# NORTH CAROLINA REPORTS

---

VOLUME 287

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SUPREME COURT OF NORTH CAROLINA

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# NORTH CAROLINA

*Chief Justice*

SUSIE SHARP

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DAN K. MOORE
J. WILLIAM COPELAND
JAMES G. EXUM, JR.

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SHERRY M. COCHRAN

# TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

## SUPERIOR COURT DIVISION

*First Division*

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | J. HERBERT SMALL | Elizabeth City |
| 2 | ELBERT S. PEEL, JR. | Williamston |
| 3 | ROBERT D. ROUSE, JR. | Farmville |
| 4 | RUSSELL J. LANIER | Beulaville |
| 5 | BRADFORD TILLERY | Wilmington |
| | JOSHUA S. JAMES | Wilmington |
| 6 | PERRY MARTIN | Rich Square |
| 7 | GEORGE M. FOUNTAIN | Tarboro |
| | JOHN WEBB | Wilson |
| 8 | ALBERT W. COWPER | Kinston |

*Second Division*

| | | |
|---|---|---|
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| 10 | JAMES H. POU BAILEY | Raleigh |
| | A. PILSTON GODWIN, JR. | Raleigh |
| | EDWIN S. PRESTON, JR. | Raleigh |
| 11 | HARRY E. CANADAY | Smithfield |
| 12 | E. MAURICE BRASWELL | Fayetteville |
| | COY E. BREWER | Fayetteville |
| 13 | GILES R. CLARK | Elizabethtown |
| 14 | CLARENCE W. HALL | Durham |
| | THOMAS H. LEE | Durham |
| 15 | D. MARSH MCLELLAND | Burlington |
| 16 | HENRY A. MCKINNON, JR. | Lumberton |

*Third Division*

| | | |
|---|---|---|
| 17 | JAMES M. LONG | Yanceyville |
| 18 | WALTER E. CRISSMAN | High Point |
| | CHARLES T. KIVETT | Greensboro |
| | W. DOUGLAS ALBRIGHT | Greensboro |
| 19 | THOMAS W. SEAY, JR. | Spencer |
| | HAL HAMMER WALKER | Asheboro |
| 20 | JOHN D. MCCONNELL | Southern Pines |
| 21 | WILLIAM Z. WOOD | Winston-Salem |
| | HARVEY A. LUPTON | Winston-Salem |
| 22 | ROBERT A. COLLIER, JR. | Statesville |
| 23 | JULIUS R. ROUSSEAU | North Wilkesboro |

*Fourth Division*

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 24 | BRUCE B. BRIGGS | Mars Hill |
| 25 | SAM J. ERVIN III | Morganton |
| | FORREST A. FERRELL | Hickory |
| 26 | FRED H. HASTY | Charlotte |
| | WILLIAM T. GRIST | Charlotte |
| | FRANK W. SNEPP, JR. | Charlotte |
| | KENNETH A. GRIFFIN | Charlotte |
| 27 | B. T. FALLS, JR. | Shelby |
| | JOHN R. FRIDAY | Lincolnton |
| | ROBERT W. KIRBY | Cherryville |
| 28 | HARRY C. MARTIN | Asheville |
| | ROBERT D. LEWIS | Asheville |
| 29 | J. W. JACKSON | Hendersonville |
| 30 | LACY H. THORNBURG | Webster |

## SPECIAL JUDGES

| | |
|---|---|
| SAMMIE CHESS[1] | High Point |
| DENNIS J. WINNER[2] | Asheville |
| ROBERT R. BROWNING | Greenville |
| JERRY S. ALVIS | Raleigh |
| RALPH A. WALKER | Greensboro |
| ROBERT L. GAVIN | Sanford |
| JAMES M. BALEY, JR. | Asheville |
| DONALD L. SMITH | Raleigh |
| RONALD BARBEE[3] | Greensboro |
| WILLIAM THOMAS GRAHAM[4] | Winston-Salem |

## EMERGENCY JUDGES

| | |
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| W. H. S. BURGWYN | Woodland |
| ZEB NETTLES | Asheville |
| WALTER J. BONE | Nashville |
| F. DONALD PHILLIPS | Rockingham |
| GEORGE B. PATTON | Franklin |
| FRANCIS O. CLARKSON | Charlotte |
| P. C. FRONEBERGER | Gastonia |
| JOSEPH W. PARKER | Windsor |
| ROBERT M. GAMBILL | North Wilkesboro |
| WALTER W. COHOON | Elizabeth City |
| W. E. ANGLIN | Burnsville |
| FRANK M. ARMSTRONG | Troy |
| W. K. McLEAN | Asheville |

[1] Resigned 30 June 1975.
[2] Resigned 30 June 1975.
[3] Appointed 1 August 1975.
[4] Appointed 1 August 1975.

# DISTRICT COURT DIVISION

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | JOHN T. CHAFFIN (Chief) | Elizabeth City |
| | GRAFTON G. BEAMAN | Elizabeth City |
| 2 | HALLETT S. WARD (Chief) | Washington |
| | CHARLES H. MANNING | Williamston |
| 3 | J. W. H. ROBERTS (Chief) | Greenville |
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| | HERBERT O. PHILLIPS III | Morehead City |
| | ROBERT D. WHEELER | Grifton |
| 4 | HARVEY BONEY (Chief) | Jacksonville |
| | PAUL M. CRUMPLER | Clinton |
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| | JOHN M. WALKER | Wilmington |
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| 7 | J. PHIL CARLTON (Chief) | Pinetops |
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| | BEN H. NEVILLE | Whitakers |
| 8 | W. MILTON NOWELL (Chief) | Goldsboro |
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| | LESTER W. PATE | Kinston |
| | ARNOLD O. JONES | Goldsboro |
| | JOHN PATRICK EXUM | Kinston |
| 9 | JULIUS BANZET (Chief) | Warrenton |
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| | LINWOOD T. PEOPLES | Henderson |
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| | S. PRETLOW WINBORNE | Raleigh |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
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| | GEORGE R. GREENE | Raleigh |
| | CARLOS W. MURRAY, JR. | Raleigh |
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| | W. POPE LYON | Smithfield |
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| | COLEMAN CATES | Burlington |
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| | FRANK FREEMAN | Dobson |
| 18 | E. D. KUYKENDALL, JR. (Chief) | Greensboro |
| | BYRON HAWORTH | High Point |
| | ELRETA M. ALEXANDER | Greensboro |

| DISTRICT | JUDGES | ADDRESS |
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| | WALTER E. CLARK, JR. | Greensboro |
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| | FRANK M. MONTGOMERY | Salisbury |
| | ADAM C. GRANT, JR. | Concord |
| | L. FRANK FAGGART | Kannapolis |
| 20 | F. FETZER MILLS (Chief) | Wadesboro |
| | EDWARD E. CRUTCHFIELD | Albemarle |
| | WALTER M. LAMPLEY | Rockingham |
| | A. A. WEBB | Rockingham |
| 21 | ABNER ALEXANDER (Chief) | Winston-Salem |
| | BUFORD T. HENDERSON[3] | Winston-Salem |
| | JOHN CLIFFORD | Winston-Salem |
| | A. LINCOLN SHERK | Winston-Salem |
| | ROBERT K. LEONARD | Winston-Salem |
| 22 | LESTER P. MARTIN, JR. (Chief) | Mocksville |
| | HUBERT E. OLIVE, JR. | Lexington |
| | PRESTON CORNELIUS | Troutman |
| | ROBERT W. JOHNSON | Statesville |
| 23 | RALPH DAVIS (Chief) | North Wilkesboro |
| | SAMUEL L. OSBORNE | Wilkesboro |
| 24 | J. RAY BRASWELL (Chief) | Newland |
| | ROBERT HOWARD LACEY | Newland |
| 25 | LIVINGSTON VERNON (Chief) | Morganton |
| | BENJAMIN BEACH | Lenoir |
| | JOSEPH P. EDENS, JR. | Hickory |
| | BILL J. MARTIN | Hickory |
| | SAMUEL McD. TATE | Morganton |
| 26 | CLIFTON E. JOHNSON (Chief) | Charlotte |
| | J. EDWARD STUKES | Charlotte |
| | P. B. BEACHUM, JR. | Charlotte |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | WILLIAM G. ROBINSON | Charlotte |
| | LARRY THOMAS BLACK | Charlotte |
| | DAVID B. SENTELLE | Charlotte |
| | JAMES E. LANNING | Charlotte |
| | FRED ALLEN HICKS | Charlotte |
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| | J. RALPH PHILLIPS | Gastonia |
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| | DONALD E. RAMSEUR | Gastonia |
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| | WADE B. MATHENY | Forest City |
| | LADSON F. HART | Brevard |
| 30 | ROBERT J. LEATHERWOOD III (Chief) | Bryson City |
| | J. CHARLES McDARRIS | Waynesville |

[1] Retired 30 June 1975. Succeeded by Elton C. Pridgen, Smithfield, 24 July 1975.
[2] Resigned 31 July 1975. Succeeded by Frank T. Grady, Elizabethtown, 19 August 1975.
[3] Retired 31 August 1975. Succeeded by Frank J. Yeager, Walkertown, 2 September 1975.

# ATTORNEY GENERAL OF NORTH CAROLINA

*Attorney General*

RUFUS L. EDMISTEN

*Administrative Deputy Attorney General*

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*Deputy Attorney General For Legal Affairs*

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*Special Assistant to the Attorney General*

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*Senior Deputy Attorneys General*

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GEORGE J. POE, JR.

# DISTRICT ATTORNEYS

| DISTRICT | DISTRICT ATTORNEY | ADDRESS |
|---|---|---|
| 1 | THOMAS S. WATTS | Elizabeth City |
| 2 | WILLIAM C. GRIFFIN, JR. | Williamston |
| 3 | ELI BLOOM | Greenville |
| 4 | WALTER T. BRITT | Clinton |
| 5 | WILLIAM ALLEN COBB | Wilmington |
| 6 | W. H. S. BURGWYN, JR. | Woodland |
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| 9 | CHARLES M. WHITE III | Warrenton |
| 10 | BURLEY B. MITCHELL, JR. | Raleigh |
| 11 | JOHN W. TWISDALE | Smithfield |
| 12 | EDWARD W. GRANNIS, JR. | Fayetteville |
| 13 | LEE J. GREER | Whiteville |
| 14 | ANTHONY BRANNON | Durham |
| 15 | HERBERT F. PIERCE | Graham |
| 16 | JOE FREEMAN BRITT | Lumberton |
| 17 | ALLEN D. IVIE, JR. | Eden |
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| 19 | JAMES E. ROBERTS | Kannapolis |
| 20 | CARROLL R. LOWDER | Monroe |
| 21 | DONALD K. TISDALE | Clemmons |
| 22 | H. W. ZIMMERMAN, JR. | Lexington |
| 23 | MICHAEL A. ASHBURN | North Wilkesboro |
| 24 | CLYDE M. ROBERTS | Marshall |
| 25 | DONALD E. GREENE | Hickory |
| 26 | PETER S. GILCHRIST | Charlotte |
| 27A | JOSEPH G. BROWN | Gastonia |
| 27B | W. HAMPTON CHILDS, JR. | Lincolnton |
| 28 | ROBERT W. FISHER | Asheville |
| 29 | M. LEONARD LOWE | Caroleen |
| 30 | MARCELLUS BUCHANAN III | Sylva |

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# LICENSED ATTORNEYS

I, Fred P. Parker III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 24th day of August, 1975, and said persons have been issued certificates of this Board:

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| GEORGE WAYNE ABERNATHY | Mebane |
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| ROBERT EARL ALEXANDER | Concord |
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| JEFFREY L. BISHOP | Durham |
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| JAMES WILLIAM BLUE, JR. | Southern Pines |
| RICHARD DALE BONER | Lexington |
| VIRGINIA GRIER BOOKER | Greensboro |
| VICTOR JEROME BOONE | Durham |
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| Joel Grim Bowden | Greensboro |
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| George Wayne Brown | Durham |
| Richard H. Brown | Marshall |
| Robert Brown, Junior | Wilson |
| Roger Kent Brown | Charlotte |
| David Barrett Burge | Winston-Salem |
| Henry Holoman Burgwyn | Jackson |
| Eloise W. Burke | Charlotte |
| Vessie Jean Burkins | Winston-Salem |
| Ronald Wayne Burris | Albemarle |
| Robert F. Busby | Salisbury |
| George Kenneth Butterfield, Jr. | Wilson |
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| Samuel Arthur Butts III | Chapel Hill |
| Carol Wilson Caldwell | Parmele |
| F. Douglas Canty | Brevard |
| Alfred P. Carlton, Jr. | Durham |
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| Deborah Rule Carrington | Raleigh |
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| Saxby Mather Chaplin | Charlotte |
| Ertle Knox Chavis | Pembroke |
| William Sutton Cherry, Jr. | Windsor |
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| William Oscar Coffin | Durham |
| Gerald Allen Cohen | Chapel Hill |
| Laurence Davis Colbert | Durham |
| Thomas Walter Cole | Winston-Salem |
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| Francis Xavier Coman | Winston-Salem |
| Bruce Hartmann Connors | Tobaccoville |
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| Ronald McKinley Cowan | Burlington |
| Hugh Dalton Cox, Jr. | Raleigh |
| James Darrell Cox | Wilmington |
| Jack Lowell Cozort | Morganton |
| Charles Lemuel Cromer | High Point |
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| Thomas Terrell Crumpler | Madison |

