill Road affects the Williams property in a manner, or to a degree, differing from all other properties, north and south of the Williams land, which remain zoned and used for single family residence use.

[8] The record shows there has been no rezoning of abutting properties from R-4 uses to commercial uses since the enactment of the original ordinance. On the contrary, such change as has occurred in the use of abutting properties strengthens the position of the plaintiffs. The old mill, which was the reason for zoning its site as industrial property, has been burned and has

not been in operation for a number of years. Nothing in the record indicates that it will ever be rebuilt or replaced by another industrial operation. The property occupied by the Lassiter Lumber Company and antique shop is zoned R-4 and this operation is carried on solely as a nonconforming use in existence when the original ordinance was adopted. Furthermore, these are, quite obviously, relatively insignificant and exceptional variations from the single family residence use which prevails otherwise throughout the entire large area surrounding the Williams property on all sides.

[9] If the need for additional luxurious town houses in Raleigh be a change in conditions since the adoption of the original ordinance in 1958, nothing in the record shows a need for such land use in this particular area. Thus, this case is distinguishable from situations in which the growing up of a residential area makes desirable the development therein of neighborhood grocery stores or service businesses. See, *Higbee v. Chicago, B. & Q. Railroad Co.*, 235 Wis. 91, 292 N.W. 320, 128 A.L.R. 734.

[10] The record falls far short of indicating that the Williams property, itself, cannot be used, practicably, for single family residence purposes. The statement of the president of Williams to the Council that this five acres is not suitable for "the type of housing residence *that we have been building* in these two subdivisions we mentioned before," (emphasis added) is not basis for a finding that this particular property is not usable for single family residence purposes. On the contrary, as late as 1969, the Planning Commission recommended to the City Council that the old mill site, itself, be rezoned to R-4. Williams does not contend that its property is not suitable for residence purposes. It proposes to build residences thereon. The controversy relates to the type of building wherein people are to reside. It is not suggested that the proposed change from single family residences to R-6 uses will promote the development of, or appropriate use of, any property other than the five acres in question, or that the devotion of this tract to R-6 uses is made necessary by the growth in the population of this area resulting from the construction of single family residences therein.

Zopfi v. City of Wilmington, supra, is readily distinguishable from the present case. There, the property to be rezoned lay in or near the apex of a triangle lying between two heavily traveled highways. The major portion of the property, closest

to the apex of the triangle, was rezoned to commercial use and the remainder to apartment house use. Under the circumstances, there disclosed by the record, it was not unreasonable for the City Council of Wilmington to conclude that the property was not suitable for single family residences.

[11, 12] A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning." It is beyond the authority of the municipality, in the absence of a clear showing of a reasonable basis for such distinction. *Zopfi v. City of Wilmington, supra; Wakefield v. Kraft,* 202 Md. 136, 96 A. 2d 27, 29; *Page v. City of Portland,* 178 Oregon 632, 165 P. 2d 280; *Marshall v. Salt Lake City,* 105 Utah 111, 141 P. 2d 704, 149 A.L.R. 282; *Rowland v. Racine,* 223 Wis. 488, 271 N.W. 36; 58 AM. JUR., Zoning, § 39; 101 C.J.S., Zoning, § 91; Yokley, Zoning Law and Practice, 3d Ed., § 8-3; Annotation, 37 A.L.R. 2d 1143. The record discloses no reasonable basis for granting to Williams a freedom from restrictions imposed upon the owners of other properties in the surrounding area. The contention that the Williams property is an island, since it is bounded by Lassiter Mill Road, the Old Lassiter Mill Road, the Lassiter properties to the south and the proposed extension of Marlowe Road to the north, is untenable. It is no more of an island than is any other city block in the area.

Furthermore, the ordinance in question runs afoul of the rule stated in *Allred v. City of Raleigh, supra,* where, speaking through Chief Justice Bobbitt, we said:

> "Consideration of the minutes of the Planning Commission and of the City Council show beyond doubt that the City Council did not determine that the 9.26-acre tract and the existing circumstances justified the rezoning of the 9.26-acre tract so as to permit *all* uses permissible in an R-10 district. On the contrary, it appears clearly that the ground on which the City Council based its action was its approval of the specific plans of the applicant to construct on the 9.26-acre tract 'luxury apartments * * * in twin high-rise towers.' * * *

"In our view, and we so hold, the zoning of the property may be changed from R-4 to R-10 only if and when its location and the surrounding circumstances are such that the property should be made available for all uses permitted in an R-10 district. Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated. Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land."

[13] Here, as in the Allred case, *supra,* there is nothing whatever in the record to indicate that the City Council, by adopting the ordinance in question, contemplated the opening of this five acre tract to the construction thereon, if desired by the owner, of a hospital, a sanitarium or a rest home. On the contrary, it is quite apparent that the amending ordinance was adopted solely because the applicant convinced the Council that it would use the property for the construction of town houses as specifically described. Nevertheless, the adoption of the ordinance, if it be valid, would permit use of this property for any other purpose permitted in an R-6 district.

The ordinance was adopted by a procedure specifically forbidden by the Council's own resolution, which it adopted in 1967, pursuant to the requirements of G.S. 160-175. The mere recitals in the preamble of the ordinance that the City Council considered certain specified things are not conclusive so as to preclude the court from examining the record and making its own determination thereon in the light of the evidence concerning the proceedings before the Council. Furthermore, the recitals may well relate, in this instance, to two other tracts, in other parts of the city, rezoned by the same ordinance. The court may not substitute its judgment for that of the legislative body concerning the wisdom of imposing restrictions upon the use of properties within that body's legislative jurisdiction. *Schloss v. Jamison, supra; In re Markham,* 259 N.C. 566, 131 S.E. 2d 329; *In re Appeal of Parker, supra.* The court may, however, inquire into procedures followed by the board at the hearing before it and determine whether the ordinance was adopted in violation

of required procedures, or is arbitrary and without reasonable basis in view of the established circumstances. *Allred v. City of Raleigh, supra.*

Both because the ordinance in question constitutes unlawful "spot zoning" and unlawful "contract zoning," it is in excess of the authority of the City Council and invalid.

The judgment of the Superior Court of Wake County is, therefore, reversed and the matter is remanded to that court for the entry by it of a judgment declaring Ordinance (1970) 28-ZC-91 invalid insofar as it rezones the five acres of the Williams property from the R-4 classification to the R-6 classification.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILLIE HORACE BRYANT

No. 89

(Filed 15 March 1972)

1. **Rape § 5— sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of rape where it tended to show that defendant had sexual intercourse with the prosecutrix after choking her and threatening her with a knife.

2. **Criminal Law § 75— in-custody statements — absence of waiver of counsel — admission for impeachment purposes**

In this rape prosecution, defendant's in-custody admissions that he had choked the prosecutrix and had placed a knife at her side prior to the acts of intercourse were properly admitted for the limited purpose of impeaching defendant's testimony at the trial, notwithstanding defendant had not waived his right to counsel when the in-custody statements were made.

3. **Rape § 6— failure to submit assault with intent to rape**

In this prosecution for rape, the trial court did not err in failing to submit to the jury the lesser included offense of assault with intent to commit rape, where all the evidence, including defendant's testimony, disclosed completed acts of intercourse, and the only factual dispute was whether the acts were voluntary or as a result of defendant's use of force.

Chief Justice BOBBITT dissenting.

Justice SHARP joins in dissenting opinion.

State v. Bryant

APPEAL by defendant from *Cowper, J.*, August 16, 1971 Criminal Session, NASH Superior Court. This case was docketed and argued at the Fall Term 1971 as No. 159.

The defendant, Willie Horace Bryant, by grand jury indictment proper in form, was charged with having committed the capital felony of rape upon Dorothy Whitehead. The alleged offense occurred in Nash County on June 5, 1971.

Upon arraignment the defendant, through court-appointed counsel, entered a plea of not guilty. The record shows a jury acceptable both to the State and to the defendant, was selected and empaneled.

At the trial, Dorothy Whitehead, the prosecutrix, gave testimony here summarized except when quoted. On the night of June 5, 1971, she, her two children (ages three and four), and her cousin drove to her aunt's house a distance of about one-half mile from where the witness lived. "After I put my cousin out I started on my way (home) and I heard someone holler and I thought it was her so I stopped . . . . When I did, Willie Horace Bryant jumped in the car with me. . . . After he jumped in he asked me to take him to Shorty Bridges. I noticed he had a knife in his hand. . . . He was the one who directed me. . . . Each time I refused to do something he would stick the knife in my side."

The witness testified she drove, at defendant's direction, to a wooded area where he forced her to remove all her clothes and to submit to two acts of intercourse. When she attempted to resist he choked her and threatened her further by placing an open knife at her side. After the second act he permitted her to put on her clothes. In the meantime he had placed his open knife on the instrument board of the vehicle. While he was dressing outside the car she hid the knife under the seat and delivered it to the officers at the time she reported to them the full story of what had occurred.

After re-entering the highway from the wooded area, the witness saw an outside drink box at a closed filling station. She asked the defendant to get her a soft drink. When he started toward the drink box she hurriedly drove away and immediately reported to members of her family and to the officers, describing fully what had occurred. She told the officers

the defendant had choked her and threatened her with the knife which she delivered to the officers.

After defense counsel vigorously cross-examined the prosecuting witness attempting to impeach her, the State for purpose of corroboration examined Deputy Sheriff Strickland who testified she reported to him and Sheriff Womble that the defendant had choked her and had placed the open knife at her side. This knife she recovered and delivered to the officers.

The defendant testified in his own defense. He said he stopped Dorothy's car and asked her to drive him to Shorty Bridges. She agreed. Thereafter, he had sexual relations with her twice, but with her consent—in fact at her suggestion. He admitted, however, at the time he entered the car, "I had the knife because I'm scared to walk along the highway. . . . I didn't close it because it was in my pocket. . . . The reason I didn't take the knife out was because I didn't know what I was liable to run into when I got in the car." On cross-examination the solicitor, for purpose of impeachment, asked the defendant if he had not told Officers Merritt and Strickland that he had choked the girl and put the knife to her side. He denied having made the statements.

After the defense rested, the State, for purpose of impeachment, called Deputy Sheriff Strickland who testified: "Officer Merritt and I brought him on over to the office and read the warrant to him and gave him a copy of it and he told me that he got in the car with Dorothy, took this switchblade pocketknife and held it in her side and told her to take him to Shorty Bridges' house. . . . (W)hen they got to Taylor's Store he made her turn right and . . . pull into a farm path . . . he told her he wanted to have intercourse with her. . . . (S)he first refused him and he took his hands and put around her neck and choked her with both of his hands." The solicitor offered the statements solely for the purpose of impeaching the defendant's testimony. The court was careful to instruct the jury that it was admitted for that purpose only.

The court charged the jury to return a verdict of (1) guilty of rape, or (2) guilty of rape with a recommendation the punishment be imprisonment for life in the State's prison, or (3) not guilty. Defense counsel requested the court to submit, as a permissible verdict, assault with intent to commit rape. The court refused and the defendant excepted.

The jury returned its verdict finding the defendant guilty of rape with a recommendation the punishment be imprisonment for life in the State's prison. From the judgment of the court in accordance with the jury's verdict, the defendant appealed.

Robert Morgan, Attorney General, by Associate Attorney General Walter E. Ricks, III and Deputy Attorney General R. Bruce White, Jr., for the State.

James E. Ezzell, Jr., and Thomas W. Henson for defendant appellant.

HIGGINS, Justice.

[1] The State's evidence discloses ample support for every essential element of the capital offense charged in the indictment. The defendant as a witness for himself corroborates all essential elements of the offense except the use of force. Although he claimed the prosecuting witness consented, even so, he admitted when he approached her automobile he had an open knife in his pocket, ". . . (B)ecause I didn't know what I was liable to run into when I got in the car." The evidence required its submission to the jury on the capital felony charged. *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826; *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

[2] The defendant stressfully contends he is entitled to a new trial upon the ground the court committed error in permitting Officers Strickland and Merritt, over his objection, to testify with respect to his in-custody admissions that he had choked the prosecuting witness and had placed a knife in her side prior to the acts of intercourse. While there was evidence he had been given the required warnings, it was admitted he had not waived his right to counsel, had not been given a voir dire hearing, and the court had not found facts showing his statements and admissions were voluntary.

In support of his demand for a new trial the defendant cites *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398; *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694; and *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561.

In particular the defendant relies on the following from Catrett: ". . . (I)n-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible *for any purpose* unless, after a voir dire hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights. . . . (T)estimony . . . absent a voir dire hearing and factual determinations as indicated above, was not admissible either as substantive evidence or for impeachment purposes."

Catrett was decided on June 6, 1970, and was based on our interpretation of the exclusionary rule in Miranda. Some other appellate courts made this same interpretation. However, on February 24, 1971, the Supreme Court of the United States decided *Harris v. New York,* 28 L.Ed. 2d 1, reviewing the Miranda exclusionary rule. In *Harris* the Court held "that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements" which were made during in-custody interrogation, without counsel, and without waiver of rights.

In our case the use of the defendant's in-custody admissions to impeach and contradict his testimony before the jury was proper and his objections thereto are not sustained. The defendant's admissions were not offered to make out the prosecution's case. They were offered to tear down the defendant's defense. *State v. Lynch, supra,* did not involve admissions offered for the purpose of impeaching the defendant's testimony before the jury.

The decision in *Harris* warranted the use of the impeaching testimony. In view of the importance we attach to the *Harris* decision and its current unavailability to some of our trial courts, we quote extensively from it:

> "Some comments in the Miranda opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel.

It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

* * * * * * *

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

. . . (T)here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. 347 U.S., at 65, 98 L.Ed. at 507.

* * * * * * *

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States v. Knox*, 396 U.S. 77, 24 L.Ed. 2d 275, 90 S.Ct. 363 (1969); cf *Dennis v. United States*, 384 U.S. 855, 16 L.Ed. 2d 973, 86 S.Ct. 1840 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements."

[3] The defendant has objected to the court's failure to submit to the jury the lesser included offense of assault with in-

tent to commit rape. This objection cannot be sustained. All the evidence, including the defendant's testimony, disclosed completed acts of intercourse. The factual dispute was whether the acts were voluntary or as a result of defendant's use of force. Even consent if induced by fear, fright, or coercion, is equivalent to physical force. *State v. Primes, supra; State v. Carter, supra.* The court should not submit an issue in the absence of some evidence which tended to support it. The rule is stated in *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732. "The court (trial) charged the jury to return a verdict: (1) guilty of rape; (2) guilty of rape with a recommendation that punishment be imprisonment for life in the State's prison; or (3) not guilty. Failure to find the defendant guilty of (1) or (2) required a verdict of not guilty. The defendant was not prejudiced by the charge which required the jury to acquit of all included lesser offenses. There was no evidence of the lesser included offenses, and the court was correct in refusing to permit the jury to consider them. (Citing authorities.)"

State v. Carnes, 279 N.C. 549, 184 S.E. 2d 235, states the rule: "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. Murry, 277 N.C. 197, 176 S.E. 2d 738, states the rule: "The necessity of 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. (Citing authorities.)"

State v. Green, 246 N.C. 717, 100 S.E. 2d 52, is not in point. The indictment charged "the felony and crime of rape upon a 16-year-old female child by a male person over 18 years of age." Upon arraignment the solicitor announced: "The State will not ask for a verdict of guilty of the capital crime carrying the death penalty, but will ask for a verdict of guilty of rape, with the recommendation of life imprisonment or guilty of attempt to commit rape, as the facts and law may justify."

In the case of *State v. Smith,* 201 N.C. 494, 160 S.E. 577, the defendant was indicted for first degree burglary and rape.

The court said: "According to her (prosecutrix) testimony, which contains a full recital of the crime, the prisoner was guilty of rape; according to his own evidence he was guilty of no offense. There is no aspect of the case that would justify a verdict merely of a simple assault or an assault with intent, and refusal to instruct the jury in reference to the lesser offense did not constitute reversible error. *S. v. White,* 138 N.C. 704; *S. v. Kendall,* 143 N.C. 659."

In *State v. Lance,* 166 N.C. 411, 81 S.E. 1092, the defendant was tried for rape. "It has been repeatedly held that the judge upon a proper state of facts can tell the jury that if they believe the evidence they can find the prisoner guilty of murder or nothing. It would have been no error to have so charged on this occasion." (Rape instead of murder.) In *State v. Williams,* 185 N.C. 685, 116 S.E. 736, the Court labored long and hard to get around *State v. Lance, supra,* to hold assault should have been submitted. In *Williams* the Court stated the evidence of the prosecutrix at great length, emphasizing its inconsistencies to her discredit, and concluded: "Her conduct was not by any means, that of an outraged woman, and certainly not of a chaste or virtuous woman, but she acted in a perfectly natural and normal way of a lewd and lascivious female. . . . We recite this much of the testimony to show how carefully judges should charge juries in such cases, so that they may subject the testimony to close examination and scrutiny, as the accusation is one very easy to make and very hard for the man to rebut, or overcome." The court ordered a new trial for failure to submit assault with intent " . . . (T)o the end that justice may be administered . . . ."

The decision in *Williams* appears to be out of line with the other well-considered cases which require supporting evidence in order to justify submission of any lesser included offenses. In *State v. Miller,* 268 N.C. 532, 151 S.E. 2d 47, the indictment charged rape. The court submitted five possible verdicts. The jury found guilty on No. 3—assault with intent. On the defendant's appeal this Court found no error prejudicial to him in the trial. The State of course could not appeal. This Court affirmed the judgment on the theory discussed by this Court in *State v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738.

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by

an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed. (Citing numerous cases.)"

* * * * * * * * *

" . . . (T)he judge must confine himself to the *evidence* in giving his instructions to the jury: 'He shall state in a plain and correct manner the evidence given in the case and declare and explain the law rising thereon.' Instruction under the statute is the law geared to the facts. In informing the jury as to their duty, we have never held that it is incumbent on the court, under this statute, to go beyond the evidence or advise the jury that they may ignore its absence and find the accused guilty of a minor offense, which could only be reached by the process of arbitration."

The defendant's objection to the court's failure to submit assault with intent or assault on a female is not sustained. The court's instruction in this case harmonizes with the well established rule that in order to submit a lesser included offense there must be evidence of that lesser offense. "The presence of such evidence is the determinative factor." *State v. Carnes, supra.*

The defendant's other objections, not herein referred to, have been examined and have been found to be free from legal objection. Hence, in this trial, verdict, and judgment we find

No error.

Chief Justice BOBBITT dissenting.

In my opinion, defendant is entitled to a new trial because of the court's refusal to submit assault with intent to commit rape as a permissible verdict.

An indictment for rape includes an assault with intent to commit rape. *State v. Birckhead,* 256 N.C. 494, 499, 124 S.E.

2d 838, 843 (1962). "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); *State v. Carnes,* 279 N.C. 549, 554, 184 S.E. 2d 235, 238 (1971), and cases cited.

Where the State's evidence, if believed in its entirety, tends to establish all elements of the crime of rape, and the defendant, while admitting he had sexual intercourse with the prosecutrix, testifies it was with her consent, is the court required to submit assault with intent to commit rape as a permissible verdict? This question was fully considered in *State v. Williams,* 185 N.C. 685, 116 S.E. 736 (1923), and answered, "Yes." In *Williams,* it was held that the defendant was entitled to a new trial on account of the court's failure to so instruct the jury and that the verdict of guilty of rape did not cure the error.

In *State v. Green,* 246 N.C. 717, 100 S.E. 2d 52 (1957), the State's evidence tended to show the defendant, a married man, raped the prosecutrix, a sixteen-year-old girl. The defendant, while admitting he had sexual intercourse with the prosecutrix, testified it was with her consent. The defendant was convicted of an assault with intent to commit rape and this Court found "No error." Justice (later Chief Justice) Parker, speaking for the Court, said: "It would have been error for the court not to have charged the jury on the lesser offenses, as it did. *S. v. Williams,* 185 N.C. 685, 116 S.E. 736."

The consent of the prosecutrix when the act of sexual intercourse takes place is a defense to the charge of rape. However, this would not preclude a finding that, earlier in their relationship, the defendant had assaulted the prosecutrix with the intent to gratify his passion on her person notwithstanding any resistance she might make. The jurors are the sole judges of the credibility of the witnesses; they may believe all, or a part, or none of what a witness has testified. When there is conflicting evidence as to what occurred between the prosecutrix and the defendant, it is proper and customary for the trial judge to so instruct the jury; and in such case it is required that the lesser included offense of assault with intent to commit rape be submitted.

Decisions in which the rule stated in the preceding paragraph has been applied include *State v. Kiziah,* 217 N.C. 399, 8 S.E. 2d 474 (1940); *State v. Shull,* 268 N.C. 209, 150 S.E. 2d 212 (1966); *State v. Miller,* 268 N.C. 532, 151 S.E. 2d 47 (1966). In each, the prosecutrix testified the defendant had sexual intercourse with her by force and against her will; the defendant testified he had sexual intercourse with the prosecutrix with her consent.

In *Kiziah,* the defendant was indicted for rape. He was placed on trial for assault with intent to commit rape. The jury returned a verdict of guilty of assault on a female.

In *Shull,* the defendant was indicted for rape. He was placed on trial for assault with intent to commit rape or assault on a female as the evidence might warrant. The defendant was convicted of an assault with intent to commit rape.

In *Miller,* each of the five defendants was indicted for rape and placed on trial for rape. Each was convicted of assault with intent to commit rape. On appeal, the defendants assigned as error, *inter alia,* "that the court instructed the jury on assault with intent to commit rape when there was no evidence of an assault to commit rape." The following are excerpts from the opinion of Justice Higgins:

(A) "The critical issue in this case is whether the acts of intercourse (which the witness and all defendants admitted) were by force and against the will of Ribbie Parham as she testified, or with her consent as each of the defendants testified. The jury heard the witnesses and observed their demeanor, and returned verdicts 'guilty of assault with intent to commit rape.'" (B) "The court instructed the jury to consider five possible verdicts: (1) rape; (2) rape with a recommendation that punishment should be imprisonment for life; (3) assault with intent to commit rape; (4) assault on a female; (5) not guilty." (C) "The court gave clear and explicit instructions as to the rules of law applicable to the facts as the jury might find them to be from the evidence. The charge was correct."

The present case is distinguishable, as were *Williams* and *Green,* from cases in which the *uncontradicted* evidence shows the crime of rape was committed, *e.g., State v. Jackson,* 199 N.C. 321, 154 S.E. 402 (1930), where the defendant's evidence related solely to an alibi; *State v. Brown,* 227 N.C. 383, 42

S.E. 2d 402 (1947), where the defendant's evidence related solely to his plea of insanity; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513 (1958), where the defendant offered no evidence.

The majority opinion cites as authority for the court's refusal to submit assault with intent to commit rape our decisions in *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826 (1965); *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969); *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970); *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931); and *State v. Lance,* 166 N.C. 411, 81 S.E. 1092 (1914). In each, the defendant was convicted of rape; and in all except *Primes* and *Lance* the testimony of the prosecutrix as to what occurred was *uncontradicted.*

In *Carter,* where the prosecutrix was a nine-year-old girl, the defendant testified he was in no way involved and offered alibi evidence.

In *Primes,* the defendant took the stand and testified he had sexual intercourse with the prosecutrix with her consent. The jury was instructed to say by their verdict whether they found the defendant "guilty of rape as charged in the bill of indictment; guilty of rape, with recommendation that his punishment be imprisonment for life in the State's prison; guilty of an assault with intent to commit rape; or guilty of an assault upon a female, he being a male person above the age of eighteen years; or not guilty."

In *McNeil,* the defendant did not testify or offer evidence.

In *Murry,* where the prosecutrix was an eleven-year-old girl, the defendant testified he was in no way involved and offered alibi evidence.

In *Smith,* there was no evidence in contradiction of the prosecutrix's testimony except the defendant's alibi.

In *Lance,* the defendant requested the court to charge that the jury might return any one of these verdicts: (1) guilty of rape; (2) guilty of assault with intent to commit rape; (3) guilty of assault with a deadly weapon; (4) guilty of simple assault; or (5) not guilty. The judge refused to submit whether the defendant was guilty of an assault with a deadly weapon or whether he was guilty of simple assault. He instructed the jury it might return any one of these verdicts: (1) guilty of rape;

(2) guilty of assault with intent to commit rape; (3) guilty of an assault on a female by a male person above the age of eighteen years; or (4) not guilty. In a split decision (3 to 2), this Court approved the instructions given by the trial judge. Speaking for the majority, Chief Justice Clark specifically approved the following instruction: " 'If the jury under the law and the evidence should find the prisoner guilty of rape, as charged, they will not consider or pass upon the question of his guilt of any lesser offense. But if they should not find him guilty of rape, then the jury will consider the question whether or not he be guilty of an assault with intent to commit rape,' etc." 166 N.C. at 414, 81 S.E. at 1093. Speaking for the minority, Justice (later Chief Justice) Hoke dissented on the ground that under the evidence the defendant was entitled to have submitted whether he was guilty of an assault with a deadly weapon or of a simple assault.

In *State v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738 (1943), the court did not submit whether the defendant was guilty of an assault with a deadly weapon; the jury returned the verdict of guilty of an assault with a deadly weapon on its own initiative and in the absence of any instruction that this was a permissible verdict.

Justice SHARP joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. HAROLD EDWARD JACKSON

No. 55

(Filed 15 March 1972)

1. **Indictment and Warrant § 12; Narcotics § 2— dispensing narcotics to minor — amendment of indictment — allegation of defendant's age**

   The trial court erred in allowing the State to amend an indictment for dispensing narcotics to a minor to include therein an allegation that defendant was "an adult person, age 25."

2. **Narcotics § 2— dispensing drugs to minor — indictment — age of defendant**

   An indictment for dispensing drugs to a minor need not allege the age of defendant or that defendant is an adult in order to charge an offense punishable under G.S. 90-111(c), since the age of defendant is not an element of the crime but is relevant only on the subject of punishment.

3. **Narcotics § 5— adult's dispensation of drugs to minor — punishment — validity of statute**

Statute setting forth the punishment for dispensing narcotic drugs when the dispensation is "to a minor by an adult," G.S. 90-111(c), is not unconstitutionally vague and indefinite in failing to define the words "minor" and "adult" as used therein.

4. **Infants § 1— "minor" defined**

Except when otherwise provided by statute, a person, male or female, is a minor until he attains the age of twenty-one years.

5. **Criminal Law § 75— in-custody statements volunteered by defendant — absence of waiver of counsel**

Statements made by defendant to officers at his apartment after his arrest in October 1970 were properly admitted in evidence, notwithstanding defendant had not waived his right to counsel either in writing as provided by [former] G.S. 7A-457 or orally as provided by the Miranda decision, where the statements were not made in response to interrogation by the officers but were volunteered by defendant.

6. **Criminal Law § 75— in-custody statements — under influence of drugs**

Defendant was not under the influence of drugs so as to render his in-custody statements incompetent if he knew what was being said and done on the occasion the statements were made.

7. **Criminal Law § 75— in-custody statements — influence of drugs — sufficiency of court's findings**

The trial court's findings that defendant was aware of the presence of the officers and that he understood his constitutional rights when he made statements to the officers at his apartment after his arrest were substantially equivalent to a finding that defendant understood what was being said and what was transpiring on that occasion, and failure of the court to make an explicit finding with reference to whether defendant was under the influence of drugs at that time did not render incompetent testimony as to the statements made by defendant.

APPEAL by defendant from *Johnston, J.*, December 4, 1970 Session of GUILFORD Superior Court, transferred for initial appellate review by the Supreme Court under general order of July 31, 1970, entered pursuant to G.S. 7A-31(b)(4), docketed and argued at Fall Term 1971 as No. 15.

The indictment on which defendant was tried contained two counts: The *first count* charged that defendant "did unlawfully, wilfully, and feloniously have in his possession and under his control the narcotic drugs, Cannabis, commonly known as Marijuana, and D-Lysergic Acid Diethylamide, commonly known as LSD, in violation of Chapter 90, Section 88, of the General

Statutes of North Carolina." The *second count* charged that defendant "did unlawfully, wilfully and feloniously dipense to one Neil Cooper, age 15, the narcotic drugs, Cannabis, commonly known as Marijuana, and D-Lysergic Acid Diethylamide, commonly known as LSD, in violation of Chapter 90, Section 88, of the General Statutes of North Carolina." Each count alleged that the criminal offense charged therein was committed on September 27, 1970. Defendant entered pleas of not guilty.

On account of defendant's indigency, the court appointed the public defender to represent him.

The only evidence was that offered by the State. Summarized, except when quoted, it tends to show the facts narrated below.

Norman Neil Cooper (Neil) testified that on a Saturday, which he thought was September 27, 1970, but in fact was September 26, 1970, defendant drove him to defendant's apartment and gave him "the drugs to sell for him." Specifically, defendant gave Neil "LSD and Marijuana." Neil had first met defendant near the University of North Carolina at Greensboro campus in the early part of the summer, probably June. Neil had been going to this area for some months and had been buying drugs and using them. Drugs were "rampant." Neil saw defendant several times afterward, usually in the same vicinity. After arriving at defendant's apartment on the day in question, the two talked, and Neil voiced concern about getting caught. However, defendant "was always saying that if I did get caught, you know, that since I was a juvenile, I wouldn't get but eight years [months], and it wouldn't be that much of a sweat." Neil was not certain, but he believed the amount of marijuana defendant gave him was "a half pound or a pound." He and defendant "bagged" the marijuana at defendant's apartment in several cellophane bags. Defendant gave him in addition, thirty "tabs" of LSD. An arrangement was established by which Neil would receive a percentage of the take. Neil did not recall discussing his age with defendant, but he thought he had mentioned to defendant that he went to Page High School. Neil was born on November 23, 1954, and in September, 1970, he was 15 years old.

On the morning of Tuesday, September 29, 1970, Neil was arrested at Page High School by Officer G. A. Cox of the Vice

Division of the Greensboro Police Department. On Officer Cox's request, the assistant principal called Neil out of his biology class, and Cox arrested Neil in the hallway. Neil had called him fifteen minutes before. Nevertheless, Neil seemed surprised and reached in his pocket. Cox searched Neil's pocket and found four small pills. Neil confessed that, in addition, he had some marijuana in his boot. On the way to the police department Neil stated that he had more drugs at home. They went to Neil's home and found LSD, hashish, and marijuana. Altogether twelve "packs" of marijuana were found, ten at Neil's home, two in his boots. Cox found "nine small yellowish pills" in a paper in a pipe bowl in Neil's closet. The four pills found in Neil's pocket were sent to the S.B.I. Crime Laboratory in Raleigh to be analyzed. Cox testified that the four pills sent away and the other nine "looked exactly alike." One bag of marijuana was also sent. Cox compared this bag with the others not sent to Raleigh; he observed that they were wrapped alike and that they smelled "just alike." Neil was afraid to tell from whom he got the narcotics, but two days after his arrest he sent word that he wanted to talk. He stated that he had gotten the drugs from a person named Eddie, whom he described. He also described where this person lived.

Officer J. D. Heffinger of the Vice Division of the Greensboro Police Department, accompanied by Officer Cox, went to defendant's apartment about noon on Monday, October 12, 1970. He advised defendant of each of his *Miranda* rights. No questions were asked defendant "at that time." However, defendant made several statements. He said "he knew we were coming down there . . . ever since he found out that a kid had been arrested for some stuff that he had gave him." Defendant stated to Heffinger that he had known "this boy by the name of Neil" for several months, that Neil "looked to be about twenty years old instead of fifteen" (this before any mention to defendant of Neil's age), and that "he knew nothing of Neil selling drugs for him." Defendant stated to Heffinger that "he started fooling with Marijuana while he was overseas serving in Vietnam" and that "after he was fired from his job here in Greensboro he had to make a living some way." Cox overheard defendant make these remarks to Heffinger, as he was investigating defendant's refrigerator, and he corroborated Heffinger's testimony.

Officer Robert D. Brewer, also of the Vice Division of the Greensboro Police Department, delivered the aforementioned bag of marijuana and four tablets of LSD to J. M. Dismukes, a chemist for the S.B.I. Crime Laboratory in Raleigh. Dismukes was found to be an expert in the analysis of marijuana and LSD. He testified that the sealed plastic bag contained "green vegetable material" which was, in his opinion, "high quality Marijuana," according to microscopic and chemical examinations. The four yellow tablets in the sealed yellow envelope, under chemical, ultraviolet, and chromatographic testing, were found to contain lysergic acid diethylamide. On the stand Dismukes asserted that the cellophane packages that had not been sent to Raleigh appeared "identical" with the one that had been sent, "being high quality manicured Marijuana."

Officer Cox was recalled to the stand to explain that his notation, "7-29-70," on Exhibit 5 (LSD from Neil's pocket) and the same notation on Exhibit 2 (LSD found at Neil's home) were erroneous and should have been "9-29-70."

The State was permitted to reopen its case to recall Officer Heffinger. He testified that on October 12, 1970, defendant stated that he was twenty-five years old and that his birthday was February 13, 1945.

Evidence offered at the *voir dire* hearing conducted to determine the admissibility of testimony as to statements made by defendant on October 12, 1970, in defendant's apartment, will be set forth in the opinion.

The jury returned a verdict of guilty as charged on each count. The court pronounced judgments of imprisonment on the verdicts as follows: On the first count, two years; on the second count, ten years. It was provided that the sentences run concurrently. Defendant excepted and appealed.

Attorney General Morgan and Assistant Attorney General Harris for the State.

Wallace C. Harrelson, Public Defender, for defendant appellant.

BOBBITT, Chief Justice.

Each count charged a violation of G.S. 90-88, which provided: "It shall be unlawful for any person to manufacture,

possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article [Chapter 90, Article 5]." The *first count* charged that defendant had possession and control of the described narcotic drugs; the *second count* charged that defendant dispensed them to one Neil Cooper, age 15. The State offered no evidence that defendant had possession and control of any narcotic drugs except those he dispensed to Neil.

Punishment for violation of G.S. 90-88 is set forth in G.S. 90-111. Section (a) of the latter statute provides a penalty for first violation by "any person" of not more than five years in prison. Section (c) increases the penalty to a *minimum* of ten years if the offense of dispensation is "to a minor by an adult."

Defendant's brief does not bring forward and discuss the assignments of error based on defendant's exceptions to the overruling of his motions for judgments as in case of nonsuit.

The record shows that "[p]rior to the introduction of evidence by the State, the defendant, through counsel, moved to quash the bill of indictment." Assignment of Error No. 1 is based on defendant's exception to the denial of this motion.

The record does not disclose the grounds, if any, advanced in the court below in support of the motion to quash. On appeal, defendant asserts (1) that the second count does not charge a criminal offense punishable under G.S. 90-111(c) in that it does not allege that defendant is an adult; and (2) that G.S. 90-111(c) is unconstitutionally vague and indefinite in that it does not define the words "minor" and "adult" as used therein.

[1] While the jury deliberated, the court, allowing the solicitor's motion therefor, entered an order purporting to amend the *second count* by including therein an allegation that defendant was "an adult person, age 25." Defendant's Assignment of Error No. 28, based on his exception to the purported amendment, has merit. "In the absence of statute, an indictment cannot be amended by the court or prosecuting officer in any matter of substance without the consent of the grand jury which presented it." 42 C.J.S. *Indictments and Information* § 230(a). Accord: *State v. Corpening,* 191 N.C. 751, 133 S.E. 14 (1926); *State v. Dowd,* 201 N.C. 714, 161 S.E. 205 (1931); *State v. Cole,* 202 N.C. 592, 163 S.E. 594 (1932). See Comment Note, Power

of court to make or permit amendment of indictment, 17 A.L.R. 3d 1181 et seq. We do not consider to what extent, if any, a bill of indictment may be amended with the consent of a defendant and his counsel. Suffice to say, this defendant did not consent to the amendment.

[2] We hold the *second count,* without amendment, sufficiently charged a criminal offense in violation of G.S. 90-88 which, if committed by an adult person, is punishable under G.S. 90-111(c). G.S. 90-111(c) does not define or create a criminal offense. The age of defendant is not an element of the crime; it is relevant only on the subject of punishment. By analogy, under former G.S. 14-33 (Volume 1B, Recompiled 1953) simple assault was punishable as a general misdemeanor when committed by a male person over 18 years of age on a female person, but punishable only by thirty days imprisonment if committed by a male person 18 years of age or less. Since it was not an essential element of the criminal offense, it was not required that the indictment allege that the defendant was a male person over 18 years of age at the time of the alleged assault. *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861 (1958), and cases cited; *State v. Beam,* 255 N.C. 347, 121 S.E. 2d 558 (1961). Here, although the indictment did not allege the age of defendant or that he was an adult, the State offered evidence that defendant was 25 years of age and *the jury so found.* With reference to the second count, the trial judge instructed the jury as follows: "[I]f the State has satisfied you beyond a reasonable doubt, the burden being on the State to so satisfy you, that on the 27th day of September, 1970, this defendant was twenty-five years of age, or more than twenty-one years of age, and that Neil Cooper was fifteen years of age, having been born on November 23, 1954, and that the defendant dispensed to him any quantity of Marijuana or LSD, and if the State has so satisfied you beyond a reasonable doubt, it will be your duty to convict him as charged in the second count of the bill of indictment. If the State has failed to so satisfy you, it will be your duty to acquit him of that second count."

Defendant contends he was prejudiced because he was not advised by the indictment that he was to be tried for an offense punishable under G.S. 90-111(c). This contention is without substance. The second count alleges explicitly the age of Neil Cooper. No allegation was required to notify defendant of his own age.

Defendant seems to rely largely on *State v. Miller,* 237 N.C. 427, 75 S.E. 2d 242 (1953), which holds: "Where a statute prescribes a higher penalty in case of repeated convictions *for similar offenses,* an indictment for a subsequent offense must allege facts showing that the offense charged is a *second* or *subsequent crime within the contemplation of the statute* in order to subject the accused to the higher penalty." (Our italics.) Although the decision in *Miller* was based primarily on G.S. 15-147, due process would seem to require that the State identify by allegation any previous conviction of defendant on which it intended to rely as a basis for the imposition of greater punishment. In such case, the identity and relevance of prior court proceedings are involved. Absent such allegations, the defendant would be brought to trial without notice of matters necessary to enable him to prepare his defense. Neither a statute nor an infringement of due process supports defendant in the present case.

[3, 4] There is no merit in defendant's contention that G.S. 90-111(c)—the punishment statute—is unconstitutional because it fails to define "minor" and "adult" as used therein. Under the common law, persons, whether male or female, are classified and referred to as *infants* until they reach the age of twenty-one years. *Personnel Corp. v. Rogers,* 276 N.C. 279, 281, 172 S.E. 2d 19, 20 (1970). "In the law the word 'infant' refers to a person who has not arrived at his majority as fixed by law, and the word 'infancy' as used in law means minority or nonage." 42 Am. Jur. 2d *Infants* § 1. Except when otherwise provided by statute, a person, male or female, is a minor until he attains the age of twenty-one years. Upon attaining the age of twenty-one years a person reaches his or her majority and is an adult. These common-law definitions apply to the words "minor" and "adult" as used in G.S. 90-111(c) as of September, 1970.

We take notice of the fact that the General Assembly of 1971 enacted Chapter 585 of the Session Laws of 1971, which provides: "§ 48A-1. Common law definition of 'minor' abrogated.—The common law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated." "§ 48A-2. Age of minors.—A minor is any person who has not reached the age of 18 years." We need not consider in what respects, if any, the words "minor" and "adult" as used in G.S.

90-111(c) have been modified by the 1971 Act. Under any permissible definition, a 15-year-old boy is a minor and a 25-year-old man is an adult.

Defendant assigns as error the admission of testimony of Officers Heffinger and Cox as to statements by defendant on October 12, 1970, in defendant's apartment, which testimony is summarized in our statement of facts.

After Heffinger was put on the stand and gave testimony leading up to the statements that defendant was alleged to have made on the occasion of his arrest, defendant's counsel "moved for a voir dire examination concerning the voluntariness of any statement made to the investigating officer." The jury was excused and a *voir dire* hearing was conducted. The State offered the testimony of Heffinger. Defendant's counsel "put the defendant on for the limited purpose of this voir dire examination." The testimony, except when quoted, is summarized below.

On *voir dire,* Heffinger testified that he advised defendant with particularity of each of his constitutional rights as stated in *Miranda;* that defendant said he understood his rights; that defendant appeared to be normal and to understand what Heffinger said to him; that he made no threats against defendant to get him to make a statement; that he did not offer defendant any inducement or hope of reward; and that, after having been so advised by Heffinger, "certain conversation did follow." Thereupon, Heffinger was cross-examined by defendant's counsel. On cross-examination, he testified that defendant made no specific statement or comment "as to his right to have a lawyer" and that defendant did not tell him "that he had been taking LSD on that particular day."

On *voir dire,* defendant testified that three officers, Heffinger, Cox and a third officer (later identified as Gibson in Cox's testimony before the jury), came to his apartment on West Fisher Avenue around twelve o'clock noon on October 12, 1970; that when Heffinger knocked on the door, he stated he was a police officer and defendant "let him in"; that defendant let "them" in after "they" told him they had a search warrant; that, upon entering the apartment, one of the officers handcuffed defendant while the search warrant was being read to him; that there was "mass confusion"; that Heffinger was

talking "about one thing" and the others were searching the apartment.

Defendant testified further that although he could not deny that he was advised of his rights, including the right to have a lawyer present when the officers talked to him, he "didn't fully understand it"; that he (defendant) "didn't make any comment at all about [his] rights"; that, after they had searched the apartment, the officers told defendant that he was under arrest and took him into custody; that he was not advised "specifically" at that time what he was "under arrest for"; that no warrant of arrest was served on defendant until "[a]pproximately nine o'clock that night"; and that he first realized that he was "charged with dispensing drugs to a juvenile" when they served the warrant on him.

Defendant testified further that, when the officers arrived at his apartment, defendant was "still feeling the effects" of "more than the usual dosage" of LSD; that he had taken four tablets the night before and was "still to some extent under the influence" of it; and that he "was in a confused state of mind," being partly under the influence of LSD "[a]nd marijuana."

On cross-examination, defendant testified that he was twenty-five years of age; that he had a high school education; and that he had spent seven years in the army where he had approximately five years of training in electronics. Referring to what occurred in defendant's apartment about twelve o'clock noon on October 12, 1970, the solicitor's question and defendant's answer are as follows: "Q. And you don't know whether you told them anything or not about Neil Cooper on that day? A. I did not specify any name, but I made a comment or something about Neil—something or other—I can't recall the exact conversation because, like I said, you know the whole situation was—I wasn't aware of what was really going on." When asked if he did not tell the officers "that [he] gave Neil about ten bags of Marijuana and some LSD," defendant answered, "No," —"I think I made remarks later on that night when I was being interrogated." Asked if he did not tell the officers that he had seen Neil and had a transaction with him about two weeks prior to the time that they were there in his apartment, defendant answered: "I recall a conversation more or less in that direction, yes." Upon further redirect examination with reference to an interrogation subsequent to the occasion of his

arrest, defendant answered: "I think it was two days later in the evening."

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

"THE COURT: Let the record show that on the occasion that Mr. Heffinger and the other two police officers went to the apartment of the defendant with a search warrant; that the defendant was warned of his constitutional rights under the Miranda decision; and that thereafter that any statements that were made were voluntary to the police officers, and made without any offer of reward or hope of reward or without any threats being made upon him.

"The Court is of the opinion and further finds as a fact that the defendant on the occasion was aware of the presence of the officers; that they were there with a search warrant; and that they were naming to him his rights under the rules of the Miranda decision; that he knew and understood from what the officers told him what his constitutional rights were."

We note here that no questions were raised concerning the validity of the search warrant and no evidence was offered as to the results of the search.

Defendant excepted "to the failure of the court to make adequate and appropriate findings of fact and conclusions of law consistent with the evidence produced on the voir dire examination." Assignment of Error No. 6 is based on this exception. Assignments of Error Nos. 7 and 8 are based on defendant's exceptions to the admission of the testimony of Heffinger and Cox as to statements made by defendant.

The main thrust of defendant's argument in support of Assignment of Error No. 6 is that the findings were insufficient to show that defendant had waived his right to counsel either orally or in writing. Defendant also argues that the findings are deficient in that there is no specific finding that defendant was not under the influence of narcotics on October 12, 1970, when he and the officers were in his apartment.