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EDWARD GARNER, JR. ..... Washington
WILLIAM BANKS GARRISON, JR. ..... Franklin
HERMAN EARL GASKINS, JR. ..... Washington
EDWIN LEE GAVIN II ..... Pinehurst
FRANK BYRON GIBSON, JR. ..... Southport
ROBERT BREVARD GILLELAND ..... Sanford
GEOFFREY E. GLEDHILL ..... Durham
EDWARD VERNON FERRELL GLENN ..... Winston-Salem
MELVIN DOUGLAS GOINES ..... Winston-Salem
NATHAN CARLINER GOLDMAN ..... Dillon, S. C.
JAMES WHITMEL GOLDSMITH ..... Marion
JACK N. GOODMAN ..... Greensboro
VERN HENRY GRANSEE, JR. ..... Charlotte
STEPHEN ANDREW GRAVES ..... Williamston
ALLAN BAYLOR GRAY ..... Winston-Salem
CARL WILLIAM GRAY ..... Winston-Salem
LEONARD GLEN GREEN ..... Oxford
RICHARD MICHAEL GREENE ..... Chapel Hill
RONALD GENE GREENING ..... Chapel Hill
MICHAEL RALPH GREESON, JR. ..... Charlotte
JOHN WEST GRESHAM ..... Charlotte
CHARLES TERRY HALL ..... Winston-Salem
JOYCE AMELIA HAMILTON ..... Magnolia
IRVIN WHITE HANKINS III ..... Charlotte
ELLEN DODD WARME HANSON ..... Durham
HENRY AVERILL HARKEY ..... Charlotte
WILLIAM DANDO HARPER ..... Winston-Salem
NORMA SMITHWICK HARRELL ..... Greenville
CURTIS ODELL HARRIS ..... Gastonia
MALCOLM ERSKINE HARRIS ..... Raleigh
ERNEST JACKSON HARVIEL ..... Burlington
CHARLES LINN HASLAM ..... Chapel Hill
KENT SHELDON HEDMAN ..... Wilmington
PAUL EDWARD HEMPHILL ..... Charlotte
CHARLES HERALD HENDERSON ..... Durham
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GORDON BRUCE HERBERT ..... Durham
JOHN FRANKLIN HESTER ..... Raleigh
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DANNY GLENN HIGGINS ..... Eden
JAMES ROWLAND HILL ..... Durham
EDGAR BRUCE HINKLE, JR. ..... Lexington
GREGORY LEWIS HINSHAW ..... Burlington
THOMAS NELSON HIX ..... Raleigh
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CHARLES RALPH HOGSHEAD ..... Morganton
CYRUS DUNLAP HOGUE III ..... Wilmington
C. BYRON HOLDEN ..... Shallotte
JAMES EARL HOOVER ..... Washington
JAMES CLARENCE HORD ..... Fayetteville
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JEFFREY PAUL HUNT ..... Winston-Salem
FREDERICK DANA HUTCHISON ..... Chapel Hill
DOUGLAS RAYMOND HUX ..... Reidsville
WALTER SMALL IDOL ..... Dallas, Tex.
ARTHUR EUGENE JACOBSON ..... Asheville
ELEANOR RUTH JENKINS ..... Brooklyn, N. Y.
RICHARD ERIK JENKINS ..... Chapel Hill
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SANDRA LEIGH JOHNSON ..... Lillington
WILLIAM HENRY JOHNSON ..... Orangeburg, S. C.
DAVID ELWOOD JOHNSTON ..... Winston-Salem
JAMES JOSEPH JOHNSTON ..... Durham
PAUL LAWRENCE JONES ..... Kinston
ALEXA HOWELL JORDAN ..... Graham
THOMAS MICHAEL JORDAN ..... Murphy
MICHAEL FRANCIS JOSEPH ..... Greensboro
MONICA KIVEL KALO ..... Chapel Hill
ROBERT ALAN KARNEY ..... Asheville
MORRIS WAYNE KEETER ..... Hickory
ANNA ELIZABETH KEEVER ..... Jonesville
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JUDITH ELIZABETH KINCAID ..... Durham
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FLOYD MATTHEW LEWIS ..... Como
RICHARD MERRITT LEWIS ..... Winston-Salem
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ROBERT SHERWOOD LILIEN ..... Durham
RONALD THOMAS LINDSAY ..... Durham
JOHN ANDERSON LITTLE ..... Chapel Hill
JESSE DANIEL LONG ..... Chapel Hill
WILLIAM THOMAS LONG ..... Mebane

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| DON SAMUEL NEILL | Hendersonville |
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HUGH FRANKLIN OATES, JR. ..... Mount Olive
THOMAS RUSSELL ODOM ..... Chapel Hill
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CHRISTINE ANNE OPP ..... Chapel Hill
MARC STEVEN ORLOFSKY ..... Durham
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LARRY ALBERT OUTLAW ..... Calypso
WILLIAM VAN OVERMAN ..... Greensboro
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ANNE M. PAGE ..... Raleigh
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WINSTON LEGRANDE PAGE, JR. ..... Raleigh
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ERNEST CLIFTON PEARSON ..... Charlotte
PHYLLIS STURDIVANT PENRY ..... Lexington
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JAY DEE PICKERING ..... Mebane
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ROBERT F. POLSON ..... Greensboro
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JEAN ELIZABETH POWELL ..... Clinton
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BEN ARTHUR RICH ..... Raleigh
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LAWRENCE ROSEN ..... Cincinnati, Ohio
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GERALD EDWIN RUSH ..... Norwood
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RICHARD BRIAN SCHULTZ ..... High Point

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WOODROW WILSON SEYMOUR, JR. ..... Sanford
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RANDOLPH EDISON SHELTON, JR. ..... Winston-Salem
GLORIA MARNITE SHUFORD ..... Charlotte
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ROBERT FREDERICK SILER ..... Franklin
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ELLIOT M. SILVERSTEIN ..... Chapel Hill
WILLIAM FREDERICK SIMPSON, JR. ..... Pink Hill
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JOHN MANNING SKINNER ..... Williamston
HENRY L. SLOAN III ..... Charlotte
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EDWARD JEROME SMITH ..... Chapel Hill
LLOYD CLIFTON SMITH, JR. ..... Dunn
SHELTON KENT SMITH ..... Mebane
RICHARD DEWITTE SPARKMAN ..... Winston-Salem
DOW MAURICE SPAULDING ..... Graham
MARK LAING SPEAS ..... Winston-Salem
STANLEY ERIC SPECKHARD ..... Hickory
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PAUL BOWMAN STAM, SR. ..... Greensboro
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HAYWOOD RAY STARLING, JR. ..... Raleigh
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ROBERT FREDERICK STEELE ..... Mebane
JAMES ISAAC STEPHENS ..... Fuquay-Varina
RALPH LORENZA STEPHENS ..... Fayetteville
JOHN THOMAS STEWART ..... Winston-Salem
STEPHEN WAYNE STOTTLEMYER ..... Highlands
CHARLES CLINTON STRETCH ..... Carrboro
JAMES LEE STUART ..... Raleigh
QUENTIN TALIFERRO SUMNER ..... Rocky Mount
WILLIAM DAVID SUMPTER III ..... Nashville, Tenn.
WILLIE ALLEN SWANN ..... Roxboro
NEAL E. TACKABERY ..... Southern Pines
MARTHA JENNET TALLEY ..... Fayetteville
ROBERT TAYLOR TALLY ..... Fayetteville
MARVIN JEROME TEDDER ..... Whiteville
LEONARD WHITE THAGARD ..... Fayetteville
ALBERT S. THOMAS, JR. ..... Wilson
CURTIS MICHAEL THOMPSON ..... Raleigh
JANE RANKIN THOMPSON ..... Raleigh
SANDRA TINDALL ..... Gastonia
NORWOOD BOYD TISDALE ..... Durham
MARY CARR TOLTON ..... Chapel Hill
WILLIAM JAY TRULL, JR. ..... Asheville
AUBREY WILLIAMS TURNER, JR. ..... Pink Hill
MARLER SLATE TUTTLE, JR. ..... Kannapolis

JANICE IRENE VANDYKE ..... Durham
KEITH WATSON VAUGHAN ..... Bluefield, W. Va.
SIDNEY VERBAL II ..... Durham
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ARTHUR ALEXANDER VREELAND ..... Ithaca, N. Y.
DANIEL STEVEN WALDEN ..... Winston-Salem
JAMES KENNETH WALDROUP ..... Robbinsville
CHARLIE C. WALKER, JR. ..... Winston-Salem
EDWARD GARRETT WALKER ..... Roanoke Rapids
RUFUS FLANDERS WALKER, JR. ..... Needham, Mass.
JAMES GRIER WALLACE ..... Winston-Salem
MICHAEL GREGORY WALSH ..... Scranton, Pa.
ACIE LOUELLA WARD ..... New Bern
DAVID DOCKERY WARD ..... Lumberton
REGINALD LEANDER WATKINS ..... Raleigh
JAMES PAUL WEAVER ..... Lexington
MARLAND O. WEBB, JR. ..... Raleigh
RICHARD HOWARD WEISBERG ..... Carrboro
EDMUND BURT WELCH ..... Greenville
ALLEN HEWITT WELLONS ..... Durham
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STANLEY WINBORNE WEST ..... Greensboro
WILLIAM EDWIN WHEELER ..... Wilson
CHARLES SCOTT WHISNANT ..... Morganton
HAROLD MITCHELL WHITE, JR. ..... Clayton
ROBERT CARLETON WHITT ..... Mount Holly
OTIS HAMPTON WHITTINGTON, JR. ..... Chapel Hill
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FREDERICK BRANT WILKINS, JR. ..... Winston-Salem
JOSEPH ANDREW WILLIAMS ..... Greensboro
WILLIAM JENKINS WILLIAMSON ..... Whiteville
CHARLEENE WILSON ..... Chapel Hill
DAVID LEWIS WILSON, JR. ..... Winston-Salem
SAMUEL ALEXANDER WILSON III ..... Charlotte
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ROBERT PRESTON WORTH ..... Greensboro
PAUL MICHAEL WRIGHT ..... Canton
RICHARD THOMPSON WRIGHT ..... High Point
JOHN CLINTON WYATT ..... Greensboro
ALEXANDER THOMAS WYCHE ..... Whiteville
CHRISTOPHER MYRRLE WYNE ..... Raleigh
ANN LOUISE YAEGER ..... Charlotte
WILLIAM CARLOS YOUNG ..... Shelby
THOMAS CARLTON YOUNGER, JR. ..... Winston-Salem
VIRGINIA GAYLE EVANS YOUNGER ..... Washington
WALTER LEE ZACHARY, JR. ..... Yadkinville
ROBERT ELLIS ZAYTOUN ..... Raleigh
JONATHAN ALAN ZIMRING ..... Durham

THE FOLLOWING NAMED APPLICANTS WERE ADMITTED BY COMITY WITHOUT WRITTEN EXAMINATION:

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| WILLIAM H. GURNEE | Greensboro |
| JAMES ANDREW LEWIS | Durham |
| WILLIAM BURKE WILLIAMSON | Asheville |
| HERMAN G. THOMPSON | Charlotte |
| OTTO GEORGE STOLZ | Hillsborough |
| JAMES EDWARD RAGAN III | Rocky Mount |
| BEN FOHL LOEB, JR. | Chapel Hill |
| CHARLES EDWIN HINSDALE | Chapel Hill |
| WILLIAM CHARLES FLEMING | Durham |
| STUART VRIES CARTER | Wilmington |
| KERMIT DAYTON McGINNIS | Charlotte |
| MICHAEL THOMAS BREEN | Raleigh |
| RICHARD DUNWODY HALL, JR. | Greensboro |
| GEORGE JONA POE, JR. | Cary |
| THOMAS JOHN SCHOENBAUM | Chapel Hill |
| JOSEPH JOHN KALO | Chapel Hill |
| ADOLPH S. HOLM | Burlington |

Given over my hand and the Seal of the Board of Law Examiners, this the 6th day of October, 1975.

FRED P. PARKER III
*Executive Secretary*
The Board of Law Examiners of
The State of North Carolina

# CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

# RALEIGH

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## SPRING TERM 1975

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THOMAS HUFF AND WIFE, BARBARA F. HUFF v. BRANTLEY THORNTON, CENTRAL CAROLINA FARMERS EXCHANGE, INC., JOSEPH MILTON FULTON, SR., AND J. W. JENKINS, INC.

No. 4

(Filed 14 April 1975)

**1. Evidence § 56— damaged house — evidence of value — expert opinion testimony**

In an action to recover damages for injury to plaintiffs' house caused when defendant's truck struck the corner of it, the trial court did not err in allowing two witnesses who were contractors and one witness who was engaged in the real estate and insurance business to testify as to their respective opinions concerning the value of the house before and after the accident, or in permitting them to testify as to the probability that such a blow, delivered to the corner of the building, would "ramshackle" the whole house inside, loosen nail joints throughout the house and knock the entire house out of alignment, since these witnesses were obviously better qualified by their occupational experience than was the jury to form an opinion as to the nature and extent of the damage, the practicability of repair, and the fair market value of the house before and after it was struck by the truck.

**2. Evidence § 56— opinion testimony as to value — no inspection of house prior to accident**

Where witnesses inspected plaintiffs' house after the accident and from such inspection determined the size and design of the house, the

nature of the materials used in its construction, and its probable general condition prior to the observable results of the accident, the fact that they had not actually visited the house prior to the occurrence would go to the weight to be given their estimate of its prior value, not to its admissibility.

3. **Evidence § 45— opinion as to value — witness not expert**

Even though not an expert, a witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property with which he is familiar.

4. **Evidence § 56— opinion testimony as to value — procedure for eliciting testimony**

While a witness, asked if he has an opinion as to value, should first state that he does and should then be asked to give that opinion, the mere fact that a witness in this action, in response to the first question, proceeded to express his opinion and the court overruled the motion to strike the answer as not responsive is not ground for a new trial.

5. **Damages § 13— damaged house — entry of rats and roaches — increased use of heating oil — relevancy of evidence**

In an action by plaintiffs to recover for damages to their home caused when defendants' truck struck it, the trial court did not err in allowing plaintiffs to testify with reference to the increase in their consumption of heating oil since their house was damaged and with reference to their difficulties with rats and roaches coming into the house through holes and cracks resulting from the accident, since such testimony was clearly relevant to the question of the nature and extent of the injury done to the house.

6. **Damages § 4— damage to real or personal property — recovery for loss of use**

Even in the case of personal property, the impracticability of repair does not bar recovery for loss of use of the property during the period necessarily required for the acquisition of a replacement.

7. **Damages § 5— injury to house — items of damage recoverable**

It having been stipulated that the plaintiffs' residence was damaged by the negligence of the defendants, the plaintiffs are entitled to recover an amount sufficient to compensate them for all pecuniary losses sustained by them, which are the natural and probable result of the wrongful act and which are alleged in the complaint and shown with reasonable certainty by the evidence; such losses include the difference between the fair market value of plaintiffs' residence before and after it was struck by defendants' truck and the loss of use of plaintiffs' home during the time necessary for its repair, and the trial court did not err in allowing the male plaintiff to testify as to the availability of other comparable lodging, its rental cost, the time required for repair or rebuilding of plaintiffs' residence and the cost of moving.

**8. Trial § 13— jury view of damaged house discretionary matter**

In an action to recover for damage to plaintiffs' house caused when it was struck by defendants' truck, the granting or denial of defendants' motion to allow the jury to view the premises was within the discretion of the trial court.

**9. Damages § 15— injury to residence — sufficiency of evidence**

In an action to recover for injury to plaintiffs' residence, evidence was sufficient to submit to the jury issues as to the amount the plaintiffs were entitled to recover for damages to their residence and the amount they were entitled to recover for loss of its use where such evidence tended to show that the house was in excellent condition before it was struck by defendants' truck, a hole four feet square, cracks, loose nail joints and other damages resulted from the accident, plaintiffs offered expert evidence as to the value of the house before and after the accident, there was testimony that it would take twelve to fifteen months to repair the house, and rent for a comparable house was $150 per month.

**10. Trial § 11— jury argument — impropriety not prejudicial**

Statement of plaintiffs' counsel in his jury argument, "Since the defendants have agreed they are liable, why have they waited for two years to make recompense?" though improper argument, was not sufficiently prejudicial to require a new trial.

**11. Appeal and Error § 31— jury instructions — failure to object in trial court**

Where defendants failed to call to the attention of the trial court alleged errors in his jury instructions in his review of the evidence and statement of the parties' contentions, so as to permit correction thereof, such errors in the charge, if made, would not be basis for the granting of a new trial.

APPEAL by defendants from the decision of the Court of Appeals, reported in 23 N.C. App. 388, 209 S.E. 2d 401, in which the Court of Apeals, *Campbell, J.*, dissenting, found no error on the appeal of the defendants from *McLelland, J.*, at the 3 December 1973 Session of GRANVILLE.

The two corporate defendants are owners of trucks driven on 23 December 1971 by the two individual defendants. As the Jenkins truck, loaded with gasoline and driven by Fulton, was in the act of passing the Farmers Exchange truck, driven by Thornton, Thornton attempted to make a left turn into the driveway of a store owned by the plaintiff Thomas Huff. The Farmers Exchange truck collided with the Jenkins truck. The Jenkins truck thereupon ran off the highway, struck and demolished a parked 1963 Ford automobile owned by Thomas Huff alone. The Jenkins truck then continued on and struck, with great force, the corner of the brick veneer residence owned by

both plaintiffs as tenants by the entireties. In a single action the plaintiffs sued for damage to the automobile, damage to the house, loss of use of the house and other alleged injuries not pertinent to this appeal.

At the commencement of the trial, the defendants stipulated that the issue as to their joint liability to the plaintiffs should be answered in favor of the plaintiffs, leaving for trial only the issues as to damages. The jury found the damage to the house was $18,000, the damage to the automobile was $600 and the damage for loss of use of the house was $1,534. Judgment upon the verdict in the total sum of $20,134 was entered.

*Spears, Spears, Barnes, Baker & Boles by Alexander H. Barnes; and Young, Moore & Henderson by Joseph Yates III for defendant appellants.*

*Watkins, Edmundson & Wilkinson by William T. Watkins for plaintiff appellees.*

LAKE, Justice.

The defendants base their appeal upon 82 assignments of error, 52 of which are brought forward into their brief, the others being abandoned. Rule 28, Rules of Practice in the Supreme Court; *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789. It would serve no useful purpose to discuss, individually, the assignments of error which have been preserved. They present the following questions: (1) Was there error in the court's rulings upon the admission of evidence relating to the extent of the damage to the house? (2) Was there error in the court's rulings upon the admission of evidence relating to damages for loss of use of the house? (3) Was there error in denying the defendants' motion to have the jury view the premises? (4) Was there error in denying the defendants' motions for a directed verdict and for judgment notwithstanding the verdict? (5) Was there error in overruling the defendants' objection to argument made by counsel for the plaintiff? (6) Was there error in the court's instructions?

The plaintiffs' witness Clark, an experienced building contractor, testified that he inspected the plaintiffs' residence about two weeks after the accident. (In the meanwhile, no repairs of consequence had been made.) He described the damage he observed. Without objection, he testified that in his opinion the fair market value of the house and lot before the accident was

$26,895. Over objection, he testified that after the accident the lot had a value of $4,000 but the house, itself, had no market value and that it would take twelve months to replace or repair it. On cross-examination he testified that the house could not be restored to its pre-accident condition, the structure, itself, having been knocked out of line, and that it would be more practical to build a new one. Also on cross-examination, he testified that his figure of $26,895 for the fair market value of the house and lot was his estimate of the cost of replacing the house with a new one. Assignments of error directed to the overruling of objections to the testimony of this witness were among those abandoned. In any event, we perceive no error in these rulings of the trial court.

The plaintiffs' witness Daniel has for many years been engaged in the real estate and insurance business in Granville County and has built for sale and has sold a number of houses. He testified that he was familiar with prices of real estate in Granville County and had been to the plaintiffs' house. Their witness Morgan has been a general contractor for many years, building residential and commercial structures in Granville County and is familiar with construction prices and sales of such property in the county. He went to the plaintiffs' home on the day it was damaged and inspected it for the purpose of determining the extent of the damage. Their witness Dickerson has also been a building contractor for many years and he, too, examined the residence to determine the extent of the damage it had sustained.

**[1]** There was no error in permitting these witnesses to testify as to their respective opinions concerning the value of the house before and after the accident, or in permitting them to testify as to the probability that such a blow, delivered to the corner of the building, would "ramshackle" the whole house inside, loosen nail joints throughout the house and knock the entire house out of alignment. These witnesses were obviously better qualified, by their occupational experience, than was the jury to form an opinion as to the nature and extent of the damage, the practicability of repair and the fair market value of the house before and after it was struck by the truck. Consequently, each was qualified to testify as an expert witness concerning these matters. *State v. Vestal,* 278 N.C. 561, 594, 180 S.E. 2d 755; *Paris v. Aggregates, Inc.,* 271 N.C. 471, 157 S.E. 2d 131; Stansbury's North Carolina Evidence (Brandis Revision), § 132.

**[2-4]** Although none of these witnesses testified to having been in the plaintiffs' residence prior to the damage, each inspected it thereafter and from such inspection could, of course, determine the size and design of the house, the nature of the materials used in its construction and its probable general condition prior to the observable results of the accident. The fact that they had not actually visited the house prior to the occurrence would go to the weight to be given their estimate of its prior value, not to its admissibility. Even though not an expert, a witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property with which he is familiar. Stansbury's North Carolina Evidence (Brandis Revision), § 128. While a witness, asked if he has an opinion as to value, should first state that he does and should then be asked to give that opinion, the mere fact that the witness Morgan, in response to the first question, proceeded to express his opinion and the court overruled the motion to strike the answer as not responsive is not ground for a new trial. *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214.

The witness Morgan was asked if he had an opinion as to whether the house could have been repaired so as to put it back into the condition it was in prior to being struck by the truck. He replied: "Not exactly. It will always be racked, twisted. Anything that gets as much lick as a truck that large running into it is bound to knock it out of line. It cannot help it." The objection that the latter part of this answer is not responsive is without merit. The witness was entitled to explain the basis of his answer and thus show why the house could not have been repaired so as to restore it to its previous condition. There was likewise no error in permitting this witness to be questioned on direct examination and the defendant's witness Lawrence to be questioned on cross-examination for the purpose of showing that their respective estimates of repair costs did not include the cost of straightening and realigning the whole house.

**[5]** The defendants objected to questions directed to Mr. and Mrs. Huff, the plaintiffs, with reference to the increase in their consumption of heating oil since their house was damaged and with reference to their difficulties with rats and roaches coming into the house through holes and cracks resulting from the accident, on the ground that such testimony was not relevant and was designed only to excite the sympathy of the jury. There is no merit in these objections. The witnesses had previ-

ously testified that a hole four feet square had been knocked in the brick veneer and to a crack through the wall into which a blanket had to be stuffed to keep out the cold. All of this testimony was clearly relevant to the question of the nature and extent of the injury done to the house. It was so limited by the judge in his charge to the jury.

The fact that the plaintiffs' witnesses based their estimates of value prior to damage upon their estimates of the cost of reproducing such a house new, or, as in the case of witness Daniel, less a reasonable allowance for depreciation, does not make their estimate of value inadmissible. *Peterson v. Power Co.*, 183 N.C. 243, 111 S.E. 8. The failure of the witness to take into account depreciation or other relevant circumstances such as location, size and design is a matter to be developed on cross-examination and goes to the weight of the testimony, not to its admissibility. The cost of construction of a like structure is relevant to its value, though not conclusive evidence thereof.

**[6]** The defendants contend that the theory of the plaintiffs' case is that their house was so severely damaged that it would not be practicable to attempt to repair it and so the house must be entirely replaced. For this reason they contend that the plaintiffs are not entitled to recover, in addition to damages for the injury to the house, further damages for loss of its use during the period of such rebuilding. They cite *Roberts v. Freight Carriers*, 273 N.C. 600, 160 S.E. 2d 712, as authority for their proposition that while damages for loss of use of property, while it is being repaired, are recoverable, when the property is completely destroyed, damages for loss of use are not proper. Our opinion in that case does not support their position in this respect. There, speaking through Justice Sharp, now Chief Justice, this Court said:

> "In general, the right to recover for loss of use [of a motor vehicle] is limited to situations in which the damage to the vehicle can be repaired at a reasonable cost and within a reasonable time. If the vehicle is totally destroyed as an instrument of conveyance or if, because parts are unavailable or for some other special reason, repairs would be so long delayed as to be improvident, the plaintiff must purchase another vehicle. In this situation, *he would be entitled to damages for loss of use only if another vehicle was not immediately obtainable* and, in consequence, he suffered loss of earnings during the interval between the accident

and the acquisition of another vehicle. The interval would be limited to the period reasonably necessary to acquire the new vehicle." (Emphasis added.)