[5] There was no evidence or findings to show that defendant, when talking with the officers at his apartment on October 12, 1970, had waived his right to counsel, either in writing as provided by G.S. 7A-457 (1969 Replacement Volume), the stat-

ute on which *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), is based, or orally as provided by *Miranda,* the decision on which *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), is based. Since defendant was then arrested and in custody, the testimony as to what defendant said on that occasion would be incompetent if defendant's statements were made *in response to interrogation* by officers. But there was no evidence that defendant was interrogated by any officer on that occasion. (Note: Defendant testified on *voir dire* to an incriminating statement made by him when interrogated *on a subsequent occasion.* The State offered no evidence as to comments or statements by defendant except those made by him to the officers at his apartment around the noon hour on October 12, 1970.) Under the circumstances disclosed by the evidence, the volunteered statements then made by defendant were admissible under *Miranda* as fully stated in our prior decisions. *State v. Gladden,* 279 N.C. 566, 570, 184 S.E. 2d 249, 252 (1971), and cases cited; *State v. Chance,* 279 N.C. 643, 661-62, 185 S.E. 2d 227, 238-39 (1971), and cases cited. The inherent nature of the comments or statements made by defendant on the occasion of his arrest supports the evidence that they were made spontaneously rather than in response to interrogation.

We consider next whether the testimony as to what was said by defendant when talking with the officers at his apartment on October 12, 1970, was incompetent because the trial judge failed to make an explicit finding with reference to whether defendant was under the influence of drugs when the comments or statements were made. Defendant also contends that Judge Johnston's findings are insufficient because they were essentially conclusions of law rather than findings of fact, citing *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569 (1966), and *State v. Moore,* 275 N.C. 141, 153-54, 166 S.E. 2d 53, 62 (1969).

Judge Johnston found as a fact that the police officers went to the apartment of defendant with a search warrant. Both Heffinger and defendant testified to that effect. Judge Johnston found that defendant was warned of his constitutional rights. Heffinger testified that defendant was advised specifically as to each of his constitutional rights as listed in *Miranda.* Defendant testified that he remembered something about his rights; and that, although he could not deny having been ad-

vised of his rights, he "didn't fully understand it, no." Judge Johnston found that any statements made by defendant to the police officers were made voluntarily in that they were "made without any offer of reward or hope of reward or without any threats being made upon him." Heffinger so testified. Defendant did not contradict this testimony.

[6] With reference to whether defendant was under the influence of drugs on October 12, 1970, when the officers were with him in the apartment, the crucial fact is whether defendant knew what was being said and done on that occasion. Only defendant could have known when and to what extent he had taken drugs. The officers could testify only to what defendant said and did on that occasion. While there is no explicit finding with reference to drugs, Judge Johnston did find as a fact "that the defendant on the occasion was aware of the presence of the officers; . . . [and] that he knew and understood from what the officers told him what his constitutional rights were." There was ample evidence to support these findings of fact.

[7] While more explicit phraseology might have been used, we consider the findings that defendant was aware of the presence of the officers and that he understood his constitutional rights as substantially equivalent to a finding that defendant understood what was being said and what was transpiring on that occasion. Moreover, counsel for defendant did not request a specific finding about whether defendant was under the influence of drugs or whether his statements were understandingly made, nor did he except on the ground that the court had failed to make such a finding. Doubtless Judge Johnston would have made a more explicit finding if he had been requested to do so by defendant. Under the circumstances here considered, we hold that Judge Johnston's findings of fact constituted a sufficient basis for the admission of the evidence of volunteered statements attributed to defendant on the occasion of his arrest.

Defendant lists thirty-one assignments of error. All have been considered. Assignments not discussed specifically herein do not disclose prejudicial error or require discussion.

We note that ten years imprisonment was the minimum punishment for the criminal offense charged in the *second count* of the bill of indictment. G.S. 90-111(c), G.S. Vol. 2C,

Replacement 1965. Moreover, ten years is the minimum punishment under G.S. 90-95(i), G.S. Vol. 2C, 1971 Cumulative Supplement. Error, if any, relating solely to the first count is of no avail to defendant since the sentences pronounced by Judge Johnston run concurrently.

Defendant having failed to show prejudicial error, the verdicts and judgments will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. ALBERT BOBBY CHILDS

No. 6

(Filed 15 March 1972)

Burglary and Unlawful Breakings § 8; Criminal Law § 135; Rape § 7— death sentence set aside by U. S. Supreme Court — sentencing to life imprisonment

The Superior Court of Buncombe County properly sentenced defendant to life imprisonment for each of the crimes of rape and first degree burglary pursuant to a mandate and order of the United States Supreme Court setting aside sentences of death which had been imposed for those crimes.

Chief Justice BOBBITT concurring.

Justice HIGGINS votes to dismiss appeal.

Justice LAKE dissenting.

APPEAL by defendant from *Martin, J.*, at the 9 August 1971 Session of BUNCOMBE Superior Court.

At the November 1965 Criminal Session of Buncombe Superior Court, defendant was tried and convicted for the capital crimes of rape and first degree burglary and was sentenced to death by asphyxiation in each case. Defendant appealed to the Supreme Court of North Carolina, and this Court on 3 February 1967 found no error in the verdicts and judgments of the Superior Court. *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967). Defendant then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of North Carolina. That court stayed proceedings pending the filing of a petition by defendant in the State courts for a post-conviction hearing.

On 14 June 1967 defendant filed a petition in the Superior Court of Buncombe County for a post-conviction hearing seeking a review of the constitutionality of his convictions and sentences. This petition was heard before James H. Pou Bailey, Judge Presiding at the 8 July 1968 Special Session of Buncombe Superior Court, and on 10 July 1968 Judge Bailey entered an order denying the relief sought by defendant.

Pursuant to G.S. 15-222, defendant then filed a petition for a writ of *certiorari* in the North Carolina Court of Appeals. This petition was denied by the Court of Appeals on 1 October 1968.

On 27 December 1968 a petition for writ of *certiorari* to the Superior Court of Buncombe County, North Carolina, was filed in the United States Supreme Court. On 28 June 1971 *certiorari* was granted. *Childs v. North Carolina,* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2278 (1971). On 28 June 1971 the United States Supreme Court entered the following mandate:

"UNITED STATES SUPREME COURT MANDATE
UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

"To the Honorable the Judges of the Superior Court of the State of North Carolina, Buncombe County,

"GREETINGS:

"WHEREAS, lately in the Superior Court of the State of North Carolina, Buncombe County, there came before you a cause between Albert Bobby Childs, petitioner, and The State of North Carolina, respondent, No. 67-791 WC, wherein the judgment of the said Superior Court was duly entered on the tenth day of July A.D. 1968, as appears by an inspection of the petition for writ of certiorari and response thereto.

"AND WHEREAS, in the October Term, 1970, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said petition for writ of certiorari and response thereto, and the court having granted the said petition:

"ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 28, 1971, by this Court that the judgment

of the said Superior Court, insofar as it imposes the death sentence, be reversed, and that this cause be remanded to the Superior Court of the State of North Carolina, Buncombe County, for further proceedings. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Boulden v. Holman*, 394 U.S. 478 (1969); *Maxwell v. Bishop*, 398 U.S. 262 (1970) and *United States v. Jackson*, 390 U.S. 570 (1968).

"NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

"Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-third ——— day of July ——— in the year of our Lord one thousand nine hundred and seventy-one.

E. ROBERT SEAVER
Clerk of the Supreme Court of the United States.

"No. 5014, October Term, 1970
Albert Bobby Childs,
v
North Carolina"

Pursuant to this order and mandate of the United States Supreme Court, Harry C. Martin, Judge Presiding, Superior Court of Buncombe County, issued notice on 30 July 1971 to counsel of record that further proceedings in accordance with the mandate of the United States Supreme Court would be conducted on 9 August 1971. On 9 August 1971 defendant was present in the Buncombe County Superior Court, together with his counsel, James E. Ferguson, II, who filed a written motion for a new trial. After hearing arguments of counsel on the motion, Judge Martin found certain facts from the record and affidavit filed in the case and entered conclusions of law and judgments as follows:

"1. That the guilt of the defendant and his conviction of the crimes of rape and first degree burglary have not been reversed or modified by any appellate court and have been affirmed by the Supreme Court of North Carolina.

"2. That in the event the State sought to retry the defendant as to his guilt or innocence of said charges, a plea by the defendant of former jeopardy under the Fifth Amendment of the United States Constitution would probably be sustained.

"3. That it is very improbable that the State could secure the attendance of the prosecuting witness Mrs. Waller at any further proceedings in this cause, and without her presence the State could not be accorded right and justice in any retrial of the cases.

"4. That the Supreme Court of the United States has reversed the imposition of the death sentence (and this court has construed it to apply to both death sentences) and in the opinion of this court there is no sentence for possible commutation by the Chief Executive of North Carolina.

"5. Upon invalidation of the death sentences in this cause by the Supreme Court of the United States, the only permissible punishment in accord with right and justice is life imprisonment.

"6. This court has the authority, both inherent and under the laws, common and statutory, and Constitution of North Carolina, to pronounce judgments of life imprisonment against the defendant in each of the charges, rape and burglary, of which the defendant has been found guilty by the jury.

"Upon the foregoing findings of fact and conclusions of law, IT IS, THEREFORE, HEREBY ORDERED, in conformity with the judgment of the Supreme Court of the United States in this cause, and as accord with right and justice and the Constitution and laws of the United States and the Constitution and laws of North Carolina, that the defendant, Albert Bobby Childs, be sentenced to life imprisonment in Docket 65-424—Rape and Docket 65-425—first degree burglary; that following the imposition of said sentences, the clerk of this court shall issue commitments thereupon and the sheriff of Buncombe County shall forthwith transport the defendant to Raleigh, North Carolina, and place him in the custody of the North Carolina De-

partment of Corrections at Central Prison pursuant to said commitments."

Judgments of life imprisonment were thereupon entered in accordance with these conclusions. Defendant objected to the signing and entry of the judgments, gave notice of appeal, and James E. Ferguson, II, was appointed to represent defendant on appeal to the Supreme Court of North Carolina.

Attorney General Robert Morgan and Assistant Attorney General Jacob L. Safron for the State.

James E. Ferguson, II, for defendant appellant.

MOORE, Justice.

In *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970); *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970); and *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410 (1971), this Court found no error of law which would justify granting the defendants new trials or in vacating or modifying the judgments imposing the death sentence.

In each of these cases petition for writ of *certiorari* to the Supreme Court of North Carolina was filed in the United States Supreme Court. That Court on 28 June 1971 entered the following order in each case:

> "June 28, 1971. On petition for writ of certiorari to the Supreme Court of North Carolina. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari granted. Judgment, insofar as it imposes the death sentence, reversed. *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968); *Pope v. United States,* 392 U.S. 651, 20 L.Ed. 2d 1317, 88 S.Ct. 2145 (1968), and case remanded to the Supreme Court of North Carolina for further proceedings. Mr. Justice Black dissents."

On 23 July 1971 the order and mandate of the United States Supreme Court was issued to the Supreme Court of North Carolina, and this Court upon remand filed opinions on

7 September 1971 in each of those cases. The opinion in *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97 (1971), is typical:

> "Pursuant to the mandate of the Supreme Court of the United States, this cause is remanded to the Superior Court of Edgecombe County with directions to proceed as follows:
>
> "1. The presiding judge of the Superior Court of Edgecombe County will cause to be served on the defendant, Marie Hill, and on her attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open court, the defendant, Marie Hill, being present in person and being represented by her attorneys, the presiding judge, based on the verdict of guilty of murder in the first degree returned by the jury at the trial at the December 16, 1968 Criminal Session, will pronounce judgment that the defendant, Marie Hill, be imprisoned for life in the State's prison.
>
> "2. The presiding judge of the Superior Court of Edgecombe County will issue a writ of *habeas corpus* to the official having custody of the defendant, Marie Hill, to produce her in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.
>
> "Remanded for judgment."

See also *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106 (1971); *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107 (1971); *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106 (1971); *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105 (1971).

The record in the present case discloses that Judge Martin on 9 August 1971 proceeded exactly as this Court subsequently directed the Superior Court to do in *Atkinson, Hill, Roseboro, Sanders, Williams,* and *Atkinson.* Notice was issued by Judge Martin on 30 July 1971 to counsel of record for defendant Childs that on 9 August 1971, ten days from the date of the notice, further proceedings would be conducted in accordance with the mandate of the Supreme Court of the United States. On 9 August 1971 defendant, represented by counsel James E.

Ferguson, II, was present in Buncombe Superior Court. While present in open court and represented by counsel, Judge Martin sentenced defendant to life imprisonment in each case pursuant to the mandate of the Supreme Court of the United States, based upon the verdicts of guilty of rape and first degree burglary returned by the jury at defendant's trial at the November 1965 Criminal Session of Buncombe Superior Court.

In the imposition of these judgments, after notice and hearing, and in accordance with the mandate of the Supreme Court of the United States, we find no error.

No error.

CHIEF JUSTICE BOBBITT concurring.

The dissenting opinion in the present case, and the dissenting opinions of Justice Lake in *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson* (rape), 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson* (murder in the first degree), 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108, to the effect that a new trial should be awarded in each of these cases, are based on grounds set forth at greater length in his dissenting opinion in *State v. Hill, supra.* In each of these cases, the jury returned a verdict of guilty of murder in the first degree or a verdict of guilty of rape and did not recommend that the punishment be imprisonment for life. These dissenting opinions take the position that a judgment of imprisonment for life is permissible only if the jury so recommends and that, in the absence of this recommendation, a new trial must be awarded in respect of both guilt and punishment. As support for this position, *State v. Ruth,* 276 N.C. 36, 170 S.E. 2d 897 (1969), is cited. In respect of the point under consideration, *State v. Ruth, supra,* is based on *State v. Spence and Williams,* 274 N.C. 536, 164 S.E. 2d 593 (1968).

When *State v. Spence and Williams, supra,* and *State v. Ruth, supra,* were decided, the Supreme Court of the United States had not decided whether its decisions in *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968), and in *Pope v. United States,* 392 U.S. 651, 20 L.Ed. 2d 1317, 88 S.Ct. 2145 (1968), invalidated the death penalty provisions

of our North Carolina statutes *with reference to capital offenses committed prior to the repeal of G.S. 15-162.1.* This statute permitted a defendant to avoid the risk of a death sentence by pleading guilty to the capital crime, thereby receiving a sentence of imprisonment for life.

In *State v. Spence and Williams,* 271 N.C. 23, 155 S.E. 2d 802 (1967), this Court upheld the conviction of these defendants for murder in the first degree and the judgments pronouncing death sentences. Thereafter, upon consideration of their petitions for *certiorari,* the Supreme Court of the United States vacated the judgments and remanded the cases for reconsideration in the light of *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968). *Spence and Williams v. North Carolina,* 392 U.S. 649, 20 L.Ed. 2d 1350, 88 S.Ct. 2290 (1968). *Witherspoon* had held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522, 20 L.Ed. 2d at 784-85, 88 S.Ct. at 1777. Thereafter, this Court, in *State v. Spence and Williams, supra* (274 N.C. 536), held (1) that the jury which convicted Spence and Williams "was not selected according to their constitutional rights as set forth in *Witherspoon,*" and (2) that Spence and Williams were entitled to new trials both as to guilt and as to punishment. In *State v. Ruth, supra,* upon the defendant's appeal from his conviction for murder in the first degree and the judgment pronouncing a death sentence, this Court awarded a new trial both as to guilt and as to punishment solely on the ground the jury had not been selected as required by *Witherspoon.*

When *Spence-Williams* and *Ruth* were decided, the members of this Court were divided in opinion as to whether, prior to the repeal of G.S. 15-162.1, the death penalty provisions relating to murder in the first degree, rape, burglary in the first degree and arson (G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58, respectively) were invalidated by the decisions of the Supreme Court of the United States in *Jackson* and *Pope.* The majority were of opinion that *Jackson* and *Pope* did not invalidate the death penalty provisions of our North Carolina statutes. Under this prevailing view, the award of a new trial recognized the possibility that a jury selected in compliance with

Witherspoon might return a verdict upon which a valid sentence of death could be imposed. The dissenting opinions were based on the view that *Jackson* and *Pope* did invalidate the death penalty provisions of the North Carolina statutes and therefore a new trial could not result in any verdict upon which a valid death sentence could be imposed.

Since *Spence-Williams* and *Ruth* were decided, the Supreme Court of the United States has held that the death penalty provisions of our North Carolina statutes in force when the crimes involved in this case and in *Hill, Atkinson, Williams, Sanders* and *Roseboro,* were committed, were invalidated by *Jackson* and *Pope.* If there were a new trial of any one of these defendants and he (she) was found guilty again of the crime of murder in the first degree or of rape, it would not be within the discretion of the jury to determine whether the punishment should be death or imprisonment for life. So far as these cases are concerned, there is no possibility of a verdict upon which a valid sentence of death could be imposed.

North Carolina statutes in force when these crimes were committed envisioned two possible punishments for murder in the first degree and for rape. While those statutes were in force, and in respect of the cases now under consideration, the Supreme Court of the United States has held that the death sentence may not be imposed. Imprisonment for life is the only alternative. A judgment which pronounces a sentence of imprisonment for life accords to a defendant the full benefit of a jury recommendation that this should be his punishment. The course suggested in these dissenting opinions would be a new trial at which a defendant convicted of murder in the first degree or rape could not be sentenced to life imprisonment unless the jury in addition to its verdict volunteered a recommendation that the punishment be imprisonment for life or unless the jury added such words to its verdict under explicit directions of the judge so as to conform to the letter of the North Carolina statutory provisions. Under this suggested course, if the jury should return a verdict of guilty of murder in the first degree or a verdict of guilty of rape and say no more, no judgment could be pronounced and therefore the defendant would be entitled to his discharge. In my opinion, no sound principle of law requires such an unrealistic and futile course.

JUSTICE HIGGINS votes to dismiss the appeal.

The defendant was indicted, tried, and convicted of rape and burglary in the first degree. The death sentences were affirmed by this Court. Thereafter the defendant, by writ of habeas corpus, obtained a review in the Federal Courts. The Supreme Court of the United States issued a directive to the Superior Court of Buncombe County commanding that the death sentences be vacated and sentences of life imprisonment substituted. The Superior Court of Buncombe County proceeded as ordered by the Supreme Court of the United States.

In my opinion the Supreme Court of North Carolina is without power to act in the premises. I vote to dismiss the appeal.

JUSTICE LAKE dissenting.

The defendant was tried in the Superior Court of Buncombe County upon two indictments, one charging him with rape, the other charging him with first degree burglary. He was found guilty as charged on each count with no recommendation by the jury as to sentence. Consequently, the superior court, at that time, imposed a sentence of death in each case. Upon appeal, this Court, unanimously, adjudged that there was no error. *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453.

Thereafter, the Superior Court of Buncombe County denied the petitioner's application to it for post conviction relief. The Court of Appeals denied his petition to it for a writ of certiorari to review that action of the superior court. The defendant then filed his petition in the Supreme Court of the United States for a writ of certiorari, which was allowed, and the Supreme Court of the United States entered its order, 29 L.Ed. 2d 859, stating:

> "On petition for writ of certiorari to the Superior Court of North Carolina, Buncombe County. Motion for leave to proceed in forma pauperis granted. Petition for writ of certiorari granted. Judgment, insofar as it imposes the death sentence, reversed and case remanded to the Superior Court of North Carolina, Buncombe County, for further proceedings. [Citations omitted.] Mr. Justice Black dissents."

Thereupon, the Superior Court of Buncombe County brought the defendant again before it, denied his motion for

a new trial, and in each case (rape and burglary) entered judgment sentencing the defendant to confinement in the Central Prison "for the remainder of his natural life." From these judgments, the defendant has now appealed to this Court, contending that he should be awarded a new trial.

The life sentences from which the defendant now appeals were not imposed by the superior court pursuant to any mandate or direction from this Court. However, the procedure followed by the superior court upon the remand of the cases to it by the Supreme Court of the United States, is that which was directed by the majority of this Court to be followed by the respective superior courts in cases contemporaneously remanded to us by the Supreme Court of the United States. *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97; *State v. Atkinson* (rape), 279 N.C. 385, 183 S.E. 2d 105; *State v. Atkinson* (murder in the first degree), 279 N.C. 386, 183 S.E. 2d 106; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108.

Neither in the present cases nor in the cases above cited, which were remanded by the Supreme Court of the United States to us and by us to the respective superior courts which tried them, did the Supreme Court of the United States direct the imposition of a sentence to imprisonment for life.

In each of the above cited cases so remanded to this Court by the Supreme Court of the United States, I voted to affirm the imposition of the death sentence on the initial appeal to this Court, just as I did in the present cases. I am still aware of no error in those judgments. However, the Supreme Court of the United States has held there was error in each of the cases, so the death sentences affirmed by this Court cannot be carried out. Upon the remand by us to the appropriate superior court of each of the above cited cases, subsequent to the order of the Supreme Court of the United States reversing the judgment therein, "insofar as it imposes the death penalty," I dissented from the decision of this Court directing the superior court to enter a sentence to life imprisonment. The reasons for my dissents therein are stated in my dissenting opinion in *State v. Hill, supra,* at p. 378. I adhere to the views there expressed.

Neither the Supreme Court of the United States nor this Court may lawfully direct or authorize a superior court of

North Carolina to enter a judgment imposing a sentence to imprisonment, which sentence is not supported by the verdict of the jury in the record. The Supreme Court of the United States has not directed the superior court to enter life sentences in this defendant's cases. As in the above cited cases, the sentences to imprisonment for life now imposed by the Superior Court of Buncombe County upon this defendant are not supported by the verdict of the jury. The only sentence supported by that verdict is a sentence to death. Consequently, a valid sentence to imprisonment for life cannot be imposed upon this defendant in either of these cases without a new trial and a new verdict.

The defendant, having appealed to this Court and having requested a new trial, both upon the present appeal and upon the original appeal to this Court, as well as in the superior court, may not complain, if his request be granted, that such new trial violates his constitutional protection against double jeopardy.

At the hearing in the superior court, pursuant to the remand from the Supreme Court of the United States, it was made to appear that the prosecuting witness is now physically unable to testify if such new trial were to be ordered. In that event, it does not necessarily follow that the defendant would be acquitted at the new trial. The sworn, recorded testimony of the prosecuting witness at the former trial could be offered in evidence by the State. *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773; Stansbury, North Carolina Evidence, 2d Ed, § 145; 31A CJS, Evidence, § 396.

STATE OF NORTH CAROLINA v. ROBERT DOUGLAS BROWN AND MARION HAMILTON

No. 19

(Filed 15 March 1972)

1. **Criminal Law § 66— in-court identification — pretrial lineup — independent origin**

In this prosecution for kidnapping and rape, the trial court did not err in the admission of the victims' in-court identifications of defendants, where the court found upon competent, clear and convincing evidence presented on voir dire that defendants were represented by counsel at pretrial lineups and that the lineups were fairly conducted, and that the in-court identifications were of independent origin from the pretrial identifications.

2. **Criminal Law § 66— representation by counsel at lineups — statements by defense counsel**

The trial court properly found that defendants were represented by counsel at pretrial lineups where the attorney for one defendant stated to the court that he had conferred with defendants prior to the lineups and was present and represented defendants at the lineups, a police officer testified that the attorney was present during the lineups, and defendants did not deny the statements made by the attorney or ask that they be allowed to question him or offer evidence to the contrary.

3. **Criminal Law § 66— testimony that defendant resembled assailant — admissibility**

Although a kidnap and rape victim testified that she could not positively identify one of the defendants, the trial court properly allowed the victim to testify that the defendant looked very much like the shorter person who kidnapped and raped her, the victim's lack of positiveness affecting only the weight and not the admissibility of her testimony.

4. **Criminal Law § 42— article found five days after crime — remoteness**

In this kidnapping and rape prosecution, testimony relating to an unfired .22 cartridge found at the scene of the crimes five days after the crimes were committed was not incompetent on the ground of remoteness, since the lapse of five days did not affect the competency of the evidence but only its probative value.

5. **Criminal Law § 45— experimental evidence**

Experimental evidence is competent when the experiment is carried out under circumstances substantially similar to those existing at the time of the occurrence in question and tends to shed light on it.

6. Criminal Law § 45— experimental evidence — visibility at crime scene

The trial court did not err in allowing a State's witness to testify as to lighting conditions and visibility at the crime scene based on a visit to the scene three days after the crime occurred, where the witness testified that he visited the crime scene at approximately the same time of night that the crime allegedly occurred, and that there was a low overcast on both nights.

7. Kidnapping § 1; Rape § 5— sufficiency of State's evidence

The State's evidence was sufficient for the jury in this prosecution of two defendants for the kidnapping and rape of the prosecutrix and the kidnapping of her male companion.

8. Criminal Law §§ 113, 168 —instructions — immaterial misstatement of fact

Misstatement of fact made by the court in its charge that a State's witness had testified that one defendant had in his possession on the night of the crimes the rifle which had been introduced as State's Exhibit No. 1, when in fact the rifle had not been introduced at the time the witness testified but was thereafter introduced, *held* an immaterial misstatement which was not prejudicial to defendant.

9. Criminal Law § 122— instructions urging jury to reach a verdict — statement that all available evidence has been introduced

Where the jury foreman in a kidnapping and rape prosecution announced after the jury had deliberated for two hours that it had not agreed upon a verdict, statement made by the trial court, while instructing the jury on its duty to make a sincere effort to reach a verdict, that "Insofar as I know, all of the evidence that is available has been presented for your consideration," *held* not to constitute an expression of opinion in violation of G.S. 1-180, since the court was merely stating that it knew of no other evidence which would come up in a new trial, and that based upon the evidence it was the duty of the jury, if possible, to reach a verdict.

DEFENDANTS appeal from *Thornburg, J.*, at the August 1971 Criminal Session of GASTON Superior Court.

Defendants were charged in separate bills of indictment with kidnapping Douglas Eugene Picklesimer and kidnapping and raping Patsy Dean Phillips. The cases were consolidated for trial, and the defendants entered pleas of not guilty. Both defendants were found guilty on the kidnapping charges and on the charge of rape. The jury recommended life imprisonment as to each defendant on the rape charge. The court imposed life sentences on each defendant for the kidnapping offenses and life sentences for the rape. From these sentences, each defendant appeals.

The evidence for the State tends to show that about 10:30 p.m. on 12 February 1971 Douglas Picklesimer and Patsy Phillips were parked in an automobile on Plastics Drive in the city of Gastonia, North Carolina. After they had been there for a short time, two Negro males, one short and one tall, came to the car, ordered them at gunpoint to get out of the car and go to an old abandoned house. On the way to the house the taller of the assailants made Picklesimer hand him his wallet, his cigarette lighter, chapstick, and some pocket change. Picklesimer and Miss Phillips were then ordered to enter the house. Once inside, the shorter assailant handed the rifle to the taller one. Picklesimer, in an attempt to wrestle it away from him, grabbed the barrel. This man jerked the rifle away, stepped back into the hallway, and ejected a shell from the chamber but did not fire. Miss Phillips was then forced against her will to engage in sexual intercourse with each defendant. These acts took place on an old mattress in a room in the abandoned house. While one assailant was having intercourse with Miss Phillips, the other held the rifle on Picklesimer.

After finishing these acts of intercourse, both assailants fled. Picklesimer and Miss Phillips then drove first to the Phillips' home and from there to the hospital. Dr. Robert Groves examined Miss Phillips at 2:30 a.m. on 13 February 1971 and found that she had bruises on her left leg and forehead. Based on a thorough pelvic examination, the finding of a tear or laceration of the back wall of the vagina, and the presence of active sperm on a vaginal smear test, Dr. Groves concluded that there had been penetration, with some significant loss of blood, and that this had occurred not more than seven hours before the examination. Dr. Groves further concluded that prior to this time Miss Phillips was physically virginal.

Later that same day a search was conducted in and around the old house, and the police found Picklesimer's lighter and chapstick, as well as one unspent .22 caliber cartridge. Inside the house, in the room in which the rape allegedly occurred, the police found an old mattress with blood stains on it.

On 14 February 1971 B. V. Posey and M. A. Carswell of the Gastonia Police Department's Detective Bureau, acting on information they had received, went to the home of defendant Brown. Officer Posey explained to Brown that he was under suspicion in a rape case and asked if he could search the house

for a rifle. The officers did not have a search warrant, but they did advise the defendant of his rights and the defendant signed a typewritten consent to search. The officers searched the house but did not find the gun; defendant then told them that it was probably at his girl friend's house. The officers and defendant Brown drove to her house. She told them that she thought the gun was in the attic of the defendant's house. Officer Posey and the defendant drove back to defendant's house, and defendant climbed into the attic, found the rifle, and gave it to Officer Posey.

The testimony of Mrs. Minnie Pitts tends to show that the defendants lived together in a house about one block from her, that on 12 February 1971 defendants visited her about 9:00 p.m. and left about 10:30 p.m., that defendants had been drinking, and that defendant Brown had a .22 caliber rifle with him at the time. Truitt Lazenby testified that he is a pawnbroker, that defendant Brown pawned a .22 caliber rifle with him in December 1970 and redeemed this rifle on 12 February 1971, and this was the same rifle identified as State's Exhibit No. 1. On 17 February 1971 a second unspent .22 caliber cartridge was found by Officer Posey near the door to the room in the old house where the mattress was found and where the rapes were alleged to have occurred. According to the expert testimony of E. B. Pierce, an agent of the State Bureau of Investigation, this unspent cartridge had been ejected from State's Exhibit No. 1, the rifle given by defendant Brown to Officer Posey.

On 15 February 1971 Picklesimer identified defendant Brown in a lineup, and on 17 February 1971 Picklesimer identified defendant Hamilton while he was sitting in a Gaston County courtroom as a spectator. Defendant Hamilton was also identified by Patsy Phillips in a lineup on 19 February 1971. Additional facts concerning these lineups will be stated in the opinion.

The court conducted lengthy *voir dires* and concluded that both lineups were fairly conducted, that at all times during the lineups defendants were represented by counsel, and that the viewing of defendant Hamilton in the courtroom by Picklesimer on February 17 was not impermissibly suggestive.

The trial court conducted extensive *voir dires* to determine if Douglas Picklesimer and Patsy Phillips had ample oppor-

tunity and sufficient light to identify their assailants on the night in question. The court heard the testimony of several witnesses regarding the illumination provided by the interior light in the car that Picklesimer was driving, floodlights on a nearby factory and service station, and railroad warning lights that were flashing near the place where the car was parked. Based on this evidence the court found as a fact and concluded as a matter of law that there was sufficient light for the two victims to identify their assailants, that Picklesimer and Phillips had ample opportunity to view their assailants, and that their in-court identification was based on their encounter with the defendants on 12 February 1971 and was independent of the lineup identifications.

The defendants offered no evidence.

Attorney General Robert Morgan and Assistant Attorney General Howard P. Satisky for the State.

H. L. Fowler, Jr., for defendant appellants.

MOORE, Justice.

Defendants first assign as error the trial court's finding that the in-court identification of the defendants by the witness Picklesimer was of independent origin and properly admissible.

The witness Picklesimer identified defendant Brown at a lineup on 15 February 1971. Defendant Brown, with seven other Negro males, was in the lineup. At the time Brown was represented by Joseph George Brown, attorney, who was present and advised Brown during the lineup procedure. When Picklesimer was asked to identify Brown at the trial, defendant objected. Judge Thornburg then held a lengthy *voir dire* to determine the admissibility of defendant's identification. After the *voir dire,* Judge Thornburg made findings of fact and conclusions of law, concluding, among other things, that the witness Picklesimer's in-court identification of defendant Brown was of independent origin not tainted by any lineup or suggestive statement of anyone and that his identification had its origin in the ample opportunity which the witness had to observe Brown at the time and place the alleged offenses occurred. On *voir dire* it was also found by Judge Thornburg that defendant Hamilton was identified by Picklesimer at a time when

Hamilton, not in custody, was seated in a local courtroom with some forty other persons, and that at no time did anyone, law-enforcement officers or otherwise, suggest to the witness Picklesimer the identity of defendant Hamilton. There was competent, clear, and convincing evidence to support the court's positive finding that the in-court identification of each defendant was of independent origin based solely on what the identifying witness saw at the time of the crimes, and that the in-court identification did not result from any out-of-court confrontation or pretrial identification procedure suggestive or conducive to mistaken identification. Such findings when supported by competent evidence are conclusive on appellate courts, both State and Federal. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652 (1971); *State v. Barnes,* 264 N.C. 517, 521, 142 S.E. 2d 344, 346-47 (1965).

Defendant Hamilton next contends that the court erred in permitting the witness Patsy Phillips to identify him at the trial. When Patsy Phillips was asked to identify Hamilton, Hamilton objected and a *voir dire* was held. The court found that a lineup was held on February 19 and that defendant Hamilton was placed in the lineup, together with six other Negro males of substantially similar height, age, and dress, and that at the time Hamilton was represented by Attorney Joseph George Brown. The court further found that the identification of defendant Hamilton was of an independent origin resulting from Patsy Phillips' observation of him over a period of several minutes on the night of the alleged offenses, and that the in-court identification was of independent origin in no way tainted by the lineup. The witness Phillips was then permitted to make an in-court identification of defendant Hamilton. The court's findings were based on competent, clear, and convincing evidence, and such findings are binding on this Court. *State v. Taylor, supra; State v. McVay* and *State v. Simmons, supra; State v. Barnes, supra.*

This Court, in *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969), stated:

> "The rules established for in-custody lineup identification by *United States v. Wade,* 388 U.S. 218, 18 L. ed. 2d 1149, 87 S.Ct. 1926, and *Gilbert v. California,* 388 U.S. 263, 18 L. ed. 2d 1178, 87 S.Ct. 1951 (both decided June 12,

1967), include the constitutional right to the presence of counsel at the lineup and, when counsel is not present, (1) render inadmissible the testimony of witnesses that they had identified the accused at the lineup, and (2) render inadmissible the in-court identification of the accused by a lineup witness unless it is first determined on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal lineup. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581."

[1] In the case at bar the court found on *voir dire* that defendants were represented by counsel at the lineups and that these lineups were fairly conducted. The court further found that the in-court identifications were of independent origin. Applying the rules stated in *Rogers,* the assignments of error as to the in-court identifications of defendants are without merit.

[2] Defendants further contend that the court erred in allowing Attorney Joseph George Brown to make an unsworn statement that he represented defendants at the lineup on 15 February 1971, and defendant Hamilton further contends the court erred in allowing Attorney Brown to make a similar unsworn statement that he represented Hamilton at the February 19 lineup. From the statements made by Attorney Brown, the court found that Attorney Brown was present and did represent both defendants at the lineup on February 15; that Brown asked for and was given permission to talk with defendants in private before the lineup, which he did; and that Attorney Brown gave defendants advice as to their conduct during the course of and after the lineup. Officer Posey also testified that Attorney Brown was present during the lineup procedures. Defendants did not deny the statements made by the attorney, nor did they ask that they be allowed to question him or to offer evidence to the contrary. In view of these facts, the court properly found that both defendants were represented by counsel at the time of the lineup on February 15, and that Attorney Brown was present and represented defendant Hamilton at the lineup on February 19. This assignment is overruled.

[3] Defendant Brown contends that the court erred in not excluding the testimony of Patsy Phillips that defendant Brown resembles the shorter person who kidnapped and raped her on the occasion in question. Patsy Phillips stated on *voir dire* that she was unable to positively identify the defendant Brown, and

on direct examination at the trial she was not asked to identify him. On cross-examination she was asked by Brown's attorney if she could identify defendant Brown. She replied: "I can't identify him positively as the person who attacked me. There's some question in my mind as to whether or not he is the man who did that. In good conscience, I can't swear that Robert Douglas Brown to a certainty was the man that attacked me that night. I will have to tell the truth." The solicitor on redirect examination asked the witness if she could identify defendant Hamilton, and she proceeded to do so. The solicitor then asked the following: "You say that you cannot positively identify the shorter subject, but is there any . . . was there any similarity between the one you saw on this particular night of February 12th, and the defendant who is seated behind Mr. Robert Gaines at this particular time, Robert Douglas Brown?" Brown's attorney objected, and the objection was overruled. The witness answered "yes," and then explained her answer by saying: "He resembles him very much but I can't say positively about him like I can about the taller one."

This testimony was competent to show the similarity between the assailant and the defendant. The witness admitted that she could not make a positive identification of the defendant, but she had previously testified without objection as to the size of this defendant, and she kept referring to him as the "shorter subject." It was proper on cross-examination to admit her testimony that the defendant Brown looked very much like one of the men who kidnapped and raped her. Her lack of positiveness affected only the weight, not the admissibility of her testimony. Stansbury, N. C. Evidence § 129 (2d Ed. 1963).

In *State v. Lawrence,* 196 N.C. 562, 146 S.E. 395 (1929), this Court considered testimony as to the identity of defendant as follows:

> "(a) 'I know the defendant, and the man in the car looked like him, but I will not say that it was. My impression is that it looked like him.' (b) 'He looked like the defendant. . . . When he came by I thought I recognized him as the man I saw in the coupe on the early morning of 25 March 1928.' (c) 'I think the man in the automobile looked like him, but I will not swear it was him. No, sir, I will not swear so, but I think it was.' "

The Court stated: "This kind of evidence has frequently been held to be admissible in this jurisdiction," citing *State v. Costner,* 127 N.C. 566, 37 S.E. 326 (1900); *State v. Carmon,* 145 N.C. 481, 59 S.E. 657 (1907); *State v. Lane,* 166 N.C. 333, 81 S.E. 620 (1914); *State v. Walton,* 186 N.C. 485, 119 S.E. 886 (1923). This assignment is without merit.

[4] The State was permitted to introduce into evidence two unfired .22 cartridges, one found 13 February 1971 and one found 17 February 1971 at the scene of the crimes, and was further permitted to introduce expert testimony to the effect that the cartridge found on February 17, State's Exhibit No. 18, had been chambered in State's Exhibit No. 1, the rifle identified as belonging to defendant Brown. Picklesimer testified that defendants had a rifle with them during the commission of the crimes. He also testified that as they were entering the room in which the rapes occurred, he wrestled with the defendant Hamilton by grabbing the rifle barrel, and Hamilton pushed him away and ejected a shell from the rifle. Officer Posey of the Gastonia Police Department testified that five days after these crimes he found a cartridge near the door of the bedroom where the rapes took place, and this was the cartridge later identified by the expert as the one having been ejected from Brown's rifle. Defendants contend that the identification of the cartridge found on February 17 should not have been admitted because of remoteness. The five-day lapse occurring between the crimes and the discovery of the cartridge is not a significantly long period. This lapse of time would not render the evidence incompetent, but would only affect the probative force of the evidence. *State v. Payne,* 213 N.C. 719, 197 S.E. 573 (1938); *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936); Stansbury, N. C. Evidence § 118 (2d Ed. 1963); 22A C.J.S. Criminal Law § 712, p. 963 (1961).

[5, 6] Defendants next contend that the court erred in permitting the witness Ralph Phillips to testify as to the visibility at the scene of the crimes. On 15 February 1971 the witness Phillips went to the scene around 10:15 p.m., which was about the same time the crimes were alleged to have occurred. The witness testified that there was a low overcast on the night of the 15th when he was there, as there had been on the night when the crimes occurred. He testified concerning the various lights near the scene of the crimes, and further testified that there

was sufficient light to recognize a person. Experimental evidence is competent when the experiment is carried out under circumstances substantially similar to those existing at the time of the occurrence in question and tends to shed light on it. It is not required that the conditions be precisely similar, the want of exact similarity going to the weight of the evidence with the jury. 2 Strong, N. C. Index 2d, Criminal Law § 45. The determination of competency of such evidence rests largely in the discretion of the trial court. *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1972); *Jenkins v. Hawthorne,* 269 N.C. 672, 153 S.E. 2d 339 (1967); 3 Strong, N. C. Index 2d, Evidence § 19, p. 625. Here, no abuse of discretion is shown.

[7] Defendants next contend that the court committed error in overruling defendants' motion for judgment as of nonsuit. This assignment is without merit. There was substantial evidence against defendants of every essential element of the crimes charged. Decision requires consideration of the evidence in the light most favorable to the State. *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553 (1971), and cases cited.

[8] Defendants contend that the court erred in its charge to the jury by stating that, as the court recalled, the witness Minnie Pitts testified "that the defendant, Brown, had a gun in his possession [on the night of the crimes] which has been introduced in evidence as State's Exhibit No. 1." The witness Minnie Pitts testified without objection that on the night of 12 February 1971 the defendant Brown had a rifle when he first came to her house about 9 p.m., that he left but then came back about 10 p.m., at which time he still had the rifle. Subsequently the court held an examination in the absence of the jury to determine the admissibility of testimony by Minnie Pitts that the rifle defendant Brown brought to her house was the same rifle as the one (later marked State's Exhibit No. 1) the State then had in court, but which had not been introduced into evidence. The court made findings that the witness Minnie Pitts knew this rifle belonged to defendant Brown and "that the .22 caliber rifle was in the possession of the defendant, Brown, at approximately 10:30 p.m. on the night of February 12, 1971." The court then ordered the evidence suppressed until the State proved lawful possession of the rifle. Later in the trial, it was established that on 14 February 1971 defendant

Brown voluntarily delivered a .22 caliber rifle to Officer Posey. This rifle was admitted into evidence without objection as State's Exhibit No. 1 and was identified by Truitt Lazenby, a pawnbroker, as the rifle defendant Brown redeemed from him about 5:30 p.m. on 12 February 1971. The State did not reintroduce the previously suppressed testimony of Minnie Pitts to the effect that State's Exhibit No. 1 was the same rifle that defendant Brown had in her house on the night of 12 February 1971.

The statement that Brown had a rifle in his possession on the night of the crimes and that Brown had given Officer Posey a rifle which was later introduced in evidence as State's Exhibit No. 1 was a correct statement of fact. The misstatement of fact, if any, made by the court in its charge was that Minnie Pitts had testified that the defendant Brown had in his possession the rifle which had been introduced in evidence as State's Exhibit No. 1. Actually at the time Minnie Pitts testified the rifle had not been introduced. At most this was an immaterial misstatement which was not prejudicial to defendant. Ordinarily a misstatement of fact must be brought to the court's attention by counsel for defendant in apt time to afford opportunity for the court to correct it. *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960), cert. den. 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961); 3 Strong, N. C. Index 2d, Criminal Law § 163. This assignment is without merit.

[9] Defendants finally contend that the court erred in stating to the jury, "insofar as I know, all of the evidence that is available has been presented for your consideration"—that this was a violation of G.S. 1-180 in that it was an expression of an opinion by the trial court. The record discloses that after the charge of the court the jury retired at 4:45 p.m. to make up its verdict, and that at 6:45 p.m. the jury through its foreman announced that it had not agreed upon a verdict. The jury was then excused to return at 8:25 p.m. When court reconvened at 8:25 p.m., the trial judge stated:

> "COURT: Members of the jury, before you return to your deliberations, I want to give you these additional instructions. It is not anticipated under our system of justice that all twelve jurors will enter into a jury room at the end of the court's instructions and be of the same opinion. That is the purpose of having twelve jurors—so that

they might sit together, deliberate, and consider the opinions of each other and finally arrive at a just verdict. These cases have been well presented by both the State and counsel for the defense.

"Insofar as I know, all of the evidence that is available has been presented for your consideration.

"Coming as you do from all parts of the county, of various backgrounds, I am certain that we will at no time in the future be able to obtain a more competent jury to determine these matters that are now before you. Some jury has to decide these cases. I am hopeful that it will be you. You have not deliberated for an excessive period of time and I am not asking any member of the jury to surrender a conscientious opinion that he or she may have concerning what the verdict should be in either of these cases, but I am asking you to make a conscientious effort to arrive at verdicts in these cases—to discuss them, to consider each others opinions, and see if you as a jury cannot return to this courtroom with fair verdicts in the cases. You may retire and continue your deliberations." (Emphasis added.)

This is said in 3 Strong, N. C. Index 2d, Criminal Law § 122, p. 34 (citing cases):

"Generally, where the jury have retired but are unable to reach a verdict, the court may call the jury back and instruct them as to their duty to make a diligent effort to arrive at a verdict, so long as the court's language in no way tends to coerce or in any way intimate any opinion of the court as to what the verdict should be. Thus, the court may properly instruct the jury that the trial of the cause involved heavy expense to the county and that it was the duty of the jury to continue its deliberations and attempt to reach an agreement, but that the court was not attempting to force an agreement."