Thus, even in the case of personal property, the impracticability of repair does not bar recovery for loss of use of the property during the period necessarily required for the acquisition of a replacement. The Supreme Court of California so held in *Reynolds v. Bank of America National T.&S. Ass'n,* 53 Cal. 2d 49, 345 P. 2d 926; *In Guide v. Hudson Transit Lines,* 178 F. 2d 740 (3d Cir.) ; and in *Louisville & I.R. Co. v. Schuester,* 183 Ky. 504, 209 S.W. 542, the holdings were to the same effect.

Where it is not practicable to repair the damaged article and a replacement is readily obtainable, as is the case with a motor vehicle under ordinary circumstances, the rule requiring an injured party to take all reasonable steps to minimize his damages limits the recovery to the fair market value of the destroyed property; i.e., the difference between its value before and after the injury. In such case no additional recovery for loss of use of the damaged article is proper because such damage could have been avoided by prompt replacement. This principle has no application to the present case since a brick veneer residence, such as that of the plaintiffs, is not instantly replaceable when damaged beyond practicable repair. One does not go to the neighborhood store, or dealer, and buy one in stock. Assuming another existing house, similar in design, size and quality could be purchased, it would not be a replacement for there would, at least, be a difference in location. In the instant case, the location of the plaintiffs' residence was of prime importance to them because it was immediately adjacent to Mr. Huff's place of business.

**[7]** It having been stipulated that the plaintiffs' residence was damaged by the negligence of the defendants, the plaintiffs are entitled to recover an amount sufficient to compensate them for all pecuniary losses sustained by them, which are the natural and probable result of the wrongful act and which are alleged in the complaint and shown with reasonable certainty by the evidence. *Steffan v. Meiselman,* 223 N.C. 154, 25 S.E. 2d 626; Strong, N. C. Index 2d, Damages, §§ 5 and 6. See also: Note, 35 Cornell L.Q. 862, 866, and Note, 19 Fordham L. Rev. 223, 225. In addition to the loss of the automobile, which is not in question upon this appeal, the plaintiffs have lost, as a direct and natural result of the defendants' negligence, the difference between the fair market value of their residence before and after it was

struck by the truck. This they are entitled to recover. *Paris v. Aggregates, Inc., supra.* The defendants do not contend otherwise, assuming the evidence as to the amount of such loss is sufficient. To stop there would not fully compensate the plaintiffs for the losses sustained by them as a direct and natural result of the negligence of the defendants. Another such result of the negligent damage to or destruction of the house is that the plaintiffs cannot have the use of their house during the time reasonably necessary for its repair or replacement and must obtain lodging elsewhere for such period of time. For this loss also they are entitled to recover from the wrongdoers, the burden being upon the plaintiffs to establish the amount of such loss with reasonable certainty. *Trucking Co. v. Payne,* 233 N.C. 637, 65 S.E. 2d 132.

The plaintiffs having alleged the loss of the use of their home during the period necessary for its repair as an element of their damages, there was no error in permitting Mr. Huff to testify, over objection, as to the availability of other comparable lodging, its rental cost, the time required for repair or rebuilding of the Huff residence and the cost of moving. These are elements of damage flowing from the plaintiffs' loss of use of their own residence. Witness Clark, a building contractor, also testified as to the time it would take to replace the damaged house.

We find in the rulings of the trial court on the admission of evidence, assigned as error by the defendants, no basis for a new trial.

**[8]** The granting or denial of the defendants' motion to allow the jury to view the premises was within the discretion of the trial court. *Paris v. Aggregates, Inc., supra; Highway Com. v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314. No abuse of that discretion is shown in this instance and, consequently, the denial of the motion was not error.

There was no error in the denial of the defendants' motions for a directed verdict and for judgment notwithstanding the verdict. As we said in *Dickinson v. Pake,* 284 N.C. 576, 583, 201 S.E. 2d 897:

> "A motion for a directed verdict under Rule 50(a) presents substantially the same question as formerly presented by motion for judgment of nonsuit. *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). In passing upon such motion at close of plaintiffs' evidence in a jury case, as here, the evidence must be taken as true, considered in the light most favorable to plaintiffs, and may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiffs. *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972); *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971); *Cutts v. Casey, supra; Kelly v. Harvester Co., supra;* 5A Moore's Federal Practice, para. 50.02[1] (2d ed. 1971).

* * * *

" 'The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict * * *.' Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intramural L. Rev. 1, 41 (1969).

So, a motion for judgment notwithstanding the verdict is simply a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury. Rule 50(b), Rules of Civil Procedure; *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549 (1973)."

**[9]** The defendant contends that the plaintiffs' evidence was not sufficient to permit the court to submit to the jury the issues as to the amount the plaintiffs are entitled to recover for damages to their residence and the amount they are entitled to recover for loss of its use, it being stipulated that the property was damaged by the negligence of the defendants. We find no merit in this contention.

The testimony of the two plaintiffs was that their brick veneer house, the lay-out of which Mrs. Huff described, was in excellent condition immediately prior to its being struck by the truck, the floors being tight, the plastering uncracked with the exception of a single small crack, the roof being only two months old and the house having been freshly painted, inside and out. After the truck struck the house, their evidence was that a hole four feet square was knocked in the brick veneer, the roof was pushed up at one point and sagged in the middle, doors would not open and close, the house was out of line, nail joints throughout the house were loosened, built-in cabinets were destroyed,

floors were loose and had cracks, twice as much fuel oil was required to heat the house comfortably, and various cracks existed in other parts of the brick veneer.

Experienced building contractors testified that they had examined the house and it was so badly damaged that it was not practicable to repair it. Witness Clark, an experienced building contractor, testified that within two weeks after the accident he inspected the house, describing the damage observed by him, and that, in his opinion, the fair market value of the house, exclusive of the lot, before it was struck was $22,895, and that it had no market value after the accident. Witness Morgan, also an experienced general contractor, testified that he inspected the house immediately after the accident, describing the damages observed by him, and that the market value prior to the damage was between $26,000 and $27,000 and after the accident was $5,000 "if you could have found a buyer." Witness Dickerson, another experienced building contractor, testified that he inspected the house not long after the accident, describing the damages observed by him, and that, in his opinion, it was not repairable. Witness Daniel, experienced in the real estate business, testified that, in his opinion, the house, apart from the lot, had a fair market value prior to the accident of $25,800, after subtracting depreciation, and after the accident it had a fair market value of $5,800.

As to the amount of damage attributable to the loss of use of the house, Mr. Huff and Mr. Clark testified that it would take from twelve to fifteen months to repair the house; i.e., to rebuild it. Mr. Huff further testified that the rent for a comparable house was $150.00 per month.

This evidence was ample to permit the jury to determine the amount of the plaintiffs' damages and to require the submission to the jury of the issues as to damages. The jury was not compelled to accept, and did not accept, the precise amounts suggested by any of the witnesses.

**[10]** In the course of his argument to the jury, counsel for the plaintiffs said:

> "Since the defendants have agreed they are liable, why have they waited for two years to make recompense?"

The court overruled the objection of the defendants to this portion of the argument. While this statement by counsel for the

plaintiffs was not pertinent to the issues submitted to the jury and cannot be deemed proper argument, we do not deem it sufficiently prejudicial to justify the granting of a new trial.

**[11]** The defendants' assignments of error directed to the court's review of the evidence and statement of the defendants' contentions in the charge to the jury are without merit. No error in the charge in either of these respects was called to the attention of the court at the time so as to permit correction thereof. Consequently, such errors in the charge, if made, and we find none of any consequence, would not be basis for the granting of a new trial. *Lewis v. Barnhill,* 267 N.C. 457, 468, 148 S.E. 2d 536; *Brown v. Brown,* 264 N.C. 485, 141 S.E. 2d 875; *Morgan v. Bell Bakeries, Inc.,* 246 N.C. 429, 98 S.E. 2d 464; *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817; *State v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608.

As to the amounts recoverable for damage to the house and damage to the automobile, the court instructed the jury:

> "In each instance the measure of compensatory or monetary damages is the difference between the fair market value of the property damaged immediately before it was damaged and its fair market value immediately after it was damaged. And fair market value, ladies and gentlemen, is in law the amount which would be agreed upon as a fair price by an owner who wishes to sell but is not obliged to do so, and a buyer who wishes to buy but is not compelled to do so. In determining fair market value, you should fairly weigh and consider all of the evidence the parties have presented to you."

In this instruction there was no error and the defendants do not contend otherwise.

The court specifically instructed the jury, correctly, that the plaintiffs' evidence as to the entry of rats and roaches into the house and as to the increased difficulty of heating it could be considered by the jury only as descriptive of the nature of the damage to the house and not as a basis for an award of additional compensation for these circumstances. It also instructed the jury:

> "You should also consider in determining fair market value the evidence of the parties relating to the costs of repairing the house and the costs of rebuilding the house. And

finally, you should weigh and consider the opinions expressed by the various witnesses as to before and after values and the explanations that these witnesses gave, particularly on cross-examination as to the bases for their opinions."

In this there was no error. The instruction left for the jury's consideration the possible discrepancy between replacement cost and fair market value.

As to the amount to be awarded, if any, for the loss of use of the house, the court charged the jury:

"As to the fourth issue, what amount, if any, are plaintiffs entitled to recover for loss of use of real property? I charge that you must be satisfied by the evidence and by its greater weight of two things. First, that the plaintiffs' house was damaged to such an extent that repairs cannot be made while plaintiffs continue to live in it or that the only practical repairs will amount to reconstruction so that it will be necessary for plaintiffs to move out of the house for a reasonable period of time while repairs are being made; and secondly, that the plaintiffs have proved with reasonable certainty the amount of the loss they will suffer by reason of the temporary loss of use of their residence.

"If you are not satisfied that plaintiffs' house was so damaged that the plaintiffs must move out for a reasonable period of time while repairs are being made, you must answer the fourth issue, nothing, and not further consider it.

"If you are so satisfied you must consider whether you can determine from the evidence of the plaintiffs with reasonable certainty the amount due the plaintiffs for temporary loss of the use of their house, keeping in mind that you may not base an award on mere speculation and conjecture.

"If you are not satisfied that you can do so, you must answer the issue, nothing, even though you may have found that moving out will be necessary and that some loss will be sustained. This is for the reason that the plaintiffs have the burden of proving loss and may not recover any amount if they fail to present proof as I have defined it to you.

* * * *

"If you are so satisfied, your answer to the fourth issue should be such total amount as will reasonably com-

pensate the plaintiffs for the added expenses caused by their temporary loss of use of their residence."

In this instruction there was no error.

We have carefully considered all of the assignments of error not abandoned by the defendants and find no merit therein.

No error.

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LARRY WAYNE SIDES, ADMINISTRATOR OF THE ESTATE OF TERRY COMPTON SIDES v. CABARRUS MEMORIAL HOSPITAL, INC.; J. VINCENT AREY; JOHN R. ASHE, JR.; CABARRUS CLINIC FOR WOMEN, P.A.; J. O. WILLIAMS; WILLIAM J. REEVES AND NANCY ELIZABETH DEASON

No. 73

(Filed 14 April 1975)

1. **Hospitals § 1; Municipal Corporations § 1— establishment of county hospital — local act — county agency**

In passing a local act providing for the establishment of Cabarrus Memorial Hospital, the General Assembly intended the hospital to be an agency of Cabarrus County and not a separate municipal agency of the State of North Carolina; therefore, the Industrial Commission did not have exclusive original jurisdiction of a claim based on alleged negligence of employees of the hospital.

2. **Hospitals § 3; Municipal Corporations § 5— operation of hospital — proprietary function — liability for torts**

The construction, maintenance and operation of a public hospital by a city or a county is a proprietary function, and such hospitals are therefore liable in tort for the negligent acts of their employees committed within the course and scope of their employment.

Justice EXUM did not participate in the hearing or decision of this case.

ON *certiorari* to review decision of the Court of Appeals reported in 22 N.C. App. 117, 205 S.E. 2d 784 (1974) (opinion by Campbell, J., Brock, C.J., and Britt, J., concurring) which affirmed the order entered by *Exum, J.*, on 19 February 1974, said order denying defendant's motion for dismissal.

This is an action instituted by plaintiff for personal injuries and for the wrongful death of plaintiff's intestate.

Plaintiff alleges that Terry Compton Sides was admitted to Cabarrus Memorial Hospital on 8 March 1971 in a pregnant condition. Later she gave birth to a daughter and subsequent to delivery of the baby began to lose blood. Plaintiff alleges that the hospital failed to match and cross-match Terry's blood when a transfusion was needed, and as a result, B-POSITIVE BLOOD was negligently transfused into her body when her blood type was A-NEGATIVE. Plaintiff further alleges that the doctors allowed the wrong blood type to be transfused into deceased's body and that this negligence can be imputed to the hospital. As a result of these alleged acts, plaintiff contends that deceased suffered a "transfusion reaction resulting in death."

Defendant, Cabarrus Memorial Hosiptal, filed a motion to dismiss under the provisions of G.S. 1A-1, Rule 12(b) (1), (2) and (6), on the grounds that the court did not have jurisdiction over the subject matter; that the court did not have jurisdiction over the defendant; and that the plaintiff had failed to state a claim upon which relief could be granted. In support of this motion, the defendant attempted to show the following:

"1. That the Cabarrus Memorial Hospital is a political subdivision of Cabarrus County and the State of North Carolina, having been created under the provisions of Chapter 307 of the Public-Local Laws adopted by the 1935 General Assembly of North Carolina.

"2. That the operation of the Cabarrus Memorial Hospital described in the Claim for Relief is a governmental function, and said Cabarrus Memorial Hospital, being an agency of the State of North Carolina, is immune from suit in actions of the kind and character instituted herein by the plaintiff.

"3. That the General Court of Justice, Superior Court Division, is without jurisdiction to hear and determine the plaintiff's action, for that the North Carolina Industrial Commission has been constituted a court by the General Assembly of North Carolina for the purpose of hearing and passing upon tort claims against all departments, institutions and agencies of the State."

Defendant's motion was treated as a motion for summary judgment and was heard before Judge Exum at the 3 September 1973 Civil Session of Cabarrus County Superior Court. On 19 February 1974 Judge Exum denied this motion.

Defendant appealed to the Court of Appeals under the provisions of G.S. 1-277(b). After considering all of defendant's contentions, the Court of Appeals held:

> "The defendant Cabarrus Memorial Hospital is a county agency and is bound by the county's purchase of insurance for the defendant. Defendant's argument that it may accept the benefit of county bonds, county taxes, use of the county treasury and treasurer and exemption from taxation as a county agency but that it may disavow the county's purchase of insurance is without merit. Each instance merely involves a cost of doing business. We find no error in the denial by the trial court of defendant's motion to dismiss and the denial of its motion for summary judgment." 22 N.C. App. at 122-23, 205 S.E. 2d at 788.

Writ of certiorari to the North Carolina Court of Appeals was allowed on 30 August 1974. The case was docketed and argued as No. 70 at the 1974 Fall Term of this Court.

*Hartsell, Hartsell & Mills, P.A., by William L. Mills, Jr., and Fletcher L. Hartsell, Jr., for defendant appellant.*

*Byrd, Byrd, Ervin & Blanton, by John W. Ervin, Jr. for plaintifff appellee.*

COPELAND, Justice.

**[1]** Was Cabarrus Memorial Hospital a political subdivision of Cabarrus County *or* of the State of North Carolina?

Defendant contends it is a separate governmental agency of the State of North Carolina and that exclusive original jurisdiction over the claim is vested solely in the North Carolina Industrial Commission under provisions of the North Carolina Tort Claims Act. G.S. 143-291, et seq.

In deciding this issue it is necessary to closely examine Chapter 307, 1935 Public-Local and Private Laws. This Act, in pertinent part, provides:

> "Section 1. That the Board of County Commissioners of Cabarrus County, North Carolina, by a majority vote of said Board, or upon the petition of two hundred voters of said county, shall . . . order an election to be held to determine the will of the people of said county whether there shall be issued and sold bonds . . . and to levy a tax of not exceeding two cents on the one hundred dollar valuation of

property, the proceeds of sale of said bonds to be issued to be used in securing lands and erecting or altering buildings and equipping same to be used as a public hospital for said county. . . . The said Board of County Commissioners shall also levy a tax not to exceed two cents on the one hundred dollar valuation of property for the maintenance and upkeep of said hospital. . . . The hospital so erected from the sale of said bonds in addition to other hospitalization funds from other sources shall be known as the 'Cabarrus County Hospital.'

* * * *

"Sec. 3. If a majority of the qualified voters shall vote 'For Cabarrus County Hospital,' at any election held under this Act, then the County Commissioners shall issue and sell bonds . . . and shall pay over the proceeds arising therefrom to the Treasurer of Cabarrus County . . . and the taxes which may be levied and collected under this Act shall also be paid to the Treasurer of Cabarrus County, and by said Treasurer kept in two separate accounts, one of said accounts being the hospital interest and sinking fund, and the other account the hospital maintenance fund . . . and it shall be the duty of the Board of Commissioners of Cabarrus County to annually levy and collect as other taxes a special tax not exceeding the limit provided by this Act, sufficient to pay the interest on said bonds, and to provide the necessary sinking fund for the payment of same, and also to afford the necessary maintenance fund as herein provided.

* * * *

"Sec. 5. Should a majority of the qualified voters of Cabarrus County, under any election held under this Act, vote 'For Cabarrus County Hospital,' then the County Commissioners shall at once appoint a Board of Trustees, one trustee to come from each and every voting precinct in the county. . . . Upon the first meeting of the Board of Trustees . . . the said Board shall appoint an executive committee composed of seven members from the trustees, all residents of the county. . . .

"Sec. 6. . . . The county treasurer of the county in which such hospital is located shall be Treasurer of the executive committee. . . . [A]ll moneys received for such hospital shall be deposited in the treasury of the county

to the credit of the hospital fund. . . . Said executive committee . . . shall in general carry out the spirit and intent of this Act in establishing and maintaining a county public hospital. . . . [A]nd the committee shall during the first week in January of each year file with the Board of Commissioners of said county a report . . . and a statement of all receipts and expenditures during the year, and shall at such time certify to the Board of County Commissioners the amount necessary to maintain and improve such hospital for the ensuing year. . . .

"Sec. 7. The hospital established under this Act shall be for the benefit of the inhabitants of Cabarrus County, and of any person falling sick or being injured or maimed within its limits; . . .

* * * *

"Sec. 9. That 'Cabarrus County Hospital' is hereby declared to be a body corporate, with power to receive and hold gifts, grants, and devises of real and personal property, to sue and be sued, and to do any and all lawful acts necessary to carry out the objects of its creation, and shall possess all other rights and powers usually incident to corporations."

We believe this Act makes it clear that the General Assembly never intended Cabarrus Memorial Hospital to be a separate and independent agency of the State of North Carolina. In addition to granting the county the authority to levy a special tax to provide for the operation and maintenance of the hospital and to substantially control its operations through the county board of commissioners, Section 6 of the Act provides specifically that the hospital's executive committee *"shall in general carry out the spirit and intent of this Act in establishing a county public hospital."* (Emphasis supplied.)

Also we note that the formal or informal interpretation of a statute or law by an administrative agency of the executive department is entitled to consideration from the courts, and must be accorded appropriate weight in determining the meaning of the law. *See, e.g.,* 2 Am. Jur. 2d Administrative Law § 241 (1962); 7 Strong, N. C. Index 2d, Statutes § 5 (1968). *Accord, Faizan v. Insurance Co.,* 254 N.C. 47, 57, 118 S.E. 2d 303, 310 (1961).

In this context, the following opinions or rulings by various State and Federal agencies have held Cabarrus Memorial Hospital to be an agency or instrumentality of the county.

(1) In a letter dated 31 March 1966, former Attorney General T. W. Bruton stated:

> "I have studied Chapter 307 of the Public-Local Laws of 1935 creating Cabarrus Memorial Hospital. *In my opinion, it is a county agency.* . . ." (Emphasis supplied.)

(2) In a letter dated 22 July 1971, former Attorney General Robert Morgan stated:

> "In your letter of June 25, 1971, and a telephone conversation subsequent thereto, you have asked to be advised as to the legal status of the Cabarrus Memorial Hospital. In this regard, *it is my opinion that the Cabarrus Memorial Hospital is a wholly-owned instrumentality of the County* and is a separate independent, juristic, political subdivision of government with regard to social security and retirement purposes. . . ." (Emphasis supplied.)

(3) In a "determination letter" dated 23 November 1964, the United States Internal Revenue Service ruled:

> "*[I]t is the opinion of this office that you are an instrumentality of the County of Cabarrus,* a political subdivision of the State of North Carolina, and as such you are not subject to Federal income tax." (Emphasis supplied.)

(4) In a letter dated 14 April 1971, former North Carolina Commissioner of Revenue, I. L. Clayton, ruled that Cabarrus Memorial Hospital was a *"county-owned and operated hospital"* and an *"integral part of the county operation and body politic of the county."* (Emphasis supplied.)

(5) In a letter dated 20 December 1971, the North Carolina Employment Security Commission ruled:

> "This Agency concurred in the ruling of the Attorney General *that Cabarrus Memorial Hospital is an instrumentality of a political subdivision, Cabarrus County* and, therefore, exempt under the Employment Security Law." (Emphasis supplied.)

We note that at the time defendant's charter was adopted by the General Assembly, there was existing a "general law"

that enabled counties to establish and maintain public hospitals. *See* Chapter 42, 1913 Public Laws, ratified 3 March 1913, and codified as G.S. 131-4, et seq. This act was last amended by Chapter 247, 1929 Public Laws, and therefore was codified as presently written on 17 April 1935, the date defendant's charter was adopted by the General Assembly. There is a substantial similarity between G.S. 131-4, et seq., the general law, and Chapter 307, the special-local law. However, the laws differ in two important areas. (1) Under the "general law" the county commissioners are authorized to impose a tax of one-fifteenth of one cent (1/15 of 1¢) on the dollar ($1.00) of assessed property in such county. This is equivalent to a tax of 6.6¢ per $100.00 of assessed property. However, under the "special law," the county commissioners are authorized: (a) To levy a tax not exceeding two cents on the one hundred dollar valuation of property to secure the land, to erect the buildings, and to pay the interest on the bonds; and (b) to also levy a tax not to exceed two cents on the one hundred dollar valuation of property to pay for the upkeep and maintenance of the hospital. This is equivalent to a total tax of 4¢ per $100.00 of assessed property. (2) Under the "general law" the hospital board of trustees, after initial appointment, are to be elected at the next general election. However, under the "special law" there is no provision for the popular election of the hospital's board of trustees.

Based on examination of the public and local acts above cited, including relevant administrative rulings, we hold that Cabarrus Memorial Hospital is an agency of Cabarrus County and not a separate municipal agency of the State of North Carolina. It is clear that this was the intent of the General Assembly. In fact, the only justification we can discern for defendant's creation under the special act was to take advantage of the lower tax rate (4¢ per $100 valuation as opposed to 6.6¢ per $100 valuation) and to have the county commissioners appoint the hospital board of trustees rather than have them elected.

**[2]** Having determined that defendant hospital is an agency of the county, we must next decide if the county's construction, maintenance and operation of the hospital was a governmental or a proprietary function.

In the case *sub judice,* with respect to the proprietary-governmental distinction, we can find no ruling by this Court as to whether the constuction, maintenance and operation of a hospital by a county or a city is a governmental function or a pro-

prietary one. This question is, therefore, one of first impression. *But see Hitchings v. Albemarle Hospital,* 220 F. 2d 716 (4th Cir. 1955) (N.C. law).

At this point, we note that this Court has held that the expenditure of tax funds for the construction of a general county hospital is for a *public purpose. Rex Hospital v. Comrs. of Wake,* 239 N.C. 312, 79 S.E. 2d 892 (1954). In that case, Justice Denny (later Chief Justice), writing for the Court, stated: "The expenditure of tax funds for the construction of a general county hospital is for a public purpose; and a county, when authorized by the General Assembly and with the approval of a majority of the voters voting in an election held as provided by law, has as much right to issue its bonds to provide hospital facilities for those citizens who are able to pay for the services rendered to them as it does to provide such facilities for the sick and afflicted poor. [Citations omitted.]" *Id.* at 329, 79 S.E. 2d at 904. *Cf. Foster v. Medical Care Comm.,* 283 N.C. 110, 195 S.E. 2d 517 (1973) (financing plan for private non-profit and public hospitals declared unconstitutional under the public purpose doctrine). This Court has also held that although such expenditures are for a valid *public purpose,* they are not a *necessary expense. See, e.g., Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668 (1937); *Armstrong v. Comrs.,* 185 N.C. 405, 117 S.E. 388 (1923). However, as noted *infra,* these decisions are not controlling on the question of governmental vs. proprietary function. *Compare Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211 (1944), *with Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371 (1949).

The problem we presently face was well stated by Justice Barnhill (later Chief Justice) in *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42 (1942): "The line between municipal operations that are proprietary and, therefore, a proper subject of suits in tort and those that are governmental and, therefore, immune from suits is sometimes difficult to draw." *Id.* at 342, 23 S.E. 2d at 44.