The additional statement made by the trial court in the present case that insofar as he knew all available evidence had been introduced was simply a statement that the court knew of no other evidence which would come up in a new trial, and that based upon the evidence it was the duty of the jury, if possible, to reach a verdict. The court was careful to caution the jury

that it was not asking any member of the jury to surrender a conscientious opinion which he or she might have concerning what the verdict should be, but that the court was simply asking them to make a sincere effort to arrive at verdicts in the cases. In this statement there was no error. See *State v. McVay* and *State v. Simmons, supra; State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767 (1966); *State v. Green* 246 N.C. 717, 100 S.E. 2d 52 (1957).

There was ample evidence to carry the cases to the jury and sustain the verdicts. Prejudicial error has not been shown and the judgments must therefore be upheld.

No error.

KATHERINE INEZ HALL v. WAKE COUNTY BOARD OF ELECTIONS

No. 37

(Filed 15 March 1972)

1. **Appeal and Error § 26— exception to judgment — review of face of record**

Where appellant took no exception to any finding of fact made by the trial court, and the only assignment of error is to the entry of the judgment, the facts found are binding upon the appellate court, and the only question presented is whether error of law appears on the face of the record.

2. **Elections § 2— eighteen-year olds — right to vote**

Eighteen-year olds are now *sui juris* and, if they possess the qualifications prescribed by law for all voters, are eligible to vote. Twenty-Sixth Amendment to the U. S. Constitution; G.S. 48A-1 to -2.

3. **Domicile § 1; Elections § 2— voter qualifications — residence — domicile**

As used in Article VI of the North Carolina Constitution of 1970, relating to qualifications to vote in this State, "residence" means "domicile."

4. **Domicile § 1— residence — domicile**

Residence simply indicates a person's actual place of abode, whether permanent or temporary; domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence.

5. Domicile § 1— definition of domicile

Domicile is the place to which a person intends to return when absent therefrom *(animus revertendi)*, and the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave *(animus manendi)*.

6. Domicile § 1— definition of domicile

Two things must concur to constitute a domicile: First, residence; second, the intent to make the place of residence a home.

7. Domicile § 1— mere sojourner

One who lives in a place for a temporary purpose with the design of leaving when that purpose has been accomplished is a "mere sojourner" and retains his original home with all its incidental privileges and rights.

8. Domicile § 1; Elections § 2— election laws — residence — domicile

Residence, when used in the election law, means domicile. G.S. 163-57.

9. Elections § 2— voting residence of college student

The question whether a student's voting residence is at the location of the college he is attending or where he lived before he entered college is a question of fact which depends upon the circumstances.

10. Domicile § 1; Elections § 2— college student — domicile — voting

An adult student may acquire a domicile at the place where his university or college is situated, if he regards the place as his home, or intends to stay there indefinitely, and has no intention of resuming his former home, but if he goes to a college town merely as a student, intending to remain there only until his education is completed and does not change his intention, he does not acquire a domicile there.

11. Domicile § 1— college student — domicile — presumption

There is a rebuttable presumption that a student who leaves his parents' home to enter college is not domiciled in the college town to which he goes.

12. Domicile § 3— domicile at birth

The law permits no individual to be without a domicile; at birth he takes the domicile of the person upon whom he is legally dependent.

13. Domicile § 1— presumption of continuance of domicile

A domicile, once acquired, is presumed to continue and is never lost until a new one is established, the burden of proof being upon the person who alleges a change.

14. Domicile § 1— change in domicile

To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to re-

turn to it and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home

15. Domicile § 1— proof of domicile

Domicile is a fact which may be proved by direct and circumstantial evidence.

16. Domicile § 1; Elections § 2— college student — domicile — place of voting

The court must rely upon both the student's words and his actions to determine whether he has the intent to make the college town where he seeks to vote his home and to remain there indefinitely.

17. Domicile § 1; Elections § 2— change in domicile — testimony as to intent

A person's testimony regarding his intention with respect to acquiring a new domicile or retaining his old one is competent evidence, but is not conclusive of the question.

18. Domicile § 1; Elections § 2— college student — change of domicile to college town — findings by court

Findings of fact by the trial court that a student attending college in Raleigh had abandoned her former domicile and acquired a new one in Raleigh are binding on the appellate court and support the trial court's judgment that the student is entitled to vote in Raleigh, although the evidence would have justified the court in finding that the student was temporarily sojourning in Raleigh for the purpose of attending college and had not abandoned her former domicile.

APPEAL by Wake County Board of Elections from *Brewer, J.*, 15 December 1971 Session of WAKE, certified for initial appellate review by the Supreme Court under G.S. 7A-31(b) (1) upon motion of both parties.

On 15 October 1971, plaintiff applied for registration as a voter in Precinct No. 2 of Wake County. The precinct registrar refused to register her and, pursuant to G.S. 163-75, she appealed to the Wake County Board of Elections. The Board conducted a hearing as prescribed by G.S. 163-76 and, on 28 October 1971, decided that plaintiff was not entitled to registration. Within ten days plaintiff appealed to the Superior Court of Wake County. On 15 December 1971, Judge Brewer heard the matter *de novo* as provided by G.S. 163-77.

The parties stipulated that plaintiff was not disqualified to vote under G.S. 163-55; that her eligibility for registration as a voter in Precinct No. 2, Raleigh, Wake County, depended upon "whether she satisfies the residency requirements" of the

State's election law. The only evidence offered was the testimony of plaintiff, which tended to show:

Plaintiff was born in the United States on 25 April 1953 and has lived in North Carolina for the past thirteen years. She is the unmarried, eighteen-year-old daughter of parents who are residents of Tarboro, North Carolina. Plaintiff graduated from Tarboro High School in 1971 and attended summer school in Raleigh during the summer of 1971. In June of that year, she came to Raleigh for the specific purpose of continuing her education at Meredith College. Since June 1971, as a freshman, she has occupied a dormitory room on the college campus. Her address has been 314 Springfield Dormitory, Meredith College, Raleigh, since September 1971. During holidays she returns to Tarboro to the home of her parents. They continue to support her and to pay her college expenses; her grades are sent to them. All of plaintiff's personal property which she does not need at school, and for which she has no room, remains in her parents' home. Her pet dog, a cocker spaniel, now belongs to her parents. Plaintiff's church membership remains in Tarboro.

At the time of the hearing before the Wake County Board of Elections, plaintiff's checking account was in a Tarboro bank, and the address printed on her check was the Tarboro address of her parents. However, she was then marking through that address and writing in, "Box 159, Meredith College." In December 1971, about a week before the hearing before Judge Brewer, plaintiff opened a checking account with a Raleigh bank. On 29 November 1971 she had her address changed to Meredith College on her driver's license and also on the college records. She testified that she made those changes upon the advice of counsel to try to prove that she was "serious about remaining in Wake County"; that she planned to reside in Wake County indefinitely and considered Raleigh her home; that in June 1971 she formed the intent to stay in Raleigh "on a permanent basis." Plaintiff has not decided upon a vocation, but she is "thinking about law school."

On cross-examination plaintiff said "it would be too inconvenient to return to Tarboro to vote"; that she was familiar with the law giving students the right to vote in both primary and general elections by absentee ballot, but she still thought "it would be less inconvenient, that it would be easier to vote in Raleigh."

Judge Brewer substantially incorporated the foregoing evidence in his findings of fact, from which we quote only the following:

"5. Since September 1971, Plaintiff has dwelled at 314 Springfield Dormitory, Meredith College, Wake County, North Carolina, in Wake County Precinct No. 2. . . .

"18. Since at least September 1971, Plaintiff has intended and still intends to dwell indefinitely in Precinct No. 2, Wake County, Raleigh, North Carolina.

"19. Plaintiff has no present intention or plans to establish a permanent dwelling place outside Wake County."

Upon the facts found Judge Brewer concluded as a matter of law that plaintiff is a resident of Wake County, entitled to register as a qualified voter of Precinct No. 2, Wake County. He entered judgment ordering the Wake County Board of Elections to register plaintiff as a qualified voter of Precinct No. 2 in Raleigh.

Defendant excepted to the judgment and appealed.

Sanford, Cannon, Adams & McCullough, by Robert W. Spearman and John H. Parker for plaintiff appellee.

Attorney General Morgan; Deputy Attorney General Bullock; and Assistant Attorney General Denson for defendant appellant.

SHARP, Justice.

[1] Defendant took no exception to any finding of fact made by Judge Brewer. The only assignment of error is to the entry of judgment that "plaintiff is a resident of Wake County and is, therefore, entitled to register and vote." Thus, the facts found are binding upon this Court, and the only question presented is whether error of law appears on the face of the record. *Manufacturing Co. v. Clayton, Acting Comr. of Revenue,* 265 N.C. 165, 143 S.E. 2d 113 (1965); 1 N. C. Index 2d *Appeal and Error* § 26 (1967). Specifically, the question here is whether the facts found will support the legal conclusion that plaintiff has acquired a domicile in Raleigh, the place where she is attending college.

This controversy results from recent changes in the law altering the voting age and the age of majority. The twenty-sixth amendment to the United States Constitution, which became effective 5 July 1971, provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." In anticipation of the ratification of this amendment, on 17 June 1971, the General Assembly provided that upon its certification the age of majority was changed from twenty-one years to eighteen. G.S. 48A-1 to -2 (Ch. 585, N. C. Sess. Laws (1971).)

[2] Thus, eighteen-year olds are now *sui juris* and, if they possess the qualifications prescribed by law for all voters, are eligible to vote. Under N. C. Const. art. VI, § 2 (1970), "any person who has resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days next preceding an election, and possesses the other qualifications set out in this article shall be entitled to vote at any election held in this State."

[3] Since 1868 our Constitution has required a voter to be a person who has "resided" in the State and in the precinct or ward for a specified time, and this Court has held "without variation that residence within the purview of this constitutional provision is synonymous with domicile. . . ." *Owens v. Chaplin,* 228 N.C. 705, 708, 47 S.E. 2d 12, 15 (1948), and cases cited therein. *Accord, Baker v. Varser,* 240 N.C. 260, 268, 82 S.E. 2d 90, 96 (1954). Residence as used in Article VI of the North Carolina Constitution of 1970 continues to mean domicile.

[4-6] Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return *(animus revertendi);* it is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave *(animus manendi).* Two things must concur to constitute a domicile: First, residence; second, the intent to make

the place of residence a home. *Martin v. Martin,* 253 N.C. 704, 118 S.E. 2d 29 (1960); *Sheffield v. Walker,* 231 N.C. 556, 58 S.E. 2d 356 (1950); *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240 (1919); *Wheeler v. Cobb,* 75 N.C. 21 (1876); *Horne v. Horne,* 31 N.C. 99 (1848).

[7] One who lives in a place for a temporary purpose with the design of leaving when that purpose has been accomplished is a "mere sojourner." *Groves v. Comrs.,* 180 N.C. 568, 105 S.E. 172 (1920). He retains his "original home with all its incidental privileges and rights." Therefore, a residence for a specific purpose, "as at summer or winter resorts, or to acquire an education, or some art or skill in which the *animus revertendi* accompanies the whole period of absence," effects no change of domicile. *Hannon v. Grizzard,* 89 N.C. 115, 120 (1883).

[8] It is quite clear that residence, when used in the election law, means domicile. G.S. 163-57, which defines residence for registration and voting, incorporates the case law laid down in the opinions cited above. It provides:

"All registrars and judges, in determining the residence of a person offering to register or vote, shall be governed by the following rules, so far as they may apply:

"(1) That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

"(2) A person shall not be considered to have lost his residence who leaves his home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.

"(3) A person shall not be considered to have gained a residence in any county of this State, into which he comes for temporary purposes only, without the intention of making such county his permanent place of abode.

"(4) If a person removes to another state or county within this State, with the intention of making such state or county his permanent residence, he shall be considered to have lost his residence in the state or county from which he has removed.

"(5) If a person removes to another state or county within this State, with the intention of remaining there an indefinite time and making such state or county his place of residence, he shall be considered to have lost his place of residence in this State or the county from which he has removed, notwithstanding he may entertain an intention to return at some future time.

"(6) If a person goes into another state or county, or into the District of Columbia, and while there exercises the right of a citizen by voting in an election, he shall be considered to have lost his residence in this State or county.

"(7) School teachers who remove to a county for the purpose of teaching in the schools of that county temporarily and with the intention or expectation of returning during vacation periods to live in the county in which their parents or other relatives reside, and who do not have the intention of becoming residents of the county to which they have moved to teach, for purposes of registration and voting shall be considered residents of the county in which their parents or other relatives reside.

"(8) If a person removes to the District of Columbia or other federal territory to engage in the government service, he shall not be considered to have lost his residence in this State during the period of such service unless he votes there, and the place at which he resided at the time of his removal shall be considered and held to be his place of residence.

"(9) If a person removes to a county to engage in the service of the State government, he shall not be considered to have lost his residence in the county from which he removed, unless he demonstrates a contrary intention."

This Court has not heretofore decided a case directly involving the domicile of a student seeking to vote in the town to which he came for the purpose of enrolling in college. However, the question of a student's domicile will be determined by the following well-established rules of law, which are applicable to any situation in which it is necessary to locate an individual's domicile.

[9] *First:* The question whether a student's voting residence is at the location of the college he is attending or where he lived

before he entered college, is a question of fact which depends upon the circumstances of each individual's case. *See In Re Will of Marks,* 259 N.C. 326, 130 S.E. 2d 673 (1963); 29 C.J.S. *Elections* § 22 (1965); annot., 98 ALR 2d 488 (1964); 8 Ore. L. Rev. 171 (1929). Domicile is a highly personal matter. The fact that one is a student in a university does not entitle him to vote where "the university is situated, nor does it of itself prevent his voting there. He may vote at the seat of the university if he has his residence there and is otherwise qualified." Annot., 37 ALR 138, 139 (1925).

[10] *Second:* An adult student may acquire a domicile at the place where his university or college is situated, if he regards the place as his home, or intends to stay there indefinitely, and has no intention of resuming his former home. If he goes to a college town merely as a student, intending to remain there only until his education is completed and does not change his intention, he does not acquire a domicile there. *Baker v. Varser, supra.* See annot., 98 ALR 2d 488, 498 (1964). See 3 Geo. Wash. L. Rev. 121 (1934).

[11] *Third:* The presumption is that a student who leaves his parents' home to enter college is not domiciled in the college town to which he goes. See 29 C.J.S. *Elections* § 22 (1965). However, this presumption is rebuttable. It is an inference of fact based on probabilities and "the common experience of mankind" under the circumstances. Opinion of the Justices, 46 Mass. (5 Met.) 587 (1843). It stems from the following principles relating to domicile:

[12-14] The law permits no individual to be without a domicile. At birth he takes the domicile of the person upon whom he is legally dependent. Hence, "an unemancipated infant, being *non sui juris,* cannot of his own volition select, acquire, or change his domicile." *Thayer v. Thayer,* 187 N.C. 573, 574, 122 S.E. 307, 308 (1924); *In re Hall,* 235 N.C. 697, 702, 71 S.E. 2d 140, 143 (1952). A domicile, once required, is presumed to continue. It is never lost until a new one is established, and the burden of proof rests upon the person who alleges a change. *Reynolds v. Cotton Mills, supra; Hannon v. Grizzard, supra;* 25 Am. Jur. 2d *Domicile* § 87 (1966). To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it and (2) the acquisition of a new domicile by actual residence at

another place, coupled with the intention of making the last acquired residence a permanent home. *Owens v. Chaplin, supra; In Re Finlayson,* 206 N.C. 362, 173 S.E. 902 (1934).

[15] *Fourth:* Domicile is a fact which may be proved by direct and circumstantial evidence. It is "not more difficult of ascertainment, when required as the qualification of a voter, than residence or domicile at the moment of a man's death"—a matter often disputed and determined by probate courts. *Roberts v. Cannon,* 20 N.C. 398, 411 (1839).

[16] A student's physical presence in the college town where he seeks to vote demonstrably fulfills the residency requirement of domicile. However, the court must rely upon both his words and his actions to determine whether the student has the requisite intent to make the town his home and to remain there indefinitely, the *animus manendi.* See annot., 98 ALR 2d 489 (1964).

[17] A person's testimony regarding his intention with respect to acquiring a new domicile or retaining his old one is competent evidence, but it is not conclusive of the question. " 'All of the surrounding circumstances and the conduct of the person must be taken into consideration.' " *Martin v. Martin, supra* at 710, 118 S.E. 2d at 34; *accord, State v. Carter,* 194 N.C. 293, 139 S.E. 604 (1927); *Boyer v. Teague,* 106 N.C. 576, 11 S.E. 665 (1890); *Hannon v. Grizzard, supra.* The rule is well stated in 25 Am. Jur. 2d *Domicile* §§ 91 and 93 (1966): "The determination of domicile depends upon no one fact or combination of circumstances, but upon the whole, taken together, showing a preponderance of evidence in favor of some particular place as the domicile. A person's own testimony regarding his intention with respect to acquiring or retaining a domicile is not conclusive; such testimony is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness. . . . [*C*]*onduct is of greater evidential value than declarations.* Declarations as to an intention to acquire a domicile are of slight weight when they conflict with the facts." (Italics ours.)

The Supreme Judicial Court of Massachusetts, in an advisory opinion requested by its House of Representatives in 1843, listed certain criteria for determining a student's domicile which are equally pertinent today:

If the student is maintained and supported by a parent with whom he has been accustomed to reside and to whose home he returns to spend his vacations; "if he describes himself of such place and otherwise manifests his intent to continue his domicile there," these are circumstances tending to prove his domicile has not changed. If he has no parents or has separated from them and is not supported by them; "if he has a family of his own and removes with them to such town; or by purchase or lease takes up a permanent abode there, without intending to return to his former domicil; if he depend on his own property, income or industry for his support; — these are circumstances, more or less conclusive, to show a change of domicil and the acquisition of a domicil in the town where the college is situated." Opinion of the Justices, *supra* at 589-90.

In addition to the foregoing considerations, an editorial note in 8 Ore. L. Rev. 171 (1929) suggests that a registrar might, in substance, ask the student applicant for voter registration the following questions: Did you leave your father's home for the temporary purpose of attending school or "of cutting loose from home ties"? Do you keep your permanent possessions in the place you claim as your residence, or do you keep there only enough for temporary needs? If you were to fail at the university or were forced to discontinue your studies because of illness would you return to your parents' home? Would you be living in the university town if the school were not there? If tomorrow you were to transfer to a school in another town would you still consider your present residence your home? For what purposes other than attending school are you in this college town? What occupation do you plan to follow upon graduation and where do you plan to follow it? Where do you maintain church or lodge affiliations, if any? Banking and business connections?

The answer to none of the foregoing questions would be conclusive of domicile, but each would be a circumstance from which the registrar and judge might draw an inference. On the other hand, as the editorial note points out, these circumstances might be outweighed by others: Even though the student left home for temporary purposes only, the evidence might show that he had since "cut loose entirely"; that his possessions were left at his father's house for storage purposes only; that even though he went to his father's house for vacations, he went only

to visit; that even though he would not have come to the university town but for the university he had made it his actual home independently of that fact. "He might get all his financial support from his father and yet have a home separate from his. He might transact business and belong to organizations in a town other than that of his residence, and so on." *Id.* at 173.

The author suggested that before attempting to register as a voter in the town where he is attending school a student should ask himself whether he, in good faith, considers the college town his home. "Each student is in a position to make an honest and accurate decision for himself. Other people can judge only from outward facts and circumstances although in case of a judicial determination that judgment would have to prevail." *Id.* at 173.

In this case, plaintiff left her parents' home in Tarboro to enter Meredith College at Raleigh as a freshman student. The college sends her grades to her parents. Her father pays her college expenses, supports and maintains her entirely. During vacations, and when the school is closed, she returns to her parents' home. Her only dwelling place in Raleigh is the dormitory room which she occupies subject to the rules and regulations of the college. Her personal property, except that required for her immediate needs, remains at her parents' home. Her church membership is in Tarboro. Her post-graduation plans are indefinite although she is "thinking about law school." Pending her appeal to the Superior Court from the refusal of the Wake County Board of Elections to register her, upon the advice of counsel, plaintiff moved her checking account from a bank in Tarboro to one in Raleigh. She also changed the address on her driver's license and on her college registration to show Meredith College as her permanent address.

[18] Certainly the foregoing evidence would have fully justified the judge below in finding that plaintiff was temporarily sojourning in Raleigh for the purpose of attending college; that she had not abandoned her domicile in Tarboro; and that she was, therefore, not eligible to vote in Raleigh. However, he did not make such findings. Instead he found that plaintiff had abandoned her former domicile and acquired a new one in Raleigh. The facts he found are binding on this Court, and they support his judgment that she is entitled to vote in Wake County. We must, therefore, affirm his judgment. However,

as previously pointed out, whether a particular student is entitled to register and vote in the town where he or she is attending college must be determined by the application of the rules stated herein to the specific facts of that individual's case. Decision here relates directly to plaintiff only. This is in no sense a class action.

It also seems appropriate to note that had Judge Brewer found that plaintiff's domicile remained in Tarboro she would not have been disfranchised. She would merely have found herself in the same situation as many of the State's judges, teachers, traveling salesmen, construction workers, truck drivers, executives, and a host of others whose work will take them away from home on election day and who will not be able to vote unless they make timely application for an absentee ballot. The election law, however, has amply safeguarded the voting privileges of all its citizens, and there is no legal or practical reason why any qualified voter cannot vote at the place of his legal residence if he is sufficiently interested in doing so. G.S. 163-226 to -240.5.

Affirmed.

IN RE JOHN J. TEW, JR.

No. 59

(Filed 15 March 1972)

1. **Criminal Law §§ 5, 124— acquittal by reason of insanity**

A verdict of not guilty due to insanity constitutes a full acquittal, and one thus acquitted is entitled to all the protection and constitutional rights as if acquitted upon any other ground.

2. **Criminal Law § 5; Insane Persons § 1— acquittal by reason of insanity — inquisition**

A person acquitted of crime because of insanity will be held for and inquisition and, if it is determined that he is insane, he will be committed to a State Hospital. G.S. 122-84.

3. **Insane Persons § 1— acquittal by reason of insanity — commitment to hospital — purpose**

The commitment of a person acquitted of crime because of insanity is imposed for protection of society and the individual confined —not as punishment for crime.

4. **Insane Person § 11— acquittal by reason of insanity — right to discharge**

A person acquitted of crime because of insanity can be confined in an asylum only until his mental health is restored, at which time he will be entitled to his release like any other insane person.

5. **Insane Persons § 11— acquittal by reason of insanity — discharge from hospital — certificates of State hospital superintendents — unconstitutionality of statute**

Portion of G.S. 122-86 providing that no judge shall discharge upon habeas corpus a person acquitted of crime because of insanity until the superintendents of the several State hospitals have certified to his sanity and safety violates due process and infringes upon the Court's prerogative and duty to issue the writ of *habeas corpus*. N. C. Constitution, Art. I, § 21.

6. **Insane Pernsons § 11; Habeas Corpus § 2— acquittal by reason of insanity — discharge from hospital — habeas corpus — burden of proof**

A person acquitted of crime by reason of insanity who seeks to be discharged from a mental hospital on the ground of restoration to sanity must resort to habeas corpus proceedings; such person has the burden of proving not only that he has recovered his sanity, but that his release would not endanger himself or others.

APPEAL by petitioner pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals affirming the order of *Hall, J.*, 3 November 1970 Session of WAKE, reported in 11 N.C. App. 64, 180 S.E. 2d 434. This appeal was docketed and argued in the Supreme Court as No. 36 at the Fall Term 1971.

Habeas corpus proceeding instituted by John J. Tew, Jr., an inmate of Dorothea Dix Hospital, one of the State's hospitals for persons acquitted of crime on account of mental illness.

On 17 July 1965 Tew shot and killed his wife, Inez Suggs Tew. In consequence he was indicted for first-degree murder and tried at the 30 August 1965 Session of the Superior Court of Harnett County, at which Judge Leo Carr presided. The State offered plenary evidence that Tew was guilty of the capital crime with which he was charged. His defense was that he was insane at the time his wife was killed. The jury's verdict, returned 4 September 1965, was that "the defendant is not guilty by reason of insanity."

In accordance with G.S. 122-84 (1964), Judge Carr ordered Tew held pending an inquisition as to his mental condition, which was duly held on 17 September 1965. After a plenary hearing Judge Carr found that Tew's mental condition "is such as to render him dangerous to himself and more especially to

other persons, and that his confinement for care, treatment and security demands that he be committed to the Dorothea Dix Hospital in Raleigh, North Carolina." He ordered Tew committed to the hospital "for treatment and care" pursuant to the provisions of G.S. 122-83 (1964), G.S. 122-84 (1964), and G.S. 122-86 (1964).

Since 17 September 1965 Tew has been continuously within the confines of Dorothea Dix Hospital. So far as the record discloses, he first attempted to obtain his release in May 1969 in habeas corpus proceedings before Judge Hamilton Hobgood. After a plenary hearing, Judge Hobgood ordered that Tew's confinement in the hospital continue.

On 7 October 1970 Tew began this proceeding by applying to Judge C. W. Hall for a writ of habeas corpus. In his petition he alleged, *inter alia,* that "he is not now insane" and his continued restraint in Dorothea Dix Hospital is illegal; that at the previous hearing before Judge Hobgood, Dr. R. L. Rollins, superintendent of Dorothea Dix Hospital, and Dr. Andrew L. Laczko, director of the hospital's forensic unit, gave testimony which "was without foundations in fact" and in conflict with "the facts known and expressed previously" by them; that "certain pressures were brought upon Dr. Laczko by high officials of Dorothea Dix Hospital which caused him to testify differently from what he believed" and from what he had "solemnly indicated" to Tew's attorneys he would say. He prayed that a writ of habeas corpus be directed to Dr. R. L. Rollins and to Dr. Andrew L. Laczko, requiring them to bring him before Judge Hall in order that the legality of his restraint might be determined.

Judge Hall issued the writ and heard the matter on 3 November 1970. In his judgment, filed 5 November 1970, Judge Hall made findings of fact which, except when quoted, are summarized below (enumeration ours):

(1) Since February 1969 Tew has worked in the hospital supply room in the presence of both men and women and has shown no disposition to harm himself or anyone else.

(2) His "mental condition has considerably improved since his commitment," and drug treatment has been discontinued for over two years. "Recent psychiatric examinations by qualified experts reveal no evidence of any mental disorder."

(3) "Petitioner has now been restored to his right mind, is now sane, and his mental condition is not now such as to render him dangerous to himself or other persons."

(4) "Petitioner has had symptoms of paranoia, which are now in remission; and the Superintendent of Dorothea Dix Hospital does not recommend his unconditional release."

(5) "The superintendents of the several State hospitals have not certified that they have examined the petitioner and found him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public."

Upon the foregoing findings, Judge Hall "concluded" that Tew "is now sane and his detention is no longer necessary for his own safety or the safety of the public." Although he noted "doubts as to the validity of the proviso of G.S. 122-86," he held that he was "not authorized to discharge the petitioner until after the superintendents of the several State hospitals have certified that they have examined him and found him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public." He thereupon remanded Tew to the custody of the Dorothea Dix Hospital.

Tew excepted to Judge Hall's conclusion that he was not authorized to discharge him and to the order remanding him to Dorothea Dix Hospital. His application to the Court of Appeals for a writ of certiorari was allowed and, in an opinion by Judge Campbell in which Judge Graham concurred, the Court of Appeals affirmed Judge Hall's judgment. Judge Britt dissented, and Tew appealed under G.S. 7A-30(2).

Robert Morgan, Attorney General, and G. Eugene Boyce, Special Counsel, for the State.

Yarborough, Blanchard, Tucker & Denson by Charles F. Blanchard and Irvin B. Tucker, Jr., for petitioner appellant.

SHARP, Justice.

The one question presented by this appeal is the validity of the last sentence of G.S. 122-86, italicized below. In whole, the section provides:

"PERSONS ACQUITTED OF CRIME ON ACCOUNT OF MENTAL ILLNESS; HOW DISCHARGED FROM HOSPITAL.—No person acquit-

ted of a capital felony on the ground of mental illness, and committed to the hospital designated in § 122-83 shall be discharged therefrom unless an act authorizing his discharge be passed by the General Assembly. No person acquitted of a crime of a less degree than a capital felony and committed to the hospital designated in § 122-83 shall be discharged therefrom except upon an order from the Governor. No person convicted of a crime, and upon whom judgment was suspended by the judge on account of mental illness, shall be discharged from said hospital except upon the order of the judge of the district or of the judge holding the courts of the district in which he was tried: Provided, that nothing in this section shall be construed to prevent such person so confined in the hospitals designated in § 122-83 from applying to any judge having jurisdiction for a writ of habeas corpus. *No judge issuing a writ of habeas corpus upon the application of such person shall order his discharge until the superintendents of the several State hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public.*" (Italics ours.)

The precursor of G.S. 122-86 was N. C. Public Laws ch. 1, § 67 (1899). In pertinent part it provided: "No person acquitted of a capital felony, on the ground of insanity, and committed to the hospital for the dangerous insane, shall be discharged therefrom unless an act authorizing his discharge be passed by the general assembly. . . . "

In 1904, in *In re Boyette,* 136 N.C. 415, 48 S.E. 789, this Court declared the foregoing section invalid as a legislative attempt to infringe upon the Court's constitutional prerogative and duty to issue the writ of habeas corpus upon proper application. The Court said: A person restrained of his liberty cannot be required to "await the action of the Legislature before he can have the cause thereof inquired into." Under the constitutional guaranty that the privilege of the writ of habeas corpus shall not be suspended, "every person restrained of his liberty is entitled to have the cause of such restraint inquired into by a judicial officer. The judicial department of the government cannot by any legislation be deprived of this power or relieved of this duty. It must afford to every citizen a prompt, complete and adequate remedy by due process for every unlawful injury to his person or property. This is absolutely essential

to a constitutional government." *Id.* at 423, 48 S.E. at 792. We reaffirm the decision in *In re Boyette, supra.*

Inexplicably, after the decision in *Boyette,* the legislature of 1905 attempted to cure the constitutional infirmities of Section 67 by re-enacting the invalidated section *ipsissimis verbis* with the addition of the following provisions: "Provided, that nothing in this section shall be construed to prevent such person so confined in the hospitals for the dangerous insane from applying to any judge having jurisdiction for a writ of habeas corpus. No judge, issuing a writ of habeas corpus upon the application of such person, shall order his discharge, until the superintendents of the several state hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public." Rev. § 4620 (1905).

Needless to say, the re-enactment of invalidated Section 67 did not validate it. The quoted additions, with insignificant alterations in subsequent years, are codified in the last two sentences of G.S. 122-86. The final sentence clearly purports to prohibit a judge from ordering the discharge of any such person from Dorothea Dix Hospital or Cherry Hospital (the hospitals designated in G.S. 122-83) "until the superintendents of the several State hospitals shall certify that they have examined him and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public." Because of the conclusion we reach, we need not decide whether the statute designates the superintendents of Dorothea Dix Hospital and Cherry Hospital or the superintendents of *all* the State's mental hospitals.

Tew contends that the certification requirement of G.S. 122-86 is unconstitutional, and Judge Hall's findings that he is now sane and safe requires his unconditional release. He asserts: (1) to make such certification an indispensable requisite for his release, without providing any recourse in the event a superintendent should arbitrarily or erroneously refuse certification, deprives him of due process of law, N. C. Const. art. I, § 19 (1970), and (2) to prohibit a judge from releasing him on a writ of habeas corpus under any circumstances until the superintendents have issued the required certificates suspends the privilege of the writ of habeas corpus as to him and infringes upon the court's prerogative and duty to issue the writ, N. C.

Const. art. I, § 21 (1970). These contentions require serious consideration.

[1-4] A verdict of not guilty due to insanity constitutes a full acquittal, and one thus acquitted "is entitled to all the protection and constitutional rights as if acquitted upon any other ground." *In re Boyette, supra* at 419, 48 S.E. at 791. See 68 Yale L. J. 293 (1958). However, such a person will be held for an inquisition and, if it is determined that he is then insane, he will be committed to a State hospital. G.S. 122-84. The commitment of such a person following an acquittal is imposed for the protection of society and the individual confined—not as punishment for crime. *Salinger v. Superintendent,* 206 Md. 623, 112 A. 2d 907 (1955); *In re Clark,* 86 Kan. 539, 121 P. 492 (1912). He can be confined in an asylum *only* " 'until his mental health is restored when he will be entitled to his release, like any other insane person.' " *In re Boyette, supra* at 419, 48 S.E. at 791. See generally, 38 Tex. L. Rev. 849 (1960); 112 U. Pa. L. Rev. 733 (1963-64); 1961 Duke L. J. 481.

In G.S. 122-86 the legislature clearly manifested its dual purpose to protect the public from the premature release of "a criminally insane" person and to protect such an individual from himself. The certification requirement also discloses the legislature's conviction that judges are not qualified to make medical findings, and that the institutional psychiatrists are better equipped to determine whether such a person has recovered his sanity and is no longer dangerous. The requirement of examination and certification from each of the *several* superintendents divides the responsibility in the event insanity recurs in a petitioner certified to be sane and safe. Presumably multiple certification diminishes the danger that a superintendent, fearful of public censure in the event of a recurrence, will keep a patient confined longer than is reasonably necessary.

The question before us, however, is not whether the purpose and premise upon which the legislature based the statute are sound, but whether it can constitutionally make the court's power to release petitioner upon habeas corpus depend *solely* upon certification by the several superintendents that he is now sane and safe. The answer is NO. The power of the court, in a proper case, to discharge a person acquitted of crime because of insanity, cannot be thus circumscribed. Such a condition would deprive the court of any exercise of judicial discretion and

nullify its power to release an inmate being illegally detained in a mental hospital. *In re Boyette, supra.* The legislature, in one sentence of its 1905 enactment, recognized the right of a person confined in a mental hospital to apply to a judge for a writ of habeas corpus and, in the next, imposed a condition which would effectively defeat the purpose of the writ.

[5] Psychiatry is not an exact science, and hospital doctors are not infallible. Yet G.S. 122-86 would not permit a petitioner to establish his restoration to sanity by the testimony of other qualified psychiatrists. It provides no remedy or procedure whatever to determine a charge (such as the one made here) that a superintendent arbitrarily withheld a certificate, acted in bad faith, or was honestly mistaken in judgment. It merely decrees, with complete finality, that no judge shall discharge a person acquitted of crime because of insanity until the superintendents of the several State hospitals have certified to his sanity and safety. It does not, therefore, meet the requirements of due process. We hold that the absolute certification requirement of G.S. 122-86 is unconstitutional. See *Rogers v. State,* 459 S.W. 2d 713, 716-17 (Tex. Civ. App. 1970).

G.S. 122-86 has not been materially changed since 1905 and the changes then made created a mishmash. The section is now "a thing of shreds and patches," and its presence in the General Statutes is deceptive and confusing. The first sentence was declared unconstitutional in 1904 for reasons which are equally applicable to the second. The third sentence is a part of G.S. 122-84, and the fourth is a constitutional guaranty. This decision invalidates the fifth and last sentence.

[6] When the legislature has prescribed adequate procedures whereby one acquitted of crime because of mental illness may have determined the issue of his restoration to sanity, the general rule is that one who seeks to be discharged from a mental hospital on that ground must show that he has exhausted the statutory remedy before resorting to habeas corpus. Annot., 73 A.L.R. 567 (1931); annot., 95 A.L.R. 2d 54 (1964); 39 Am. Jur. 2d *Habeas Corpus* § 87 (1968); 21 Am. Jur. 2d *Criminal Law* § 61 (1965); 44 C.J.S. *Insane Persons* § 131b (1945). In this State, there is no such statutory procedure. G.S. 122-84 specifies the procedure whereby the authorities having the custody of persons acquitted of crime on the grounds of insanity may initiate proceedings for his release. One who seeks his own

release must resort to habeas corpus proceedings. See 41 Am. Jur. 2d *Incompetent Persons* § 46 (1968). In that proceeding he has the burden of proving not only that he has recovered his sanity, but that his release would not endanger himself or others. *Ragsdale v. Overholser*, 281 F. 2d 943 (D.C. Cir. 1960). See 21 Am. Jur. 2d *Criminal Law* § 58 (1965); 39 C.J.S. *Habeas Corpus* § 48 (1944).

In *Ragsdale*, Burger, Circuit Judge, now Chief Justice of the United States, noted that one who has been committed to a mental institution in consequence of having obtained a verdict of not guilty by reason of insanity belongs to an exceptional class of people. He not only has the burden of proof when he seeks his release, said Judge Burger, but "[i]n a 'close' case even where the preponderance of the evidence favors the petitioner, the doubt, if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk danger to the public or the individual. A patient may have improved materially and appear to be a good prospect for restoration as a useful member of society; but if an 'abnormal mental condition' renders him potentially dangerous, reasonable medical doubts or reasonable judicial doubts are to be resolved in favor of the public and in favor of the subject's safety." *Id.* at 947.

The manner in which this case comes to us presents practical problems. Since Judge Hall remanded petitioner to the custody of Dorothea Dix Hospital without declaring the certification requirement of G.S. 122-86 unconstitutional the State did not except to the findings of fact or appeal. Satisfied with Judge Hall's findings, petitioner did not bring up the evidence which Judge Hall heard and upon which presumably he based his findings. As previously noted, petitioner's sole assignment of error is that the judge erred in failing to declare the statute unconstitutional and to release him upon the facts found.

Petitioner's position is not without its logic. However, we concluded that the present posture of the case does not justify our remanding it with directions that a judgment be entered ordering Tew's immediate release. In the first place, we do not know what Tew's mental condition is today. More than sixteen months have elapsed since Judge Hall made his findings. Although he found that Tew was then sane he also found that he had shown "symptoms of paranoia which are now in remission;

and the Superintendent of Dorothea Dix Hospital does not recommend his unconditional release."

"The term 'remission' at best means a temporary recovery, perhaps a temporary, partial recovery." *In re Rosenfield,* 157 F. Supp. 18, 22 (1957). Since Tew was acquitted of first-degree murder by reason of insanity the public interest requires that we make no assumptions about his present mental condition. Furthermore, at the time Judge Hall made his findings he was under a misapprehension as to the applicable law. Even though he expressed doubt about the constitutionality of the certification requirement of G.S. 122-84, he held he was without authority to release him until the certificates were obtained. Under this view, any findings with reference to Tew's mental condition were superfluous and without consequences. It does not appear that, but for the statute, he would have ordered Tew's *unconditional* release in the face of Dr. Rollins' refusal to recommend it. This refusal, which Judge Hall incorporated in his findings, bolsters our conclusion that the judgment should be vacated and this proceeding remanded for a hearing de novo. It is so ordered.

At the hearing the burden of proof will be upon petitioner. The judge will consider all the evidence offered by both petitioner and the State and make his findings therefrom. According to the facts found, Tew may be granted his unconditional release or he may be remanded to the custody of Dorothea Dix Hospital. Further, we perceive no legal reason why he could not be granted a conditional probationary release if his mental condition be found to justify it. See G.S. 122-67 (1964). We note that Tew is not now a person charged with crime or one upon whom judgment has been suspended; nor is he one awaiting sentence.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. DENNY JUNIOR FREEMAN

No. 25

(Filed 15 March 1972)

1. **Criminal Law § 15— change of venue — local prejudice — failure of record to show ruling on motion**

Defendant in a first degree murder prosecution is not entitled to a new trial by reason of the failure of the record to show a ruling by the trial court upon a motion for change of venue on account of local prejudice which was prepared and filed by defendant without the knowledge of his counsel, since proceeding with the trial was, in effect, a denial of the motion, and the record shows no abuse of discretion in such denial.

2. **Criminal Law § 99— expression of opinion by court**

It is error for the trial judge to express or imply, in the presence of the jury, any opinion as to the guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of any witness. G.S. 1-180.

3. **Criminal Law § 99— questions by trial judge — clarification of testimony**

The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it.

4. **Criminal Law § 99— questioning of witness by trial judge — expression of opinion**

In this homicide prosecution, the trial court did not express an opinion in asking one State's witness thirteen questions or in asking a second State's witness five questions, where each question was designed to clarify the testimony of the witness as to the location of the defendant and the deceased at the time the homicide occurred.

5. **Criminal Law § 99— questioning of defendant by trial judge — expression of opinion**

In this homicide prosecution, the trial court did not express an opinion in any of nine questions propounded to defendant where their purpose was to enable the court to rule upon objections by the solicitor, to clarify a simple, affirmative answer to a question asked in the alternative, to clarify defendant's ambiguous answers to questions by the solicitor concerning a prior conviction, or to enable the court to make an accurate note concerning defendant's testimony as to his reason for following deceased out of the poolroom where the homicide occurred.

6. **Criminal Law § 99— questions asked defendant — sustaining of solicitor's objections — expression of opinion**

The trial court did not express an opinion on the credibility or guilt of defendant in sustaining the solicitor's objections on ten occasions to questions propounded to the defendant on direct examina-

tion, the ruling in each instance being the customary ruling, "Objection sustained," and the rulings being interspersed with six others overruling objections by the solicitor.

7. **Homicide § 15; Criminal Law § 169— intent to kill — exclusion of testimony by defendant — harmless error**

It was error for the trial court in a first dergee murder prosecution to sustain the solicitor's objection to a question propounded to the defendant by his counsel as to whether defendant at any time intended to kill the deceased; however, such error was harmless where the defendant thereafter testified without objection that he did not intend to hit deceased with the bullets he fired, and so did not intend to kill him, and the court charged the jury that in order to convict defendant of first degree murder it must find beyond a reasonable doubt that defendant specifically intended to kill the deceased.

8. **Homicide § 21— first degree murder — sufficiency of State's evidence**

There was ample evidence to support the submission of the charge of first degree murder to the jury where the State's evidence tended to show that defendant armed himself, concealed his weapon, sought out a confrontation with the deceased, who did not know him, followed deceased from a poolroom and knocked him down, and when deceased retreated back into the poolroom without any attempt to strike the defendant, twice fired his pistol at deceased at close range and thereby caused his death.

9. **Criminal Law § 166— abandonment of assignment of error**

An assignment of error not brought forward into defendant's brief is deemed abandoned.

10. **Homicide § 24— instructions — burden of proof — reasonable doubt**

The trial court adequately instructed the jury that each of the necessary elements of murder in the first degree must be proved beyond a reasonable doubt in order to convict defendant of that charge.

11. **Homicide § 30— failure to submit involuntary manslaughter — harmless error**

In this first degree murder prosecution wherein defendant testified that he did not intend to hit deceased with the bullets he fired, the trial court's failure to charge that the jury might return a verdict of involuntary manslaughter constituted harmless error, where the court clearly instructed the jury that an intent to kill was an element of first degree murder, and the jury returned a verdict of guilty of first degree murder with a recommendation of life imprisonment, it being clear from the verdict that the jury did not believe defendant's testimony as to his intention and that failure to charge on involuntary manslaughter did not affect the verdict.

APPEAL by defendant from *Cohoon, J.*, at the 6 September 1971 Session of CHOWAN.

Under an indictment, proper in form, the defendant was tried for the murder of George Thomas Smith. The jury re-

turned a verdict of guilty of murder in the first degree, with recommendation that the defendant be sentenced to imprisonment for life. Judgment was entered in accordance with the verdict.

The evidence for the State is to the following effect:

At approximately 10:30 p.m. on 30 April 1971, Smith was playing pool in the Pickwick Pool Hall in Edenton. The defendant came in and shortly thereafter asked a bystander if he knew George Smith. The bystander pointed out Smith to the defendant. Thereafter, Smith left the pool hall. The defendant followed him out. In a few minutes Smith came back in, bleeding at the mouth. He asked that the police be called. At that instant the defendant, standing outside the pool hall, fired two pistol shots through the screen door. One struck Smith in the neck, passing through the esophagus, the jugular vein and the carotid sheath.

Smith was immediately carried to the local hospital, given medical attention and promptly transferred by ambulance to the hospital in Elizabeth City. Shortly after arrival there, he died. In the opinion of the surgeon who examined him at the Elizabeth City Hospital, the cause of death was the gunshot wound in the neck.

A police officer, on routine patrol of the poolroom area heard someone, not in sight, say, "I am going to blow your G.d. head off." Proceeding in the direction of the voice, the officer observed the defendant alone on the sidewalk, eight to ten feet from the door of the poolroom, and saw him point a pistol toward the door and fire it twice. The officer then disarmed and arrested the defendant.