This problem is made more difficult by two further considerations. First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability. *Compare Woodie v. North Wilkesboro,* 159 N.C. 353, 74 S.E. 924 (1912) (operation of municipal water plant

held proprietary) *with Klassette v. Drug Co.*, 227 N.C. 353, 42 S.E. 2d 411 (1947) (furnishing of water to extinguish fires held governmental). Second, it does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a *public necessity* that the expenditure of funds in connection with it was for a *public purpose. Compare Turner v. Reidsville*, 224 N.C. 42, 29 S.E. 2d 211 (1944) (held expenditure of public funds for construction and maintenance of airport was for a *public purpose) with Rhodes v. Asheville*, 230 N.C. 134, 52 S.E. 2d 371 (1949) (held operation and maintenance of airport a proprietary and *not a governmental function); James v. Charlotte*, 183 N.C. 630, 112 S.E. 423 (1922) (held city engaged in governmental function when it removed garbage *for its inhabitants* for a fee that covered only its actual collection and disposal expenses) *with Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972) (held city engaged in proprietary functions in operating a landfill for disposal of garbage where city had contracted with county to dispose of county garbage for a fee); *Glenn v. Raleigh*, 246 N.C. 469, 98 S.E. 2d 913 (1957) (held city acting in proprietary capacity when charged small fee for admission to public park) *with Rich v. City of Goldsboro*, 282 N.C. 383, 192 S.E. 2d 824 (1972) (operation of playground on which city received donations of less than 1% of operating cost held governmental function). *See generally* R. Ligon, North Carolina Hospital Law 153-64 (Inst. of Gov't. 1964).

As Justice Branch stated in *Koontz v. City of Winston-Salem, supra*, "application of [the governmental-proprietary distinction] to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary." 280 N.C. at 528, 186 S.E. 2d at 907. Nonetheless, an analysis of the various activities that this Court has held to be proprietary in nature reveals that they involved *a monetary charge* of some type. *See, e.g., Koontz v. City of Winston-Salem, supra* (charge for use of garbage landfill); *Glenn v. Raleigh, supra* (charge for admission to public park); *Foust v. Durham*, 239 N.C. 306, 79 S.E. 2d 519 (1954) (supplying water to customers for which a charge was made and from which a profit was realized); *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543 (1952) (distributing electricity for profit); *Rhodes v. Asheville, supra* (operation of airport); *Lowe v. Gastonia*, 211 N.C. 564, 191

S.E. 7 (1937) (operation of golf course). *Cf., Rich v. City of Goldsboro, supra* (operation of playground for which city received donations of less than 1% of the operating cost held governmental and not proprietary); *Parks-Belk Co. v. Concord,* 194 N.C. 134, 138 S.E. 599 (1927) (held no liability for bursting water main used both for furnishing water for fire protection and for sanitary purposes, and for distributing water to consumers paying a rate).

While a "charge" has been involved in each case holding a particular function to be proprietary, we note that the basis for each holding was not dependent on the "profit motive." For example, in *Glenn v. Raleigh, supra,* the total annual receipts from the operation of Chavis and Pullen Parks amounted to $22,648.99, while the over-all annual cost to operate and to maintain *all* of the city's parks, including its recreational program, was $158,247.95. 246 N.C. at 480, 98 S.E. 2d at 921. That the "profit motive" is not essential to a proprietary classification is further documented by the decision of this Court in *Rhodes v. Asheville, supra.* In that case, this Court, in an opinion by Justice Denny (later Chief Justice), stated: "Airports are here to stay and will be used extensively by the public in the future. *However, transportation by air has not been developed to a point so as to make the construction, operation and maintenance of the average airport a profitable enterprise.* That is why private capital is not available for this purpose." 230 N.C. at 141, 52 S.E. 2d at 376. (Emphasis supplied.) Nevertheless, despite the lack of profit, the Court held the construction, operation and maintenance of the airport by the county to be a proprietary or corporate function.

Furthermore, it appears that all of the activities held to be governmental functions by this Court are those historically performed by the government, and which are not ordinarily engaged in by private corporations. *See, e.g., Hayes v. Billings,* 240 N.C. 78, 81 S.E. 2d 150 (1954) (erecting and maintaining a jail by a county); *Hamilton v. Hamlet,* 238 N.C. 741, 78 S.E. 2d 770 (1953) (installation and maintenance of traffic light signals); *Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814 (1937) (operation of police car); *Cathey v. Charlotte,* 197 N.C. 309, 148 S.E. 426 (1929) (erection and maintenance of police and fire alarm system); *Howland v. Asheville,* 174 N.C. 749, 94 S.E. 524 (1917) (furnishing water for extinguishing fires).

In the case *sub judice* there is no doubt that the hospital derived some pecuniary benefits from its day to day operations. In fact, it is common knowledge that hospitals derive "substantial revenues" from daily room rents, nursing care, laboratory work, etc. This is a crucial factor under our decisions. "Our city and county hospitals make charges for some of their services based on market value rather than actual expense, so that net revenues are obtained even though in particular instances *the activity of the hospital as a whole may be nonprofitable.*" R. Ligon, North Carolina Hospital Law, *supra,* at 160 (Emphasis supplied.) However, the fact that the operation as a whole is nonprofitable is not determinative as to whether the activity will be classified as proprietary or governmental.

Although the doctrine of immunity as applied to governmental hospitals is being increasingly abandoned by state courts, it still appears to be the rule in the majority of states. For a state-by-state analysis, *see* IIA Hospital Law Manual. Negligence, Immunity to Suit, Section 3, 45-55; Annot., "Immunity from Liability for Damages in Tort of State or Governmental Unit or Agency in Operating Hospital," 25 A.L.R. 2d 203 (1952) and supplemental decisions. Suffice it to say, there is precedent from other jurisdictions to support both views, i.e., that the operation of a hospital is a governmental function, and that it is a proprietary function. However, we fail to discern any "uniform standard" for determining whether a hospital is operated in the performance of a governmental or a proprietary function in any of these cases. *See* Annot., *supra,* at 207. And yet, the trend is obvious. This doctrine, like the doctrine of charitable immunity, is being increasingly abandoned by state courts. *See* IIA, Hospital Law Manual, *supra;* Annot., *supra,* particularly supplemental decisions thereto. In this context, one commentator has recently stated: "The doctrine of governmental immunity, especially when applied to the hospital, is as unsatisfactory and anachronistic as the doctrine of charitable immunity." Doctor and Hospital Liability Today 233 (1972 Practicing Law Institute).

In *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485 (1967), this Court, in an opinion by Justice Sharp (now Chief Justice), abolished the doctrine of charitable immunity as it applied to hospitals in North Carolina. Specifically the Court stated:

> "Convinced that the rule of charitable immunity can no longer properly be applied to hospitals, we hereby over-

rule *Williams v. Hospital,* 237 N.C. 387, 75 S.E. 2d 303, *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662, and other cases of similar import. We hold that defendant Hospital is liable for the negligence of its employees acting within the scope and course of their employment just as is any other corporate employer. Recognizing, however, that hospitals have relied upon the old rule of immunity and that they may not have adequately protected themselves with liability insurance, we follow the procedure of Michigan, Illinois, Nebraska, and Wisconsin, as detailed in the decisions previously noted. The rule of liability herein announced applies only to this case and to those causes of action arising after January 20, 1967, the filing date of this opinion." *Id.* at 21, 152 S.E. 2d at 499.

In Rabon, *supra,* Justice Lake dissented, in part, on the grounds that it was *not* a case of first impression. *Id.* at 25, 152 S.E. 2d at 499. In the case *sub judice,* this Court is faced with a question of first impression, to wit: Is the construction, maintenance and operation of a hospital by a county or a city a governmental or a proprietary function? In resolving this issue, we once again "stand at a crossroads created by the courts' applications of the various rules of governmental immunity." *Koontz v. City of Winston-Salem,* 280 N.C. at 529, 186 S.E. 2d at 908. Here, however, we believe the following language clearly indicates the direction we should now take:

> "[W]e 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. [Citations omitted.]" *Id.* at 529-30, 186 S.E. 2d at 908.

It seems clear to us that the operation of a public hospital is not one of the "traditional" services rendered by local governmental units. Accordingly, for this reason, and for the reasons hereinbefore stated, we hold that the construction, maintenance and operation of a public hospital by either a city or a county is

a proprietary function. Hence, such hospitals, just like any other corporate employer, are liable in tort for the negligent acts of their employees committed within the course and scope of their employment.

Since we hold that the operation of Cabarrus Memorial Hospital is a proprietary function, there is no need to discuss defendant's other arguments relating to the applicability of G.S. 153-9(44) [now G.S. 153A-435], pertaining to waiver of governmental immunity by the county board of commissioners to the extent of secured liability insurance, or for any other reason.

Finally, with reference to this case, we point out that it is now only in the pleading stage. Whether plaintiff can ultimately recover, remains to be seen.

The judgment of the Court of Appeals is

Modified and affirmed.

Justice EXUM did not participate in the hearing or decision of this case.

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IN THE MATTER OF THE WILL OF LAWRENCE ADOLPH MUCCI, DECEASED

No. 12

(Filed 14 April 1975)

1. **Wills § 1— probate — necessity for testamentary intent**

Before any instrument can be probated as a testamentary disposition there must be evidence that it was written *animo testandi*, or with testamentary intent; an intent to make some future testamentary disposition is not sufficient.

2. **Wills § 4— holographic instrument — testamentary intent**

The necessary *animo testandi* with regard to a holographic instrument must appear not only from the instrument itself and the circumstances under which it was made but also from the fact that the instrument was found among the deceased's valuable papers after his death or in the possession of some person with whom the deceased had deposited it for safekeeping.

**3. Wills § 4— holographic instrument — testamentary intent — jury question**

Where a holographic instrument on its face is equivocal on the question of whether it was written with testamentary intent and there is evidence that the instrument was found among the valuable papers of the deceased, the *animo testandi* issue is for the jury and parol evidence relevant to the issue may be properly admitted.

**4. Wills § 4— holographic instrument — testamentary intent — among valuable papers — insufficient evidence — question of law**

If there is nothing on the face of a holographic instrument from which a testamentary intent may be inferred or evidence is lacking that the instrument was found among deceased's valuable papers or placed by him in the possession of some other person for safekeeping, the instrument may not, as a matter of law, be admitted to probate.

**5. Wills § 6— letter sent to attorney — no codicil**

The evidence was insufficient to support a jury finding that a handwritten letter mailed by testator to his executor and attorney who prepared his will, in which testator stated that he wished his third wife to have use of the residence until her death, was intended by testator to be a codicil and was placed by testator with his executor-attorney for safekeeping as a codicil, where it tended to show that testator simply mailed the letter to the executor-attorney without any instructions with regard to it as a document.

**6. Wills § 24— caveat — necessity for jury verdict**

Once a caveat is filed and the proceeding to probate is transferred to superior court for trial, there can be no probate except by a jury's verdict; the trial court may not, at least where there are factual issues, resolve those issues even by consent and adjudge that the disposition in question is testamentary and entitled to probate as a matter of law.

**7. Wills § 24— caveat proceeding — directed verdict**

Where the propounder fails to offer evidence from which a jury might find that there has been a testamentary disposition, it is proper for the trial court under G.S. 1A-1, Rule 50, to enter a directed verdict in favor of the caveators and adjudge, as a matter of law, that there can be no probate.

ON *certiorari* to review the decision of the Court of Appeals, reported in 23 N.C. App. 428, 209 S.E. 2d 332 (1974), reversing the judgment of *Winner, J.*, entered at the March 4, 1974 Session of BUNCOMBE Superior Court.

This is a caveat proceeding attacking the validity of a purported holographic codicil to an attested will of the deceased, Lawrence A. Mucci. Only the propounder offered evidence. Judge Winner entered this judgment:

> "Upon close of the Propounder's evidence and upon Motion of the Caveators, pursuant to Rule 1 and Rule 50, Section 1A-1 of the General Statutes of North Carolina, made in open Court, the Court hereby enters a directed verdict in favor of the Caveators and adjudges the letter dated September 25, 1971, offered for probate by the Propounders, not to be a codicil to the Last Will and Testament of the decedent as a matter of law."

The uncontradicted evidence was that Lawrence A. Mucci, before his death in October, 1972, was a physician specializing in radiology. George H. Johnson, Jr., the propounder, Mucci's attorney and neighbor, prepared an attested will for the deceased which was duly executed on June 25, 1971, at Johnson's residence. By this will, Mucci devised his entire estate after payment of claims to his two minor sons, Richard Allyn Mucci and Jeffrey Alan Mucci who, acting through their guardian, Mary M. Mucci, deceased's second wife, are the caveators. His two adult sons were named contingent beneficiaries. George H. Johnson, Jr., was named executor. On September 11, 1971, Mucci married Mary Elizabeth, his third wife, referred to by witnesses who knew her as "Betty," who has aligned herself with the propounder. After Mucci's death, Johnson presented to the Clerk of Buncombe County two paper writings purporting to be the last will and testament of the deceased. The first was the attested will, the validity of which is not contested. The second was a letter reproduced in the record as follows:

> "LAWRENCE A. MUCCI, M.D.
> 4 SPRINGSIDE PARK
> ASHEVILLE, N. C. 28803
>
> 9-25-71
>
> Atty. George H. Johnson
> 1 Springside Park
> Asheville, N. C. 28803
>
> Dear George:
>
> Please note that on my death I want my present wife Mary Elizabeth (Illegible) Mucci to have the right of resid-

ing at 4 Springside Park until her death. Also note that the expense of upkeep and care of said residence will rest with the estate if her share of my estate is insufficient for this purpose.