The defendant's evidence was to the following effect:

Smith and his wife were separated. Thereafter, the defendant began going with Mrs. Smith. A few days prior to the shooting, the defendant, while visiting in the home of Mrs. Smith's mother, where Mrs. Smith resided, heard some man in another part of the house, whom he took to be Smith, then unknown to him, and whose voice he subsequently identified as Smith's voice, say that he was going to kill "that short legged, sawed off s.b." and that he had a shotgun in the back seat of his car. The defendant, believing this declaration referred to him, and having been told by Mrs. Smith's sister that Smith had

a gun, attempted unsuccessfully to have a warrant issued for Smith. Nothing further happened on that occasion.

On the night of the shooting, the defendant entered the poolroom and, after having Smith pointed out to him, followed Smith out of the poolroom. He called to Smith, who was preceding him along the sidewalk. When Smith stopped, the defendant walked up to him, identified himself and told Smith he was the one who had been dating Smith's wife. Smith first denied and then admitted that he had said he was going to blow the defendant's brains out, and also first denied and then admitted that he had threatened to kill his (Smith's) two children who were living with Mrs. Smith. Upon these admissions by Smith, the defendant struck Smith with his fist and knocked him down. Smith got up and walked to the poolroom door. He made no attempt to strike the defendant. The defendant turned partially around to leave the scene and heard someone say, "I am going to blow your G.d. brains out." He could not see Smith clearly behind the screen door of the poolroom and, in fear of his own life, pulled his pistol out of concealment under his shirt and shot. He "didn't have no intention of hitting him," but was "more or less trying to scare him and trying to keep him inside that poolroom."

The defendant never saw Smith with any kind of a weapon. The defendant had previously been convicted and fined for assault with a deadly weapon and had been convicted three times for the offense of escape, the record not showing the offense or offenses for which he was serving a sentence at the time of the escapes.

Attorney General Morgan and Associate Attorney Speas for the State.

Walter H. Oakey, Jr., for defendant.

LAKE, Justice.

The defendant is not entitled to a new trial by reason of the failure of the record to show a ruling by the trial court upon a motion prepared and filed by the defendant, himself, for a change of venue, this being his Assignment of Error No. 1. Prior to the filing of this document, competent, experienced counsel was appointed to represent the defendant and has represented him diligently at all stages of this proceeding. The motion

was prepared and filed without the knowledge of the defendant's counsel. Upon receipt of the document, the presiding judge wrote the defendant, with a copy to his counsel, advising him that he had court-appointed counsel, that he should communicate with his counsel at once and that any motions "that are to be made can be made through him." The motion for change of venue was not renewed.

Thereafter, at the defendant's arraignment, the court, prior to ordering the drawing of a special venire from the Chowan County jury box, inquired, "Is there anything before I proceed with this order?" The defendant's counsel replied, "No, Sir, we are ready." The order for the special venire was thereupon entered and the trial of the defendant proceeded.

[1] The defendant's contention, in his self-prepared motion, was that the deceased, a resident of Edenton, had many friends therein, whereas the defendant was from "out of town," and a newspaper, circulated in the Town of Edenton, and radio broadcasts had contained vivid accounts of the incident, which would prevent the selection of a fair jury. The granting of a motion for change of venue on account of local prejudice rests in the discretion of the trial court. *State v. Ray,* 274 N.C. 556, 568, 164 S.E. 2d 457; *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233. There is nothing whatever in the record to indicate abuse of discretion if, indeed, the motion filed by the defendant should not be deemed waived or withdrawn by his counsel. Proceeding with the trial was, in effect, a denial of the motion. Nothing in the record indicates that the defendant exhausted the peremptory challenges allowed him by law in the selection of the jury.

Assignments of Error 2, 3 and 5 are to questions directed by the court to witnesses for the State and to the defendant as a witness in his own behalf, the contention being that thereby the court indicated to the jury an opinion that the defendant was guilty and reflected upon his credibility. The defendant concedes that the questions would not have been improper had they been asked by the solicitor.

[2, 3] It is elementary that it is error for the trial judge to express or imply, in the presence of the jury, any opinion as to the guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of any witness. 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. G.S. 1-180; *State v. Atkinson,* 278 N.C. 168, 177, 179 S.E. 2d 410; *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481; *State v. Douglas,* 268 N.C. 267, 271, 150 S.E. 2d 412; *State v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378. It is equally clear that, as the defendant here concedes, the trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. The rule with reference to such questions by the court is thus stated by Justice Huskins in *State v. Colson,* 274 N.C. 295, 308, 163 S.E. 2d 376, cert. den., 393 U.S. 1087:

> "Defendant assigns as error certain questions put to witnesses by the trial judge during the trial. The Court of Appeals found no merit in this assignment, and we agree. 'It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. . . . ' *State v. Horne,* 171 N.C. 787, 88 S.E. 433. Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the 'impression of judicial leaning,' they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error. *State v. McRae,* 240 N.C. 334, 82 S.E. 2d 67; *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180; *State v. Peters,* 253 N.C. 331, 116 S.E. 2d 787; *State v. Lea,* 259 N.C. 398, 130 S.E. 2d 688. Even so, this Court has said that 'Judges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness so that the "truth, the whole truth, and nothing but the truth" be laid before the jury.' *Eekhout v. Cole,* 135 N.C. 583, 47 S.E. 655. We have examined the questions by the judge to which exception was taken, and in our opinion no prejudice resulted from them. The questions served only to clarify and promote a proper understanding of the testimony of the witnesses and did not amount to an expression of opinion by the judge. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1."

It is, of course, immaterial upon this point that it was not the motive of the trial judge to convey any opinion of his own to the jury, or that his expression or intimation of such opinion was inadvertent. *State v. Lea,* 259 N.C. 398, 130 S.E. 2d 688. Upon appeal, we must examine such questions or comments by the court with care to see if a juror could reasonably infer therefrom that the judge was intimating an opinion as to the credibility of the witness or as to any fact to be determined by the jury. If so, the defendant must be given a new trial. Much depends upon tone of voice and facial expressions not discoverable in the printed record. The trial judge must be constantly alert to avoid the expression of his opinion in any manner whatever.

It is the duty of the trial judge, in his charge to the jury, to review the evidence to the extent necessary to apply the law thereto. He must also rule upon the motions, if any, of the defendant for a judgment of nonsuit. Obviously, in order to perform these duties, the judge must hear and understand the answers given by a witness to questions propounded by counsel. He may, with care, propound questions of his own to a witness for this purpose.

[4] We have carefully examined the thirteen questions propounded by the court to the State's first witness, Tom White, to each of which the defendant took an exception. Each was designed to clarify the testimony of this witness as to the location of the witness, the defendant and Smith at the time of the firing of the shots about which the witness had testified. We find nothing therein which could reasonably be construed as intimating any opinion by the court concerning these matters, the credibility of the witness or the guilt of the defendant. Several of these questions were the result of unclear answers by the witness to a previous question by the court.

Similarly, the five questions which the court asked the State's witness Grandy were designed to ascertain the respective positions of the defendant and Smith with reference to the poolroom door at the time of the shooting, which this witness had testified he observed. Nothing in the record before us indicates that a juror could reasonably have inferred from any of these questions, or from all of them, that the judge was expressing an opinion as to these facts, the credibility of the witness or the guilt of the defendant.

[5] The defendant also excepts to nine questions directed by the court to the defendant, himself, when testifying in his own behalf. Three of these were propounded by the court following objections by the solicitor to questions asked by defendant's counsel. Their purpose was to elicit information which would enable the court to rule properly upon the objection. These questions were entirely proper. Another question was to clarify a simple, affirmative answer to a question asked in the alternative. Four others were to clarify the defendant's ambiguous answers to questions by the solicitor concerning a prior conviction on the charge of assault with a deadly weapon. The remaining question appears to have been to enable the court to make an accurate note concerning the defendant's testimony as to his reason for following Smith out of the poolroom. We find nothing in these questions which could reasonably be deemed by a juror to imply an opinion by the court as to the defendant's credibility or guilt, or as to any fact to be determined by the jury.

[6] The defendant also takes exception to ten rulings of the trial court sustaining the solicitor's objections to questions propounded to the defendant on direct examination. The defendant assigns these rulings as error, not because of any present disagreement as to the competency of the evidence sought to be introduced, but as reflections upon the credibility of the defendant and indications of an opinion of the court concerning his guilt. In each instance the ruling of the court was the customary ruling, "Objection sustained." These rulings, which were interspersed with six others overruling objections by the solicitor, constituted no violation of G.S. 1-180. We find no merit in the defendant's Assignments of Error 2, 3 and 5.

[7] Assignment of Error No. 6 is to the court's sustaining of the solicitor's objection to this question propounded to the defendant by his counsel: "Did you at any time have any intention in your mind of killing George Thomas Smith?" The defendant was on trial for murder in the first degree. A murder not committed by one of the means specified in G.S. 14-17 and not committed in the perpetration of, or attempt to perpetrate, another felony, is not murder in the first degree unless there was, on the part of the defendant, an actual, specific intent to kill. *State v. Propst,* 274 N.C. 62, 70, 161 S.E. 2d 560. Thus, it was error to sustain the objection to this question. Nothing else appearing, this error would entitle the defendant to a new trial.

However, the record shows that, following the objection and prior to the ruling of the court, the witness answered "No." The court did not instruct the jury to disregard the answer. There was no motion to strike. The solicitor merely requested the court to instruct the witness not to answer a question following an objection until the court ruled on the objection. The court so directed the witness. More significantly, as the direct examination of the defendant by his counsel continued, the defendant testified, without objection: "I was shooting at him, but I didn't have no intention of hitting him. I was more or less trying to scare him and try to keep him inside that poolroom." Thus, the jury had before it the defendant's testimony that he did not intend to kill Smith.

In the charge the court specifically instructed the jury that to convict the defendant of murder in the first degree, it must find, beyond a reasonable doubt, every element of the offense, that one element is an unlawful killing with premeditation and that "when we say that the killing must be accompanied by deliberation and premeditation it is meant that there must be a fixed purpose to kill." Again, the court charged: "A specific intent to kill, while a necessary constituent of the element of premeditation and deliberation in first degree murder, is not an element of second degree murder, or manslaughter." Again: "So I instruct you that if upon a consideration of all of the evidence the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant unlawfully, feloniously, wilfully and with malice and premeditation, and deliberation, intentionally shot and killed George Thomas Smith, then you would return one of two verdicts, either guilty of murder in the first degree, or guilty of murder in the first degree with a recommendation at the time of returning your verdict, that the prisoner's punishment be imprisonment for life in the State's Prison, instead of death." The court then further instructed the jury that if the State had failed to satisfy them from the evidence and beyond a reasonable doubt of the defendant's guilt of murder in the first degree they would acquit him of that charge and pass to a consideration of murder in the second degree and of manslaughter.

In view of these instructions and the subsequent admission of the defendant's testimony that he did not intend to hit Smith with the bullets he fired, and so, did not intend to kill him, the above mentioned error must be deemed harmless.

[8] There was ample evidence to support the submission of the charge of first degree murder to the jury and to support the jury's verdict. The evidence for the State, if believed, is sufficient to show that the defendant armed himself, concealed his weapon, sought out a confrontation with Smith, who did not know him, followed him from the poolroom, knocked Smith down and, when Smith retreated back into the poolroom without any attempt to strike the defendant, twice fired his pistol at him at close range and thereby caused his death. There was, therefore, no error in overruling the defendant's motion for judgment of nonsuit on the charge of murder in the first degree or in denying the motion to set aside the verdict on the ground that the evidence failed to show premeditation and deliberation. The defendant's Assignments of Error 4 and 10 are, therefore, overruled.

[9] Assignment of Error No. 7, not being brought forward into the brief of the defendant, is deemed abandoned. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526; *State v. Barber,* 270 N.C. 222, 154 S.E. 2d 104; *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343; Rule 28, Rules of Practice in the Supreme Court. We have, nevertheless, examined it and find no merit therein.

[10] In his Assignment of Error No. 8, the defendant contends that the court erred in failing adequately to charge that each of the necessary elements of murder in the first degree must be proved beyond a reasonable doubt in order to convict the defendant of that charge. An examination of the charge discloses that the court instructed the jury: "The defendant, who has not the burden of proof, is not bound to disprove the State's case, for the State must fail if upon the whole evidence it fails to satisfy you, the jury, beyond a reasonable doubt that the defendant is guilty of every element of the offense charged against him in the bill of indictment." The elements of murder in the first degree were set forth and properly defined in the charge. Thereupon, the court instructed the jury: "These elements must be established beyond a reasonable doubt, and found by the jury before a verdict of murder in the first degree can be rendered against the defendant." We find no merit in this assignment of error.

[11] In his Assignment of Error No. 9, the defendant contends that the court erred in failing to instruct the jury that they might return a verdict of guilty of involuntary manslaughter.

The basis of this contention is the defendant's testimony that he did not intend to hit Smith when he fired the pistol. After instructing the jury that to return a verdict of guilty of murder in the first degree, it must find beyond a reasonable doubt that the defendant with premeditation and deliberation shot and killed Smith, the court charged: "A specific intent to kill, while a necessary constituent of the element of premeditation and deliberation in first degree murder, is not an element of second degree murder, or manslaughter, * * * So it is for you to determine as to whether the defendant intentionally used the pistol, and if so if he intentionally shot George Smith. It is not necessary to constitute murder in the second degree that he should have intended his death, but it is necessary that he should have intended to shoot George Smith with the pistol, and that as a result of the act George Smith did in fact die. * * * Now manslaughter, generally speaking, is the unlawful killing of a human being without malice, express or implied, and without deliberation and premeditation. Voluntary manslaughter is an intentional homicide in sudden passion or heat of blood, caused by something which the law recognizes as adequate provocation, and not with malice aforethought and not with premeditation and deliberation. The most common instance of voluntary manslaughter is where one unlawfully and intentionally kills another by reason of anger, suddenly aroused by provocation which the law deems adequate, anger naturally aroused from such provocation and the killing being done before time has elapsed for passion to subside and reason to resume her sway." The court then charged that the jury might return a verdict of guilty of murder in the first degree, guilty of murder in the first degree with a recommendation that the punishment be imprisonment for life, guilty of murder in the second degree, guilty of manslaughter, or not guilty. The final instruction was that if the State had satisfied the jury beyond a reasonable doubt that the defendant "unlawfully, feloniously, wilfully and with malice and premeditation, and deliberation, *intentionally* shot and killed George Thomas Smith" (emphasis added), the jury would return a verdict of guilty of murder in the first degree or guilty of murder in the first degree with a recommendation that punishment be imprisonment for life, but if the State had failed so to satisfy the jury, it would acquit him of murder in the first degree and consider his guilt or innocence of murder in the second degree and if the State had failed

to satisfy the jury as to his guilt on that charge, the jury would consider "his guilt or innocence of voluntary manslaughter if you acquit him on the charge of second degree murder."

Notwithstanding the defendant's testimony as to his intention, and the court's clear instruction that an intent to kill was an element of first degree murder, the jury returned a verdict of guilty of first degree murder with a recommendation that the punishment be life imprisonment. Thus, it is clear that the jury did not believe the defendant's testimony as to his intention. Had it done so, it would have, pursuant to the court's instructions, returned a verdict of guilty of second degree murder or not guilty. The court's failure to charge that the jury might return a verdict of involuntary manslaughter did not, therefore, affect the verdict and must be deemed harmless error.

The defendant has had a fair trial with the aid of able, experienced and diligent counsel. The verdict of the jury is fully supported by the evidence and we find in the record no basis for granting him a new trial.

No error.

STATE OF NORTH CAROLINA v. WILBERT LONG, JR., WILL JOHNSON, JR., AND EDDIE LEE JOHNSON

No. 81

(Filed 15 March 1972)

1. **Criminal Law § 88; Witnesses § 8— cross-examination — collateral matter — rebuttal evidence**

Answers made by a witness to a collateral question on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them, except (1) where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and (2) where the cross-examination is as to a matter tending to show motive, temper, disposition, conduct, or interest of the witness toward the cause or parties.

2. **Criminal Law § 88; Witnesses § 8— material or collateral matter — test**

The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction;

or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible.

3. **Criminal Law § 88; Robbery § 3; Witnesses § 8— armed robbery — cross-examination as to acquisition of pistol — material matter — rebuttal testimony**

In a prosecution for attempted armed robbery of a service station, cross-examination of defendant as to whether the pistol used in the attempted robbery had been acquired by him in the robbery of a grocery store was an inquiry tending to establish an essential element of the crime for which defendant was on trial—the criminal intent of defendant when he entered the service station—rather than an inquiry about a collateral matter; consequently, the State was not bound by defendant's denial that he had acquired the pistol in such manner and could properly present rebuttal testimony by an employee of the grocery store that defendant had taken the pistol in a robbery of the store.

4. **Criminal Law § 169— error in limiting consideration of evidence — prejudice**

Defendant was not prejudiced by the fact that the trial court erroneously limited consideration of rebuttal testimony tending to establish an essential element of the crime to mere contradiction or impeachment of defendant, since the error was favorable to him and prejudicial to the State.

5. **Criminal Law § 34— evidence showing commission of another crime — competency to show intent**

Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused.

6. **Criminal Law § 34— evidence showing commission of another offense — competency to show intent**

In this prosecution for attempted armed robbery of a service station, rebuttal testimony offered by the State tending to show that the pistol used in the robbery was acquired by defendant in the robbery of a grocery store was competent as substantive evidence bearing upon the criminal intent of defendant when he entered the service station he is charged with attempting to rob, notwithstanding the testimony discloses defendant's commission of another crime for which he has not been convicted.

7. **Criminal Law § 95— presumption that jury followed instructions**

The law will presume that the jury followed the judge's instructions not to consider against defendants evidence presented by the State to rebut the testimony of a codefendant.

APPEAL by defendants from *McLean, J.*, 19 April 1971 Special Criminal Session, MECKLENBURG Superior Court, docketed as Case No. 146 and argued at the Fall Term 1971.

State v. Long

Defendants were charged in separate indictments with attempted armed robbery of Charles Thomas Stewart on 12 February 1971. The three cases were consolidated for trial.

The State's evidence tends to show that Charles Thomas Stewart and Ronnie Sailers worked at a Gulf Service Station located at the intersection of I-85 and Statesville Avenue in Charlotte. On 12 February 1971 at 9:45 p.m., the three defendants, in a 1962 model Mercury Comet, blue with white top, entered the service station where the driver bought and paid for a dollar's worth of gas. Will Johnson, Jr., the driver, parked the car beside a telephone booth on the corner of the lot. Wilbert Long, Jr., and Eddie Lee Johnson went inside the service station and Eddie Lee put money in a candy machine. He then requested a return of his coin, asserting that the machine did not pay off. Charles Stewart opened the cash register with a key, obtained a refund coin, and closed the register. At that time Eddie Lee Johnson stuck a black .22 caliber pearl handled pistol in Stewart's side and told him to open the register again. Stewart locked the register, pocketed the key, and began a tussle with Eddie Lee Johnson for possession of the gun. As the tussle progressed, Wilbert Long, Jr., tried to open the register which contained about $75 but was unable to do so. Charles Stewart and Eddie Lee Johnson were on the floor struggling and fighting for the gun, and Johnson called for help. Wilbert Long, Jr., thereupon joined the tussle and Eddie Lee Johnson ran out the door and disappeared in a wooded area behind the station. Wilbert Long, Jr., finally got possession of the gun and ran to the blue Mercury Comet which was waiting near the phone booth with Will Johnson, Jr., under the wheel. Long entered the car on the passenger side, and it was driven rapidly away.

Officers H. H. Edwards and P. L. Green were patrolling on Statesville Avenue on the night of 12 February 1971 and received a broadcast over the police radio that there had been an armed robbery at the Statesville Avenue-Interstate 85 Gulf Station. The broadcast gave a description of the 1962 model Mercury Comet. The officers sighted the car about 10 p.m. on Statesville Avenue about one mile from the Gulf Station and followed it to a service station parking lot at Kohler and Statesville Avenue where it stopped. Will Johnson, Jr., was driving the Comet and Wilbert Long, Jr., was riding on the

passenger side. The officers pulled into the parking lot behind them and placed the two men under arrest.

The glove compartment in the Comet was standing open about an inch or more, and Officer Edwards observed a pistol in the glove compartment when he shined his light in the car and asked the occupants for identification. The pistol was seized and offered in evidence as State's Exhibit 2. It was a .22 pistol with pearl handles, one of which was chipped. Another weapon was observed protruding from beneath the front seat and seized by the officers.

William R. Stack testified that he worked at the Little General Store on Monroe Road and that State's Exhibit 2 is a pistol he owned and kept at that store until it was taken in a robbery about three weeks prior to 12 February 1971; that State's Exhibit 2 is "a high standard Double Nine, left hand wheeler, six-inch barrel Colt Forty-four frame, .22 nine shot. It belonged to me. I got it through an inheritance. It had that chip on it, on the left front pearl handle. Prior to February 12, 1971 the last time I saw State's Exhibit No. 2 was about three weeks prior to that, a month possibly. Three or four weeks prior to February 12, 1971, it was taken in a robbery."

Defense evidence consisted of the testimony of the three defendants narrated below.

Eddie Lee Johnson testified that the three defendants went to the Gulf Service Station together to buy gas. He and Long went inside to buy cigarettes, but the station had no cigarette machine so he tried to buy a pack of Nabs. He deposited a dime in the machine, received no merchandise, and requested a refund of his money. Thomas Stewart, the service station attendant, refused a refund because it wasn't his machine, pushed the witness, and ordered him out of the station. "[S]o when he pushed me I pulled my gun out and we got into a fight over the refund" and scuffled for about fifteen or twenty minutes. Wilbert Long, Jr., joined the scuffle and "tried to take the gun away from me. . . . So I turned the gun loose and I went around to the back of the service station." Eddie Lee Johnson further stated that he never had any intention of robbing anyone, made no demands for any money except his refund, and was fighting about the refund. He stated that State's Exhibit 2 is the gun he was carrying that night and

the gun he drew on Charles Stewart. "The gun was fully loaded. I got to the service station in a blue '62 Mercury Comet. A Mercury Comet, blue and white, and Will Johnson was driving the car, and Wilbert Long, Jr., was in the car with me. Just the three of us were in the car." This witness further stated that Will Johnson, Jr., stayed in the car while he and Long entered the service station; that he did not return to the car after the fight because he was afraid. He said he had been convicted of storebreaking and larceny.

Wilbert Long, Jr., testified that he visited the restroom in the service station and when he returned "they were scuffling with the gun and I asked the man what was going on. The man told me there was trying to be a robbery, and then he told me to try to help him get the gun from the boy and I took the gun from both of them, and by that time I ran. I had no intention of hurting anybody. I was not trying to hurt Stewart or Johnson. I was just trying to break up the fight. Mr. Stewart asked me to help him get the gun." He further stated that after he got the gun he thought the best thing to do was "get away from there." He denied having any intention or making any attempt to rob anybody. He admitted on cross-examination that he had been convicted three times for larceny, twice for hit-and-run driving, and once for common-law robbery.

Will Johnson, Jr., testified that they had been to a beer joint called Hoover's Club and stopped at the Gulf Station to buy some gas. They bought and paid for one dollar's worth of gas, and he backed the car up to the telephone booth because he wanted to make a phone call. Eddie Johnson (his brother) and Wilbert Long, Jr., entered the station to get cigarettes and some Nabs. Shortly thereafter he saw Eddie Lee Johnson and Charles Stewart fighting over the gun, saw the gun up in the air, and saw Wilbert Long, Jr., join the fight when he came out of the restroom. He further stated that after Wilbert Long joined the fight Eddie Lee Johnson ran. Shortly thereafter Wilbert Long got the gun, ran from the service station, jumped in the car, and they drove away. He said a customer had intervened to aid Stewart and "the customer picked up an oil can and threw it at my car. That's when I took off."

Will Johnson, Jr., further stated that it was about 10:15 p.m. when he stopped to check his tires and put water in his

radiator and was arrested by the police who came up behind him. His testimony concerning prior offenses and the .22 caliber pistol with the chipped handle (State's Exhibit 2) will be discussed in the opinion.

The jury found each defendant guilty of attempted armed robbery, a violation of G.S. 14-87, and each was sentenced to an active prison term. Their appeal to the Court of Appeals was transferred to the Supreme Court for initial appellate review pursuant to our general order dated 31 July 1970.

T. O. Stennett, attorney for defendant appellants.

Robert Morgan, Attorney General, and Claude W. Harris, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Without objection, Will Johnson, Jr., stated on cross-examination that he had been "convicted of receiving stolen goods; of unlawful concealment. I'm presently on parole. I am on parole for receiving stolen goods and damage to property. I am presently under indictment for armed robbery. Not this case some other case. I have two cases. . . . State's Exhibit No. 2 is my pistol. I traded a .32 pistol which I owned for that pistol right there . . . at a night club. The FOUNTAIN BLEAU [sic] night club. I got it from a guy in there . . . on the 25th of January." Then the following exchange occurred: (Question) "Do you deny getting that pistol, Mr. Johnson, in an armed robbery in a Little General Store?" Objection. Overruled. (Answer) "Yes, I deny it." The question was repeated over objection and again denied.

In rebuttal, the State examined Joseph Lee Gammeter who, over objection, was permitted to testify that William R. Stack was manager of the Little General Store on Monroe Road where Gammeter worked. Mr. Stack owned the pistol identified as State's Exhibit 2 and left it at the store with the witness Gammeter on 18 January 1971. At approximately 10 p.m. on that date the defendant Will Johnson, Jr., entered the store, held it up and, among other things, took the .22 caliber pistol identified as State's Exhibit 2 and carried it away.

With respect to the foregoing rebuttal testimony of Joseph Gammeter, the judge charged the jury as follows:

"Members of the jury, the evidence of Joseph Lewis Gammeter with reference to Will Johnson, Jr., and the taking of the pistol, State's Exhibit No. 2, you will not consider this evidence against either Wilbert Long, Jr., or Eddie Lee Johnson. Nor will you consider it against Will Johnson, Jr., except, as it may tend to contradict him upon his evidence as to where he obtained the pistol, State's Exhibit No. 2, and not otherwise. You will not consider it as substantive evidence."

Defendants assign as error (1) the admission of the foregoing rebuttal testimony of Joseph Gammeter and (2) the judge's charge with respect to it. Defendants contend that where Will Johnson, Jr., got State's Exhibit 2 was a collateral matter and the State was bound by his answer, thus precluding the rebuttal testimony. Furthermore, defendants say that admission of the rebuttal testimony permitted the State to offer evidence of another, separate and distinct armed robbery allegedly committed by Will Johnson, Jr., but of which he had never been convicted. Defendants therefore contend that the rebuttal testimony of the witness Gammeter was erroneously received to their prejudice. We now examine the validity of this contention.

[1] It is a general rule of evidence in North Carolina "that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them; which rule is subject to two exceptions, first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and second, where the cross-examination is as to a matter tending to show motive, temper, disposition, conduct, or interest of the witness toward the cause or parties." *State v. Jordan,* 207 N.C. 460, 177 S.E. 333 (1934). This has been the rule since *State v. Patterson,* 24 N.C. 346 (1842). *Accord, State v. Carden,* 209 N.C. 404, 183 S.E. 898 (1936); *State v. Spaulding,* 216 N.C. 538, 5 S.E. 2d 715 (1939); *State v. Wilson,* 217 N.C. 123, 7 S.E. 2d 11 (1940); *State v. King,* 224 N.C. 329, 30 S.E. 2d 230 (1944); *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342 (1955); *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); Stansbury, North Carolina Evidence (2d ed.), Witnesses § 48(3).

[2] The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible. Stansbury, *supra; State v. Taylor,* 250 N.C. 363, 108 S.E. 2d 629 (1959). *See* Wigmore on Evidence (3d ed.) §§ 1003, 1020. When this test is applied to the challenged evidence, the inapplicability of the foregoing exclusionary rule becomes apparent. The inquiry on cross-examination of Will Johnson, Jr., as to where and how he came into possession of the pistol used in this attempted armed robbery is an inquiry tending to establish an essential element of the very crime for which defendants were on trial rather than an inquiry about a collateral matter. The State is required to show, as an essential element of attempted armed robbery, that the attempt was made with the felonious intent to deprive the owner of his property permanently and to convert it to the use of the taker. *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739 (1965). "The taking must be done *animo furandi,* with a felonious intent to appropriate the goods taken to some use or purpose of the taker." *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194 (1966).

[3, 4] In this case each defendant, testifying in his own behalf and in behalf of his codefendants, denied having any intention or making any attempt to commit robbery. The disturbance inside the service station was explained as a fight over the refund of a dime which had been deposited in a machine that delivered no merchandise. Thus the State's allegation and evidence tending to show a felonious intent to rob, and defendants' denial with evidence tending to show a complete absence of such intent, placed in issue a vital fact with the burden on the State to prove its existence beyond a reasonable doubt. The rebuttal testimony of Joseph Gammeter was competent and material as substantive evidence bearing upon a fact in issue—the intent existing in the mind of Will Johnson, Jr., when he and his codefendants approached and entered the Gulf Service Station on the night in question. For this reason the cross-examination of Will Johnson, Jr., concerning the pistol used in the commission of the crime for which he was on trial was not an inquiry concerning a collateral matter, and the State was not bound by his answer. The fact that the court erroneously limited consideration of the rebuttal testimony against Will Johnson, Jr., to

mere contradiction or impeachment of him was favorable to said defendant and he is in no position to complain. *State v. Quick,* 150 N.C. 820, 64 S.E. 163 (1904); *State v. Fowler,* 151 N.C. 731, 66 S.E. 567 (1909); *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364 (1950). It was an error prejudicial to the State and not to him.

But defendants say admission of the rebuttal testimony violated another well-settled rule of evidence to the effect that while prosecuting for one crime the State cannot offer evidence to show defendant committed another criminal offense. This requires an examination of the rule and the exceptions to it.

[5] It is a general rule of evidence that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. Stansbury, North Carolina Evidence (2d ed.) § 91. The rule and eight well-defined exceptions to it are thoroughly discussed and documented in a scholarly opinion by Ervin, J., in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). The second exception to the rule is expressed in *McClain* as follows: "2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused."

[6] The rebuttal testimony of Joseph Gammeter falls within the second exception to the rule, quoted above, and was competent as substantive evidence bearing upon the criminal intent of Will Johnson, Jr., on the night of 12 February 1971 when he and his codefendants entered the Gulf Service Station they are charged with attempting to rob. His intent is a relevant but disputed fact which the challenged evidence tends to prove. It will not be excluded merely because it also shows Will Johnson, Jr., to have been guilty of an independent crime. Stansbury, North Carolina Evidence (2d ed.) § 91; *State v. Dawson,* 278 N.C. 351, 180 S.E. 2d 140 (1971).

[7] The court properly instructed the jury not to consider the rebuttal evidence against Wilbert Long, Jr., or Eddie Lee Johnson, and the law presumes the jury followed the judge's instructions. *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453 (1970);

State v. Ray, 212 N.C. 725, 194 S.E. 482 (1938). Hence they have in nowise been prejudiced.

Defendants having failed to show prejudicial error, the verdicts and judgments must be upheld.

No error.

STATE OF NORTH CAROLINA v. LEROY COOK

No. 11

(Filed 15 March 1972)

1. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— capital case — excusing of jurors who would never return death penalty**

In a prosecution for the capital crime of rape, the trial court did not err in sustaining the State's challenges for cause to nine prospective jurors who stated on voir dire that he or she would not, under any circumstances, regardless of the evidence, consider joining in a verdict as a result of which the death penalty would be imposed, but would vote automatically against such a verdict.

2. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— capital case — Witherspoon decision — death penalty not imposed**

The decision of *Witherspoon v. Illinois*, 391 U.S. 510, has no application where the verdict rendered by the jury in a capital case does not result in the imposition of the death penalty.

3. **Criminal Law § 86— rape trial — cross-examination of defendant — conviction for other sex offenses — refusal to rule on pretrial motion**

In this prosecution for the rape of an eight-year-old child, defendant was not prejudiced by the refusal of the trial court to rule, prior to the trial, upon defendant's motion that, if he should elect to take the witness stand and testify, the State be denied the right to cross-examine him concerning his prior convictions for other sex crimes, since such cross-examination would have been competent had defendant taken the stand as a witness in his own behalf.

4. **Criminal Law § 86— cross-examination of defendant — prior convictions**

When the defendant in a criminal action becomes a witness in his own behalf, he is subject to cross-examination like any other witness and, for the purpose of impeachment, may be asked about his prior convictions, including those for offenses similar to that for which he is presently on trial.

5. **Witnesses § 1— competency of child to testify**

The determination of the competency of a child to testify is a matter resting in the sound discretion of the trial judge.

6. Witnesses § 1— competency of eight-year-old rape victim to testify

The trial court did not err in ruling that an eight-year-old rape victim was competent to testify in the trial of her alleged assailant.

7. Criminal Law § 98— sequestration of witnesses — allowing mother of raped child to remain in courtroom

In this prosecution for the rape of an eight-year-old child, the trial court did not abuse its discretion in granting defendant's motion that the witnesses for the State be sequestered, with the exception of permitting the child's mother to remain in the courtroom while the child testified.

8. Criminal Law § 66— identification of defendant — placing hand on defendant's shoulder

There was nothing improper in permitting an eight-year-old rape victim to step down from the witness chair and walk over to the defendant and, by placing her hand on his shoulder, identify him positively as her assailant.

9. Criminal Law § 66— in-court identification — failure to object or to request voir dire

The trial court did not err in permitting the in-court identification of defendant by an eight-year-old rape victim without holding a voir dire to determine whether there had been an impermissible pretrial photographic identification, where there was no objection to the initial in-court identification of defendant by the victim and there was no request for a voir dire.

10. Criminal Law §§ 89, 117— pretrial statements by rape victim — corroboration — instructions

The trial court did not err in admitting for corroborative purposes evidence of pretrial statements by an eight-year-old rape victim to her mother, to the investigating officer, and as a witness at the defendant's preliminary hearing, or in instructing the jury that such corroborative evidence might be considered "as to what weight and credit" the jury would give to the victim's testimony.

11. Witnesses § 7— allowance of unresponsive testimony

The trial court did not abuse its discretion in allowing a police officer, over defendant's objection, to give testimony concerning his investigation of an alleged rape which was not responsive to the question asked by the solicitor.

12. Witnesses § 7— right of witness to give full answer

A witness is entitled to give a full answer to a question propounded to him, subject to the right of the court in its discretion to cut off an unnecessarily detailed or repetitious answer.

13. Criminal Law § 77— request for lie detector test — self-serving declaration

The trial court in a rape prosecution properly excluded testimony by the jailer and one of the investigating officers as to alleged requests by defendant to them for the administration of a lie detector

test, the testimony being incompetent as a self-serving declaration not coming within any exception to the hearsay rule.

14. Criminal Law § 112— instructions on alibi

The trial court's instructions on alibi, including a statement that "Alibi is not a defense within any accurate meaning of the word 'defense' but is a mere fact which may be used to call into question the identity of one person charged or the entire basis of the prosecution," *held* without error.

APPEAL by defendant from *Harry Martin, J.*, at the 9 August 1971 Criminal Session of BUNCOMBE.

Upon an indictment, proper in form, the defendant was tried and found guilty of the rape of Tanya Denise Jeffries, eight years of age. The jury, at the time of returning its verdict, recommended that he be imprisoned for life. A judgment was entered imposing a sentence in accordance with the verdict and recommendation.

The child testified that she was eight years of age. On 2 May 1971, she was at an amusement area for the purpose of riding on some of the amusement devices. The defendant, whom she identified in the courtroom, took her by the arm and dragged her to a tent in a nearby wooded area. There, he partially disrobed her, whipped her and had sexual intercourse with her. Thereafter, he gave her a dollar and let her go home. Upon arrival there she informed her mother as to what had occurred. Her mother took her to the hospital where she was examined and treated. Following her release from the hospital, the child led the investigating police officer to the tent where the offense had occurred. She described her assailant to the officer and thereafter identified the last of five pictures exhibited to her as a photograph of her assailant. This was a picture of the defendant. In the perpetration of the offense, the defendant slapped her in the face and "busted her lip." She identified the defendant in the courtroom by walking to him from the witness stand and placing her hand on his shoulder.

The child's mother testified that the little girl was eight years of age at the time of the offense, that she returned home from the amusement area with her clothing dirty from grass stains and blood and with a "bursted lip." Upon arrival she told her mother what had happened. Following her stay in the

hospital for treatment, the little girl led her mother and the investigating officer to a tent in the woods near the amusement area and told them this was where the offense had occurred.

The doctor who examined the child at the hospital, approximately two hours after the alleged offense, testified that her face was swollen and bruised and that in his opinion she had been recently penetrated, there being sperm present in the vaginal canal and substantial bleeding.

The investigating officer testified as to the description of the assailant given him by the child. He further testified that from the child's description he went to the area and located a tent in a thicket of bushes and brambles down an embankment from the amusement area. Keeping this location under observation, he observed a man go over the embankment and into the bushes after nightfall. Going immediately to the tent, he found the defendant therein and arrested him. Following the child's release from the hospital, the officer took her to the vicinity and she led him to the tent, saying this was the place where the attack upon her occurred. The tent contained an old mattress, some blankets, food and clothing and gave an appearance of having been lived in for some time. The officer placed the defendant under arrest and told the defendant "to get all his things and put them in a paper bag." The defendant, in response to this instruction by the officer, took with him the clothing and food in the tent.

The defendant did not testify but offered evidence, including the reading by the reporter of excerpts from the transcript of the testimony of the child and that of her mother at the preliminary hearing, contending that these were inconsistent with their testimony at the trial. On cross-examination, the State had the reporter read other excerpts from the child's testimony at the preliminary hearing, which the court instructed the jury were competent only for the purpose of corroborating the child's testimony if the jury found that it did so corroborate her.

The defendant also introduced the testimony of witnesses to the effect that they had seen him at the amusement area during the time of the alleged offense, the apparent purpose of the testimony being to establish an alibi.

Attorney General Morgan and Assistant Attorney General Eagles for the State.

Gudger, Erwin & Crow by James P. Erwin, Jr., for defendant.

LAKE, Justice.

[1, 2] The defendant assigns as error the sustaining of challenges for cause by the State to nine prospective jurors. Each of the prospective jurors so excused stated on voir dire that he or she would not, under any circumstances, regardless of the evidence, consider joining in a verdict as a result of which the death penalty would be imposed, but would vote automatically against such a verdict. In these rulings by the trial court, there was no error. They were not in violation of the decision of the Supreme Court of the United States in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L. Ed. 2d 776. We have so held, since the Witherspoon decision was announced, in cases wherein the verdict of the jury, so selected, resulted in the imposition of the death penalty. *State v. Atkinson,* 275 N.C. 288, 303-308, 167 S.E. 2d 241; *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487. While in both of these cases the judgment was reversed by the Supreme Court of the United States, insofar as it imposed the death penalty, such reversal was on a different ground and our view as to the validity of the selection of the jury was not mentioned. Where, as here, the verdict actually rendered by the jury so selected does not result in the imposition of the death penalty, the decision in *Witherspoon v. Illinois, supra,* has no application. *Bumper v. North Carolina,* 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797; *State v. Dickens,* 278 N.C. 537, 548, 180 S.E. 2d 844; *State v. Williams,* 275 N.C. 77, 86, 165 S.E. 2d 481; *State v. Peele,* 274 N.C. 106, 113-114, 161 S.E. 2d 568. There is nothing to be gained in rethreshing this old straw.

[3] The defendant next assigns as error the refusal of the trial judge to rule, prior to trial, upon the defendant's motion that, if he should elect to take the witness stand and testify, the State be denied the right to cross-examine him concerning his prior convictions for other sex crimes. The defendant's motion recited, "that among the charges and convictions appearing on the defendant's record are charges and convictions involving sex crimes similar in nature to the crime with which

the defendant is charged in this action." His contention is that to permit the State, on cross-examination, to inquire into these offenses for the purpose of impeaching his credibility as a witness would be highly prejudicial and so, impermissible. The trial judge stated that he would not pass on the motion at that time; i.e., prior to trial. The defendant did not take the stand and, consequently, no evidence of his prior convictions on these or other offenses was introduced.

[4] It is well established in this State that when the defendant in a criminal action becomes a witness in his own behalf, he is subject to cross-examination like any other witness and, for the purpose of impeachment, may be asked about his prior convictions, including those for offenses similar to that for which he is presently on trial. *State v. Brown,* 266 N.C. 55, 58, 145 S.E. 2d 297 (no longer a correct statement of the law as to questions concerning previous indictments as distinguished from previous convictions); Stansbury, North Carolina Evidence, 2d Ed., §§ 38 and 112. Since, had the defendant taken the stand as a witness in his own behalf, cross-examination of the type in question would have been competent, the failure of the court to grant his motion prior to the commencement of the trial does not afford basis for granting him a new trial.

[5, 6] The defendant next assigns as error the ruling by the trial court, following an examination of Tanya Denise Jeffries, that the child was competent to testify, notwithstanding her tender age. Here, too, the law of this State is well settled contrary to the defendant's position. The determination of the competency of a child to testify is a matter resting in the sound discretion of the trial judge. *State v. Turner,* 268 N.C. 225, 230, 150 S.E. 2d 406, is directly in point with reference to the competency of an eight-year-old child to testify in a case of this nature. There, we said:

> "There was no error in holding that the little girl who was the alleged victim of these offenses was a competent witness. *Artesani v. Gritton,* 252 N.C. 463, 113 S.E. 2d 895; *State v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754; *State v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; Wigmore on Evidence, 3d Ed., § 505. There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath

facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. In the present case, the child was examined with reference to her intelligence, understanding and religious beliefs concerning the telling of a falsehood, all of which took place out of the presence of the jury. The record indicates that she was alert, intelligent and fully aware of the necessity for telling the truth."

In the present case, as in *State v. Turner, supra,* there is nothing in the record to indicate an abuse of discretion in permitting the child to testify.

[7] Likewise, there was no error in granting the defendant's motion that the witnesses for the State be sequestered, with the exception of permitting the child's mother to remain in the courtroom while the child testified. The sequestration of witnesses is not a matter of right but is discretionary with the trial judge. *State v. Yoes* and *Hale v. State,* 271 N.C. 616, 641, 157 S.E. 2d 386; *State v. Manuel,* 64 N.C. 601; Stansbury, North Carolina Evidence, 2d Ed., § 20. It was clearly not an abuse of discretion to permit the mother of an eight-year-old witness to remain in the courtroom while the child testified so as to give the child the comfort of her mother's presence in strange and, at best, frightening circumstances to a little girl testifying in a case of this nature.

[8] There is likewise no merit in the contention that permitting the in-court identification of the defendant by the child was error. There was nothing improper in permitting the little witness to step down from the witness chair and walk over to the defendant and, by placing her hand on his shoulder, identify him positively as her assailant. The child had previously testified that the defendant, whom she thereupon indicated in a manner not disclosed by the record, looked just like her assailant. To this testimony there was no objection. The touching of the defendant by the witness simply removed any possibility of doubt as to the man she was identifying as the assailant.

There was no reference to the little girl's pretrial selection of a photograph of the defendant from amongst five pictures, exhibited to her by the investigating officer, until the defend-

ant brought this out on cross-examination of the child. There is nothing whatever in the record to show that this pretrial procedure was conducted in an impermissibly suggestive manner. At no time did the defendant move to suppress evidence of an in-court identification of the defendant by this witness, and there was never a request by him that a voir dire be held to determine whether there had been an impermissible pretrial identification. The defendant was never placed in a lineup.

[9] In *State v. Accor* and *State v. Moore,* 277 N.C. 65, 79, 175 S.E. 2d 583, Chief Justice Bobbitt said: "When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection and requests a *voir dire* or asks for an opportunity to 'qualify' the witness, such *voir dire* should be conducted in the absence of the jury and the competency of the evidence evaluated. Upon such hearing, if the in-court identification by a witness is challenged on the ground it is tainted by an unlawful out-of-court photographic or corporeal identification, all relevant facts should be elicited and all factual questions determined, including those involving the defendant's constitutional rights, pertinent to the admissibility of the proffered evidence." In the present case, as above noted, there was no objection to the initial in-court identification of the defendant by this witness and there was no request for a voir dire. This assignment is without merit.

[10] There was no error in the admission of evidence of pretrial statements by the child to her mother, to the investigating officer and as a witness at the defendant's preliminary hearing. Stansbury, North Carolina Evidence, 2d Ed., §§ 50 and 51. The jury was instructed that this evidence was admitted for the sole purpose of corroborating the little girl if the jury found it did so. Nor was it error for the court, at the time of admitting such evidence, to instruct the jury that such evidence, competent for corroborative purposes only, might be considered by the jury "as going to what weight and credit" the jury would give to the testimony of the child. The defendant's Assignments of Error 6, 8 and 10 are overruled.

[11, 12] On cross-examination, the child testified that when the investigating officers came to see her at the hospital, she answered their questions, including their question as to what her assailant "looked like." Police Sergeant Letterman testified

that he talked to the little girl and "she described the man as being an old fellow, small, getting gray and said he had on dark pants or light or white shirt and said his hair was down on his forehead." He then continued to testify as to his and his associate's actions in the investigation, including his discovery of and first visit to the tent where the alleged offense occurred. The solicitor then asked: "All right. Now after you made the first visit to this lean-to what did you do?" The witness replied: "Let's back up just a little." Thereupon, over objection on the ground that "he ought to respond to the question as it's asked," the witness testified further concerning what he did when he first reached the amusement area where the child was first accosted by her assailant. In this testimony he related that he then talked to the defendant at this area and instructed him not to leave town as the officer might want to talk to him later. He testified that the defendant "seemed quite nervous." The defendant assigns the overruling of his objection as error on the ground that this testimony was not responsive to the question. While it was not responsive to the question above quoted, we are unable to determine from the record whether it was responsive to a previous question since the previous questions are not set forth. A witness is entitled to give a full answer to a question propounded to him, subject to the right of the court in its discretion, to cut off an unnecessarily detailed or repetitious answer. Stansbury, North Carolina Evidence, 2d Ed., § 25. There is nothing in connection with this testimony to indicate an abuse of discretion by the trial court.

Officer Letterman then identified the photograph of the defendant selected by the little girl from the five pictures handed to her for inspection by the officer. He then testified: "That's the one. I picked him up and his hair was hanging down on his forehead just like she described it." The defendant now contends that this answer was not responsive to the question propounded to the officer. The record does not show what the question was and we are, therefore, unable to find merit in this assignment of error.

[13] There was no error in the sustaining of the objection to the defendant's questions to the jailer and to one of the investigating officers, called as witnesses by him, as to alleged requests by the defendant to them for the administration of a lie detector test. The purpose of such proposed testimony was

clearly to present the inference that the defendant was innocent of the charge and had nothing to fear from such a test. Thus, the proposed testimony went further than the mere proof of a statement as a fact in and of itself. Being designed to establish the truth of the inference to be drawn from it, the proposed testimony was hearsay. Stansbury, North Carolina Evidence, 2d Ed., § 138. Being a self-serving declaration and not within any of the established exceptions to the Hearsay Rule, the objections were properly sustained. *Trust Co. v. Wilder,* 255 N.C. 114, 120 S.E. 2d 404; Stansbury, North Carolina Evidence, 2d Ed. § 140.

[14] The court properly charged the jury as to the burden of proof upon the contention supported by the defendant's evidence designed to establish an alibi. Included in that portion of the charge was the following sentence: "Alibi is not a defense within any accurate meaning of the word 'defense' but is a mere fact which may be used to call into question the identity of one person charged or the entire basis of the prosecution." The charge on the subject of alibi was full and complete and there is no merit in the exception to this excerpt from it. See *State v. Bridgers,* 233 N.C. 577, 579, 64 S.E. 2d 867.

The defendant's final contention that there was error in denying his motion for judgment of nonsuit is obviously without merit.

No error.

STATE OF NORTH CAROLINA v. KENNETH R. GREENWOOD

No. 14

(Filed 15 March 1972)

1. **Municipal Corporations § 32— regulation of billiard and dance halls — abatement of nuisances**

A municipal corporation may by ordinance license and regulate the operation of pool and billiard rooms and dance halls, G.S. 160A-181; subject to constitutional limitations, it may by ordinance define and abate nuisances. G.S. 160A-174(a).

2. **Evidence § 1— judicial notice — municipal ordinance**

The courts of this State will not take judicial notice of a municipal ordinance.

3. Constitutional Law § 20— equal protection — legislative classifications

The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found.

4. Constitutional Law § 20; Municipal Corporations § 32— Sunday closing ordinances — equal protection

Sunday closing legislation, like other legislation, may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted.

5. Constitutional Law § 20— equal protection — classifications

The equal protection clauses do not require perfection in respect of classification, and in borderline cases, the legislative determination is entitled to great weight.

6. Constitutional Law § 20; Municipal Corporations § 32— ordinance prohibiting operation of billiard hall on Sunday — violation of equal protection

A municipal ordinance prohibiting the operation of a billiard hall "at any time on Sunday" violates the equal protection clauses of the United States and North Carolina Constitutions, since the operation of billiard halls on Sunday does not constitute an interference with the peace and quiet of that day in a manner or to an extent substantially different from the operation of other sporting or recreational facilities.

Justice LAKE concurs in result.

APPEAL by defendant under G.S. 7A-30(1) from the decision of the Court of Appeals reported in 12 N.C. App. 584, 184 S.E. 2d 386.

This criminal action was commenced in the District Court Division, BUNCOMBE County, by a warrant based on an affidavit which alleged that, on or about December 13, 1970, defendant "did unlawfully, wilfully, Operate as an employee of the Family Recreation Center, a licensee, at 85 Tunnel Road on Sunday The said family Recreation Center being a Billiard Hall consisting of 16 billiard tables in violation of City Ordance [*sic*] Chapter 7 Section 7-7."

The portion of the ordinance referred to in the warrant is set out in the record as follows:

"Sec. 7-7. OPERATION BETWEEN CERTAIN HOURS AND ON SUNDAY PROHIBITED.

It shall be unlawful for any billiard hall licensee or his employee to keep such billiard hall open or to operate the same between the hours of 12:00 midnight and 8:00 a.m., or at any time on Sunday. (Code 1945, § 185)."

The cause came on for hearing before District Court Judge Winner on December 22, 1970, on defendant's (oral) motion to quash the warrant on the ground that it was based on an unconstitutional ordinance. No evidence was offered. Briefs and oral arguments were submitted. Judge Winner considered and answered four specific questions, presumably those raised by defendant as grounds for his motion to quash.

Answering Question I, Judge Winner held that the ordinance came within the provisions of G.S. 160-200(33) and that Asheville had "the power to pass a constitutional ordinance in this area." Answering Question II, he held "that the regulations of businesses, in the area [in which] they may operate, is within the police power vested in the states, and . . . the ordinance is not unconstitutional for that reason." Answering Question III, he held "it is not a denial of freedom of religion to prohibit businesses from opening on Sunday and . . . this ordinance is not unconstitutional for that reason." Question IV and Judge Winner's answer thereto are quoted in full below.

"Question IV: Is the ordinance unconstitutional in that it is a denial of equal protection of the laws, as granted by the Fourteenth Amendment of the United States Constitution? It has been held that statutes may be passed as long as they are not class legislation and are not made to apply arbitrarily to certain persons or classes or to make unreasonable discrimination between persons or classes. It is the opinion of the court that to make a distinction between billiard parlors and other forms of sporting activities for which one must pay a rental for the use of premises, is both unreasonable and arbitrary and it does create a discrimination between businesses of the same type or class with no apparent reason for the discrimination. This court cannot find any reasonable distinction between the operation of billiard halls and the operation of bowling alleys, snooker parlors, golf courses or tennis courts. In this day and time, there is nothing inherent in the playing of billiards, which distinguishes it from any of the above mentioned sports. It is therefore the opinion of this court that the ordinance named

does deny the defendant the equal protection of the laws, and it is therefore unconstitutional."

Holding the ordinance denied to defendant the equal protection of the laws, Judge Winner quashed the warrant and dismissed the action.

An appeal by the State from Judge Winner's judgment was heard at the January 25, 1971 Criminal Session of the Superior Court of Buncombe County by Ervin, J., who affirmed Judge Winner's judgment. On the State's appeal therefrom, Judge Ervin's judgment was reversed by the Court of Appeals. Defendant appeals to this Court as of right under G.S. 7A-30(1).

Attorney General Morgan and Associate Attorney General Baxter for the State.

Uzzell & DuMont, by Harry DuMont and Ervin L. Ball, Jr., for defendant appellant.

BOBBITT, Chief Justice.

Rejecting defendant's contention to the contrary, the Court of Appeals upheld the State's right of appeal from Judge Ervin's judgment. In this respect, the decision of the Court of Appeals is affirmed for the reasons well and fully stated in the opinion of Chief Judge Mallard.

G.S. 160-200(33), Vol. 3D, Replacement 1964, authorized the legislative body of a municipal corporation "[t]o license, prohibit, and regulate pool and billiard rooms and dance halls, and in the interest of public morals provide for the revocation of such licenses." The quoted statutory provision was repealed by Chapter 698 of the Session Laws of 1971, effective January 1, 1972. However, the section of the 1971 Act designated G.S. 160A-174(a) provides: "A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." Vol. 3D, 1971 Cumulative Supplement. G.S. 160A-181 in part provides: "A city may by ordinance regulate places of amusement and entertainment, and may regulate, restrict or prohibit the operation of pool and billiard halls, dance halls, carnivals, circuses, or any itinerant show or exhibition of any

kind." However, "[a] city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States." G.S. 160A-174(b).

[1] Unquestionably, Asheville may by ordinance license and regulate the operation of pool and billiard rooms and dance halls. Subject to constitutional limitations, it may by ordinance "define and abate nuisances." As to this, Judge Winner, Judge Ervin and the Court of Appeals are in accord.

The subject ordinance is violated if a billiard hall licensee opens or operates his business "between the hours of 12:00 midnight and 8:00 a.m., or at any time on Sunday." The ordinance provision on which this prosecution is based does not purport to regulate in any respect the manner in which a billiard hall is operated; it *prohibits* the operation thereof in any manner on Sunday and during specified hours on other days. The warrant charges that defendant, a billiard hall licensee, operated his place of business on a specified Sunday. Since there is no allegation that this operation occurred between the hours of 12:00 midnight and 8:00 a.m., the constitutional question here presented relates to the portion of the ordinance which absolutely prohibits the opening and operation "at any time on Sunday" of a business otherwise recognized as legitimate. The constitutionality thereof depends upon whether the absolute prohibition on Sunday of the one business of operating billiard halls by licensed operators in a lawful manner denies to defendant the equal protection of the laws guaranteed by Article I, § 19, of the Constitution of North Carolina, and by the Fourteenth Amendment to the Constitution of the United States.

"A valid ordinance must be shown or the prosecution necessarily fails." *State v. Prevo,* 178 N.C. 740, 742, 101 S.E. 370, 371 (1919). Accord: *State v. Abernethy,* 190 N.C. 768, 772, 130 S.E. 619, 621 (1925); *State v. McGraw,* 249 N.C. 205, 206, 105 S.E. 2d 659, 661 (1958).

[2] This prosecution is based solely on the ordinance provision ("Sec. 7-7") quoted in our statement of facts. As stated by Justice (later Chief Justice) Parker in *Surplus Co. v. Pleasants,* 263 N.C. 587, 591, 139 S.E. 2d 892, 895 (1965): "This Court has consistently held that our courts of general jurisdiction and the Supreme Court will not take judicial notice of a municipal

ordinance." This statement is fully supported by the cited texts and decisions.

Upon oral argument, it was stated without contradiction that Asheville has no general Sunday closing ordinance. Be that as it may, no other ordinance was offered in evidence or placed before us pursuant to stipulation. The validity of the ordinance provision under consideration must be determined solely on the basis of its own terms.

[3] The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification "be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud,* 354 U.S. 457, 465, 1 L.Ed. 2d 1485, 1491, 77 S.Ct. 1344, 1350 (1957). "The general rule is that the enactment of Sunday regulations is a legitimate exercise of the police power, and that the classification on which a Sunday law is based is within the discretion of the legislative branch of the government or within the discretion of the governing body of a municipality clothed with power to enact and enforce ordinances for the observance of Sunday, and will be upheld, *provided the classification is founded upon reasonable distinctions,* affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety." (Our italics.) *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 229, 134 S.E. 2d 364, 369 (1964).

In determining whether a Sunday ban on the operation of billiard halls, but on no other businesses which provide facilities and opportunities for recreation, amusements and sports, denies equal protection to the operators of billiard halls, consideration must be given (1) to the *purpose* of the ordinance, and (2) to the *classification* involved.

[4] The validity of a Sunday closing statute or ordinance depends "upon its reasonable relation to the accomplishment of the State's legitimate objective, which, in this instance, is the promotion of the public health, safety, morals and welfare by the establishment of a day of rest and relaxation. Legislation for this purpose, like other legislation, may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which

are permitted." *Mobile Home Sales v. Tomlinson,* 276 N.C. 661, 666-67, 174 S.E. 2d 542, 546 (1970). Assuming Asheville's objective was to promote Sunday as a day of rest, tranquillity and relaxation, the subject ordinance provision does nothing to accomplish that objective except prohibit the operation of billiard halls.

[6] The crucial question is whether, in relation to the purpose of the ordinance, there is a rational basis for placing billiard halls in a unique class, separate and apart from all other businesses which offer facilities and opportunities for recreation, sports and amusements. An affirmative answer would require that we hold that the operation of billiard halls on Sunday constitutes an interference with the peace and quiet of that day in a manner or to an extent substantially different from the operation of other sporting or recreational facilities. To so hold would require us to disregard plain facts. Bowling alleys, dance halls, skating rinks, swimming pools, amusement parks, spectator games and sports, and similar businesses, no less than billiard halls, are *potential* gathering places for idlers and trouble-makers and *potential* centers for boisterousness, immorality and crime. However, all are facilities for wholesome recreation. In terms of the *purpose* of the ordinance all are within *the same classification.*

Municipal ordinances which prohibit generally all sales of merchandise on Sunday with specific exceptions have been upheld in *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370 (1965); *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5 (1966); *Kresge Co. v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d 236 (1969); *Mobile Home Sales v. Tomlinson, supra; Kresge Co. v. Davis,* 277 N.C. 654, 178 S.E. 2d 382 (1971). Municipal ordinances which prohibit generally all businesses on Sunday with specific exceptions have been upheld in *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198 (1949); *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783 (1953); *State v. Towery,* 239 N.C. 274, 79 S.E. 2d 513 (1954); *Clark's Charlotte, Inc. v. Hunter, supra.* The issue of whether there was a rational and nondiscriminatory basis for the exceptions to the general prohibitions was involved in these cases.

In *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764 (1962), the statute under consideration prohibited Sunday sales, at retail, of specified articles of merchandise, but

excepted "novelties, toys, souvenirs, and articles necessary for making repairs and performing services." The provision purporting to identify excepted articles was held "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 213, 125 S.E. 2d at 769. The statute was held unconstitutional on the ground of uncertainty as to what merchandise was affected by the prohibition. Hence, there was no basis for considering whether there was a rational and nondiscriminatory basis for the specific prohibitions.

[5] The equal protection clauses do not require perfection in respect of classifications. In borderline cases, the legislative determination is entitled to great weight. However, this is not a borderline case. The Sunday closing ordinance here involved singles out and bans one particular business but permits others which provide facilities for recreation, sports and amusements, and potentionally are equally disruptive.

Although different factually, decisions based on cognate legal principles include the following: In *State v. Smith,* 265 N.C. 173, 143 S.E. 2d 293 (1965), a Forsyth County resolution which closed "clubs" located within three hundred yards of a church or school between 2:00 a.m. and 12:00 midnight on Sunday, was held to be arbitrary and unreasonable. In *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18 (1968), an ordinance which strictly regulated "massage parlors, health salons, or physical culture studios" but excepted barber shops, beauty parlors, and Y.M.C.A. and Y.W.C.A. health clubs, was held to violate equal protection. In *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860 (1948), a statute (G.S. 113-172) which proscribed the emptying of deleterious substances into the waters of the State, but exempted corporations chartered before 1915, was held "to mechanically split into two groups persons in like situation with regard to the subject matter dealt with" and therefore to be unconstitutional.

In *its appeal* from Judge Ervin's judgment, *the State* did not draw into focus, and the opinion of the Court of Appeals did not discuss, the Sunday closing feature of the ordinance provision. However, on *his appeal* from the Court of Appeals, *defendant* emphasizes this feature both by brief and on oral argument.

[6] Since the ordinance provision prohibiting the operation of billiard halls on Sunday violates the equal protection clauses, defendant's motion to quash was properly allowed. Hence, the judgment of the Court of Appeals is reversed; and the cause is remanded to the Court of Appeals with direction to enter a judgment affirming the judgment of Judge Ervin.

Reversed.

Justice LAKE concurs in results.

IN RE INCORPORATION OF INDIAN HILLS, JACKSON COUNTY, NORTH CAROLINA

No. 63

(Filed 15 March 1972)

1. **Actions § 12; Statutes § 11— repeal of statute — survival of proceeding**

   In order to permit a proceeding to survive the repeal of the statute which authorized it, there must be a saving clause in the repealing act or a general saving statute applicable to all cases.

2. **Municipal Corporations § 1; Statutes § 2—incorporation of single village — general or special act**

   In determining whether a statute relating to the incorporation of a single village is a general law which the General Assembly has power to enact, the court will look beyond the form of the act and ascertain whether the statute is in fact generally and usually applicable throughout the State.

3. **Municipal Corporations § 1; Statutes § 2— incorporation of Indian Hills — statute reinstating Municipal Board of Control — special legislation**

   The Municipal Board of Control was abolished by an act which contained no saving clause permitting the Board to complete its unfinished business. A subsequent act purported to reinstate the Board for the sole purpose of allowing it to determine any petition or other matter pending before the Board at the time it was abolished. The only business pending before the Board when it was abolished was an application for incorporation of "Indian Hills." *Held:* The act purporting to reinstate the Municipal Board of Control is unconstitutional, since it is not a general saving clause but was enacted for the purpose of completing a single proceeding. [Former] Art. VIII, Sec. 4 of the N. C. Constitution.

APPEAL by Eastern Band of Cherokee Indians (Indians), interveners, before *Clark, J.,* February 9, 1971 Civil Session,

WAKE Superior Court. This case was docketed and argued at the Fall Term 1971 as No. 62.

This proceeding originated on January 7, 1969, by petition signed by a majority of the landowners and qualified voters of a designated area in Jackson County requesting that the area be incorporated. The described area is one mile long divided lengthwise by U. S. Highway 441. The east and west boundaries are 675 feet from the center of the highway. The northern boundary joins the Cherokee (Qualla) Indian Reservation. Cherokee, the present Indian town, is within one mile of the northern boundary.

On the date the petition was filed the area contained sixty-two inhabitants, forty-two qualified voters, and twenty tracts of land valued at $436,870.00. The petitioners requested that the area be incorporated as "Cherokee Town." The petition was addressed to the Municipal Board of Control (Board) and filed with the Secretary of State.

The Board posted notice and held a hearing as required by Article 17, Chapter 160, Sections 195, 196, 197 and 198 of the General Statutes.

The Eastern Band of Cherokee Indians intervened and filed objections to the proposed incorporation. Among the objections were: (1) The area is within three miles of the Indian Town of Cherokee; (2) the purpose of the proposed incorporation is to exploit and to cash in on the Indian name and syphon off from the Indians the lucrative trade which they have fostered and built with the hundreds of thousands of visitors attracted to the area; (3) the new incorporation would deprive them of their present livelihood; and (4) the proposed incorporation would legalize the sale of and make available to the Indians harmful commodities and drinks which are illegal and forbidden on the Reservation.

The interveners alleged they are qualified to protest the proposed incorporation by reason of the fact that they are an incorporated body created by Chapter 211, Private Laws of 1889, and by Chapter 166, Private Laws of 1895, with power to sue and defend actions in courts and before boards in which their rights are involved. (See *U.S. v. Wright,* 53 F. 2d 300, Certiorari denied 285 U.S. 539.)

The petitioners by amendment changed the proposed name substituting "Indian Hills" for "Cherokee Town." On March 19, 1969, the Municipal Board of Control, after hearing and findings, ordered the incorporation as prayed for in the petition. The Indians obtained a review in the Superior Court of Jackson County on March 28, 1969. Judge Bryson affirmed the order of incorporation.

The Court of Appeals by decision filed June 24, 1970, 8 N.C. App. 564, 174 S.E. 2d 850, reversed Judge Bryson's order and remanded the cause for further findings of fact calling attention to the failure of the Board and of the Superior Court to make a finding that the proposed area was not within three miles of the "limits of any city, town, or incorporated village."

On February 19, 1971, the Superior Court of Wake County found further facts and affirmed the order incorporating Indian Hills. The interveners brought the case here for final review alleging the order of incorporation was invalid and that Chapter 1225, Session Laws of 1969, under which the Municipal Board of Control and the Superior Court purported to act, was unconstitutional.

McGuire, Baley & Wood by J. M. Baley, Jr., for petitioner appellants.

Maupin, Taylor & Ellis by Charles B. Neely, Jr., for respondent appellees.

HIGGINS, Justice.

Prior to amendment in 1916, Article VIII of the North Carolina Constitution of 1868 provided: "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages . . . ." The new Constitution in effect since November 3, 1970, provides in Article VII, Section 1: "The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions . . . ."

> "A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory . . . . Its charter is the legislative description of the power to be exercised . . . .

". . . 'It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words, second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' " *Smith v. Winston-Salem,* 247 N.C. 349, 100 S.E. 2d 835.

By Chapter 136, Public Laws of 1917, Article 17, Section 160-165, the General Assembly created the Municipal Board of Control consisting of the Attorney General as chairman, the Secretary of State as secretary, and the Chairman of the Utilities Commission as the third member. Sections 160-196, 197 and 198 purported to give to the Board, after hearing and findings of fact, power to enter an order incorporating a described territory into a town giving it the name proposed in the petition. Section 160-196 provides that a new corporation shall not be set up "within three miles of the area included in the limits of any city, town or incorporated village . . . ."

The passage of Chapter 136, Public Laws of 1917, appears to have been a departure from the theory that the creation of municipal corporations is exclusively a legislative function. It is worthy of note that prior to the repeal of Article 17, the General Assembly, when occasion arose, ratified and confirmed the creation of municipalities by the Board. For example, Chapter 1032, Section 2, Session Laws of 1953, provided: "The incorporation of municipal corporations by the municipal board of control, under Article 17 of Chapter 160 of the General Statutes of North Carolina, which have occurred prior to the enactment of this subsection are hereby in all respects validated, confirmed and declared to be in all respects municipal corporations . . . ."

In 1969 the General Assembly appears to have returned to the original concept that the creation of municipal corporations is the business of the General Assembly. Chapter 673, Session Laws of 1969, repealed as of the date of its passage Article 17, Chapter 160 of the General Statutes. The act, however, provided that all charters created by the Board prior to the repeal were ratified and confirmed. Hence, up to the date of its pas-

sage all prior acts of incorporation ordered by the Board were made valid and were confirmed. The repealing statute became effective upon its passage which occurred on June 2, 1969. On that day and by that act the Municipal Board of Control ceased to exist. The repealing statute by failing to contain a saving clause permitting it to complete its unfinished business terminated the Board's existence, leaving the Board without power to proceed further on any matter.

However, on July 1, 1969, the General Assembly enacted Chapter 1225 in a belated attempt to insert a saving clause and to reinstate the Municipal Board of Control with power to complete its unfinished business. The only unfinished business on the date of the passage was the application for the charter for Indian Hills. Chapter 1225, Section 2½ provided:

> "Notwithstanding any other provisions of this Act, Article 17 of Chapter 160 of the General Statutes is hereby re-enacted for the sole purpose of conferring upon the Municipal Board of Control the power and authority to hear and make a determination of any petition or other matter filed or pending with the Municipal Board of Control prior to June 2, 1969. Upon the determination of such pending matters, the Municipal Board of Control shall cease to exist."

The Board having been completely abolished, its re-creation by the General Assembly could be only by a general law. "As a general rule the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions and proceedings pending under it at the time of its repeal. The rule is especially applicable to the repeal of statutes creating a cause of action, providing a remedy not known to the common law, or conferring jurisdiction where it did not exist before, and abates proceedings . . . pending on appeal . . . ." 82 CJS, Section 439, STATUTES.

"Under the common law, it has been held that, if a statute is unconditonally repealed without a saving clause in favor of pending suits, all pending proceedings thereunder are terminated, and if final relief has not been granted before the repeal goes into effect, it may not afterwards." 50 Am. Jur. § 530, STATUTES. See *Corporation Com. v. R. R.*, 185 N.C. 435, 117 S.E. 563.

[1] In order to permit a proceeding to survive there must be a saving clause in the repealing act or a general saving statute applicable to all cases. The subsequently passed act attempting to reactivate the Municipal Board of Control for the very special and limited purpose of completing an admittedly single proceeding does not and cannot qualify as a general saving clause. 82 C.J.S., Section 439, ACTIONS & OTHER PROCEEDINGS PENDING, and Section 440, SAVING CLAUSES.

At the time Chapter 1225, Session Laws of 1969, was enacted, the State Constitution, Article VIII, Section 4, provided: "It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation . . . assessment . . . contracting debts . . . so as to prevent abuses . . . by such municipal corporations." Although the new Constitution approved at the November election 1970, effective July 1, 1971, does not contain the above section, nevertheless, we must test the legality of Chapter 1225 by the constitutional provisions in effect at the date of its passage.

At the time the Court of Appeals reversed the Board's incorporating order, the act creating the Board had been repealed and the Board had been abolished unless saved by Chapter 1225. The interveners challenged the validity of Chapter 1225 upon the ground: (1) That it was a belated and unsuccessful attempt to insert a saving clause in Chapter 673; and (2) that Chapter 1225 was not a general law as required by the Constitution.

In determining whether Chapter 1225 qualified as a general law it is necessary to look at the actual purpose to be accomplished. The actual purpose was to complete the incorporation of Indian Hills which was the Board's only unfinished business when the Board was abolished. Stating the law in general terms did not make it a general law. The chapter's only purpose was to complete a single incorporation.

For purpose of clarification: " . . . (I)ntent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548.

[2] In determining whether a statute relating to the incorporation of a single village is a general law which the General Assembly has power to enact, the court will look beyond the form of the act and ascertain whether the statute in fact is generally and usually applicable throughout the State.

"The courts are not bound by the letter of the law, which has been denominated its 'body,' but may consider its spirit, which has been called its 'soul.'" *Kearney v. Vann,* 154 N.C. 311, 70 S.E. 747.

"Where . . . adherence to the strict letter would lead to injustice, the Court gives a reasonable construction consistent with the general principles of law. The spirit, or reason of the law, prevails over its letter." *State v. Scott,* 182 N.C. 865, 109 S.E. 789.

[3] We conclude that Chapter 1225 was unconstitutional and invalid. The judgment entered in the Superior Court of Wake County is

Reversed.

STATE OF NORTH CAROLINA v. KERMIT ALLEN SELF

No. 91

(Filed 15 March 1972)

1. **Criminal Law § 169; Rape § 10— marital status of defendant — evidence admitted over objection — similar evidence admitted without objection**

In this prosecution for kidnapping, rape and crime against nature, the admission of testimony to the effect that defendant was married at the time of the alleged offenses was not prejudicial error where defendant thereafter fully explained, without objection, his marital status at the time of the alleged crimes, at the time of his arrest, and at the time of the trial.

2. **Criminal Law §§ 102, 128— improper question by solicitor — motion for mistrial**

In this prosecution for kidnapping, rape and crime against nature wherein the prosecutrix testified that defendant gained entrance to her home when he appeared at the front door and asked if he could come in and see the layout of the home, the trial court did not err in denying defendant's motion for mistrial after the solicitor asked defendant if he had not tried to gain entrance into a woman's house

in another county by telling her that he was interested in the house and wanted to see the inside thereof, where the court sustained defendant's objection to the question, excused the jury and instructed the solicitor not to ask further questions along that line, and instructed the jury not to consider the question but to strike it from their minds.

3. Criminal Law § 46— evidence of flight

An accused's flight from a crime shortly after its commission is admissible as evidence of guilt.

4. Criminal Law § 46— flight 16 days after crimes — competency

Evidence that defendant left his home 16 days after the alleged offenses of kidnapping, rape and crime against nature were committed was competent to be considered by the jury in connection with other circumstances in passing upon the question of guilt.

5. Criminal Law § 46— evidence of flight — instructions — defendant's contention

In this prosecution for kidnapping, rape and crime against nature, the trial court correctly charged the jury on the effect of evidence of defendant's flight from this State and charged upon defendant's contention that he left the State to prevent his first wife from having him picked up for nonsupport.

APPEAL by defendant from *Snepp, J.*, at the 19 July 1971 Session of CATAWBA Superior Court, docketed and argued as case No. 164, Fall Term 1971.

Defendant was charged in separate bills of indictment with kidnapping, rape, and crime against nature. The cases were consolidated for trial, and defendant entered pleas of not guilty. The jury returned verdicts of guilty as charged in all three cases, with a recommendation of life imprisonment on the rape charge. From the sentence of life imprisonment for rape, and concurrent sentences of 20 years for kidnapping and 10 years for the crime against nature, defendant appealed.

The evidence for the State tends to show: On 2 December 1969 the prosecutrix, Mrs. Linda Howard, her husband, and twelve-year-old son were at their home in Catawba County where they had lived for some eleven years. On that morning about 6:30 Mr. Howard left to go to work, and about 7:30 a.m. their son left for school. At approximately 10 a.m. defendant, whom the prosecutrix had never seen before, appeared at the front door and expressed an interest in the layout of the house. He asked her if he could come in and see the inside. The prosecutrix admitted him. Defendant told the prosecutrix that he

had formerly worked with her husband. After some further conversation, defendant produced a knife, threatened to kill her if she screamed, dragged her out of the house, and forced her to get into his white station wagon. Defendant drove away from the prosecutrix' home and while driving forced the prosecutrix to partially disrobe and perform oral intercourse on him. Later defendant stopped at a secluded spot, forced the prosecutrix to remove her remaining clothes, blindfolded her, and made her walk across a field to an old abandoned house. After staying there for a short time, defendant dragged the prosecutrix back to the station wagon, put her in the rear portion of the vehicle, and forced her to commit both natural and unnatural acts of intercourse. Defendant several times threatened the prosecutrix' life unless she cooperated, and at no time did she consent to these natural and unnatural acts. Defendant then drove the prosecutrix to a point near her home where he released her. He told her he had a gun and if she looked back he would blow her head off. She walked home and immediately called her mother-in-law who lived nearby and the police.

Dr. Joseph Cutchins examined the prosecutrix about 6:30 p.m. on 2 December 1969 and found bruises on her neck and numerous scratches on her legs.

That night the prosecutrix made a formal statement to Sergeant Virgil Eller of the Catawba County Sheriff's Department and gave him a detailed account as to what had occurred and a description of the defendant and his car. Sergeant Eller later saw a car like the one described by the prosecutrix and learned that it was registered in Forsyth County in defendant's name. Sergeant Eller drove to the residence listed for defendant —a trailer park—where he found the car parked. Eller knocked on the door of the trailer, and defendant came to the door. Eller did not have a warrant for defendant at that time and, after some conversation with defendant, left without identifying himself as an officer. Two hours later he and two other officers returned to the trailer with a warrant for defendant's arrest, but defendant was gone.

Jackie Lowman, a neighbor of the prosecutrix, was driving out of his driveway about 6:30 a.m. on 2 December 1969 and almost collided with a white station wagon parked at the end of his driveway with the lights off. Lowman identified defendant as the driver of this car.

Defendant testified in his own behalf. His testimony tends to show that on the date in question he did go to the home of the prosecutrix and that she accompanied him to a secluded spot where they drank whiskey and engaged in natural and unnatural intercourse for some three hours; that at no time did defendant threaten the prosecutrix' life or commit any acts of intercourse against her will, but to the contrary the prosecutrix left her home and went with him willingly and consented completely to all the acts of intercourse in which they engaged. Defendant's testimony further tends to show that he first met the prosecutrix at a local drive-in restaurant in 1961 and that he had visited her at her home on about ten occasions since that time; that on his last visit, shortly before 2 December 1969, she kissed him and instructed him to bring some whiskey the next time, that they would have "to go and do something."

Defendant's testimony further tends to show that on 17 December 1969 he received a phone call from his first wife who said that she was going to have him picked up because he was three weeks behind in his support payments, and that the next day when Sergeant Eller came to his trailer he assumed it was in regard to these payments. He then took his four daughters to live with Mr. Dewey Armstrong and told Mr. Armstrong that the police were after him, and for him not to tell them where he had gone. In April of 1970 defendant established a residence in Riviera Beach, Florida, and in August of the same year was arrested there.

At the conclusion of the defendant's evidence, the State offered testimony of four local residents whose testimony tends to show that the reputation of the prosecutrix in the community in which she lives is good.

Attorney General Robert Morgan, Special Counsel Ralph Moody, and Deputy Attorney General Andrew A. Vanore, Jr., for the State.

John S. Freeman and H. Edward Knox for defendant appellant. Of counsel: Wardlow, Knox, Caudle & Knox

MOORE, Justice.

[1] Defendant contends that the court erred in admitting testimony to the effect that defendant was married at the time of the alleged offenses. Defendant testified without objection that

he was married, that he had four daughters and had had two wives, that his present wife Louise was in the courtroom at the trial. When asked if this was the same lady he was married to on 2 December 1969, defendant objected. The objection was overruled and he answered, "No." Defendant then testified that he was working for his present wife when he was arrested in August 1970 and that he married his present wife on 20 January 1971. Over objection, he further testified that when he was arrested he was still married to his wife in Winston-Salem. Defendant then further testified without objection that "when I was arrested I was going by the name of Bill Miller. As to why I had gone to Florida and take up the assumed name of Bill Miller, my first wife had called me on December 17. I had been out of work several months with an operation. I had to give up truck driving after 18 years. On December 17, my wife called me up and said she was going to have me picked up because I was three weeks late on the support payment." Thus, defendant fully explained, without objection, his marital status at the time of the alleged crime, at the time of his arrest, and at the time of his trial.

In *State v. McDaniel,* 272 N.C. 556, 563, 158 S.E. 2d 874, 881 (1968), Justice Lake quotes with approval from *State v. Adams,* 245 N.C. 344, 95 S.E. 2d 902 (1957):

> " 'Exceptions by the defendant to evidence of a State's witness will not be sustained where the defendant or his witness testifies, without objection, to substantially the same facts. *State v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590.
>
> " 'Likewise, the admission of evidence as to facts which the defendant admitted in his own testimony, cannot be held prejudicial. *State v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804.'
>
> "The rule so stated is well established in this and other jurisdictions. [Citing authority.]"

This assignment is overruled.

[2] Defendant next contends the court erred in allowing testimony as to a separate unrelated offense in another county and in denying defendant's motion for mistrial with regard thereto. This assignment is based upon the following proceedings:

"Q. Well, I ask you Mr. Self, if you didn't go over to Stokes County and go to a woman's door and. . .

"MR. KNOX: Objection your Honor.

"COURT: He has not finished the question.

"MR. KNOX: Your Honor. . .

"Q. . . . and knocked on the door and tell this woman that you liked the house. . .

"MR. KNOX: Objection.

"COURT: Let him finish the question.

"MR. KNOX: He knows it is improper question.

"COURT: I don't know, I have not heard it.

"MR. KNOX: I ask you to excuse the jury and let him ask it.

"COURT: Objection is overruled.

EXCEPTION NO. 18

"Q. Now, Mr. Self, I ask you if you didn't go over to Stokes County to a woman's house and knock on the door and tell her that you were interested in her house and that you wanted to see the inside of the house to try to gain entrance into the house?

"MR. KNOX: Objection.

"MR. GORDON: Objection.

"COURT: Sustained.

"MR. KNOX: Move to strike it.

"COURT: You will not consider the question.

"MR. KNOX: I would like to make a motion your Honor, please. Your Honor would you hear me on a motion at this time?

"COURT: Let the jury go out.

(The jury was removed from the courtroom.)

"MR. KNOX: At the conclusion of the question of the defendant, the defendant moves for a mistrial on the ground

that the question was highly prejudicial and was improper and is impossible for the defendant to get a fair and impartial trial before this jury now. The solicitor knows. . .

"COURT: I will deny your motion. I don't know of any evidence of that in this case. I told the jury to disregard it and the motion for a mistrial is denied. Bring the jury back.

EXCEPTION No. 19

"COURT: Ask no further questions on that.

"MR. GREENE: I want to ask. . .

"COURT: You heard me Mr. Solicitor.

"MR. GREENE: About a particular. . .

"COURT: You heard me Mr. Solicitor.

"MR. GREENE: Yes, sir.

(The jury was returned into open court.)

"COURT: Members of the jury you will not take into consideration the last question asked by the solicitor. You will strike that from your minds."

Defendant admits that the objection to the challenged question was sustained by the court and that the jury was instructed not to consider the question. Defendant contends, however, that the import of the question was apparent before the question was completed, that the jury should have been excused so that the court could have ruled on the completed question in the absence of the jury, and that the question itself left an impression upon the minds of the jurors which could not be erased by the court's instruction. We hold, however, that the court's prompt action in sustaining defendant's objection to the question and in excusing the jury and instructing the solicitor not to ask further questions along that line, coupled with the court's specific instruction to the jury not to consider the question but to strike it from their mind, was sufficient to remove any possibility of error.

In *State v. Moore,* 276 N.C. 142, 149, 171 S.E. 2d 453, 458 (1970), Justice Sharp quoted with approval from *State v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484 (1938):

" . . . '[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. *Wilson v. Mfg. Co.*, 120 N.C. 94, 26 S.E. 629.' Accord, *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216; 2 Strong, N. C. Index 2d Criminal Law § 96 (1967)."

This assignment is without merit.

Defendant next assigns as error the admission of testimony as to defendant's leaving the State of North Carolina. Defendant contends that the record indicates that he left Winston-Salem on 18 December 1969, sixteen days after the commission of the alleged crime, and that the record is silent as to when he left North Carolina except that it does show he established residence in Florida in April 1970. Defendant contends that such a lapse of time renders the relationship between his departure and any supposed consciousness of guilt too remote for the evidence to be considered by the jury.

[3] North Carolina has long followed the rule that an accused's flight from a crime shortly after its commission is admissible as evidence of guilt. See *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959); *State v. Dickerson*, 189 N.C. 327, 127 S.E. 256 (1925); *State v. Hairston*, 182 N.C. 851, 109 S.E. 45 (1921); *State v. Nat*, 51 N.C. 114 (1858). The State contends that the fact defendant left his home immediately after being questioned by Sergeant Eller, that he left his children with Mr. Dewey Armstrong in Winston-Salem and told Mr. Armstrong not to tell the officers where he had gone, and that months later defendant was found living in Florida under an assumed name, were all circumstances for the jury to consider.

In *State v. Ball*, 339 S.W. 2d 783 (Mo. 1960), cited by the defendant in his brief, it was held that flight occurring approximately three weeks after the crime was a relevant circumstance and that the remoteness of the flight goes only to the weight not the admissibility of the evidence. See 29 Am. Jur. 2d, Evidence § 280; Annot., 25 A.L.R. 886 (1923).

[4] In the present case, evidence that defendant left his home 16 days after the alleged offenses were committed is competent to be considered by the jury in connection with other circum-

stances in passing upon the question of guilt. *State v. Payne,* 213 N.C. 719, 197 S.E. 573 (1938), and cases therein cited.

[5] Finally, defendant's sixth assignment of error states: "The Court erred in failing to state defendant's contention and declare and explain the applicable law, with regard to the defendant's leaving the State of North Carolina. Defendant's exception No. 23 (R p 77)."

This assignment could be dismissed for failure to comply with the rule stated in *State v. Kirby,* 276 N.C. 123, 131, 171 S.E. 2d 416, 422 (1970), as follows:

> "Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. 'When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears . . . will not present the alleged error for review. . . .' *Samuel v. Evans* and *Cooper v. Evans,* 264 N.C. 393, 141 S.E. 2d 627."

However, an examination of the record in the case at bar discloses that the court correctly charged the jury:

> "Now ladies and gentlemen of the jury, the State has introduced evidence which tends to show that the defendant fled this jurisdiction. I instruct you that evidence of flight may be considered by you together with all the other facts and circumstances in this case in determining whether the combined circumstances amount to admission or shows a consciousness of guilt, however, I instruct you the proof of this circumstance is not sufficient in itself to establish the defendant's guilt of any of these offenses."

The record further discloses that the court stated that defendant contends he left the State to prevent his first wife from having him picked up for nonsupport. If defendant wished the court to give additional contentions, it was his duty to request them. *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477 (1967); 3 Strong, N. C. Index 2d, Criminal Law § 163.

Nothing appears in the record which would warrant disturbing the verdicts or the judgments. They will therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. ZOLLIE WILSON, JR.

No. 1

(Filed 15 March 1972)

1. **Criminal Law § 166— abandonment of exceptions and assignments of error**

Exceptions and assignments of error not brought forward into the brief are deemed abandoned. Supreme Court Rule 28.

2. **Criminal Law § 42— weapons used in crime**

Weapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime.

3. **Criminal Law § 42; Homicide § 20— gun used in homicide — sufficiency of identification**

In this homicide prosecution, a shotgun was sufficiently identified as the one used in the crime for its admission in evidence, where a witness testified that he threw the shotgun used in the shooting from a car and thereafter told a police officer where it was, and the officer testified that he found the shotgun where the witness stated he had thrown it, that he delivered it to the S.B.I., that it was received from the S.B.I. by another officer, and that it was his opinion that the gun offered in evidence was the same gun so found by him; even if the admission of the shotgun was error, it was harmless in view of the testimony of five eyewitnesses that defendant shot deceased with a shotgun.

4. **Homicide § 21— failure to introduce weapon**

While relevant, the identification and the introduction in evidence of the weapon used is not essential to a conviction of murder.

5. **Criminal Law § 162— objection to responsive answer**

An objection to an answer responsive to a question comes too late after the witness has so answered the question.

6. **Homicide § 20— photograph of body — illustrative purposes**

A photograph of the body of deceased was properly admitted in evidence in a homicide prosecution for the purpose of illustrating the testimony of a witness as to the location of a wound on the body.

7. Homicide § 15— fact of death — non-expert testimony

A non-expert who has observed a deceased person is competent to testify as to the fact of death.

8. Homicide § 15— cause of death — non-expert testimony

While it is the usual and better practice in a prosecution for homicide to offer medical testimony as to both the fact of death and the cause of it, even the cause of death may be established by non-expert testimony when the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that an observed wound was mortal in character.

9. Homicide § 21— fact and cause of death — non-expert testimony — sufficiency of evidence

There was ample evidence in this homicide prosecution to support a finding both of the fact of death and that the cause of death was the shooting of the deceased by the defendant, where the State's evidence tended to show that deceased was shot by defendant in the chest or upper abdomen with a shotgun at close range, that he fell immediately and that blood flowed from the wound, and non-expert witnesses who observed the body testified that deceased was dead on arrival at a hospital shortly after the shooting occurred.

10. Homicide § 4— first degree murder — intent to kill

A specific intent to kill is an essential element of first degree murder.

11. Criminal Law § 6; Homicide § 8— defense of intoxication

While voluntary drunkenness is not, per se, an excuse for a criminal act, it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent, such as the intent to kill.

12. Homicide § 28— defense of intoxication — instructions

The trial court's instructions in this homicide prosecution properly presented to the jury the question arising upon the evidence with reference to the intoxication of defendant and correctly stated the law applicable thereto.

13. Homicide § 28— failure to instruct on "unconsciousness"

In this homicide prosecution, defendant's testimony that, by reason of his voluntary intoxication, he did not "remember" the shooting or anything about it did not require the court to instruct the jury, as requested by defendant, that "when a person commits an act without being conscious thereof, such act is not a crime even though if committed by a conscious person it would be a crime."

APPEAL by defendant from *Braswell, J.*, at the 6 June 1971 Session of WARREN.

By an indictment, proper in form, the defendant was charged with the murder of Charlie Wilbert Alston. The jury returned a verdict of guilty of murder in the first degree, with

recommendation that the defendant be sentenced to imprisonment for life. Judgment in accordance with the verdict was entered. The evidence for the State, consistingly primarily of the testimony of five eyewitnesses, was to the following effect:

On 3 October 1970, Alston and the defendant, along with a number of other people, were at a "piccolo joint." They got into an argument. Thereafter, the defendant went home in a car driven by William Southerland. En route he said that he was tired of people "doing him wrong." Contrary to Southerland's advice, after entering his home, he returned to the car and got Southerland to drive him back to the "piccolo joint."