Sincerely Yours
LAWRENCE A. MUCCI"

Other than the letterhead, which was stamped on the paper writing, the instrument is entirely in the handwriting of Dr. Mucci. The letter is addressed to the residence of Johnson and it was delivered there by mail. Johnson took the letter to his office and placed it in a file he maintained on Mucci which contained the attested will.

Over propounder's objection Johnson testified on cross-examination that before receiving the letter he had had no conversation with Mucci relative to its contents. After receiving the letter Johnson suggested to Mucci that a formal codicil should be prepared and witnessed to conform to the original will. Mucci's response was, "George, go ahead and draw it up." Two or three days later Johnson prepared a formal codicil, the substance of which does not appear in the record. When advised that the codicil had been prepared Mucci told Johnson, "This is what I want; I have to get witnesses for it; I'll be in touch with you later." In late October, 1971, Johnson advised Mucci that he was "wearing the codicil out carrying it back and forth from [his] office to [his] home" and suggested that Mucci get his witnesses and sign the codicil. Mucci replied, "I'm not quite ready to do that yet. I'll let you know." There was no further communication between Johnson and Mucci about the formal codicil. It was never executed.

At his death Mucci was living with his third wife, Betty, and his two minor sons.

Propounder offered other evidence through witnesses who knew Mucci and Betty to the effect that a few days before his death he stated that he had everything taken care of with regard to his two wives and his kids and that "Betty's got the house, Mary's got the money"; that at the time of the execution of the attested will in June, 1971, he stated that he was going to draw a new will and take care of Betty; and that at some unspecified time he remarked that Betty would have a home for "the rest of her days, that she would have two hundred dollars a month and twenty thousand dollars." Mucci's declarations a few

days before his death and more than a year after he had written the letter were made in response to considerable prodding by the witness to whom they were made and who was also a mutual friend of Mucci and Betty. This witness insisted on knowing whether Betty had been provided for. She said to Mucci, "Have you taken care of your two wives and your kids. You're a brilliant man, but you can be so stupid." Mucci replied, "Would you quit bugging me?" After this exchange he made the declarations upon which propounder relies.

Betty Mucci testified that she had never seen the letter in question until it was presented in the courtroom.

*G. Edison Hill, for the propounder, George H. Johnson, Jr.*

*Morris, Golding, Blue and Phillips, by James F. Blue III, for Mary E. Mucci, party aligned with the propounder.*

*Richard B. Ford, for caveators.*

EXUM, Justice.

We agree with the conclusion in Judge Hedrick's opinion, 23 N.C. App. 428, 209 S.E. 2d 332 (1974), that there is no evidence in this record from which a jury could find that the letter in question was a codicil to Mucci's attested will. The Court of Appeals erred, however, in reversing the entry of a directed verdict in favor of the caveators and remanding this case for further proceedings.

**[1]** Before any instrument can be probated as a testamentary disposition there must be evidence that it was written *animo testandi,* or with testamentary intent. *In re Perry,* 193 N.C. 397, 137 S.E. 145 (1927); *In re Johnson,* 181 N.C. 303, 106 S.E. 841 (1921). The maker must intend at the time of making that the paper itself operate as a will, or codicil; an intent to make some future testamentary disposition is not sufficient. *In re Johnson, supra; In re Bennett,* 180 N.C. 5, 103 S.E. 917 (1920).

**[2]** With regard, moreover, to holographic instruments, the necessary *animo testandi* must appear not only from the instrument itself and the circumstances under which it was made, *Spencer v. Spencer,* 163 N.C. 83, 79 S.E. 291 (1913), but also from the fact that the instrument was found among the deceased's valuable papers after his death or in the possession of some person with whom the deceased had deposited it for safe-

keeping. *In re Will of Gilkey,* 256 N.C. 415, 124 S.E. 2d 155 (1962); *In re Bennett, supra.* For complete statutory requirements see G.S. 31-3.4.

**[3, 4]** Where a holographic instrument on its face is equivocal on the question of whether it was written with testamentary intent and there is evidence that the instrument was found among the valuable papers of the deceased the *animo testandi* issue is for the jury and parol evidence relevant to the issue may be properly admitted. *In re Westfeldt,* 188 N.C. 702, 125 S.E. 531 (1924); *In re Southerland,* 188 N.C. 325, 124 S.E. 632 (1924); *In re Harrison,* 183 N.C. 457, 111 S.E. 867 (1922). If there is nothing on the face of the holograph from which a testamentary intent may be inferred or evidence is lacking that the instrument was found among the deceased's valuable papers or placed by him in the possession of some other person for safekeeping, the instrument may not, as a matter of law, be admitted to probate. *In re Perry, supra; In re Johnson, supra; In re Bennett, supra; Spencer v. Spencer, supra.*

**[5]** While we do not decide this question, it is arguable that Mucci's letter, standing alone, contains language from which a testamentary intent may be inferred. There is, however, no evidence that the letter was found among his valuable papers or placed by him in the possession of someone for safekeeping. All the evidence is to the effect that he simply mailed the letter to Johnson, his executor and attorney, who three months before had prepared a formal, attested will which Mucci had duly executed. There is no reference in the letter to the formal will. There are no special instructions to Johnson with regard to the handling of the letter itself. There is nothing to indicate that Mucci intended for Johnson to keep the letter, preserve it, or treat it differently than he would any other letter. That Mucci simply mailed the letter to his attorney and executor is not enough for a jury to infer that he had placed it with him for safekeeping as a codicil. That Mucci simply mailed the letter without any special instructions with regard to it as a document tends to show that he thought of it, not as a codicil to his will, but simply an instruction to his attorney to prepare such a codicil.

*In re Bennett, supra,* was a caveat proceeding where a letter to the deceased's friend received by the friend in the mail was offered for probate. The last paragraph in the letter read:

> "Iff aney thing happens to me I want you to have ever thing I got in the world and I will have it fixed iff I can have the chance for you have done moore for me than aney one on earth,
>
> from one who love you,
> G. M. Bennett."

This Court held that the letter could not, as a matter of law, be probated as a will. We said:

> "This letter bears no evidence on its face, nor is there any proof otherwise that Bennett intended that it should be deposited with the propounder, or any one else, for safe keeping. There is no request that he keep or preserve the letter, or that he do anything more with it than he would with any ordinary or casual letter received from him, or any other person.
>
> * * * *
>
> "There is also nothing in the language used which shows an intention to deposit the paper 'with some person as his will,' but is a casual letter, written and mailed only as is a letter in any correspondence, and not attended by the solemnity which is, and should be, required in executing so important an instrument as a will." 180 N.C. at 10, 11, 103 S.E. at 919, 920.

*Alston v. Davis,* 118 N.C. 202, 24 S.E. 15 (1896) held that a letter mailed to the deceased's sister could be probated as a will saying that the mailing of the letter itself was sufficient to draw an inference that the deceased gave it to her sister for safekeeping and that it was not necessary that any express language indicating such an intent be used in the letter. There was, however, a forceful dissent by Furches, J., and the holding of the case was overruled in *Spencer v. Spencer, supra. In re Bennett,* 180 N.C. at 12, 103 S.E. at 920; *McEwan v. Brown,* 176 N.C. 249, 252, 97 S.E. 20, 21 (1918). In *Spencer,* an action to recover a portion of insurance proceeds, plaintiff relied on a letter the deceased, his brother, had written to him which plaintiff contended was a codicil to his broth-

er's previously executed will. The letter, 163 N.C. at 86, 79 S.E. at 292, read:

> "Brother Alex:
>
> I am sorry you had to go under. I hope you will save something out of it. If I die I want you to have your part of the five thousand insurance I took out for Spencer Brothers. I have written Brother George to see that you get it.
>
> We will sail for southern Italy to-morrow, and will go up through the different countries to London, and then home. Will be gone ten weeks.
>
> Give my love to Mame and Bettie.
>
> Good-bye, Your Brother,
> Jones."

This Court affirmed a judgment of nonsuit entered in the Superior Court and held, on several grounds, that the letter relied on could not as a matter of law, operate as a codicil. We said:

> "It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it.
>
> "In the case at bar the testator had made his will . . . . This so-called codicil is a letter written to his brother immediately after he had executed his will, and makes no reference to it. It is scarcely probably that the testator regarded or intended such a letter to be in any sense a part of his will." 163 N.C. at 88, 79 S.E. at 293.

In cases relied on by propounder the letters which were admitted to probate were, in each instance, found among the valuable papers of the deceased. *Rountree v. Rountree,* 213 N.C. 252, 195 S.E. 784 (1938); *In re Will of Thompson,* 196 N.C. 271, 145 S.E. 393 (1928); *In re Westfeldt, supra; Wise v. Short,* 181 N.C. 320, 107 S.E. 134 (1921); *In re Will of Ledford,* 176 N.C. 610, 97 S.E. 482 (1918). In *Rountree* this Court pointed out, "He undoubtedly intended the letter as his will. He *did not mail it,* but placed it in his safe among his valuable papers." 213 N.C. at 254, 195 S.E. at 785. (Emphasis supplied.)

The declarations made at sundry times by Mucci relied on in some instances by the propounder and in others by the caveators make no difference in result. These were to the effect that after Mucci wrote the letter, he first agreed to execute a formal codicil and then failed to do so, that he intended at some time to make a testamentary gift in favor of Betty, and that he said a few days before his death under considerable prodding that Betty had been provided for. The issue is not whether he intended to provide for Betty, or later changed his mind, or still later thought that he had somehow provided for her. The issue is whether Mucci at the time he wrote it intended for the letter itself to be a testamentary instrument and placed it *as such an instrument* in the possession of Johnson for safekeeping. None of his declarations are sufficiently probative to warrant an affirmative answer.

Since there is insufficient evidence upon which to probate the letter, was it proper for the trial court to enter a directed verdict in favor of the caveators and adjudge without submitting the question to a jury that the letter was not a codicil to the will of the deceased? Judge Hedrick was of the opinion that this was error and ordered that the case be remanded to the Superior Court so that a jury could be peremptorily instructed on the issue. He relied on cases as does the propounder here which state the rule that inasmuch as a caveat proceeding is *in rem,* motions for nonsuit or requests for a directed verdict are not proper. *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544 (1939); *In re Westfeldt, supra; In re Hinton,* 180 N.C. 206, 104 S.E. 341 (1920); *In re Will of Hodgin,* 10 N.C. App. 492, 179 S.E. 2d 126 (1971). In all of these cases, however, the propounders had satisfied the burden initially placed upon them to come forward with evidence tending to show a testamentary disposition. The real issues in *Redding* were whether the testator had testamentary capacity and whether the paper writing was procured by undue influence. In *Westfeldt* the issue was whether there was the requisite testamentary intent, but the court found there was ample evidence to go to the jury on that question. In *Hinton* the issue was whether the testator had testamentary capacity, and in *Hodgin,* whether certain marks made on an attested will were put there by the testator with intent to revoke the will.

In the case of *In re Will of Roediger,* 209 N.C. 470, 184 S.E. 74 (1936), the question was whether the testator had by obliterating certain portions of a previously attested will in-

tended to revoke it. Most of the facts were stipulated by the propounder and the caveators who agreed to waive a jury and allow the trial judge to hear the evidence and find such additional facts as would be necessary to a judgment. The trial judge did so and adjudged that the interlineations and erasures should be given no effect and the writing probated as if they had not been made. This Court remanded the case on the ground that it would have to be submitted to a jury, saying:

> "When a caveat to the probate in common form of a paper writing propounded as the last will and testament of a deceased person has been filed as provided by C.S., 4158, and the proceeding which was begun before the clerk of the Superior Court having jurisdiction, has been transferred to the Superior Court for trial of the issue raised by the caveat at term time, as provided by C.S., 4159, the issue must be tried by a jury and not by the judge. A trial by jury cannot be waived by the propounder and the caveator. Nor can they submit to the court an agreed statement of facts, or consent that the judge may hear the evidence and find the facts determinative of the issue. The propounder and the caveator are not parties to the proceeding in the sense that they can by consent relieve the judge of his duty to submit the issue involved in the proceeding to a jury.
>
> "In the instant case, it was error for the judge to render judgment on the facts agreed upon by the propounder and the caveator, and supplemented by the facts found by him, with their consent. The proceeding was *in rem,* and could not be controlled by the propounder and the caveator, even with the consent and approval of the judge. In that respect it is distinguishable from a civil action." 209 N.C. at 476, 184 S.E. at 77-78.

**[6]** These cases, *Redding, Westfeldt, Hinton, Hodgin,* and *Roediger,* taken together, stand for the proposition that once a caveat is filed and the proceeding to probate is transferred to superior court for trial there can be no probate except by a jury's verdict. The trial court may not, at least where there are any factual issues, resolve those issues even by consent and adjudge that the disposition in question is testamentary and entitled to probate as a matter of law.