When the defendant got back to the "piccolo joint," Alston, with a woman companion, was sitting in a parked car on the premises of this establishment waiting for other companions to come out so that they all might go to their homes. The defendant got out of Southerland's car carrying a shotgun, entered the building, looked around for a minute or two and then went back outside. At that time Alston, for some unknown reason, got out of the car in which he had been sitting. In the act of getting out of the car his back was turned to the defendant. Turning around, he was face to face with the defendant, who was some fifteen to twenty feet away. Neither said anything. Alston raised both hands above his head. He had nothing in either hand. Almost immediately the defendant raised his shotgun and fired, the shot striking Alston in the chest or upper abdomen. Alston fell on his back immediately and blood flowed from the wound "over top of his stomach."

The defendant, saying nothing, got back into the car of Southerland who drove him to his home. There they picked up the defendant's woman companion, to whom the defendant announced that he had killed Alston, and drove to a house in Henderson where Southerland left the defendant and his companion and where the defendant was subsequently arrested. En route to his own home, Southerland threw the shotgun into or across a ditch at the end of a dead end road. The investigating officer found a shotgun at the point where Southerland told him he had thrown it. The gun so found was offered in evidence by the State.

Meanwhile, the State's witness Hargrove and another person picked up Alston and carried him to the hospital in Hender-

son. Hargrove testified that when they got to the hospital Alston was dead. Deputy Sheriff Capps, the investigating officer, testified that he saw Alston's body at the hospital, that Alston was dead and that he, Deputy Capps, took photographs of the body with which he illustrated the location of the wound. These photographs and photographs of the scene of the shooting, also identified by Deputy Capps, were introduced in evidence.

William Southerland, a witness for the State, testified that at the time of the original argument each man had a knife in his hand. No witness testified that Alston had anything in his hand at the time of the shooting. Another witness for the State testified that at the time of the argument he heard Alston say to the defendant, "I know you got a knife, but I ain't got no knife."

The defendant testified in his own behalf and offered other witnesses. His testimony was that he had been drinking heavily prior to and after his arrival at the "piccolo joint," and he remembered nothing whatever about the shooting, he having no reason to shoot Alston. Other witnesses for the defendant testified that there was a considerable amount of drinking at the "piccolo joint" on this occasion. Witnesses for the State testified that none of the persons involved in this occurrence were drunk, and Southerland, who drove the car in which the defendant rode to and from the "piccolo joint" on both trips, testified that, in his opinion, the defendant was not under the influence of intoxicants.

There was no evidence of any attack by Alston upon the defendant, any threat by Alston or any justification or reason for the shooting.

Attorney General Morgan, Assistant Attorney General Hafer and Staff Attorney Davis for the State.

Clayton and Ballance by Frank W. Ballance, Jr., for defendant.

LAKE, Justice.

The defendant assigns as error: (1) The admission in evidence, over objection, of the shotgun, he contending it had not been identified as the weapon used in the shooting of Alston; (2) the failure of the State to prove the cause of death and

the admission of alleged hearsay evidence as to the fact of death; and (3) the failure of the court to instruct the jury, as requested by the defendant, that "when a person commits an act without being conscious thereof, such act is not a crime even though if committed by a conscious person it would be a crime." There is no merit in any of these assignments of error.

[1] Other exceptions and assignments not brought forward into the brief are deemed abandoned. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526; *State v. Barber,* 270 N.C. 222, 154 S.E. 2d 104; *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343. Rule 28, Rules of Practice in the Supreme Court. We have, nevertheless, reviewed the entire record before us and find no merit in the assignments of error so abandoned.

As to the shotgun introduced in evidence, the State's witness William Southerland testified that, after leaving the defendant in Henderson following the shooting, Southerland threw the gun out of the car into a ditch and thereafter told Deputy Capps where it was. Deputy Capps testified that, upon receipt of this information, he went to the place described by Southerland, found a shotgun about 20 feet from the other side of the ditch, he delivered the gun so found to the State Bureau of Investigation, it was received back from the Bureau by another deputy and, while it had no identifying feature known to him, it was his opinion that the gun offered in evidence was the same gun so found by him.

[2-4] Weapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime. *State v. Sneeden,* 274 N.C. 498, 502, 164 S.E. 2d 190; Stansbury, North Carolina Evidence, 2d Ed. § 118. We deem the testimony of witnesses Southerland and Capps, above mentioned, sufficient to identify the gun so offered in evidence as the one used in the shooting of Alston, but if it were not, so as to make the admission of this weapon in evidence an error, it was clearly harmless in view of the testimony of five eyewitnesses that the defendant shot Alston with a shotgun. While relevant, the identification and the introduction in evidence of the weapon used is not essential to a conviction of murder. In *State v. Macklin,* 210 N.C. 496, 187 S.E. 785, a shotgun found in the defendant's room was held properly admitted in evidence, it having been testified that it was "like

the one" with which the defendant had been seen on the night the deceased was shot.

[5] The contention that the court erred in denying the motion for arrest of judgment because there was no competent evidence of the death of Alston, or as to the cause of such death, is without merit. The State's witness Hargrove testified that he picked Alston up and carried him to the hospital after the shooting and that "when we got to the hospital he was dead." The record shows that at this point the defendant objected and the court overruled the objection. The record does not show the question in response to which the witness so answered or that the objection was interposed to such question. An objection to an answer responsive to a question comes too late after the witness has so answered the question. *Johnson v. Lamb,* 273 N.C. 701, 709, 161 S.E. 2d 131; *Brown v. Hillsboro,* 185 N.C. 368, 117 S.E. 41.

On cross-examination, this witness testified: "When I arrived at the hospital he was dead. The doctor said he was dead." Thereupon, in response to questions by the court, not set forth in the record on appeal, the witness testified: "I didn't examine him. When we got to the hospital, I went in and got some stretchers, we got him out of the car and laid him on it and toted him in. He wasn't moving no more than his arm was moving by me picking him up and laying him down." The defendant's motion to strike the answer was overruled. The question not being shown in the record before us, we cannot assume that the answers of the witness both to the question by the defendant's counsel and to the question by the court were not responsive. The witness was obviously testifying on the basis of his own observation of Alston. The statement of the doctor was apparently recounted by the witness as corroboration of his own observation and testimony.

[6] Deputy Sheriff Capps testified: "I went in the back room [of the hospital] and saw Charlie Wilbert Alston. He was dead at the time I saw him." This witness then identified the photograph of the body taken by him, which photograph was introduced in evidence and used by the witness to illustrate his testimony as to the location of the wound on the body. There was no error in the admission of the photograph in evidence for this purpose. The record not disclosing the question propounded to the witness Capps, it must be assumed that his

testimony was responsive thereto. Consequently, there being no objection to the question, the motion to strike the answer was properly overruled.

The witness William Southerland testified that when he and the defendant arrived at the defendant's home following the shooting, the defendant said to Gertrude Perry he had "killed" Alston and instructed her to "come on" with the defendant and Southerland.

[7-9] Observation of a deceased person, or of a dead animal, is not so rare an occurrence as to render a non-expert incompetent to testify as to the fact of death in a particular instance. While it is the usual and better practice in a prosecution for homicide to offer medical testimony as to both the fact of death and the cause of it, even the cause of death may be established by non-expert testimony when the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that an observed wound was mortal in character. *State v. Howard,* 274 N.C. 186, 198, 162 S.E. 2d 495; *State v. Minton,* 234 N.C. 716, 721, 68 S.E. 2d 844. The State's evidence is ample to show that Alston was shot in the chest or upper abdomen with a shotgun at close range, he fell immediately, blood flowed from the wound and, though taken immediately to the hospital, he was dead on arrival. There was ample evidence to support a finding both of the fact of death and that the cause of death was the shooting of the deceased by the defendant.

Neither the defendant nor any of his witnesses attempted to deny that the defendant shot Alston, that Alston was dead or that the shooting by the defendant was the cause of his death. Neither the defendant nor any of his witnesses attempted to establish any justification for the shooting of Alston. The defendant's testimony was designed solely to convince the jury that, by reason of his voluntary intoxication, he did not "remember" the shooting or anything about it.

[10, 11] A specific intent to kill is an essential element of first degree murder. *State v. Propst,* 274 N.C. 62, 71, 161 S.E. 2d 560. While voluntary drunkenness is not, per se, an excuse for a criminal act, *State v. Propst, supra,* it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent such as the intent to kill. *State v. Cureton,* 218

N.C. 491, 494, 11 S.E. 2d 469; *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075. As stated by Justice Barnhill, later Chief Justice, in *State v. Cureton, supra:* "No inference of the absence of deliberation and premeditation arises as a matter of law from intoxication; and mere intoxication cannot serve as an excuse for the offender. The influence of intoxication upon the question of existence of premeditation depends upon its degree and its effect upon the mind and passion. For it to constitute a defense it must appear that the defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and weigh it and understand the nature and consequence of his act."

The learned trial judge instructed the jury:

"There is evidence in this case which tends to show that the defendant was intoxicated at the time of the acts alleged in this case. Generally, voluntary intoxication is not a legal excuse for crime. However, if you find that the defendant was intoxicated, you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder.

"In order for you to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual, specific intent to kill formed after premeditation and deliberation.

"If as a result of intoxication the defendant did not have the specific intent to kill the deceased, Charlie Alston formed after premeditation and deliberation, he is not guilty of first degree murder.

"Therefore, I charge you that if upon considering the evidence with respect to the defendant's intoxication you have a reasonable doubt as to whether the defendant formulated the specific intent required for a conviction of first degree murder, you will not return a verdict of first degree murder. You will then consider whether or not he would be guilty of second degree murder."

[12] This charge properly presented to the jury the question arising upon the evidence with reference to the intoxication of the defendant and correctly stated the law applicable thereto.

[13] The court having so instructed the jury, the defendant was not entitled to the further instruction requested by him: "When a person commits an act without being conscious thereof, such act is not a crime even though if committed by a conscious person it would be a crime." The present record does not contain evidence of complete unconsciousness such as was deemed to be indicated by evidence of the defendant in *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328.

No error.

STATE OF NORTH CAROLINA v. WILLIE FLIPPIN

No. 79

(Filed 15 March 1972)

1. **Rape § 1— offense defined**

Rape is the carnal knowledge of a female person by force and against her will.

2. **Rape § 1— carnal knowledge defined**

Carnal knowledge is effected in law if there is the slightest penetration of the female sex organ by the male sex organ.

3. **Rape § 6— failure to submit lesser included offenses**

The trial court in a rape prosecution did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and of assault on a female, where the State's evidence was positive as to each and every element of the crime of rape and there was no conflict in the evidence relating to any element thereof. G.S. 15-169; G.S. 15-170.

4. **Criminal Law § 112— instructions on reasonable doubt**

Although the court is not required to define reasonable doubt absent a request, when it does define that term, the definition must be substantially correct.

5. **Criminal Law § 112— instructions on presumption of innocence**

When the trial judge charges correctly on reasonable doubt, he is not required to charge on the presumption of innocence unless there be a special request for such charge.

6. **Criminal Law § 112— instruction on reasonable doubt**

The trial court's instruction that a reasonable doubt is "doubt based on reason and common sense arising from the evidence in the case or the lack of evidence as to any fact necessary to constitute guilt" *held* sufficient.

7. Criminal Law § 122— jury's inquiry regarding parole

The trial court in this rape prosecution properly declined to answer an inquiry by the jury foreman regarding defendant's eligibility for parole if given a life sentence and adequately instructed the jury that the question of parole was not a proper matter for their consideration.

APPEAL by defendant from *Exum, J.*, at 12 July 1971 Criminal Session of ROCKINGHAM Superior Court. This case was docketed and argued at the 1971 Fall Term as Case No. 142.

Defendant was charged with rape. He was duly arraigned, and entered a plea of not guilty through his counsel.

The State offered evidence which, in substance, tended to show:

Nancy Jane McCraw, age 13, testified that the McCraw family lived in a rural section of Rockingham County and that up until a short time before the alleged rape defendant had lived nearby. On 16 May 1971, Nancy, her sister Brenda, age 15, her brother Frank, age 10, her brother George, age 9, her father, and defendant went down to a barn to see a pet cow. After a few minutes Nancy's father and Brenda returned to the house. Shortly thereafter defendant grabbed Nancy by the arm and forced her to leave the barn with him. He persuaded Frank to go home by giving him some keys. George would not leave. Defendant took Nancy into the back room of an unoccupied house and tried to remove her shorts and panties. George followed them into the house, where he protested defendant's actions and called defendant names. At one point Nancy managed to free herself and run towards her home, but defendant caught her and, despite her resistance and screams, forced her to a tobacco barn, where he again tried to remove her clothes. George followed and continued to harass defendant. Defendant then took Nancy from the barn, across a field, and into the woods, where he completed the rape. Nancy testified, in part:

> ". . . After he had done that and got me on the ground he er took his organ out. That is when he raped me. He put it in me and penetrated me and it hurt. During the time that he was putting me on the ground and getting on top of me I was trying to get loose, get aloose, get away. I was pushing his chest away. I hollered for

George. I shuffled with him. He did not say anything to me while he had me down. He held me down about ten minutes."

After defendant released Nancy, she ran home and told her family what had happened. Defendant fled in another direction. Nancy's family called the Sheriff's Department and took her to a hospital in Reidsville.

Dr. I. K. Bass, who was qualified as an expert in medicine, testified that he examined Nancy in the emergency room of the hospital and found bruises and scratches on her leg, and a large bruise on her right shoulder. During the course of his examination he made two vaginal smears, which he gave to Dr. Cecil R. Burkhart, an expert pathologist, for analysis. Dr. Burkhart testified that one of the smears that he received from Dr. Bass showed the presence of male sperm.

The other evidence offered by the State was cumulative and tended to corroborate the testimony of Nancy McCraw.

Defendant offered no evidence.

The jury returned a verdict of guilty of rape with a recommendation for life imprisonment.

Attorney General Morgan, Assistant Attorney General Burley B. Mitchell, Jr., and Associate Attorney General Edwin M. Speas, Jr., for the State.

Price, Osborne & Johnson, by D. Floyd Osborne, and Gwyn, Gwyn & Morgan, by Melzer A. Morgan, Jr., for defendant.

BRANCH, Justice.

Defendant assigns as error the failure of the trial judge to instruct the jury that they could return a verdict of assault with intent to commit rape or of assault on a female.

[1, 2] Rape is the carnal knowledge of a female person by force and against her will. *State v. Primes,* 275 N.C. 61, 65 S.E. 2d 225; *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232. "Carnal knowledge" is effected in law if there is the slightest penetration of the female sex organ by the male sex organ. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513. The provisions of G.S. 15-169

and G.S. 15-170 are pertinent to decision of this assignment of error and are set out below.

> § 15-169. Conviction of assault, when included in charge.—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character.
>
> § 15-170. Conviction for a less degree or an attempt.—Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.

The case of *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545, involved a charge of armed robbery, one of the felonies included within the provisions of G.S. 15-169. The Court there considered the sufficiency of the evidence to support a conviction of a lesser included offense, and stated:

> ". . . The notable fact here is that the crime of robbery *ex vi termini* includes an assault on the person.
>
> . . . .
>
> ". . . Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and reject it in part will not suffice."

This Court considered the same question in *State v. Jones*, *supra*. There the State's evidence tended to show that defendant, who lived in the same apartment building, found an eight-year old girl alone in her parents' apartment. He removed her clothes and carnally abused her. He told the child that "if she told it he was going to kill her." The defendant contended that

the trial judge erred because he instructed the jury to return one of three possible verdicts, to wit: (1) guilty of rape, (2) guilty of rape with recommendation that the punishment be imprisonment in State's Prison for life, and (3) not guilty. The Court, rejecting defendant's contention, stated:

> ". . . [T]he State's evidence was positive as to each and every element of the crime charged in the bill of indictment. There was no conflict in the evidence relating to any element of the crime charged. . . . Disbelief of the testimony of the child as to any essential element of the crime charged in the bill of indictment would not warrant a conviction for a lesser offense but would require a verdict of not guilty."

In *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481, we find the following statement:

> "All the evidence is to the effect that each defendant had actual sexual intercourse with (prosecutrix) and that she, kidnapped, captive and helpless, submitted solely because fearful of death or serious bodily harm if she resisted. There is no particle or trace of evidence that (she) at any time willingly permitted either defendant to have sexual intercourse with her. . . . There being no evidence that would warrant a verdict of guilty of the included crime of assault with intent to commit rape, the court properly refused to instruct the jury with reference to such verdict."

[3] In instant case defendant offered no evidence. Nor did his counsel by cross-examination elicit evidence which conflicted with testimony as to any element of the crime. Each element of the crime of rape is supported by testimony in the record. Disbelief of testimony relating to any essential element of the crime charged would require a verdict of not guilty.

There was no error in the court's failure to instruct the jury on the crimes of assault with intent to commit rape and of assault on a female.

Defendant next contends that the court erred by not fully explaining the presumption of innocence and reasonable doubt.

Judge Exum instructed the jury as follows:

"Under our system of justice when a defendant's plea is not guilty he is not required to prove his innocence. He is presumed to be innocent.

The State must prove to you that the defendant is guilty beyond a reasonable doubt. If after weighing and considering all of the evidence you are fully satisfied and entirely convinced of the defendant's guilt then you would be satisfied beyond a reasonable doubt. On the other hand if you have any doubt based on reason and common sense arising from the evidence in the case or the lack of evidence as to any fact necessary to constitute guilt you would have a reasonable doubt and it would be your duty to give the defendant the benefit of that doubt and find him not guilty.

In Strong's, 3 North Carolina Index, 2d, Criminal Law, § 112, p. 3, it is stated:

There are no stereotyped forms of instructions. The trial judge has wide discretion in presenting the issues to the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and fairly without expressing an opinion as to whether any fact has been fully or sufficiently proved.

See also: *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572.

[4] Absent request, the court is not required to define reasonable doubt, *State v. Potts,* 266 N.C. 117, 145 S.E. 2d 307; however, when it does define the term, the definition must be substantially correct. *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133. In the case of *State v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146, this Court approved a similar instruction as to presumption of innocence and definition of reasonable doubt:

" . . . 'The defendant is presumed to be innocent, and this presumption goes with him throughout the entire trial and until the jury is satisfied beyond reasonable doubt of his guilt; not satisfied beyond any doubt, or all doubt, or a vain or fanciful doubt, but rather what the term implies, a reasonable doubt, one based upon common sense and reason, generated by insufficiency of proof.' . . . . "

See also *State v. Schoolfield,* 184 N.C. 721, 114 S.E. 466; *State v. Hege,* 194 N.C. 526, 140 S.E. 80.

[5] When the trial judge charges correctly on reasonable doubt, he is not required to charge on the presumption of innocence unless there be a special request for such charge. *State v. Perry,* 226 N.C. 530, 39 S.E. 2d 460; *State v. Alston,* 210 N.C. 258, 186 S.E. 354. In instant case defendant did not request such an instruction.

[6] The charge given by Judge Exum concerning reasonable doubt was clearly and concisely stated, and is in substantial accord with the definitions approved by this Court. This assignment of error is overruled.

[7] Finally, defendant says that the court erred in failing to answer an inquiry by the foreman of the jury regarding parole.

After the jury retired, they returned for further instructions, and the record discloses the following colloquy:

> COURT: Members of the jury, I understand you have a question for the Court?
>
> FOREMAN: Your Honor, we just in our discussion, we would like to know, should the verdict be guilty with a recommendation for mercy, would this person be eligible for parole, can you give us an idea on that?
>
> COURT: No, members of the jury, I could not enlighten you on that. This is a matter that you should not be concerned with and are in law not concerned with. As I said, if you return a verdict of guilty with a recommendation of life imprisonment the punishment will be life imprisonment and that is as much as I can tell you.
>
> FOREMAN: Then it is not a standard procedure that you serve so many years then you come up for parole?
>
> COURT: I have told you all that I can tell you about it.

In the case of *State v. Conner,* 241 N.C. 468, 85 S.E. 2d 584, the defendant was charged with the capital crime of murder. At trial the jury, after some deliberation, returned to the courtroom, and one of the jurors asked the court this question: "Will the defendant be eligible for parole if he were given life imprisonment?" To the inquiry the court replied without further elaboration: "Gentlemen, I cannot answer that question."

In granting a new trial because the trial judge did not instruct the jury that the question of eligibility for parole was not a proper matter for them to consider, the Court stated:

> "It may be conceded as an established rule of law that where, as here, a jury is required to determine a defendant's guilt and also to fix the punishment as between death and life imprisonment, to permit factors concerning the defendant's possible parole to be injected into the jurors' deliberations by argument of counsel or comment of the court is considered erroneous as being calculated to prejudice the jury and influence them against a recommendation of life imprisonment. *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; . . . .
>
> . . . .
>
> "The jurors should have been given a positive instruction to put the irrelevant question, and matters relating thereto, out of their minds; . . . . "

Judge Exum properly declined to answer the foreman's question and adequately instructed the jury that the question of eligibility for parole was not a proper matter for their consideration.

A careful examination of this entire record discloses no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOHN LEROY COX

No. 77

(Filed 15 March 1972)

1. Indictment and Warrant § 5— capital case — absence of endorsement on indictment

When a bill of indictment in a capital case has been returned in open court by a majority of the grand jury as a true bill, and the action of the grand jury is duly recorded in the court's records, the lack of endorsement on the bill will not support a motion to quash. G.S. 15-141.

2. **Indictment and Warrant § 5— return of indictment — intent of endorsement**

There is no merit to defendant's contention that the grand jury intended to return not a true bill when it inserted the letter "X" in an endorsement on the indictment stating "this bill found X A True Bill," where the record discloses that the grand jury in a body, seventeen members present and all assenting to the finding, returned as a true bill the indictment charging defendant with the offense of rape.

3. **Witnesses § 1— rape trial — competency of six-year-old witness**

The trial court did not abuse its discretion in ruling, after an extensive voir dire hearing, that a six-year-old rape victim was competent to testify in the trial of her alleged assailant.

4. **Rape § 4— bloodstained clothing worn by rape victim — admissibility**

The trial court did not err in the admission of bloodstained clothing worn by a six-year-old rape victim when she was taken to the hospital, since the clothing was relevant to the State's theory that the victim had been lacerated and torn during the process of being raped by defendant.

5. **Rape § 8— victim under age of twelve**

Consent is not a defense where one is accused of abusing or carnally knowing a female child under the age of twelve years. G.S. 14-21.

6. **Rape § 10— six-year-old victim — evidence that sex matters discussed in her presence**

In a prosecution for the rape of a six-year-old child, evidence that the victim's father had discussed sexual matters in her presence was not competent as bearing upon consent, since consent is no defense, or to impugn the credibility of the victim's testimony, or for any other purpose.

APPEAL by defendant from *Martin (Harry C.) J.*, 26 April 1971 Criminal Session of BUNCOMBE Superior Court. This case was docketed and argued as No. 136 at the Fall Term 1971.

Defendant was charged with feloniously ravishing and carnally knowing a female child under twelve years of age.

The State's evidence tended to show that defendant had been a guest for approximately three weeks prior to 17 December 1970 in the house trailer occupied by Sam Hoey and his 6-year-old daughter, Belinda Bess Hoey. On 17 December 1970, Sam Hoey left his daughter at the trailer with defendant on two occasions.

Around 7:00 o'clock p.m. on that date Mr. and Mrs. Albert McFarland, Bess' maternal grandparents, picked her up and were taking her to spend the weekend at their home. Shortly after they left the Hoey residence, Bess told her grandparents that defendant had raped her several times on that day. After examining the child, they took her to Dr. A. J. Dickerson.

Dr. Dickerson testified that his physical examination of Bess revealed severe lacerations in her vaginal canal, and that extensive surgery was necessary to repair this damage. He further testified that in his opinion it was "entirely possible and probable according to the examination and history" that the damage suffered by Bess could have been the result of penetration by a male organ.

The trial judge concluded that Bess was competent to testify concerning the alleged rape. She thereupon testified regarding the alleged acts of rape committed by defendant. She stated that defendant told her not to mention his acts to her father because her father might have to go to jail.

Defendant's assignments of error do not require that we discuss in detail the testimony relating to the alleged rape.

Defendant testified in his own behalf and denied that he had raped the prosecuting witness.

The jury returned a verdict of guilty as charged and recommended punishment by imprisonment for life.

Attorney General Morgan and Special Counsel Ralph Moody for the State.

Geo. Ward Hendon, Hendon & Carson, for defendant.

BRANCH, Justice.

Defendant assigns as error the trial court's denial of his motion to quash the bill of indictment.

The bill of indictment shows the following endorsement: "Those marked X sworn by the undersigned foreman and examined before the Grand Jury, and this bill found X a True Bill."

Defendant argues that the insertion of the letter "X" in the blank space after the word "found" and before the

letter "A" indicates that the grand jury meant not to return a true bill. Defendant's sole authority is one of the many definitions of the letter "x" found in Webster's New International Dictionary, 2d Ed., Unabridged, 1961 (1951), to wit: "A wrong statement, answer, result or the like; a mistake; an error." We note in passing that the 3rd Edition of the same dictionary, 1961, also defines "x" as "used to indicate choice or approval (as on a ballot)."

[1] When a bill of indictment in a capital case has been returned in open court by a majority of the grand jury as a true bill, and the action of the grand jury is duly recorded in the court's records, the lack of endorsement on the bill will not support a motion to quash. G.S. 15-141; *State v. Sultan,* 142 N.C. 569, 54 S.E. 841; *State v. Avant,* 202 N.C. 680, 163 S.E. 806.

[2] This record discloses that the grand jury in a body, seventeen members present and all assenting to the finding, returned, as a true bill the bill of indictment charging the defendant, John LeRoy Cox, with the offense of rape of a child under twelve years of age.

There is no merit to this assignment of error.

[3] Defendant next contends that the trial court erred in ruling that Belinda Bess Hoey was competent to testify as a witness in the case.

When defendant's counsel challenged the competency of Belinda Bess Hoey to testify, the trial judge, in the absence of the jury, conducted an extensive voir dire hearing which included her testimony, testimony of her teachers, and testimony of members of her family. One of the teachers, Mrs. Gail Sutherland, described Bess as possessing average maturity for a child of her age, and stated that she had adjusted well in school. Mrs. Sutherland further testified that Bess' school work was satisfactory and that in her opinion Bess knew right from wrong.

Bess, among other things, testified:

> "I go to church. As to where I go to church, (no response). I go to church with Mama Ruth and Papa Clyde. I go to Sunday School. I go to church with them. I know what happens to little boys or little girls who don't tell

the truth. They get a whipping and go down, down, down. They go down where the devil is. I know who Jesus was. He was the Savior."

Judge Martin also questioned Bess at length as to the meaning of taking an oath, as to her ability to write, and as to her knowledge of colors. At the conclusion of the voir dire testimony, Judge Martin concluded:

"Well, on the evidence offered in the absence of the Jury concerning the competency of the witness Bess Hoey, this Court concludes as a matter of law that the witness does have the capacity to understand and relate under the obligations of an oath the facts which will assist the Jury in determining the truth of this case and that the witness has sufficient intelligence to give testimony or evidence in this case, and based upon those conclusions, the Court, in the exercise of its discretion, denies the defendant's objection to the witness, Bess Hoey, being allowed to testify and holds that she is competent as a witness in this case."

In the case of *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365, this Court considered the competency of a 7-year old girl to testify in a rape case and, in holding her to be a competent witness, stated:

"In *McCurdy v. Ashley*, 259 N.C. 619, 131 S.E. 2d 321, Justice Parker (later Chief Justice) quotes with approval from *Wheeler v. United States*, 159 U.S. 523, 40 L. Ed. 244, 16 S.Ct. 93 (in which a boy nearly five and one-half years old was held to be a competent witness in a murder case), as follows:

" 'That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well

as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities.' "

This Court again sustained the trial judge's finding that a 6-year old girl was a competent witness in a rape case in *State v. Bowden,* 272 N.C. 481, 158 S.E. 2d 493. There the Court said:

" . . . The trial judge observed the child's demeanor during the voir dire examination and cross-examination. The finding by Judge Martin that she was qualified to testify was supported by competent evidence. The question of the victim's competency to testify rested in the sound discretion of the trial court. *McCurdy v. Ashley,* 259 N.C. 619, 131 S.E. 2d 321; *State v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754; *State v. Jackson,* 211 N.C. 202, 189 S.E. 510; *State v. Satterfield,* 207 N.C. 118, 176 S.E. 466."

Here there was ample competent evidence to support Judge Martin's finding that Belinda Bess Hoey was a competent witness in this case. The record shows no abuse of discretion by the Judge.

This assignment of error is overruled.

[4] Defendant assigns as error the court's denial of his motion to suppress articles of bloody clothing worn by the prosecuting witness when she was taken to the hospital.

It is not contended that the clothing was not properly authenticated and identified.

This question was considered by this Court in the case of *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410, and there the Court stated:

"Garments worn by the victim of a rape and murder showing the location of a wound upon the person of the deceased, or which otherwise corroborate the State's theory of the case, are competent. *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294 (1949); *State v. Fleming,* 202 N.C. 512,

163 S.E. 453 (1932). When relevant, articles of clothing identified as worn by the victim at the time the crime was committed are always competent evidence, and their admission has been approved in many decisions of this Court. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968). See Stansbury, N. C. Evidence, (2d Ed., 1963), § 118."

See also *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241.

Obviously the bloodstained clothes are relevant to the State's theory that the prosecuting witness had been lacerated and torn during the process of being raped by defendant.

This assignment of error is overruled.

Finally, defendant contends that the court erred in sustaining the State's objections to testimony concerning statements made by the father of the prosecuting witness in her presence which related to sex, and that the trial judge erred in refusing to allow defendant's counsel to cross-examine the father concerning such statements. Defendant in his brief states that he intended to show by this evidence that the prosecuting witness could have obtained knowledge of sexual matters from these alleged statements.

[5] In this jurisdiction it is settled beyond question that consent is not a defense where one is accused of abusing or carnally knowing a female child under the age of twelve years. G.S. 14-21; *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206; *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232; *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

[6] Admittedly, in the case of a prosecuting witness over the age of twelve years the general character of the prosecuting witness for unchastity may be shown for the purpose of attacking the credibility of her testimony, and has bearing upon the likelihood of her consent. *State v. Grundler* and *State v. Jelly,* 251 N.C. 177, 111 S.E. 2d 1. In this case, such evidence would not be competent as bearing upon consent, and we do not think that the credibility of the testimony of this six-year old child would be impugned even if sexual matters had been discussed in her presence.

We are unable to find any legal basis for holding this evidence to be competent. Further, even if it had been relevent and

competent, we do not think that a different result would have been reached if the evidence had been admitted. *State v. Temple, supra; State v. King,* 225 N.C. 236, 34 S.E. 2d 3.

A careful examination of this record reveals no prejudicial error.

No error.

PAUL OSBORNE AND WIFE, MARJORIE OSBORNE; MARILYN PAYNE AND HUSBAND, ERIC PAYNE; PAUL BROWN OSBORNE AND WIFE, BRENDA OSBORNE; SAMUEL OSBORNE AND WIFE, KATHERINE OSBORNE; AND SUSAN OSBORNE (SINGLE) v. THE TOWN OF NORTH WILKESBORO, BY ITS BOARD OF COMMISSIONERS, W. F. ABSHER, JR., D. V. DEAL, R. M. BRAME, JR., REX M. HANDY, W. B. GWYN AND MAYOR GEORGE WIEBEL

No. 62

(Filed 15 March 1972)

1. **Dedication § 3— streets shown on developer's map — withdrawal from dedication**

When sales of property in a municipality are made with reference to a map showing streets and alleys, the sales are offers of dedication of these streets and alleys to the municipality which may or may not be accepted by the municipality; if the municipality improves the streets and opens them to public use, acceptance is conclusively presumed, but if the municipality for a period of fifteen years or more fails to improve and open to the public a street or alley shown on the developer's map, the owner may file and record a declaration withdrawing the street or alley from dedication.

2. **Dedication § 3— failure of municipality to open street — withdrawal from dedication**

Where land developers in 1900 registered a map of property in a municipality showing a street or alley on property now owned by plaintiffs, but the street and alley have never been opened or used in any way as a public street since the map was filed in 1900, plaintiffs had a right, as against the municipality, to withdraw the street and alley from dedication in 1969 under the provisions of G.S. 136-96 so as to defeat the right of the municipality to thereafter open the street and alley to public use.

APPEAL by defendant from *Seay, J.,* November 1970 Civil Session WILKES Superior Court. This case was docketed and argued at the Fall Term 1971 as No. 49.

The plaintiffs named in the caption instituted this civil action and filed a verified complaint alleging: (1) Ownership in fee of three adjoining specifically described parcels of land within the corporate limits of North Wilkesboro. (2) The Town of North Wilkesboro was laid out in 1900 as shown by the old Trogdon map recorded in Book 1, page 19, Wilkes County Registry. (3) The map described Sixth Street (north and south) crossing Cherry Street (east and west). Sixth Street north of the intersection has been open, hard-surfaced, and in use as one of the main streets in the Town for many years. As shown on the map, Sixth Street south of the intersection crosses Tract #3 of the plaintiffs' land. An unnamed alley is shown on the map as crossing Tracts #1 and #2 of the plaintiffs' land. Neither Sixth Street south of its intersection with Cherry nor the unnamed alley has ever been open or used in any way as a public street. (4) The plaintiffs and their predecessors in title have been in open, notorious and exclusive use and possession of all of that part of Sixth Street south of its intersection with Cherry and the unnamed alley likewise has not been in public use for any purpose since the map was filed in 1900.

The plaintiffs have listed and paid taxes on all of the three described parcels which include the unused part of Sixth Street and the unnamed alley. The plaintiffs further allege and offered evidence showing that on May 19, 1969, the plaintiffs filed a declaration withdrawing the dedication of Sixth Street and the unnamed alley south of the intersection with Cherry Street. Plaintiffs further allege the Town of North Wilkesboro many years ago filed a map of the Town for tax purposes which shows the plaintiffs' property, but does not disclose that part of Sixth Street or the alley south of the Cherry Street intersection. The plaintiffs have paid all taxes assessed on the three parcels of land. The record shows the Town Commissioners of North Wilkesboro on June 4, 1895, passed a resolution, " . . . (T)hat all streets & allies as laid off by the land Co. & in the . . . of the Town of North Wilkesboro be excepted (sic) by said Town & to be opened at the option of the Town Coms. South of the Rail Road." The defendant denies the plaintiffs' right to assert any claim of title by adverse possession, or otherwise.

The parties waived a jury trial and consented that the court hear the evidence, consider the stipulations, find the facts,

declare the rights of the parties, and enter judgment accordingly. The court on the evidence and the stipulations made these findings of fact: (1) The plaintiffs are the owners of the three lots shown on the Trogdon map. (2) Sixth Street south of Cherry and the unnamed alley have never been opened or used as a public street. (3) The plaintiffs and their predecessors in title have operated a private lumber business on the three lots shown on the map. A building has been erected on that part of Sixth Street shown on the map as crossing plaintiffs' lands. (4) The tax map of the Town does not show either the street or alley. The plaintiffs and their predecessors have listed and paid taxes on all of the land described in their pleadings, including the street and the unnamed alley as shown on the Trogdon map. (5) The plaintiffs on May 19, 1969, filed and had recorded a declaration withdrawing from dedication the street and alley now claimed by the defendant. Based on the findings, the court adjudged the Town of North Wilkesboro has abandoned Sixth Street and the unnamed alley described in the complaint and is estopped to assert title thereto. (6) The Town of North Wilkesboro is not exempted from the provisions of G.S. 136-96. It is accordingly adjudged that the plaintiffs own in fee the land as shown on the Exhibit "A" (map of their property) which is made a part of this judgment.

The Town of North Wilkesboro excepted and appealed.

Samuel L. Osborne for plaintiff appellees.

Whicker, Vannoy & Moore by J. Gary Vannoy for defendant appellants.

HIGGINS, Justice.

The evidence and findings in this case disclose that about the year 1900 land developers surveyed, filed, and registered a map showing lots, streets, and alleys for use in sales promotion. The map covers a large part of what is now the Town of North Wilkesboro. The map shows 108 blocks of lots and the proposed streets and alleyways proposed as access to them.

On the map Cherry Street is shown to be the main street for traffic east and west. A few tiers of lots are shown south of Cherry Street, two of which touch the north bank of the Yadkin River. The areas east and west of the two blocks which touch the River are shown on the map to be reserved to the

private owners, apparently parties other than those interested in the development. Third, Fourth, Fifth and Seventh Streets (all north and south) have their southern beginning in Cherry Street. Sixth Street (alone) is shown as crossing Cherry. After crossing Cherry, the map shows Sixth Street extends southward for about 800 feet and dead-ends at the boundary of the privately owned and reserved area.

The evidence supports the court's findings that Sixth Street north of the intersection with Cherry has been surfaced and in use and has carried heavy traffic for many years, but that part shown as south of Cherry and the unnamed alley have never been developed and have never been used by the public at any time for any purpose. In fact a building has been constructed across what is marked on the map as Sixth Street. All of Sixth Street south of Cherry and the unnamed alley have been in private use by the plaintiffs and their predecessors in title since the filing of the map by the developers. The tax map made by the City and used for tax purposes does not show Sixth Street or the alley south of Cherry. The plaintiffs and their predecessors have been charged with and have paid taxes on the lands described in their complaint which include the unused section of Sixth Street and the unnamed alley.

[1, 2] In view of the foregoing it is clear that the plaintiffs, as against the Town of North Wilkesboro, had the right to withdraw from dedication that part of Sixth Street and the unnamed alley south of Cherry. In this connection it seems clear that G.S. 136-96 provided a remedy by which the plaintiffs could remove the cloud on their title resulting from the developers' map and the June 4, 1895, resolution of the Town Commissioners. Insofar as concerns the municipality when sales are made in reference to a map showing streets and alleys, the sale is an offer of dedication of these streets and alleys to the municipality. The municipal authorities may or may not accept the dedication at their election. If they improve the streets and open them to public use, acceptance is conclusively presumed. However, if the municipality for a period of fifteen years or more fails to improve and open to public use a street or alley shown on the developers' map, the owner may file and record a declaration withdrawing the street and alley from dedication. By failure to develop or use, the municipality's rights to insist on the dedication is lost. *Irwin v. Charlotte,* 193 N.C. 109, 136

S.E. 368; *Sugg v. Greenville,* 169 N.C. 606, 86 S.E. 695; *Salisbury v. Barnhardt,* 249 N.C. 549, 107 S.E. 2d 297; *Steadman v. Pinetops,* 251 N.C. 509, 112 S.E. 2d 102. If the authorities for the statutory period fail to use the dedicated strips, the right to use is destroyed by a withdrawal.

We have not discussed here and are not concerned with the right of private purchasers of lots to insist that streets shown on a map by the developers be kept open for their benefit. Here involved is the right of the owners to take advantage of the Town's failure to open for public use that part of Sixth Street and the unnamed alley south of Cherry Street. G.S. 136-96 provides a means by which the owners may withdraw their offer of dedication and after withdrawal protects the landowners against the right of the city to open Sixth Street or the unnamed alley south of Cherry Street.

The court was correct in deciding for the plaintiffs on the basis of the landowners' withdrawal of dedication filed and recorded in this case. The judgment of the Superior Court of Wilkes County is

Affirmed.

STATE OF NORTH CAROLINA v. WILL JOHNSON, JR.

No. 83

(Filed 15 March 1972)

1. **Criminal Law § 92— consolidation of charges**

The consolidation of criminal charges is a discretionary matter, but the court must exercise its discretion within the framework of G.S. 15-152.

2. **Criminal Law § 92— consolidation of cases for trial — single defendant — crimes of same class**

In order to consolidate for trial two or more indictments in which a defendant is charged with crimes of the same class, it is not required that evidence at the trial of one of the indictments be competent and admissible at the trial of the others, but only that the offenses not be so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant.

3. Criminal Law § 92— consolidation of robbery charges against one defendant

The trial court did not err in consolidating for trial two armed robbery cases against a single defendant, where the crimes occurred on the same night, defendant used a sawed-off rifle in the first robbery and took a .22 caliber pistol from the victim, defendant used a .22 caliber pistol in the second robbery and took another .22 caliber pistol in that robbery, and when defendant was apprehended, officers found a sawed-off rifle and the .22 caliber pistol taken in the second robbery, the armed robbery charges against defendant not being so separated in time or place and not being so distinct in circumstances as to render a consolidation unjust and prejudicial.

DEFENDANT appeals from *McLean, J.*, 10 May 1971 Schedule "A" Criminal Session, MECKLENBURG Superior Court. Docketed as Case No. 151 and argued at the Fall Term 1971.

Over defendant's objection, two cases against him were consolidated for trial. In Case No. 71 CR 8972 defendant is charged with the armed robbery of John Nowell. In Case No. 71 CR 8059 defendant is charged with the armed robbery of Joseph Gammeter. The robberies occurred in the order named on 18 January 1971 at 7:15 p.m. and 10:00 p.m.

The State's evidence—defendant offered none—tends to show that John Nowell and his niece Brenda Hill worked at the Tryon Hill Grocery in Charlotte. Two Negro men entered the store at approximately 7:15 p.m. on 18 January 1971, the first carrying a stubby revolver and the second, subsequently identified as the defendant, carrying a sawed-off rifle. Defendant removed Nowell's wallet from his pocket, took three dollars from it and threw the wallet on the floor. Defendant then took a .22 caliber pistol from Nowell and ordered Brenda Hill to open the cash register. She did so, and while defendant held a gun on the two witnesses, the other robber removed some $200 from the register. Defendant then kissed Brenda Hill, said "good night" and the robbers left. As they departed the other robber took a .16 gauge shotgun, belonging to the witness Nowell, which had been hanging on the wall of the store.

Joseph Gammeter testified that on the evening of 18 January 1971 at approximately 10 p.m. the defendant entered the Li'l General Store where he worked and moved to the rear. After two other customers left the store the defendant approached the cash register counter and made a purchase. When Gammeter rang up the purchase and turned to collect

for it, defendant pointed a .22 caliber pistol at him and ordered Gammeter to hand over another .22 caliber pistol lying beside the cash register. Defendant then ordered the witness to take the money from the cash register, place it in a paper bag, and hand it over. This was done and defendant left the store with approximately $800 and the .22 caliber pistol.

On 12 February 1971 defendant was apprehended in a car in which the officers found a sawed-off .22 caliber rifle and the .22 caliber pistol taken from the Li'l General Store on 18 January 1971. Both Brenda Hill and John Nowell subsequently identified defendant and testified that the sawed-off .22 caliber rifle was similar to the one used in the robbery at the Tryon Hill Grocery on 18 January 1971. Joseph Gammeter positively identified defendant as the man who robbed him on the night of 18 January 1971.

Defendant was convicted in both cases and sentenced to thirty years in each case, to run concurrently. His appeal to the Court of Appeals was transferred to the Supreme Court for initial appellate review under general order dated 31 July 1970, entered pursuant to G.S. 7A-31(b)(4).

T. O. Stennett, attorney for defendant appellant.

Robert Morgan, Attorney General; T. Buie Costen, Assistant Attorney General; Rafford E. Jones, Associate Attorney General, for the State of North Carolina.

HUSKINS, Justice.

The sole question presented by this appeal is whether the trial court erred in consolidating the two armed robbery cases for trial. Defendant contends that although he is charged with crimes of the same class, the crimes charged are not "so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the other," citing *State v. Combs,* 200 N.C. 671, 158 S.E. 252 (1931) and G.S. 15-152.

[1] In North Carolina the consolidation of criminal charges is a discretionary matter, but the court must exercise its discretion within the framework of G.S. 15-152 which reads in pertinent part as follows: "When there are several charges against any person for the same act or transaction or for two or more

acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated . . . . " An elementary phrase-by-phrase analysis of the statute reveals a variety of circumstances under which consolidation of charges against a single defendant may be ordered: (1) where several charges against the accused arise from the same act or transaction; (2) where several charges against the accused for two or more acts or transactions are connected together (such charges need not be of the same class of crimes and offenses); and (3) where several charges for two or more transactions are of the same class of crimes or offenses which may be properly joined (such transactions need not be connected together).

It would seem that defendant has simply misread the statute. He confuses categories (2) and (3), maintaining that when there are several charges against any person for two or more transactions of the same class the transactions must also be, in some way, "connected together" in order to be properly consolidated. Defendant's conclusion in that respect is not supported by the express language of the statute.

Here the indictments are for crimes of the same class—in fact, for identical offenses of armed robbery. Their consolidation is permissible in the discretion of the court unless the circumstances are such that they may not be "properly joined," *viz:* unless the offenses are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial.

In *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962), defendant was charged in four separate indictments with receiving stolen goods valued at more than $100, knowing them to have been stolen. Two of the offenses occurred on 1 December 1959, one on 17 October 1960, and one on 7 December 1960. The goods received belonged to four different persons. The four cases were consolidated for trial over objection. Held: "Where a defendant is indicted in separate bills 'for two or more transactions of the same class of crimes or offenses' the court may in its discretion consolidate the indictments for trial. In exercising discretion the presiding judge should consider wheth-

er the offenses alleged are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant." *Accord, State v. Waters,* 208 N.C. 769, 182 S.E. 483 (1935); *State v. Harvell,* 199 N.C. 599, 155 S.E. 257 (1930); *State v. Charles,* 195 N.C. 868, 142 S.E. 486 (1928).

Defendant relies on the following language in *State v. Combs, supra:* "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others." The same argument was advanced by defendant in *State v. White, supra,* and the court observed that the quoted language from *Combs* must be interpreted in light of the facts in that case. There, two defendants were involved, the two offenses were closely related in time, and the clothing stolen from one building was found in the automobile stolen from the other. On that state of facts evidence at the trial of one of the indictments would have been competent and admissible at the trial of the other and apparently gave rise to the use of the language defendant relies on.

[2] There is nothing in the language of G.S. 15-152 to support the contention that two or more indictments in which a defendant is charged with crimes of the same class may not be consolidated for trial unless "evidence at the trial of one of the indictments will be competent and admissible at the trial of the others." We prefer to let the statute speak for itself. The question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other. The question is whether the offenses are *so separate in time or place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to defendant. *State v. White, supra,* and cases therein cited.

[3] Defendant has failed to show any impropriety in the consolidation for trial of these two indictments for armed robbery. The crimes are identical and occurred on the same night. In the first robbery defendant used a sawed-off rifle but took, in addition to money, a .22 caliber pistol from the victim John Nowell. In the second robbery defendant pointed a .22 caliber

pistol at his victim Joseph Gammeter and took not only money but another .22 caliber pistol from him. When defendant was apprehended the officers found a sawed-off rifle and the .22 caliber pistol taken from Joseph Gammeter at the Li'l General Store. Thus it may be seen that these armed robbery charges against defendant are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial. Here, in fact, much of the evidence at the trial of one charge would be competent and admissible at the trial of the other.

Applying the foregoing principles to the circumstances revealed by the record, we hold the consolidation was proper. No abuse of discretion appears, and neither prejudice nor injustice by reason of the consolidation has been shown.

No error.

NORTH CAROLINA NATIONAL BANK, EXECUTOR, U/W JOHN T. MATTHEWS, DECEASED v. O. B. CARPENTER, W. F. THOMASON, CLARADELL H. MATTHEWS, GAYLE MATTHEWS, MANUS AND JUDY MATTHEWS

No. 72

(Filed 15 March 1972)

1. **Wills § 28— effective date of will**

A will becomes effective at the testator's death unless a contrary intent appears from the language of the will. G.S. 31-41.

2. **Wills § 28— construction — intent of testator**

The dominant purpose in construing a will is to ascertain and give effect to the testator's intent, which must be found in the words testator used, in the setting in which he used them.

3. **Wills § 58— specified number of shares of stock — accretions occurring between date of will and date of death**

Where testator owned 900 shares of the stock of a corporation at the time he executed a will bequeathing 10 shares of the stock to his employee "if he is still employed by said Company at the time of my death," and as a result of a recapitalization, the 900 shares were retired and 250,000 shares of new stock were issued to testator in lieu thereof prior to testator's death, it was *held* that the employee is entitled to receive under the will only 10 shares of the stock as it existed at testator's death without accretions resulting from the

recapitalization, it being testator's intent that the legatee's right to the gift was to be determined at the time of the testator's death.

ON *certiorari* to review the decision of the Court of Appeals filed July 14, 1971, affirming the judgment entered in the Superior Court of MECKLENBURG County (by *Thornburg, J.)* at the February 22, 1971 Session. The case on appeal was docketed and argued at the Fall Term 1971 as No. 116.

The plaintiff, North Carolina National Bank, Executor, instituted this civil action for the purpose of having the court construe the will of John T. Matthews, deceased, and determine the rights of the legatees under Items IV and V of the will. Item IV provided: "I give and bequeath to O. B. Carpenter ten (10) shares of my stock in Wil-Mat Corporation if he is still employed by said Company at the time of my death." Item V provided: "I give and bequeath to W. F. Thomason ten (10) shares of my stock in Wil-Mat Corporation if he is still employed by said Company at the time of my death."

The testator executed his attested will on August 2, 1965. On that date he and Hugh Wilkin each owned 900 shares which comprised all the outstanding capital stock of Wil-Mat Corporation. Each share had a par value of $100.00.

On October 5, 1966, the two owners changed the corporate structure of Wil-Mat, retiring the 1800 shares outstanding and in lieu thereof issuing 500,000 shares of new stock, each share of the par value of $1.00. As a result of the recapitalization, the testator became the owner of 250,000 shares of stock in the corporation. Neither stockholder made any contribution to the corporation except the surrender of his old stock for the new. The testator died on August 16, 1968.

Each named legatee contended before Judge Thornburg that at the time the testator executed his will he owned 900 shares of stock in Wil-Mat and that the bequest to each was ten shares or 1/90th of the testator's entire holding. When the number of shares was increased to 250,000 shares between the date of the will and the date of the testator's death, the legacy to each appellant should be 1/90th of the new issue, or 2,777.75 shares. After hearing, Judge Thornburg adjudged that each legatee was entitled to receive ten shares as provided in the will. Both O. B. Carpenter and W. F. Thomason appealed.

Wardlow, Knox, Caudle & Knox by C. Ralph Kinsey, Jr. and Lloyd C. Caudle for defendant appellants O. B. Carpenter and W. F. Thomason.

Boyle and Alexander by B. Irvin Boyle and R. C. Carmichael, Jr. for Defendant Appellee Claradell H. Matthews.

Blakeney, Alexander & Machen by Brown Hill Boswell for plaintiff appellee.

HIGGINS, Justice.

The appellants contend that Items IV and V of the will are specific legacies contemplating the gift of stock according to conditions at the time the will was executed rather than at the time of the testator's death. They claim that all accretions resulting from the stock split should go the legatees. As authority they cite a number of cases, among them decisions of this Court in *Smith v. Smith,* 192 N.C. 687, 135 S.E. 855; *Shepard v. Bryan,* 195 N.C. 822, 143 S.E. 835; and *Trust Co. v. Dodson,* 260 N.C. 22, 131 S.E. 2d 875.

In *Shepard v. Bryan, supra,* the Court discussed at length the different types of legacies. However, the Court did not have before it and did not deal with the specific question now presented. *Smith v. Smith, supra,* and *Trust Co. v. Dodson, supra,* involved accretions which occurred after the testator's death and after the legatees' rights had accrued.

[1, 2] In cases from other jurisdictions, judges—some text writers joining them—have advanced an interesting theory, somewhat professional in its approach, contending that stock splits and stock dividends occurring after the execution of a will are merely changes in form and not in substance and should go to the legatee even though they were declared and delivered to the testator during his lifetime. In short, they contend in such case, the will should speak as of the date of its execution rather than the date of the testator's death. The argument is not at peace either with our statute or our decided cases. Acceptance of appellants' theory would begin a countdown on our rule that a will becomes effective at the testator's death unless a contrary intent appears from the language of the will. This Court has been consistent in holding that the dominant purpose in construing a will is to ascertain and give effect to the testator's intent. Intent must be found in the words

he used, in the setting in which he used them. *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246. "Evidence cannot be heard to explain, add to, take from, modify, or contradict a will when its terms plainly indicate the testator's purpose as to persons or things mentioned in it . . . . " *In re Will of Farr,* 277 N.C. 86, 175 S.E. 2d 578.

At the time the testator executed the will he owned one-half (900 shares) of the capital stock in Wil-Mat Corporation. The appellants evidently were employed by Wil-Mat at the time the will was executed, for the testator conditioned his gift on their employment by Wil-Mat at his death. The clear intent is that each legatee's right to the gift was to be determined at the testator's death. The clear wording of the will neither requires nor permits a different construction.

The controversy arose because of the capital restructure between the date of the will and the date the testator died. The restructure was completed one year, three weeks and three days after the will was executed. The testator lived thereafter for one year, nine months and eleven days. With full knowledge of the increase in the number of his shares, he permitted the bequest to remain at ten shares for each legatee. Nothing whatever indicates any dissatisfaction with the terms of the will.

G.S. 31-41 provides: "Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." A will takes effect and speaks as of the testator's death. *Trust Co. v. McKee,* 260 N.C. 416, 132 S.E. 2d 762.

[3] We find nothing in the will which indicates the complaining legatees are entitled to more than the ten shares provided in the will. "This Court can no more make the language of a will than it can make the will. Where there is language of doubtful meaning used in the will, for the purpose of interpreting the meaning of such doubtful language, the Court may try to ascertain the intention of the testator. But some language is too plain, the meaning too obvious, to admit of interpretation. In such cases the language of the testator must be taken to mean what it says." *Whitfield v. Garris,* 131 N.C. 148, 42 S.E. 568. "The jurisdiction of the courts may be invoked to construe a

will when, and only when, the language used in the will is so uncertain, vague, ambiguous, or conflicting that it creates a doubt as to the true intent of the testator. If the devise is couched in language which is clear and has a recognized legal meaning, there is no room for construction." *Rhoads v. Hughes*, 239 N.C. 534, 80 S.E. 2d 259.

The language in Items IV and V of the will says "ten (10) shares" and ten (10) shares it is.

The Court of Appeals was correct in so deciding and its decision is

Affirmed.

IRVIN WILLIS, EMPLOYEE PLAINTIFF v. J. M. DAVIS INDUSTRIES, INC., EMPLOYER; FIDELITY & CASUALTY COMPANY OF NEW YORK, CARRIER DEFENDANTS

No. 23

(Filed 15 March 1972)

1. **Master and Servant § 77— workmen's compensation — change of condition — estoppel to plead one-year limitation**

When a request for review of a workmen's compensation award for changed conditions is not made until more than twelve months after delivery and acceptance of a check in final payment, review of the award is barred under G.S. 97-47; nevertheless, the employer and his carrier may be estopped to plead the lapse of time.

2. **Master and Servant § 77— workmen's compensation — change of condition — estoppel to plead one-year limitation — failure to furnish Form 28B with last compensation payment**

Failure of the employer or the insurance carrier to furnish a copy of Industrial Commission Form 28B to plaintiff with his last compensation payment as required by an Industrial Commission rule did not estop them from asserting the one-year limitation of G.S. 97-47 as a defense to plaintiff's claim for additional compensation for change of condition; consequently, plaintiff's claim filed more than one year after receipt of his last compensation payment was barred by G.S. 97-47, notwithstanding it was filed within a year of his receipt of Form 28B from the carrier.

3. **Master and Servant § 77— workmen's compensation — necessity for providing copy of Form 28B to employee**

It is not required by statute that the employer provide a copy of Industrial Commission Form 28B to the employee, G.S. 97-18(f)

requiring only that a copy be filed with the Commission within 16 days after the final payment of compensation has been made.

4. **Evidence § 4— presumption that mail was received**

There is a *prima facie* presumption that material mailed to plaintiff was received by plaintiff in due course.

5. **Master and Servant § 77— workmen's compensation — changed conditions — statute of limitations — disapproval of statement in prior case**

The statement in *White v. Boat Corp.*, 261 N.C. 495—"If the carrier failed to comply with the rule by giving the employee notice of the limited time within which he could claim additional compensation, it failed to put the statute of limitations in operation"—is an inaccurate statement of the law and is disapproved.

APPEAL by defendants as of right under G.S. 7A-30(2) from decision of the Court of Appeals reversing decision of the North Carolina Industrial Commission which denied plaintiff further compensation. 13 N.C. App. 101, 185 S.E. 2d 28 (1971).

Plaintiff sustained a compensable injury while employed by the defendant J. M. Davis Industries, Inc., on 27 March 1968; and defendant Fidelity & Casualty Company of New York, carrier, paid compensation to plaintiff through 23 July 1968. Dr. H. M. Peacock certified that plaintiff was able to return to work on 24 July 1968, and plaintiff did resume work on that date. On 23 July 1968 defendant carrier mailed to plaintiff a draft in the amount of $38.01 as final payment of compensation benefits for temporary total disability for the period of 17 July 1968 through 23 July 1968. The draft was received and cashed by plaintiff on 25 or 26 July 1968. On 30 July 1968 defendant carrier completed I. C. Form 28B, which stated that the final payment of compensation had been made and the last compensation check forwarded to plaintiff on 23 July 1968. Copies of Form 28B were mailed to plaintiff and to the North Carolina Industrial Commission on 30 July 1968 and received by the Industrial Commission on 31 July 1968.

On 24 September 1968 attorneys representing plaintiff wrote defendant carrier demanding resumption of benefits for temporary total disability. On 25 September 1968 defendant carrier replied that plaintiff's claim was highly questionable, but if there was medical evidence sufficient to demonstrate that plaintiff's condition at the time was a result of the previous injury by accident, the company would reconsider its position.

Thereafter, on 6 November 1968 defendant carrier wrote plaintiff's attorneys observing that certainly not all of plaintiff's troubles were due to his industrial accident and inquiring as to whether plaintiff would be interested in a compromise settlement. Nothing further was heard from the plaintiff until 31 July 1969, when the Industrial Commission received a letter dated 30 July 1969 from plaintiff's attorneys requesting that the case be set for hearing.

At the hearing of this case defendants specifically pled the provisions of G.S. 97-47 in bar of plaintiff's claim for further compensation benefits. The hearing commissioner found as a fact that plaintiff had failed to notify the Industrial Commission within twelve months from the date of his last payment of compensation that a change in condition had occurred, and the commissioner concluded as a matter of law that plaintiff's claim for further compensation was barred by the provisions of G.S. 97-47 and denied plaintiff's request for additional compensation.

Plaintiff appealed to the full Commission which affirmed the holding of the hearing commissioner. Plaintiff then appealed to the North Carolina Court of Appeals, and that court, in an opinion by Judge Hedrick, concurred in by Judge Graham with Chief Judge Mallard dissenting, reversed the order entered by the full Commission and remanded the case to the Commission to make findings determinative of the questions at issue and proceed as the law requires. From this decision, defendants appealed to this Court.

Teague, Johnson, Patterson, Dilthey & Clay by Grady S. Patterson, Jr., for defendant appellants.

Wheatly & Mason by L. Patten Mason for plaintiff appellee.

MOORE, Justice.

The undisputed facts show that plaintiff received a draft dated 23 July 1968 as final payment for compensation due him for the injury which he sustained on 27 March 1968, and that he cashed this draft on 25 or 26 July 1968. It is admitted that plaintiff's attorneys wrote the Industrial Commission on 30 July 1969 requesting that plaintiff's claim be scheduled for hearing. This letter, received by the Commission on 31 July 1969, was the first notice to the Industrial Commission that

plaintiff was claiming additional compensation by reason of his injury, and was received by the Commission more than twelve months from the date of the last payment of compensation.

[1] When the request for a review of an award for changed conditions is not made until more than twelve months after delivery and acceptance of a check in final payment, review of the award is barred. G.S. 97-47; *Paris v. Builders Corp.*, 244 N.C. 35, 92 S.E. 2d 405 (1956). Nevertheless, defendants by their conduct may be estopped to plead the lapse of time. *Watkins v. Motor Lines,* 279 N.C. 132, 181 S.E. 2d 588 (1971).

[2] In the present case, it is admitted that the request to review the award was made more than twelve months from the date of the last payment. This case then presents the question: Are defendants estopped to plead as their defense the failure of the plaintiff to notify the Industrial Commission of a change in conditions within twelve months from the last payment of compensation?

The Court of Appeals held:

> "In the present case the record discloses that the defendants did not comply with the Commission's Rule XI 5 by sending a copy of Form 28B to the claimant with his last compensation check. The letter from plaintiff's attorney to the Commission requesting a hearing, dated 30 July 1969, was received by the Commission on 31 July 1969, and Form 28B, dated 30 July 1968, was received by the Commission on 31 July 1968. The Commission found as a fact that the defendant prepared and furnished the plaintiff with a copy of Form 28B on 30 July 1968. Thus, it appears that plaintiff's claim for additional compensation was made within twelve months of the time he was furnished a copy of Form 28B. Therefore, we hold the Commission was in error in concluding as a matter of law that defendants were not estopped to plead the lapse of time as a bar to plaintiff's claim for additional compensation."

G.S. 97-80 provides that "the Commission may make rules, *not inconsistent with this article,* for carrying out the provisions of this article." (Emphasis added.) Pursuant to this authority, the Commission adopted Rule XI 5, which in pertinent part provides: "The defendants will furnish . . . a copy of I. C. Form 28B to the claimant with his last payment of compensation for

either temporary total disability or permanent partial disability."

Form 28B, mailed by carrier to plaintiff and the Commission on 30 July 1968 and admittedly received by the Commission on 31 July 1968, contained certain information including the following:

"8. Total Amount of Compensation Paid, $646.17.

* * *

"10. Date Last Compensation Check Forwarded, July 23, 1968.

* * *

"14. Does This Report Close the Case—including final compensation payment? Yes.

* * *

"NOTICE TO EMPLOYEE: If the answer to Item 14 above is 'Yes,' this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing *within one (1) year from the date of receipt of your last compensation check.*" (Emphasis added.)

[3] G.S. 97-18(f) specifically provides that the employer must file a copy of Form 28B with the Commission within 16 days after the final payment of compensation has been made. This section does not require that the employer provide a copy of such report to the employee, and no such requirement is found in any of the other provisions of Chapter 97. It should be noted that the Industrial Commission has now amended its Rule XI 5 to conform to G.S. 97-18(f) insofar as the time of sending Form 28B is concerned. Rule XI 5 now provides that defendants will send a copy of Form 28B to the claimant within sixteen days after his last payment of compensation, rather than sending it with the last payment as the rule formerly required.

[4, 5] Plaintiff relies on *White v. Boat Corp.*, 261 N.C. 495, 135 S.E. 2d 216 (1964), in which Justice Rodman, speaking for the Court concerning Form 28B, said:

" . . . If that form was not given the employee, as the rules require, he was deprived of information which the

> Commission specifically directed the carrier to furnish for his protection. It had legislative authority to require the insurance carrier to give employee this information. If the carrier failed to comply with the rule by giving employee notice of the limited time within which he could claim additional compensation, it failed to put the statute of limitations in operation."

In *White* there was no evidence or finding that the carrier ever gave claimant a copy of Form 28B or that plaintiff knew of the twelve months' limitation. In the present case, there was a finding that a copy of Form 28B was mailed to plaintiff on 30 July 1968, and plaintiff does not deny that he received it. There is a *prima facie* presumption that this form was received by plaintiff in due course. *York v. York,* 271 N.C. 416, 156 S.E. 2d 673 (1967); Stansbury, N. C. Evidence § 236, p. 589 (2d Ed. 1963). The form itself plainly stated that plaintiff must file any claim for additional compensation *within one year from the date of receipt of the last payment.* Plaintiff was represented by counsel, and both plaintiff and counsel knew or should have known of the twelve months' limitation. These facts are sufficient to distinguish the present case from *White.* More compelling, however, is the fact that plaintiff here had fifty-one weeks' advance notice of the time within which he could claim additional compensation for a change in condition under G.S. 97-47. This constituted substantial compliance with the Industrial Commission's Rule XI 5. It should be observed that the twelve months' limitation within which plaintiff could claim additional compensation commenced to run from the date on which he received the last payment of compensation and not from the time he received Form 28B. The expression—"If the carrier failed to comply with the rule by giving employee notice of the limited time within which he could claim additional compensation, it failed to put the statute of limitations in operation"—found in *White v. Boat Corp., supra,* is an inaccurate expression of the law and is disapproved.

To allow plaintiff's claim for additional compensation for the reason such claim was made within twelve months from the time he was furnished a copy of Form 28B would be contrary to the express provisions of G.S. 97-47. In effect it would be allowing the Commission by its rule-making authority to amend G.S. 97-47 to read "no such review shall be made after twelve

months from the receipt of Form 28B," rather than as provided by the General Assembly, "from the date of the last payment of compensation." This would exceed the authority granted the Commission by G.S. 97-80, which provides that the Commission may only make rules *not inconsistent* with the provisions of Article 1 of Chapter 97 of the North Carolina General Statutes. See *Motsinger v. Perryman,* 218 N.C. 15, 9 S.E. 2d 511 (1940).

The record in the present case fails to disclose any equitable grounds which would estop the defendants from pleading the provisions of G.S. 97-47, and the Court of Appeals cites none. That court, as a basis for its decision, simply states that since plaintiff's claim for additional compensation was made within twelve months of the time he was furnished a copy of Form 28B, the Commission was in error in concluding as a matter of law that defendants were not estopped to plead the lapse of time as a bar to plaintiff's claim for additional compensation.

Justice Higgins, in *Nowell v. Tea Company,* 250 N.C. 575, 579, 108 S.E. 2d 889, 891 (1959), discussing estoppel, states:

> "The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. 'The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play.' *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114."

See *Ammons v. Sneeden's Sons, Inc.,* 257 N.C. 785, 127 S.E. 2d 575 (1962).

Plaintiff does not claim that the delay in filing his request for a review was induced by any acts, representations, or conduct of the defendants, the repudiation of which would amount to a breach of good faith. He does not contend that he has been misled or treated unfairly by defendants. To the contrary, the only reason plaintiff gives for claiming defendants should be estopped is that defendants failed to comply with Rule XI 5 issued by the Industrial Commission. He does not deny that he was notified on 30 July 1968 that he had until 25 or 26 July

1969 to apply for further benefits. Despite this notice, plaintiff elected not to apply for such benefits until 31 July 1969, more than one year later. We adhere to our ruling that the law of estoppel applies in compensation proceedings as in all other cases, but we hold that the facts here appearing are insufficient to invoke the doctrine in this case. See *Biddix v. Rex Mills,* 237 N.C. 660, 665, 75 S.E. 2d 777, 781 (1953), and cases therein cited.

The decision of the Court of Appeals is reversed, and the case will be remanded by that court to the North Carolina Industrial Commission for disposition in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ROBERT LOUIS ROSEBORO

No. 20

(Filed 15 March 1972)

Criminal Law § 135— imposition of life sentence pursuant to Supreme Court order

Judgment of life imprisonment imposed on defendant by the superior court pursuant to and in accordance with an order of the N. C. Supreme Court is affirmed.

Justice LAKE dissenting.

APPEAL by defendant from *Jackson, J.,* October 18, 1971 Session of CLEVELAND Superior Court.

Attorney General Morgan and Assistant Attorney General Mitchell for the State.

Chambers, Stein, Ferguson & Lanning, by James E. Ferguson, II, J. LeVonne Chambers and Charles L. Becton for defendant appellant.

BOBBITT, Chief Justice.

In *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108, filed September 7, 1971, for the reasons there stated by Justice Branch, this Court remanded the cause to the Superior Court

of Cleveland County for the pronouncement of judgment imposing a sentence of life imprisonment. On October 18, 1971, in open court, after due notice and in the presence of defendant and his counsel, Judge Jackson pronounced judgment that defendant be imprisoned for life in the State's prison. Defendant excepted and gave notice of appeal. The questions he attempts to raise by his assignments of error on the present appeal heretofore have been decided adversely to defendant in this cause.

Judge Jackson's judgment, having been entered in strict compliance with our order of September 7, 1971, is affirmed.

Affirmed.

Justice LAKE dissenting.

Following the reversal of our judgment in *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886, by the Supreme Court of the United States, "insofar as it imposes the death sentence," the majority of this Court directed the Superior Court of Cleveland County to bring the defendant again before it and pronounce judgment that the defendant be imprisoned for life in the State's prison. *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108. The superior court has done so. If this be error, as I believe it to be, the responsibility is not that of the superior court. However, neither the direction of this Court nor the mandate of the Supreme Court of the United States can authorize any court of North Carolina to enter judgment imposing a sentence not supported by the verdict of the jury. Having dissented from the above mentioned direction by this Court to the superior court for the reasons stated in my dissenting opinion, filed that day in *State v. Hill,* 279 N.C. 371, 378, 183 S.E. 2d 97, it is my view that the present sentence to imprisonment for life was erroneously imposed and the defendant should be given a new trial.

STATE OF NORTH CAROLINA v. ROOSEVELT ROBINSON

No. 8

(Filed 15 March 1972)

1. **Criminal Law § 169— failure of record to show excluded testimony**

Where the record fails to show what the witnesses would have testified had they been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial.

2. **Kidnapping § 1— past relationships with State's witnesses — exclusion of testimony**

In this prosecution for kidnapping, testimony excluded by the court as to defendant's past relationships with the prosecutrix and with another State's witness would not have destroyed the witnesses' credibility or produced such a connotation of consent as would have affected the result of the trial.

APPEAL by defendant from *Bailey, J.*, at 9 August 1972 Session of CUMBERLAND Superior Court.

Defendant, charged with kidnapping, entered a plea of not guilty.

Elizabeth Bell, testifying for the State, stated that on 17 June 1971, about 6:15 p.m., she and Diane Peavy were in front of a trailer where they lived with one Kelly Anderson. At that time defendant and Kenneth Williams drove up to the trailer, and she and Diane went inside and locked the door. She was afraid of defendant because he had threatened her. Defendant came up to the trailer and ordered Elizabeth Bell to come out. At that time Kenneth Williams went back to the car and obtained a .38 pistol which he handed to defendant. Defendant then threatened to shoot his way into the trailer if she did not come out. Kenneth Williams discovered her as she attempted to slip out the back door and defendant, still armed with the pistol, ran up to her, struck her, and he and Williams forced her into the back seat of a two-door car. She did not consent to go with defendant.

Defendant then took her to a house in Fayetteville, where he beat her with his fist and whipped her with two wire coat hangers. He intermittently beat her until members of the Cumberland County Sheriff's Department arrived at the house.

Diane Peavy corroborated the testimony of Elizabeth Bell as to the events which took place at the trailer. She further testified that she slipped out of the trailer and called the police.

Deputy Sheriff Doug Colpaert testified that he saw Elizabeth Bell around 10:00 o'clock p.m. on 17 June 1971, and that she had bruises and welts on her head and a substantial bruise on her leg. Written statements made by Elizabeth Bell and Diane Peavy were identified by Sheriff Colpaert and admitted into evidence. These statements tended to corroborate the testimony of both Elizabeth Bell and Diane Peavy.

Defendant testified that he went to the trailer where Elizabeth Bell lived on 17 June 1971 and that she voluntarily and willingly got into his car and left with him and Kenneth Williams. He admitted that he slapped her on the face but denied that he otherwise beat her. He testified that he did not own a pistol or have one in his possession on 17 June 1971. He further stated that he went to the trailer as a result of a written invitation from Elizabeth Bell. He first met Elizabeth Bell in Fort Lauderdale, Florida, and at that time she was a prostitute. On cross-examination defendant stated that he did not know the whereabouts of Kenneth Williams or the letter of invitation.

Defendant also offered the testimony of Dottie Pritchard, who stated that Defendant, Kenneth Williams, and Elizabeth Bell came into her living room on 17 June 1971 and that she saw defendant slap Elizabeth one time. On cross-examination she stated that Elizabeth Bell asked her not to let defendant hurt her, and that she (Dottie Pritchard) told defendant that there would be no fights in her house.

The jury returned a verdict of guilty of kidnapping. Defendant appealed from judgment imposing a sentence of life imprisonment.

Attorney General Morgan and Assistant Attorney General James E. Magner, Jr., for the State.

Sol G. Cherry, Public Defender, for defendant.

PER CURIAM.

Defendant's only assignments of error are that the trial judge erred in sustaining the State's objection to cross-examination of State's witnesses Elizabeth Bell and Diane Peavy concerning their past relationships with defendant, and by sustaining the State's objection to his testimony concerning his past relationship with witness Elizabeth Bell. He contends that such

testimony would indicate that Elizabeth Bell consented to accompany him at the time of the alleged kidnapping. Obviously, he also seeks to attack the credibility of the witnesses.

[1] The record does not show what the State's witnesses or defendant would have said had they been permitted to answer the questions. Therefore we cannot know whether the rulings were prejudicial. The burden is on appellant not only to show error but to show *prejudicial error. State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342.

Defendant's only citations of authority establish the fact that a wide latitude is allowed in cross-examination. 7 Strong's, N. C. Index 2d, Witnesses, § 8, p. 703; *State v. King,* 224 N.C. 329, 30 S.E. 2d 230. It is noted that the citation from *Strong* also recites the well recognized rule that the latitude of cross-examination rests largely in the trial court's discretion.

[2] There is plenary evidence in this case to show that defendant forcibly and, against her will, took Elizabeth Bell from her home and carried her to another residence in the City of Fayetteville.

Under the circumstances of this case we cannot imagine any relationship which might have existed between defendant and the female witnesses which would have so destroyed the witnesses' credibility or produced such a connotation of consent as would have affected the result of this trial. *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206; *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364. Certainly, there is no relationship which would justify defendant's alleged conduct.

We have carefully examined this entire record and we are unable to discover any prejudicial error.

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

COLLEGE v. THORNE

No. 105 PC.

Case below: 13 N.C. App. 27.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

COOKE v. MOTOR LINES

No. 44.

Case below: 13 N.C. App. 342.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972. Appeal dismissed ex mero motu for lack of substantial constitutional question 7 March 1972.

ENROUGHTY v. INDUSTRIES, INC.

No. 13 PC.

Case below: 13 N.C. App. 400.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

GOWER v. INSURANCE CO.

No. 16 PC.

Case below: 13 N.C. App. 368.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 March 1972.

GRAY v. CLARK

No. 104 PC.

Case below: 13 N.C. App. 160.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

McELRATH v. INSURANCE CO.

No. 115 PC.

Case below: 13 N.C. App. 211.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

SECURITY MILLS v. TRUST CO.

No. 7 PC.

Case below: 13 N.C. App. 332.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 March 1972.

STATE v. BALDWIN

No. 2 PC.

Case below: 13 N.C. App. 257.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

STATE v. BALDWIN

No. 11 PC.

Case below: 13 N.C. App. 232.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

STATE v. BERRY

No. 33.

Case below: 13 N.C. App. 310.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972. Appeal dismissed ex mero motu for lack of substantial constitutional question 7 March 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. BROWN

No. 4 PC.

Case below: 13 N.C. App. 315.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

STATE v. BROWN and STATE v. MADDOX and STATE v. PHILLIPS

No. 3 PC.

Case below: 13 N.C. App. 261.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

STATE v. DAYE

No. 42.

Case below: 13 N.C. App. 435.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 March 1972.

STATE v. DAYE

No. 15 PC.

Case below: 13 N.C. App. 435.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 March 1972.

STATE v. HOOD

No. 113 PC.

Case below: 13 N.C. App. 170.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

STATE v. JOHNSON

No. 10 PC.

Case below: 13 N.C. App. 323.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 March 1972.

STATE v. LASSITER

No. 45.

Case below: 13 N.C. App. 292.

Motion to dismiss appeal for lack of substantial constitutional question allowed 7 March 1972.

STATE v. McINTYRE

No. 23 PC.

Case below: 13 N.C. App. 479.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 7 March 1972.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals withdrawn 15 March 1972.

STATE v. MADDOX and STATE v. PHILLIPS

No. 46.

Case below: 13 N.C. App. 261.

Motion to dismiss appeal for lack of substantial constitutional question allowed 7 March 1972.

STATE v. PERRY

No. 41.

Case below: 13 N.C. App. 304.

Motion to dismiss appeal for lack of substantial constitutional question allowed 7 March 1972.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. THACKER

No. 6 PC.

Case below: 13 N.C. App. 299.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 14 March 1972.

STATE v. WILLIAMS

No. 92 PC.

Case below: 13 N.C. 233.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 March 1972.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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APPEAL AND ERROR

§ 16. Jurisdiction of Lower Court After Appeal

When an appeal was taken, the trial court was divested of jurisdiction and was without authority to consider plaintiff's motion under Rule 60 for a new trial on the ground of newly discovered evidence. *Wiggins v. Bunch*, 106.

§ 26. Assignment of Error to Judgment

Where the only assignment of error is to the entry of judgment, facts found are binding upon the appellate court, and the only question is whether error of law appears on the face of the record. *Hall v. Board of Elections*, 600.

ARREST AND BAIL

§ 3. Arrest Without a Warrant

Defendant's arrest was complete when officers detained her at a grill and thereafter took her to jail. *S. v. Jackson*, 122,

Arrest of defendant without a warrant was proper where the arresting officer had reasonable grounds to believe defendant had committed a felony by possessing heroin for the purpose of sale and that unless defendant was apprehended she might escape and destroy any narcotic drugs she had on her person. *Ibid.*

ARSON

§ 4. Sufficiency of Evidence

State's circumstantial evidence was insufficient to be submitted to the jury in a prosecution for malicious burning of a dwelling house. *S. v. Blizzard*, 11.

ASSAULT AND BATTERY

§ 5. Assault With a Deadly Weapon

Trial court could properly pronounce separate judgments for armed robbery and for felonious assault committed during the robbery. *S. v. Stepney*, 306.

§ 14. Sufficiency of Evidence

State's evidence was sufficient for the jury in prosecution for assault with a deadly weapon by intentionally firing a rifle into and near an occupied dwelling house. *S. v. Blizzard*, 11.

AUTOMOBILES

BURGLARY AND UNLAWFUL BREAKINGS

CONSPIRACY

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW — Continued

Trial court did not err in allowing the State's challenges for cause to prospective jurors who stated they would never consider returning a verdict upon which the judge would have to impose a death sentence. *S. v. Frazier*, 181; *S. v. Cook*, 642.

Witherspoon decision is not applicable where jury recommends life imprisonment. *S. v. Cook*, 642.

§ 30. Due Process in Trial

Constitutional rights of defendant on trial for first degree murder were not violated by the single verdict procedure or by the fact that the jury had unbridled discretion to determine whether to impose the death penalty. *S. v. Frazier*, 181.

Even when the right of confrontation is afforded to a defendant implicated in the out-of-court declarations of a codefendant, the prejudicial impact of testimony of the codefendant's declarations must be evaluated in light of the competent evidence admitted against the nondeclarant defendant. *S. v. Jones*, 322.

§ 31. Right of Confrontation

Extrajudicial statements made by defendant which implicated a codefendant were not rendered inadmissible by the Bruton decision where each declarant took the stand. *S. v. Jones*, 322.

Admission of a nontestifying codefendant's extrajudicial statements that "there were six of us involved" and "they got the safe" did not violate defendant's right of confrontation. *Ibid.*

§ 32. Right to Counsel

An indigent defendant was not denied his constitutional right to counsel by the trial court's refusal to appoint counsel to represent him in the consolidated trial of two petty misdemeanors, notwithstanding the combined punishment for both offenses could have exceeded six months' imprisonment. *S. v. Speights*, 137.

Trial court did not err in refusal to appoint another attorney for defendant when defendant expressed dissatisfaction with his attorney during the trial. *S. v. Frazier*, 181.

An indigent defendant is entitled to have counsel appointed to represent him in a preliminary hearing. *S. v. Hairston*, 220; *S. v. Gainey*, 366.

Failure of the court to appoint counsel to represent defendant at a preliminary hearing was not error where the court found defendant was not an indigent and defendant waived his right to counsel. *S. v. Hairston*, 220.

A suspect has no constitutional right to the presence of counsel at a photographic identification. *S. v. Stepney*, 306.

Indigent defendant charged with the capital crime of rape could not waive counsel at an in-custody lineup at times pertinent to this case. *S. v. Bass*, 435.

Defendant's waiver of counsel and preliminary hearing in the district court on a charge of common law robbery was not rendered invalid by the fact defendant was tried in the superior court for armed robbery. *S. v. Gainey*, 366.

CRIMINAL LAW — Continued

§ 5. Mental Capacity

Trial court did not err in refusal of defendant's demand, following selection of the jury, for a psychiatric examination prior to the beginning of the trial. *S. v. Frazier*, 181.

A verdict of not guilty due to insanity constitutes a full acquittal. *In re Tew*, 612.

§ 6. Mental Capacity as Affected by Intoxicating Liquor

While voluntary drunkenness is not, per se, an excuse for a criminal act, it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent, such as the intent to kill. *S. v. Wilson*, 674.

§ 9. Principal in the Second Degree

Evidence was sufficient to support a jury finding that defendant, who remained in the car during an armed robbery attempt at a store, was guilty of attempted armed robbery as a principal in the second degree. *S. v. Price*, 154.

§ 15. Venue

Defendant failed to show that he had been prejudiced by pretrial publicity. *S. v. Blackmon*, 42.

Defendant is not entitled to a new trial by reason of failure of the record to show a ruling of the trial judge upon a motion for change of venue on account of local prejudice made by defendant without knowledge of his counsel. *S. v. Freeman*, 622.

§ 21. Preliminary Proceedings

A preliminary hearing is not a constitutional requirement and is not essential to the finding of an indictment. *S. v. Hairston*, 220.

Failure of the court to appoint counsel to represent defendant at a preliminary hearing was not error where the court found defendant was not an indigent and defendant waived his right to counsel. *Ibid.*

Defendants were not prejudiced by failure of district court judge who conducted the preliminary hearing to reduce to writing the testimony before him. *S. v. Bass*, 435.

Defendant's waiver of counsel and preliminary hearing in the district court on a charge of common law robbery was not rendered invalid by the fact defendant was tried in the superior court for armed robbery. *S. v. Gainey*, 366.

Indigent defendant is entitled to appointment of counsel at his preliminary hearing. *S. v. Hairston*, 220; *S. v. Gainey*, 366.

§ 22. Arraignment and Pleas

There is no merit to defendant's contention that he should have been arraigned and tried only for second degree murder, where the State had agreed to accept pleas of guilty of second degree murder, kidnapping and armed robbery and defendant, upon being first arraigned for the kidnapping, repudiated a plea of guilty to that charge entered by his attorney and requested a jury trial, and defendant subsequently entered pleas of not guilty to all charges. *S. v. Frazier*, 181.

CRIMINAL LAW — Continued

§ 23. Plea of Guilty

Record shows that defendant's plea of guilty of assault with intent to commit rape was voluntary. *S. v. Shelly*, 300.

Where one superior court judge refused to accept defendant's guilty plea and continued the case, acceptance of defendant's guilty plea by another judge when the case again came on for trial was not a modification or overruling of the judgment of the first judge. *S. v. McClure*, 288.

Trial court properly accepted defendant's plea of guilty, notwithstanding defendant did not expressly admit his guilt. *Ibid.*

§ 26. Plea of Former Jeopardy

Where conviction of felony-murder was based on jury finding that murder was committed in the perpetration of a felonious breaking and entering, no separate punishment can be imposed for the breaking and entering. *S. v. Thompson*, 202.

Trial court could properly pronounce separate judgments for armed robbery and for felonious assault committed during the robbery. *S. v. Stepney*, 306.

Where judgment of nonsuit on the ground of variance was entered in defendant's trial upon an indictment charging armed robbery of an A & P store in which the life of a named employee of the store was endangered and threatened and in which money belonging to the store was taken from the person of the named employee, defendant's plea of former jeopardy should have been allowed at his second trial upon another armed robbery indictment for the same occurrence which alleged the lives of two other employees were endangered and threatened and that money was taken from the presence and person of the other employees. *S. v. Ballard*, 479.

§ 28. Pleas in Amnesty

Neither the solicitor nor the judge of superior court has authority under the law of this State to grant amnesty. *S. v. Frazier*, 181.

Trial court properly denied defendant's "plea in amnesty" made on the ground that defendant had testified for the State in the first degree murder trial of his accomplice. *Ibid.*

§ 33. Facts in Issue and Relevant to Issues

Trial court in homicide prosecution did not err in allowing testimony that defendants were members of a group known as the "Mau Mau." *S. v. Hairston*, 220.

Trial court in rape prosecution did not err in admission of blood and hair samples obtained from defendant with his consent. *S. v. Johnson*, 281.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Trial court committed prejudicial error in admission of a search warrant and the accompanying affidavit where the affidavit contained hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime. *S. v. Spillars*, 341.

Rebuttal testimony offered by the State tending to show that a pistol used in a robbery was acquired by defendant in another robbery was competent as substantive evidence bearing on defendant's criminal intent. *S. v. Long*, 633.

CRIMINAL LAW — Continued

§ 38. Evidence of Like Facts and Transactions

Trial court properly allowed police officer to testify that, when standing in the place from which the fatal shot was fired, he could see the spot where the victim fell. *S. v. Hairston,* 220.

§ 39. Evidence in Rebuttal of Facts Brought Out by Adverse Party

Admission of testimony of a State's witness offered to rebut a co-defendant's alibi evidence, if erroneous as to defendant, did not prejudice defendant since its exclusion would not have affected the result of his trial. *S. v. Bass,* 435.

§ 42. Articles and Clothing Connected with the Crime

Stolen items were admissible in evidence in prosecution for receiving stolen goods. *S. v. Muse,* 31.

Trial court properly allowed a rape victim to testify that a green jacket admitted in evidence was "similar" to the coat worn by her assailant. *S. v. Bass,* 435.

Shotgun was sufficiently identified as the one used in homicide for its admission in evidence. *S. v. Wilson,* 674.

Testimony relating to an unfired .22 cartridge found at the scene of the crime five days after the crime was committed was not incompetent on the ground of remoteness. *S. v. Brown,* 588.

§ 43. Photographs

Photographs of rape scene were properly admitted for illustrative purposes, although photographs were taken in daytime and the crime occurred at night. *S. v. Johnson,* 281.

Trial court properly admitted for illustrative purposes photographs of the homicide victim's body as it lay where found. *S. v. Frazier,* 181.

§ 45. Experimental Evidence

Trial court properly allowed State's witness to testify as to lighting conditions and visibility at the crime scene based on a visit to the scene three days after the crime occurred. *S. v. Brown,* 588.

§ 46. Flight of Defendant as Implied Admission

Evidence that defendant left his home 16 days after the alleged offenses of kidnapping and rape were competent upon question of defendant's guilt. *S. v. Self,* 665.

§ 50. Opinion Testimony

In a prosecution charging defendant with receiving stolen goods, it was proper to allow the owner of the stolen goods to give his opinion as to the value of the goods. *S. v. Muse,* 31.

§ 51. Qualification of Experts

Trial court did not express an opinion as to the credibility of witnesses for the State by ruling in the presence of the jury that such witnesses were experts. *S. v. Frazier,* 181.

Trial court did not err in allowing a pathologist to give expert testimony before he had been found to be an expert. *S. v. Hairston,* 220.

CRIMINAL LAW — Continued

Trial court properly permitted rape victim to identify defendant by placing her hand on his shoulder. *S. v. Cook,* 642.

Trial court did not err in permitting in-court identification of defendant by rape victim without holding voir dire to determine whether there had been an impermissible pretrial photographic identification where there was no objection to the identification. *Ibid.*

Trial court properly admitted rape and kidnapping victims' in-court identifications of defendants where defendants were represented by counsel at pretrial lineups, lineups were fairly conducted, and in-court identifications were of independent origin. *S. v. Brown,* 588.

Trial court properly considered unsworn statements by defendant's counsel that he represented defendant at a pretrial lineup. *Ibid.*

Trial court properly allowed prosecutrix to testify that defendant resembled her assailant. *Ibid.*

§ 68. Other Evidence of Identity

Testimony that one of the defendants asked a kidnap victim "if he had any jumping cables and would help start their car" was relevant on the question of identity in that it placed the kidnappers and their victim together at the time and place in question. *S. v. Crump,* 491.

§ 73. Hearsay Testimony in General

Testimony by a kidnap victim that he told a police officer that he could recognize the kidnappers was not hearsay. *S. v. Crump,* 491.

It is error to admit in evidence a search warrant together with the affidavit to obtain the warrant. *S. v. Spillars,* 341.

§ 74. Confessions

The statements of a defendant which admit an essential part of the offense charged are inculpatory. *S. v. Muse,* 31.

§ 75. Tests of Voluntariness of Confession and Admissibility

Incriminating statements made by an incarcerated defendant to an SBI agent were not rendered inadmissible by the agent's statement that he "would let it be known" if the defendant gave him any information. *S. v. Muse,* 31.

Defendant is not entitled to be informed of his Miranda rights where there is no custodial interrogation. *Ibid.*

Trial court in a homicide prosecution erred in holding that, since defendant had been correctly informed of his right to counsel at an in-custody interrogation and did not request an attorney, defendant's making of incriminating statements during the interrogation was a waiver of the right to the presence of counsel. *S. v. Blackmon,* 42.

Trial court properly denied defendant's motion to suppress evidence of his alleged confession made on ground that he was intoxicated and could not effectively waive his constitutional rights. *S. v. McClure,* 288.

No right of defendant under the U. S. Constitution was violated by the admission of in-custody statements where defendant was given the Miranda warning and waived his right to counsel. *S. v. Frazier,* 181.

Even if the court in a capital case erred in admission of in-custody statements made by defendant without presence of counsel, such error

was harmless where defendant, while represented by counsel, had testified to the same facts at the trial of his alleged accomplice, and such transcript was available to the solicitor. *Ibid.*

Trial court properly admitted spontaneous statements made by defendant while being transported to Central Prison that "the other man had done the shooting," notwithstanding defendant had not waived his right to counsel. *S. v. Stepney,* 306.

Defendant's in-custody admissions that he choked the prosecutrix and placed a knife at her side prior to acts of intercourse were properly admitted for the purpose of impeaching defendant's testimony at the trial, notwithstanding defendant had not waived his right to counsel when the statements were made. *S. v. Bryant,* 551.

Statements volunteered by defendant while in custody at his apartment were properly admitted, notwithstanding defendant had not waived his right to counsel. *S. v. Jackson,* 563.

Failure of trial court to make specific findings with reference to whether defendant was under the influence of drugs when he made in-custody statements did not render incompetent testimony as to the statements made by defendant. *Ibid.*

Defendant was not under the influence of drugs so as to render his in-custody statements incompetent if he knew what was being said and done on the occasion the statements were made. *Ibid.*

§ 76. Determination of Admissibility of Confession

The conflict in the testimony on the voir dire raises a question of the credibility of the witnesses, which is for the determination of the trial court, and its findings of fact, supported by competent evidence, are conclusive. *S. v. Blackmon,* 42.

§ 77. Admissions and Declarations

Evidence sought to be elicited on cross-examination that defendant immediately denied his guilt when told he was under arrest for rape was properly excluded as a self-serving declaration. *S. v. Taylor,* 273.

Testimony that defendant had requested a lie dectector test was properly excluded as a self-serving declaration. *S. v. Cook,* 642.

§ 79. Acts and Declarations of Companions

Trial court properly admitted testimony that a member of the group which included defendants stated that they were "going to knock a store off," notwithstanding the witness did not know which member of the group made the statement. *S. v. Hairston,* 220.

Statements made by one defendant in furtherance of a conspiracy were competent against both defendants. *S. v. Crump,* 491.

§ 81. Best and Secondary Evidence

Testimony by a kidnap victim that he told a police officer that he could recognize the kidnappers did not violate the best evidence rule. *S. v. Crump,* 491.

§ 84. Evidence Obtained by Unlawful Means

There is no merit to defendant's contention that a search of her at the jail took place before she had been arrested, since her arrest

CRIMINAL LAW — Continued

was complete when officers detained her at a grill and thereafter took her to jail. *S. v. Jackson*, 122.

Police officers had probable cause to arrest defendant without a warrant upon a charge of possession of heroin for purpose of sale, and neither removal of defendant to jail from a grill where she was arrested nor a delay of 30 to 45 minutes waiting for a police matron to search her made the search too remote in time or place to be considered as a search incident to the lawful arrest. *Ibid.*

Where defendant's objection to the introduction of stolen property found in defendant's vehicle was directed to the sufficiency of the identification of the property, the trial court was not required to conduct a voir dire hearing to determine whether the property was obtained by an illegal search and seizure. *S. v. Cumber*, 127.

§ 86. Credibility of Defendant and Parties Interested

Solicitor was properly permitted to examine defendant on voir dire respecting the admitted fact that he was then on parole from a sentence previously imposed. *S. v. Bass*, 435.

The solicitor was properly allowed to cross-examine defendant as to the number of prison sentences defendant had served. *S. v. Gainey*, 366.

It was competent for the solicitor to ask defendant if he had been guilty of other parole violations. *Ibid.*

Admission of evidence on cross-examination of defendant as to his arrest for another crime was harmless error. *Ibid.*

Defendant in rape prosecution was not prejudiced by refusal of trial court to rule prior to trial upon defendant's motion that, if he should elect to testify, the State be denied the right to cross-examine him concerning his prior convictions for other sex crimes. *S. v. Cook*, 642.

§ 87. Direct Examination of Witnesses

Trial court did not abuse its discretion in allowing the solicitor to ask leading questions of a nine-year-old victim of assault with intent to commit rape, *S. v. Payne*, 150, or of a rape victim, *S. v. Johnson*, 281.

Trial court properly allowed solicitor to ask leading questions of a State's witness for the purpose of showing that the witness did not implicate one defendant in the crime in his initial statement to the police because such defendant had threatened to kill him if he talked. *S. v. Hairston*, 220.

Trial court properly permitted the solicitor to ask a rape victim leading questions on voir dire as to whether her identification of defendant was based on a pretrial lineup. *S. v. Bass*, 435.

§ 88. Cross-Examination

Answers made by a witness to collateral questions on cross-examination are conclusive, with two exceptions. *S. v. Long*, 633.

The State was not bound by defendant's denial that he had acquired in a grocery store robbery the pistol used in the robbery of a service station, and could present rebuttal testimony to show that defendant had taken the pistol in the grocery store robbery, the inquiry not being about a collateral matter. *Ibid.*

CRIMINAL LAW — Continued

§ 89. Credibility of Witness; Corroboration and Impeachment

For purposes of impeachment, the defendant may no longer be asked if he has been arrested or indicted for a specific offense, but he may be asked whether he has *committed* specific criminal acts or been guilty of specified reprehensible conduct. *S. v. Gainey,* 366.

Trial court properly admitted for corroborative purposes evidence of prior consistent statements made by a rape victim. *S. v. Best,* 413; *S. v. Cook,* 642.

§ 91. Continuance

A motion for continuance on the ground that defense counsel had not seen certain reports which he had requested from the State *is held* properly denied by the trial court in a homicide prosecution. *S. v. Blackmon,* 42.

Trial court did not err in denial of defendant's unsupported motion for continuance due to absence of witnesses "located in the area of Chicago." *S. v. Stepney,* 306.

§ 92. Consolidation of Counts

Trial court did not err in permitting the State to consolidate for trial charges against defendant for malicious burning of a dwelling house on one date and secret assault and malicious injury to personal property allegedly occurring on another date. *S. v. Blizzard,* 11.

Trial court did not err in consolidating for trial charges against defendant for first degree murder of one person and kidnapping and armed robbery of another person. *S. v. Frazier,* 181.

Trial court properly consolidated for trial indictments charging two defendants with identical crimes of rape. *S. v. Bass,* 435.

Trial court properly consolidated for trial safecracking, felonious breaking and entering and felonious larceny charges against six defendants. *S. v. Jones,* 322.

In order to consolidate for trial two or more indictments for crimes of the same class, it is not required that evidence at the trial of one of the indictments be competent and admissible at the trial of the others. *S. v. Johnson,* 700.

Trial court did not err in consolidating for trial two armed robbery cases against a single defendant. *Ibid.*

§ 95. Admission of Evidence Competent for Restricted Purpose

Even when the right of confrontation is afforded to a defendant implicated in the out-of-court declarations of a codefendant, the prejudicial impact of testimony by the codefendant's declarations must be evaluated in light of the competent evidence admitted against the nondeclarant defendant. *S. v. Jones,* 322.

Admission of a testifying codefendant's extrajudicial statements which incriminated defendant under instructions limiting their competency to the codefendant did not deny defendant due process of law in this case. *Ibid.*

Admission of a nontestifying codefendant's extrajudicial statement that "there were six of us involved" and "they got the safe" did not violate defendant's right of confrontation. *Ibid.*

CRIMINAL LAW — Continued

Extrajudicial statements made by defendants which implicated a codefendant were not rendered inadmissible by the Bruton decision where each declarant took the stand. *Ibid.*

The law will presume that the jury followed the judge's instructions not to consider against defendants evidence presented to rebut the testimony of a codefendant. *S. v. Long*, 633.

§ 98. Custody of Witnesses

Trial court in rape prosecution did not abuse its discretion in refusing to sequester the State's two chief witnesses. *S. v. Taylor*, 273.

Trial court did not abuse its discretion in granting defendant's motion that witnesses for the State be sequestered, with the exception of permitting the eight-year-old rape victim's mother to remain in the courtroom while the child testified. *S. v. Cook*, 642.

§ 99. Trial Court's Expression of Opinion on the Evidence During Trial

The trial court did not err in reframing for clarification purposes the solicitor's question to the pathologist who autopsied the body as to what he found to be the cause of death. *S. v. Sanders*, 67.

Trial court did not express an opinion as to the credibility of witnesses for the State by ruling in the presence of the jury that such witnesses were experts. *S. v. Frazier*, 181.

Trial court's improper remarks to defense counsel constituted harmless error in this homicide prosecution. *State v. Holden*, 426; and in this rape prosecution. *S. v. Bass*, 435.

Trial court's statement, "Ladies and Gentlemen, step into your room. I hate to bother you," was not an expression of opinion that defendant's position was unsound. *S. v. Best*, 413.

Trial judge's erroneous comment, in passing upon a defense objection, that "the jury is the judge" held not prejudicial. *S. v. Gainey*, 366.

Trial court in homicide prosecution did not express an opinion in asking one State's witness 13 questions, in asking a second State's witness five questions, or in asking defendant nine questions. *S. v. Freeman*, 622.

Trial court did not express an opinion on the credibility or guilt of defendant in sustaining the solicitor's objection on ten occasions to questions propounded to defendant on direct examination. *Ibid.*

§ 100. Permitting Counsel to Act in Lieu of Solicitor

Trial court properly denied defendant's motion to prevent a private prosecutor from assisting in the case. *S. v. Best*, 413.

§ 101. Custody and Conduct of Jury

Trial court did not abuse its discretion in denial of defendant's motion that the jury be directed to view the trailer where the assault allegedly occurred. *S. v. Payne*, 150.

It is better practice for the court, at a recess of a trial, to instruct the jury that at such recess they are not to discuss the case among themselves or with any other person. *S. v. Frazier*, 181.

§ 102. Argument and Conduct of Counsel or Solicitor

Defendant was not prejudiced by the solicitor's improper argument to the jury where the court admonished the solicitor to "stay away from that sort of thing." *S. v. Payne*, 150.

CRIMINAL LAW — Continued

§ 122. Additional Instructions after Initial Retirement of Jury

Instruction that punishment was the concern of the court and that "I have certain information before me as to the background of the defendant's prior record, if any," while disapproved, was not reversible error. *S. v. Bailey*, 264.

Trial judge's instruction that jury had a duty to reach a verdict if they could do so without violence to their consciences was not coercive. *Ibid.*

Trial judge's comment, when asked if the jury could ask clarifying questions, that "The judges always shudder when the jury comes back in and say when they have a question to ask" held not prejudicial. *Ibid.*

Statement made by trial court, while instructing the jury to make a sincere effort to reach a verdict, that "insofar as I know, all of the evidence that is available has been presented for your consideration," held not to constitute an expression of opinion. *S. v. Brown*, 588.

The trial court properly declined to answer an inquiry by the jury foreman regarding defendant's eligibility for parole if given a life sentence and adequately instructed the jury that the question of parole was not a proper matter for their consideration. *S. v. Flippin*, 682.

§ 124. Sufficiency and Effect of Verdict

Jury's verdict was sufficient where the foreman stated "we make a recommendation that the defendant be found guilty as charged and recommend life imprisonment," and all jurors responded positively when asked by the clerk if their verdict was guilty of rape with recommendation that punishment be life imprisonment. *S. v. Best*, 413.

A verdict of not guilty due to insanity constitutes a full acquittal. *In re Tew*, 612.

§ 126. Unanimity of Verdict, Polling the Jury and Acceptance of the Verdict

The foreman announced that the jury found defendant guilty of safecracking, but one of the jurors who was polled announced his verdict as "guilty of attempted safecracking." The trial judge repeated his instruction that the jury could find defendant guilty of safecracking, guilty of attempted safecracking, or not guilty. The second poll of the jury resulted in the unanimous verdict of guilty of attempted safecracking. *Held:* The verdict of guilty of attempted safecracking was properly accepted by the trial judge. *S. v. Sanders*, 81.

§ 127. Arrest of Judgment

Defendant is entitled to have arrested the judgment imposed upon his conviction of disseminating obscenity in violation of a statute which was unqualifiedly repealed while defendant's appeal was pending in the Supreme Court. *S. v. McCluney*, 404.

§ 128. Discretionary Power to Order Mistrial

Trial court's instructions cured error in solicitor's question to defendant in rape prosecution as to whether he had not tried to gain entrance into a woman's house in another county by telling her he was interested in her house, the same method employed in the present case, and defendant's motion for mistrial was properly denied. *S. v. Self*, 665.

CRIMINAL LAW — Continued

§ 135. Judgment and Sentence in Capital Case

The death penalty for first degree murder does not constitute cruel and unusual punishment. *S. v. Frazier*, 181.

Trial court in first degree murder prosecution did not err in allowing the State's challenges for cause to prospective jurors who stated they would never consider returning a verdict upon which the judge would have to impose the death sentence. *Ibid.*

Constitutional rights of defendant on trial for first degree murder were not violated by the single verdict procedure or by the fact that the jury had unbridled discretion to determine whether to impose the death penalty. *Ibid.*

Judgment of life imprisonment imposed pursuant to Supreme Court order is affirmed. *S. v. Roseboro*, 716.

Superior court properly sentenced defendant to life imprisonment for rape and first degree burglary pursuant to a mandate of the U. S. Supreme Court setting aside death sentence. *S. v. Childs*, 576.

Trial court in prosecution for capital crime of rape properly sustained State's challenges for cause to prospective jurors who stated on voir dire that they would not consider verdict which would result in imposition of death penalty. *S. v. Cook*, 642.

Witherspoon decision is not applicable where jury recommends life imprisonment. *Ibid.*

§ 138. Severity of Sentence and Determination Thereof

A defendant is not entitled to credit for time spent undergoing psychiatric evaluation in the State hospital to determine his competency to plead and stand trial. *S. v. Ferguson*, 95.

Defendant's constitutional rights were not violated by imposition of a greater sentence in superior court than that imposed in the district court. *S. v. Speights*, 137.

§ 146. Appellate Jurisdiction of Supreme Court in Criminal Cases

Purported appeal as of right to the Supreme Court from the Court of Appeals is dismissed for failure to present a substantial constitutional question where the constitutional question relied upon was not raised in the trial court. *S. v. Cumber*, 127.

§ 148. Judgments Appealable

Defendants could appeal from a void superior court order that determined that 95% of the materials seized from defendants were obscene and could be retained by the police pending trial of defendants in the district court for disseminating obscenity. *S. v. Bryant*, 407.

§ 154. Case on Appeal

Defendant is not entitled to a new trial by reason of the unavailability of the transcript of defendant's direct testimony and the court's charge, which had disappeared from the court reporter's records. *S. v. Sanders*, 67.

There is no duty on the court to settle a case on appeal unless there is a disagreement between the solicitor and counsel. *Ibid.*

CRIMINAL LAW — Continued

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

When the charge is not included in the case on appeal, it is presumed to be free from error. *S. v. Murphy*, 1.

The Supreme Court is bound by the record as certified. *S. v. Williams*, 132.

§ 161. Necessity for and Requisites of Exceptions and Assignments of Error

Error otherwise than upon the face of the record proper must be the subject of an assignment. *S. v. Sanders*, 67.

Defendant's exception to entry of judgment upon plea of guilty presents only face of record proper for review. *S. v. Shelly*, 300.

As assignment of error is ineffectual unless based on an exception duly noted. *S. v. Green*, 431.

§ 162. Objections, Exceptions and Assignments of Error to Evidence

The trial court, upon inquiry, is entitled to know the ground of an objection, and if counsel specifies one ground he cannot urge a different ground upon appeal. *S. v. Cumber*, 127.

Where defense counsel stated he had no objection to the reporter reading a witness' testimony to the jury after the jury asked for clarification of the witness' testimony, objection thereto interposed by defendant after the testimony had been read to the jury came too late. *S. v. Payne*, 170.

The admission of incompetent evidence is ordinarily not ground for a new trial where there was no objection at the time the evidence was offered, even though defendant asserts on appeal that the evidence was obtained in violation of his constitutional rights. *S. v. Jones*, 322.

Objection to an answer responsive to a question comes too late after the witness has so answered the question. *S. v. Wilson*, 674.

§ 163. Exceptions and Assignments of Error to Charge

Objections to the manner in which the trial court stated the contentions of the parties must be made before the jury retires. *S. v. Tart*, 172.

§ 166. The Brief

Assignments of error not discussed in the brief are deemed abandoned. *S. v. Hairston*, 220.

§ 167. Harmless and Prejudicial Error in General

A constitutional error does not require reversal of a conviction where the appellate court can declare that it was harmless beyond a reasonable doubt. *S. v. Taylor*, 273.

§ 168. Harmless and Prejudicial Error in Instructions

Trial court's instruction that defendant entered the building "with the consent of the owners" was a lapsus linguae. *S. v. Sanders*, 81.

Trial judge's comment, when asked if the jury could ask clarifying questions, that "The judges always shudder when the jury comes back in and say when they have a question to ask," held not prejudicial. *S. v. Bailey*, 264.

CRIMINAL LAW — *Continued*

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

In a first degree murder prosecution, the erroneous admission in evidence of defendant's incriminating statements to an SBI agent required a new trial, notwithstanding there was other evidence sufficient to support a conviction. *S. v. Blackmon,* 42.

Admission of evidence over objection is not prejudicial when like testimony is admitted without objection. *S. v. Stepney,* 306.

Defendant was not prejudiced by an erroneous ruling of the court favorable to him. *S. v. Long,* 633.

Exclusion of defendant's testimony in first degree murder prosecution that he at no time intended to kill deceased was harmless error. *S. v. Freeman,* 622.

Exclusion of testimony is not prejudicial error where the record fails to show what testimony of the witness would have been. *S. v. Robinson,* 718.

Admission of testimony that defendant was married at the time of the alleged rape was not prejudicial error. *S. v. Self,* 665.

§ 170. Harmless and Prejudicial Error in Remarks of Court During the Trial

Defendant was not prejudiced by the solicitor's improper argument to the jury where the court admonished the solicitor to "stay away from that sort of thing." *State v. Payne,* 150.

Trial court's improper remarks to defense counsel constituted harmless error in this homicide prosecution. *S. v. Holden,* 426; in this rape prosecution, *S. v. Bass,* 435.

§ 173. Invited Error

Invited error is not ground for a new trial. *S. v. Payne,* 170.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. *Blades v. Raleigh,* 531.

DEDICATION

§ 3. Withdrawal and Revocation of Dedication

Plaintiffs were entitled to withdraw a street and alley from dedication where a municipality had not opened the street and alley to public use within 15 years after it was shown on a map registered by real estate developers. *Osborne v. North Wilkesboro,* 696.

DEEDS

§ 16. Conditions

Language in a deed was sufficient to constitute a fee on condition subsequent. *Mattox v. State,* 471.

Grantor of land is entitled to recover the premises for breach of a condition subsequent that the State "perpetually and continuously keep, maintain and operate" the premises for a Highway Patrol Radio Station and Highway Patrol Headquarters. *Ibid.*

DOMICILE

§ 1. Definitions and Distinctions

As used in Article of N. C. Constitution relating to qualifications to vote in this State, "residence" means "domicile." *Hall v. Board of Elections,* 600.

Residence and domicile defined. *Ibid.*

ELECTIONS

§ 2. Qualification of Electors and Registration

Facts to be considered in determining whether a college student's voting residence is at the location of the college he is attending or where he lived before entering college. *Hall v. Board of Elections,* 600

Findings of fact by trial court that a student attending college in Raleigh had abandoned her former domicile and acquired a new one in Raleigh are binding on the appellate court and support the trial court's judgment that the student is entitled to vote in Raleigh. *Ibid.*

EVIDENCE

§ 4. Presumptions in General

There is a prima facie presumption that material mailed to plaintiff was received by him in due course. *Willis v. Davis Industries,* 709.

§ 15. Relevancy and Competency of Evidence

Evidence as to the good or bad character of a party to a civil action who has not become a witness is not ordinarily admissible. *Johnson v. Massengill,* 376.

HABEAS CORPUS

§ 2. Determinaiton of Legality of Restraint

A person acquitted of crime by reason of insanity who seeks to be discharged from a mental hospital on the ground of restoration to sanity must resort to habeas corpus proceedings. *In re Tew,* 612.

HOMICIDE

§ 4. Murder in the First Degree

A felony is within purview of felony-murder statute if the commission or attempted commission results in substantial foreseeable human risk and actually results in the loss of life. *S. v. Thompson,* 202.

Crimes of felonious breaking and entering and felonious larceny were unspecified felonies within the purview of the felony-murder statute. *Ibid.*

Killing of a person by one engaged in the perpetration of a felony inherently dangerous to human life is first degree murder notwithstanding discharge of the pistol is unintentional. *Ibid.*

Where conviction of felony-murder was based on jury finding that murder was committed in the perpetration of a felonious breaking and entering, no separate punishment can be imposed for the breaking and entering. *Ibid.*

HOMICIDE — Continued

§ 25. Instructions on First Degree Murder; Malice

The word "black" in the court's instruction on malice did not refer to the fact that defendants are Negroes but was an adjective synonymous with evil. *S. v. Hairston*, 220.

Trial court did not err in refusing to charge the jury that a conspiracy to rob had been abandoned and that the other defendants were not accountable for the act of the defendant who shot the victim. *Ibid.*

§ 26. Instructions on Second Degree Murder

Trial court's erroneous instruction that second degree murder is the unlawful killing of a human being "without malice" was rendered harmless when the court thereafter corrected such instruction. *S. v. Cole*, 398.

§ 27. Instructions on Manslaughter

Trial court did not err in charging that manslaughter is the "intentional unlawful killing of a human being without malice, either express or implied and without deliberation or premeditation." *S. v. Rummage*, 51.

The court's frequent use in charge on manslaughter of the words "intentional killing" and "intentional shooting" bore too heavily against defendant by pointing to a finding of malice. *Ibid.*

Court's instructions did not give defendant benefit of the possibility that second degree murder might be mitigated to manslaughter by reason of the use of excessive force while acting in self-defense. *S. v. Rummage*, 51.

§ 28. Instructions on Defenses

Trial court erred in failing to charge as to the bearing the reputation of deceased as a violent man might have had on defendant's reasonable apprehension of death or great bodily harm at the time deceased attacked or threatened to attack defendant. *S. v. Rummage*, 51.

Defendant's testimony that by reason of his voluntary intoxication he did not "remember" the shooting or anything about it did not require the court to instruct the jury on the defense of "unconsciousness," the trial court's instructions on the defense of intoxication being sufficient. *S. v. Wilson*, 674.

§ 30. Submission of Lesser Degrees of the Crime

Trial court in first degree murder prosecution did not err in failing to instruct on second degree murder. *S. v. Hairston*, 220.

Failure of trial court in first degree murder prosecution to instruct on voluntary manslaughter constituted harmless error where jury returned verdict of guilty of first degree murder. *S. v. Freeman*, 622.

§ 31. Verdict and Sentence

The death penalty for first degree murder does not constitute cruel and unusual punishment. *S. v. Frazier*, 181.

Constitutional rights of defendant on trial for first degree murder were not violated by the single verdict procedure or by the fact that the jury had unbridled discretion to determine whether to impose the death penalty. *Ibid.*

INDICTMENT AND WARRANT

§ 5. Findings and Return of Grand Jury

The lack of endorsement on a bill of indictment will not support a motion to quash. *S. v. Cox,* 689.

There is no merit to defendant's contention that the grand jury intended to return not a true bill when it inserted the letter "X" in an endorsement on the indictment stating that "this bill found X A True Bill." *Ibid.*

§ 6. Issuance of Warrants

Evidence related by officers to the magistrate was sufficient to justify the issuance of an arrest warrant. *S. v. Johnson,* 281.

§ 9. Charge of Crime

Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage. *S. v. Taylor,* 273.

§ 12. Amendment

Trial court erred in allowing the State to amend an indictment for dispensing narcotics to a minor to include therein an allegation that defendant was "an adult person, age 25." *S. v. Jackson,* 563.

§ 14. Motion to Quash

In ruling on a motion to quash, the court is not permitted to consider extraneous evidence; therefore, when the defect must be established by evidence aliunde the record, the motion must be denied. *S. v. Bass,* 435.

In ruling on defendant's motion to quash a rape indictment, the trial court properly ignored defendant's recitals in the motion and an affidavit of defendant's counsel. *Ibid.*

§ 17. Variance Between Averment and Proof

There was no fatal variance between indictment charging robbery in which money was taken from "Ice Service Store, a corporation," and evidence that the name of the company was "Ice Service, Incorporated." *S. v. Spillars,* 341.

INFANTS

§ 1. Protection and Supervision of Infants by Court

Except when otherwise provided by statute, a person is a minor until he attains the age of 21 years. *S. v. Jackson,* 563.

INJUNCTIONS

§ 3. Mandatory Judgments

In a suit against a public official or board, there is no practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction. *Sutton v. Figgatt,* 89.

INSANE PERSONS

§ 11. Restoration of Sanity and Discharge

Portion of G.S. 122-86 providing that no judge shall discharge upon habeas corpus a person acquitted of crime because of insanity until the superintendents of the several State hospitals have certified to his sanity is unconstitutional. *In re Tew*, 612.

A person acquitted of crime by reason of insanity who seeks to be discharged from a mental hospital on the ground of restoration to sanity must resort to habeas corpus proceedings. *Ibid.*

INSURANCE

§ 73. Insurance Against Accidental Damage to Car Other Than by Collision

The intentional setting on fire of an automobile by the son of the insured under an automobile liability policy is held a "direct and accidental loss" within the terms of the policy. *Pleasant v. Insurance Co.*, 100.

§ 95. Cancellation — Vehicle Financial Responsibility Act

An assigned risk policy was terminated "by the insured" by his complete ignoring of the offer of the insurer to renew the policy contained in the notice of premium sent by the insurer to insured and received by him; consequently, termination of the policy was not contingent upon the insurer's giving notice thereof to the Department of Motor Vehicles 15 days prior to the effective date of termination. *Insurance Co. v. Cotten*, 20.

Where the statutory requirement is that notice be given to the Department of Motor Vehicles "immediately" after termination of the policy becomes effective, a delay in giving notice will not defeat the termination. *Ibid.*

§ 142. Action on Burglary and Theft Policies

Plaintiff's evidence was insufficient to be submitted to the jury in an action to recover under the theft provision of a homeowner's policy for the loss of two diamond rings where it tended to show only a mysterious disappearance. *Adler v. Insurance Co.*, 146.

INTOXICATING LIQUOR

§ 1. Validity of Control Statutes

Statute authorizing an election in Mecklenburg County to determine whether mixed beverages may be sold by the drink in that county is a local act regulating trade and is unconstitutional. *Smith v. County of Mecklenburg*, 497.

JURY

§ 3. Number of Jurors

The return of a guilty verdict by eleven jurors—one juror having become ill during the trial—was a nullity. *S. v. Hudson*, 74.

§ 7. Challenges

Trial court did not err in allowing the State's challenges for cause to prospective jurors who stated they would never consider returning a verdict upon which the judge would have to impose the death sentence. *S. v. Frazier*, 181; *S. v. Cook*, 642.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

The issue of defendant's guilt of kidnapping a 13-year-old boy by fraud was properly submitted to the jury. *S. v. Murphy,* 1.

Statements made by one defendant in furtherance of a conspiracy to kidnap were competent against both defendants. *S. v. Crump,* 491.

State's evidence was sufficient for jury in kidnapping prosecution. *S. v. Brown,* 588.

Exclusion of testimony as to defendant's past relationships with prosecutrix and another State's witness was not prejudicial error. *S. v. Robinson,* 718.

LARCENY

§ 5. Presumptions and Burden of Proof

The doctrine of recent possession of stolen goods allows the raising of an inference that the possessor is guilty of breaking and entering and larceny. *S. v. Muse,* 31.

§ 7. Sufficiency of Evidence

Where indictment charged larceny of personal property of a named person and evidence showed only property missing was that belonging to another person and his wife, nonsuit for fatal variance was proper. *S. v. Thompson,* 202.

MANDAMUS

§ 1. Nature and Grounds for the Writ

Nature and purpose of mandamus. *Sutton v. Figgatt,* 89.

In a suit against a public official or board, there is no practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction. *Ibid.*

Writ will not issue to compel the performance of an act which a defendant shows a willingness to perform without coercion or to redress a past wrong or to prevent a future legal injury. *Ibid.*

§ 2. Ministerial or Discretionary Duty

Plaintiffs were not entitled to a writ of mandamus compelling defendant magistrate to examine plaintiffs upon their application for a warrant against two deputy sheriffs by reason of defendant's refusal on one occasion to examine plaintiff, where defendant announced in open court that if plaintiffs would reapply to him for a warrant he would examine them upon oath. *Ibid.*

MASTER AND SERVANT

§ 77. Review of Compensation Award for Change of Condition

Failure of employer or carrier to furnish a copy of Form 28B to plaintiff with his last compensation payment as required by Industrial Commission's rule did not estop them from asserting the one-year limitation of G.S. 97-47 as a defense to plaintiff's claim for additional compensation for a change of condition. *Willis v. Davis Industries,* 709.

MUNICIPAL CORPORATIONS

§ 1. Creation of Municipal Corporations

Act purporting to reinstate the Municipal Board of Control for the sole purpose of allowing it to complete its unfinished business was unconstitutional, where the only unfinished business before the Board when it was abolished was an application for the incorporation of "Indian Hills." *In re Incorporation of Indian Hills,* 659.

§ 4. Powers of Municipalities in General

Plaintiff failed to raise a genuine issue of triable fact as to whether defendant housing authority acted arbitrarily and capriciously and in abuse of its discretion in the selection of a site for a low-rent housing project. *Singleton v. Stewart,* 460.

§ 21. Injuries in Connection with Sewers and Sewage Disposal

Municipality was not protected by the doctrine of governmental immunity in actions for wrongful death and personal injuries resulting from an explosion in a National Guard armory of accumulated methane gas which had been generated in and released from the city's landfill operation. *Koontz v. Winston-Salem,* 513.

§ 30. Zoning Ordinances

A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. *Blades v. Raleigh,* 531.

Municipality's rezoning of a 5-acre tract of land from R-4 classification to a less restrictive R-6 classification constituted "spot zoning" and unlawful "contract zoning." *Ibid.*

§ 32. Regulations Relating to Public Morals

Municipal ordinance prohibiting the operation of a billiard hall "at any time on Sunday" violates equal protection. *S. v. Greenwood,* 651.

NARCOTICS

§ 1. Elements of Statutory Offenses

Time and place are not essential elements of the offense of unlawful possession of narcotics; it is sufficient that the county of the offense be named in order to establish the jurisdiction of the court. *S. v. Bennett,* 167.

§ 2. Indictment

An indictment charging the sale of narcotics must allege the name of the purchaser. *S. v. Bennett,* 167.

Trial court erred in allowing the State to amend an indictment for dispensing narcotics to a minor to include therein an allegation that defendant was "an adult person, age 25." *S. v. Jackson,* 563.

Indictment for dispensing drugs to a minor need not allege the age of defendant or that defendant was an adult. *Ibid.*

§ 5. Punishment

Statute setting forth the punishment for dispensing narcotic drugs when the dispensation is "to a minor by an adult," is not unconstitutionally vague and indefinite in failing to define the words "minor" and "adult." *S. v. Jackson,* 563.

OBSCENITY

Warrant was sufficient to charge a violation of a county ordinance prohibiting "topless" dancing. *S. v. Tenore*, 238.

County board of commissioners had no authority to adopt an ordinance prohibiting the presentation of a nude or obscene dance, since the field has been preempted by enactment of a state-wide statute prohibiting the same conduct. *Ibid.*

Defendant is entitled to have arrested the judgment imposed upon his conviction of disseminating obscenity in violation of a statute which was unqualifiedly repealed while defendant's appeal was pending in the Supreme Court. *S. v. McCluney*, 404; *S. v. Bryant*, 407.

Superior court did not have jurisdiction under former statute to make a preliminary determination of whether materials seized were obscene. *S. v. Bryant*, 407.

RAPE

§ 3. Indictment

Trial court did not err in refusal to strike from an indictment for rape the words "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil." *S. v. Taylor*, 273.

§ 4. Relevancy and Competency of Evidence

Testimony by a rape victim's mother and grandmother as to the events that occurred in the home from the time of defendant's violent entry until the consummation of the rape was competent and relevant as part of the res gestae, including their testimony that they had been assaulted by the defendant. *S. v. Burleson*, 112; *S. v. Griffin*, 142.

Trial court in rape prosecution did not err in admission of evidence of blood and hair samples obtained from defendant with his consent. *S. v. Johnson*, 281.

Trial court properly admitted bloodstained clothing worn by six-year-old rape victim when she was taken to a hospital. *S. v. Cox*, 689.

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury in rape prosecution. *S. v. Johnson*, 281; *S. v. Johnson*, 295; *S. v. Bryant*, 551; *S. v. Brown*, 689.

§ 6. Submission of Lesser Degrees of the Crime

Where all the evidence tends to show an accomplished rape and neither the State nor defendant offered any evidence in support of a guilty verdict of assault with intent to commit rape, the trial judge is not required to charge on the lesser offense. *S. v. Burleson*, 112; *S. v. Griffin*, 142.

Trial court did not err in failing to submit to the jury the lesser included offense of assault with intent to commit rape. *S. v. Bryant*, 551; *S. v. Flippin*, 682.

§ 7. Verdict and Judgment

Jury's verdict was sufficient where the foreman stated "we make a recommendation that the defendant be found guilty as charged and recommend a life imprisonment," and all jurors responded positively when asked by the clerk if their verdict was guilty of rape with recommendation that punishment be life imprisonment. *S. v. Best*, 413.

ROBBERY — Continued

§ 3. Competency of Evidence

The State was not bound by defendant's denial that he had acquired in a grocery store robbery the pistol used in the robbery of a service station, and could present rebuttal testimony to show that defendant had taken the pistol in the grocery store robbery, the inquiry not being about a collateral matter. *S. v. Long*, 633.

§ 4. Sufficiency of Evidence and Nonsuit

There was sufficient evidence to show that the offense of attempted armed robbery had been committed. *S. v. Price*, 154.

Evidence was sufficient to support a jury finding that defendant, who remained in the car during an armed robbery attempt at a store, was guilty of attempted armed robbery as a principal in the second degree. *Ibid.*

There was no fatal variance between indictment charging robbery in which money was taken from "Ice Service Store, a corporation," and evidence that the name of the company was "Ice Service, Incorporated." *S. v. Spillars*, 341.

The fact that one employee of a store happens to be farther from the store's money than two other employees when it was taken into possession by robbers does not negate the fact that it was taken from the presence of the first employee. *S. v. Ballard*, 479.

In an armed robbery prosecution, variance between the allegations of the indictment and the proof in respect of the property taken is not material. *Ibid.*

§ 5. Submission of Lesser Degrees of the Crime

Where all of the State's evidence tends to show a completed armed robbery and defendant's evidence shows that he committed no crime, the trial court was not required to charge on the lesser offense of assault with a deadly weapon. *S. v. Allison*, 175.

Evidence in armed robbery prosecution did not require submission of common law robbery. *S. v. Frazier*, 181.

Instruction in armed robbery prosecution on endangering the life of the victim was proper. *S. v. Bailey*, 264.

Instruction in armed robbery prosecution that "a .22 caliber pistol is a firearm" was not prejudicial. *Ibid.*

§ 6. Verdict and Sentence

Trial court could properly pronounce separate judgments for armed robbery and for felonious assault committed during the robbery. *S. v. Stepney*, 306.

RULES OF CIVIL PROCEDURE

§ 12. Defenses and Objections; by Pleading or Motion

Defense of failure to state a claim for relief may be asserted either in a responsive pleading or by motion to dismiss. *Forrester v. Garrett*, 117.

§ 50. Motion for Directed Verdict

Consideration and sufficiency of evidence on motion for directed verdict. *Adler v. Insurance Co.*, 146.

RULES OF CIVIL PROCEDURE — Continued

§ 56. Summary Judgment

Summary judgment may be granted where the pleadings or proof disclose that no cause of action or defense exists. *Harrison Associates v. State Ports Authority*, 251.

Motion for summary judgment may be made either before or after responsive pleadings are filed. *Singleton v. Stewart*, 460.

In ruling of a motion for summary judgment, the trial court could not consider portions of plaintiff's affidavit not based on the affiant's personal knowledge. *Ibid.*

Although the trial judge was not required to make and enter into the record detailed findings of fact in ruling on a motion for summary judgment, it was not error for the court to do so. *Ibid.*

When motion for summary judgment should be allowed. *Koontz v. Winston-Salem*, 513; *Blades v. Raleigh*, 531.

§ 60. Relief from Judgment or Order

When an appeal was taken, the trial court was divested of jurisdiction and was without authority to consider plaintiff's motion under Rule 60 for a new trial on the ground of newly discovered evidence. *Wiggins v. Bunch*, 106.

SAFECRACKING

Trial court's instruction which used the expressions "safecracking" and "attempted safecracking" as synonymous with the statutory language "force open" and "attempt to force open" a safe or vault was not erroneous. *S. v. Sanders*, 81.

Removing the dial of a safe, sawing off its hinges, chiseling out a part of the concrete bottom of another safe and "smudging" it with a blowtorch constituted in law an "attempted safecracking." *Ibid.*

Evidence of defendant's guilt of safecracking was properly submitted to the jury. *S. v. McNeil*, 159.

SALES

§ 5. Express Warranties

Seller's statement that a mobile home was "supposed to last a lifetime and be in perfect condition" does not create an express warranty. *Motors, Inc. v. Allen*, 385.

Buyer's inspection of a mobile home at the seller's place of business did not destroy the implied warranty of fitness where the contract of sale imposed on the seller the obligation to deliver the mobile home and install it on the owner's lot. *Ibid.*

§ 6. Implied Warranties

Sale of a mobile home carried with it an implied warranty that the mobile home was fit for residential purposes. *Motors, Inc. v. Allen*, 385.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Police officers had probable cause to arrest defendant without a warrant upon a charge of possession of heroin for purpose of sale, and neither removal of defendant to jail from a grill where she was arrested nor a delay of 30 to 45 minutes waiting for a police matron to search her made the search too remote in time to be considered as a search incident to the lawful arrest. *S. v. Jackson*, 122.

§ 3. Requisites and Validity of Search Warrant

It is not necessary that an affidavit for a search warrant contain all the evidence properly presented to a magistrate. *S. v. Spillars*, 341.

Statutory requirement that an affidavit for a search warrant indicate the basis for the finding of probable cause does not impose the duty upon the magistrate to transcribe all evidence before him supporting probable cause. *Ibid.*

An affidavit for a search warrant may be based on hearsay information. *Ibid.*

There was sufficient evidence before the magistrate to establish probable cause for issuance of a warrant to search for money taken in an armed robbery and articles used in connection with that crime. *Ibid.*

Defendant failed to support his contention that the warrant was irregular because the affidavit was not attached to the warrant. *Ibid.*

Trial court committed prejudicial error in admission of a search warrant and the accompanying affidavit where the affidavit contained hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime. *Ibid.*

SOLICITORS

G.S. Ch. 7A does not prohibit the practice of employing private counsel to assist the solicitor. *S. v. Best*, 413.

STATE

§ 4. Actions Against the State

Plaintiff cannot recover in action against the State Ports Authority for loss of profits due to alleged delay by defendant and for losses due to devaluation of the German mark. *Harrison Assoc. v. State Ports Authority*, 251.

Plaintiff's contract action against the State Ports Authority should have been dismissed where plaintiff failed to complete its contract by furnishing to defendant (1) "as-built" drawings and (2) an affidavit that all payments for materials, services and any other reason in connection with the contract have been satisfied. *Ibid.*

STATUTES

§ 2. Constitutional Prohibition Against Enactment of Local or Special Acts

Act purporting to reinstate the Municipal Board of Control for the sole purpose of allowing it to complete its unfinished business was un-

STATUTES — Continued

constitutional where the only unfinished business before the Board when it was abolished was an application for the incorporation of "Indian Hills." *In re Incorporation of Indian Hills,* 659.

Statute authorizing an election in Mecklenburg County to determine whether mixed beverages may be sold by the drink in that county is a local act regulating trade and is unconstitutional. *Smith v. County of Mecklenburg,* 497.

§ 5. General Rules of Construction

A statute is not deemed to be repealed merely by the enactment of another statute on the same subject. *Person v. Garrett,* 163.

§ 8. Prospective and Retroactive Effect

The repeal of a state-wide statute which prohibited the enactment of a county ordinance does not validate an ordinance passed while the statute was in effect. *S. v. Tenore,* 238.

§ 11. Repeal and Revival

When a statute creating a criminal offense is repealed by a law subsequently enacted, the former will be held inoperative even as to offenses committed before the passage of the latter act, unless a contrary intent on the part of the legislature appears from the language in the repealing statute. *S. v. McCluney,* 404.

TRIAL

§ 13. Allowing Jury to Visit Exhibits or Scene

Trial court did not abuse its discretion in denial of defendant's motion that the jury be directed to view the trailer where the assault allegedly occurred. *S. v. Payne,* 150.

TRUSTS

§ 1. Creation of Written Trusts

Provision of a will directing trustees to transfer a portion of the trust properties to a city "to be used by it in furnishing facilities for and in furtherance of aviation" did not impress a further trust upon the properties so as to require the city to account to the trustees for its use of the properties. *Bank v. Home For Children,* 354.

§ 10. Duration and Termination of Trust and Distribution of Corpus

Trial court erred in directing that costs of an action to construe a trust to be paid out of the trust corpus where the will authorized the trustees to determine how receipts and disbursements shall be apportioned between income and principal. *Bank v. Home For Children,* 354.

UNIFORM COMMERCIAL CODE

§ 13. Form and Formation of Contract

Security agreement in which the buyer of a mobile home acknowledged delivery "in good condition and repair" was not intended as a "complete and exclusive statement of the terms of the agreement," and the buyer's

UNIFORM COMMERCIAL CODE — Continued

testimony with respect to the defective condition of the mobile home after installation was competent as evidence of additional consistent terms of the sale. *Motors, Inc. v. Allen,* 385.

§ 15. Warranties

Seller's statement that a mobile home "was supposed to last a lifetime and be in perfect condition" did not create an express warranty. *Motors, Inc. v. Allen,* 385.

Sale of a mobile home carried with it an implied warranty that the mobile home was fit for residential purposes. *Ibid.*

Buyer's inspection of a mobile home at the seller's place of business did not destroy the implied warranty of fitness where the contract of sale imposed on the seller the obligation to deliver the mobile home and install it on the owner's lot. *Ibid.*

§ 19. Inspection of Goods

The buyer's down payment on a mobile home would not impair his right to inspect following delivery. *Motors, Inc. v. Allen,* 385.

Unless otherwise agreed, when the seller is required to send the goods to the buyer, the inspection may be after their arrival, and the buyer is entitled to a reasonable time after the goods arrive at their final destination to inspect and reject them if they do not comply with the contract. *Ibid.*

§ 20. Breach, Repudiation and Excuse

Rules relating to the acceptance or rejection of goods. *Motors, Inc. v. Allen,* 385.

Defendant's evidence was insufficient to support a finding that she rejected a mobile home where it showed she moved into the home and made three monthly payments, but was sufficient to show that defendant revoked her acceptance by continually complaining to plaintiff of defects and thereafter ceasing to make payments under her contract. *Ibid.*

§ 21. Buyer's Remedies

Measure of damages when buyer of defective mobile home rejected the home or justifiably revoked her acceptance. *Motors, Inc. v. Allen,* 385.

Measure of damages for breach of implied warranty of fitness. *Ibid.*

A buyer who properly revokes his acceptance is not required to elect between revocation of acceptance and recovery of damages for breach of implied warranty of fitness, both remedies being available to him. *Ibid.*

WILLS

§ 58. General and Specific Legacies

Legatee of a bequest of a specific number of shares of stock is not entitled to accretions from stock split and stock dividends occurring between date of will and date of death of testator. *Bank v. Carpenter,* 705.

WITNESSES

WORD AND PHRASE INDEX

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