There are cases in which the writing under consideration was held as a matter of law to be entitled to probate without the intervention of the jury. *Rountree v. Rountree, supra; In re Will of Thompson, supra; Wise v. Short, supra; In re Will of Ledford, supra.* The first three of these cases were not strictly caveat proceedings. *Rountree* was a proceeding under the Declaratory Judgment Act to determine the character of a writing which had already been probated in common form. *Thompson* was an appeal from the clerk who had refused to admit the writing to probate. There was no caveator and the matter was heard in chambers in superior court. *Wise v. Short* was a civil action to enforce a contract for the sale of land where the validity of defendant's title depended upon whether the writing in question was a will. *Ledford* was a caveat proceeding. All of the facts, however, were judicially stipulated and the parties agreed that the question was one of law for the court. The procedure used in *Ledford* seems to conflict with dictum quoted above from *In re Will of Roediger. Ledford* is distinguishable, however, in that there the trial court did not make any factual findings.

**[7]** Where, as here, propounder fails to come forward with evidence from which a jury might find that there has been a testamentary disposition it is proper for the trial court under Rule 50 of the Rules of Civil Procedure to enter a directed verdict in favor of the caveators and adjudge, as a matter of law, that there can be no probate. *In re Johnson, supra.* In *Johnson,* a proceeding in solemn form for the probate of a paperwriting, the trial court after hearing evidence for the propounder adjudged without a jury's intervention that the paper writing was not a will and refused to permit it to be probated. This Court affirmed, saying:

> "The refusal to submit an issue as to the intention of the deceased was not erroneous, as this intent must be gathered from the letter and the surrounding circumstances, and a finding of the jury contrary to the language used in the letter could not be sustained." 181 N.C. at 306, 106 S.E. at 842.

In two cases, where there was no evidence of testamentary intent this Court, reviewing jury verdicts in favor of propounders, remanded the cases for peremptory instructions in favor of caveators. *In re Perry, supra; In re Bennett, supra. Perry* and *Bennett,* however, do not hold that in such cases the trial court

may not enter a directed verdict in favor of the caveator. We said in *Bennett:*

> "The learned judge who presided at the trial . . . should have directed the jury to answer the issue in favor of the caveators, or, in other words, 'No,' as there was no evidence, in a legal sense, that the paper-writing, which was propounded . . . was the will of George M. Bennett . . . . " 180 N.C. at 8, 103 S.E. at 918.

Rather than direct or peremptorily instruct the jury to do what is essentially a mechanical act the better practice is for the trial court to enter a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure.

The judgment of the trial court is correct. The decision of the Court of Appeals is

Reversed.

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STATE OF NORTH CAROLINA v. GEORGE VICK

No. 91

(Filed 14 April 1975)

1. **Criminal Law § 21— no necessity for preliminary hearing**

An accused may be properly tried on a bill of indictment without benefit of a preliminary hearing.

2. **Constitutional Law § 31— rights of counsel, confrontation — time to prepare defense**

The rights to assistance of counsel and of confrontation of one's accusers and witnesses, guaranteed by the Sixth Amendment to the U. S. Constitution and by Article I, §§ 19 and 23 of the N. C. Constitution, include the right of an accused and his counsel to have a reasonable time to investigate, prepare and present a defense; however, no set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case.

3. **Constitutional Law §§ 31, 32— effective assistance of counsel — conviction 12 days after capital offense**

Defendant was not denied the effective assistance of counsel by the fact he was convicted of rape and sentenced to death within 12 days after the crime allegedly occurred where defense counsel did not move for a continuance or suggest to the court that a continuance

might result in the production of exculpatory evidence or would permit him to prepare and present a more adequate defense.

4. **Criminal Law § 117— rape — prosecutrix as interested witness — absence of cautionary instruction**

The trial court in a rape case did not err in failing to instruct the jury to scrutinize the testimony of the prosecutrix as an "interested" witness absent a request for a cautionary instruction.

5. **Rape § 6— failure to submit lesser offenses**

The trial court in a rape case did not err in failing to submit to the jury lesser included offenses where all the evidence showed a completed act of intercourse and the dispute related only to whether the act of intercourse was by consent or as a result of force or coercion.

6. **Constitutional Law § 36; Rape § 7— death penalty for rape — constitutionality**

Imposition of the death penalty for rape does not constitute cruel and unusual punishment prohibited by the Eighth Amendment to the U. S. Constitution.

7. **Rape § 4— passes at another woman — irrelevancy**

In a rape prosecution the trial court properly sustained the State's objection to defense counsel's question to a witness as to whether defendant had ever made any passes at her.

8. **Criminal Law § 97— recalling prosecutrix as rebuttal witness — discretion of court**

The trial court in a rape case did not err in permitting the State to recall the prosecutrix as a rebuttal witness where the record does not show that defense counsel moved for a continuance on the ground he was taken by surprise by the additional evidence or that he was precluded from offering evidence in rebuttal.

9. **Criminal Law § 132— setting aside verdict as contrary to evidence**

A motion to set aside the verdict of the jury as being contrary to the greater weight of the evidence is addressed to the discretion of the trial judge and is not reviewable on appeal.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Chief Justice SHARP dissenting.

This case was docketed and argued as No. 85 at the Spring Term 1974.

APPEAL by defendant from *Fountain, J.*, 10 December 1973 Session of BEAUFORT Superior Court.

Defendant was tried on a bill of indictment which charged that " . . . George Vick . . . on or before the 1st day of December 1973, with force and arms, . . . did, unlawfully, wilfully and

feloniously ravish and carnally know Shirley Harding, a female, by force and against her will . . . . "

Upon arraignment defendant entered a plea of not guilty.

Shirley Harding, the prosecuting witness, testified that at about 5:00 p.m. on 1 December 1973, defendant and his mother drove up to the house trailer occupied by the witness, her husband Dickie Harding, and their small child. Both defendant and his mother had been drinking, and neither had a valid driver's license. They asked her husband to drive them home. He agreed and left in defendant's automobile after telling her that he would return in about one hour.

At about 9:30 or 10:00 o'clock that evening, George Vick knocked on her trailer door. He told her that Dickie had passed out in the car and asked her to help bring him inside. However, when she opened the door, defendant threw her to the floor and started pulling her clothes off. She testified:

> . . . I bit him and scratched him and I fighted him, the door was partly open and I was trying to get out, I went to the door and he grabbed me again, and he started ripping —pulling my pants off, and he threw me on the floor again. I don't remember where I bit him, I think along his shoulder. I pulled his hair and I scratched him I think but I don't remember where. I just know I was fighting. I was still fighting when he had me on the floor and he grabbed hold of my neck and said, "Shirley I swear if you don't lay still, I'll kill you." I was scared and I laid still and he went ahead and had intercourse.
>
> * * *
>
> . . . I did not consent to the act of having intercourse with him. The reason I laid still when he told me to do so is because he started choking me, I thought he was going to kill me.

Before leaving, defendant threatened to kill her if she told her husband what had happened. There was no telephone in the trailer, and she remained there with her baby until her husband returned at around noon on the following day. She immediately told him that defendant had raped her.

Ruby Edwards, who lived near the Harding trailer, testified that she heard the sounds of a woman calling for help at about

10:30 or 11:00 o'clock on the evening of 1 December 1973. The cries came from the direction of the Harding trailer.

Nelson Sheppard, a Beaufort County Deputy Sheriff, testified that Shirley Harding reported the alleged rape to him about 2:00 p.m. on 2 December 1973. At that time, she showed him several bruises on her arms and face and told him she bit defendant on his shoulders in the course of the struggle. He testified, without objection, that an internal examination of Mrs. Harding was performed, and a laboratory report indicated the presence of sperm. He arrested defendant on the same day and shortly thereafter observed tooth prints on defendant's shoulders.

Dickie Harding testified that after dropping defendant's mother at her home, he and defendant drove to Whichard's Beach and entered a dance hall where they later became separated. He saw defendant when he left and tried without success to stop him. He could not find a working telephone and finally obtained a ride to a cousin's home where he spent the night. He arrived home at about noon on the next day, and his wife immediately told him what had happened.

Defendant testified that he and his wife had been friends of the Hardings for some time. He stated that he first had intimate relations with Mrs. Harding in her trailer in May of 1973. On 1 December 1973, he and his mother went to Dickie's trailer for a social visit. Dickie left with them, and he thereafter accompanied Dickie Harding to a dance hall at Whichard's Beach. They became separated, and he returned to Mrs. Harding's trailer. Upon his arrival Shirley Harding invited him in, and after preliminary advances she voluntarily engaged in sexual intercourse with him. He testified that the marks on his shoulders were the result of her passionate embraces. He left the trailer after promising not to tell her husband of the incident.

The State recalled Mrs. Harding, who testified that she was not living in a trailer in May of 1973.

The jury returned a verdict of guilty of rape. On 12 December 1973 Judge Fountain imposed a sentence of death by asphyxiation. Defendant appealed.

*Attorney General Robert Morgan by Assistant Attorney General Lester V. Chalmers, Jr. for the State.*

*Frazier T. Woolard for defendant appellant.*

BRANCH, Justice.

Defendant's first assignment of error is as follows:

> The defendant George Vick was denied due process of law in being arrested, tried, convicted, and sentenced to death all within a ten day period.

In support of this assignment of error, defendant argues that he was prejudiced because he was denied a preliminary hearing.

**[1]** It is well recognized in this jurisdiction that an accused may be properly tried on a bill of indictment without benefit of a preliminary hearing. *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320; *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740; and *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44.

**[3]** Defendant also contends by this assignment of error that he was denied due process of law in that he was denied effective assistance of counsel because counsel did not have ample time to investigate, prepare and present his defense.

**[2]** The rights to assistance of counsel and of confrontation of one's accusers and witnesses are guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, sections 19 and 23 of the North Carolina Constitution. *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321; *Powell v. Alabama,* 237 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55; *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296. It is implicit in these Constitutional guarantees that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense of the accused. *State v. Phillips,* 261 N.C. 263, 134 S.E. 2d 386; *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389; *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294. However, no set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520.

In *State v. Gibson, supra,* Justice Ervin quoted with approval from *United States v. Nierstheimer,* 166 F. 2d 87, the following:

> "In a capital case the court should not move so rapidly as to ignore or violate the rights of the defendant to a fair trial. No standard length of time must elapse before a

> defendant in a capital case should go to trial. Each case, and the facts and circumstances surrounding it, provides its own yardstick. There must not be a mere sham proceeding or idle ceremony of going through the motions of a trial. However, courts do not deny due process just because they act expeditiously. The law's delay is the lament of society. Counsel must not conjure up defenses when there are none. Continuances to investigate and the subpoenaing of witnesses are matters that counsel must consider. If no witnesses are suggested or information furnished that would possibly lead to some material evidence or witnesses, the mere failure to delay in order to investigate would not be, in and of itself, a denial of due process."

See also: *Ungar v. Sarafite,* 376 U.S. 575, 11 L.Ed. 2d 921, 84 S.Ct. 841, reh. den., 377 U.S. 925, 12 L.Ed. 2d 217, 84 S.Ct. 1218; *Avery v. State of Alabama,* 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321; *Lewis v. Territory of Hawaii,* 210 F. 2d 552; *Barber v. United States,* 142 F. 2d 805; *State v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563, cert. den., 334 U.S. 806, 92 L.Ed. 1739, 68 S.Ct. 1185.

The defendant was charged with rape in the case of *State v. Whitfield,* 206 N.C. 696, 175 S.E. 2d 93. His case was called for trial two days after counsel was assigned for defense and twenty-two days after the crime was allegedly committed. Defense counsel moved for a continuance in order to prepare for trial. The Motion was denied. The jury returned a verdict of guilty of rape, and the defendant was sentenced to death. On appeal the defendant assigned as error the denial of his Motion to Continue. This Court found no error in the trial, and Chief Justice Stacy, speaking for the Court, in part, stated:

> In the instant case, the alleged crime was committed on 3 October; the prisoner was apprehended about a week later, and duly indicted at the October Term of court; he was arraigned on 23 October, and counsel appointed to represent him; his trial was set for 25 October. The facts were simple and the controversy reduced itself to a question of veracity between the prosecuting witness and the prisoner. There were no other witnesses to the crime. We cannot say, as a matter of law, that in ruling the defendant to trial, the court took from him his constitutional right of confrontation. . . .

**[3]** Here the record does not disclose that counsel for defendant moved for a continuance or suggested to the court that a continuance might result in the production of exculpatory evidence or would permit him to prepare and present a more adequate defense.

Under these circumstances we do not think that the trial judge's failure to, *ex mero motu,* grant defendant additional time was error.

**[4]** Defendant, without citation of authority, assigns as error the failure of the trial judge to give cautionary instructions regarding the credibility of the prosecuting witness.

The proper instruction as to how the jury should consider the testimony of an "interested" witness is that the jury should scrutinize the testimony of an "interested" party in light of his interest in the outcome of the action, but if after such scrutiny the jury believes the witness has told the truth, it should give his testimony the same weight as it would give to any other credible witness. *State v. Turner,* 253 N.C. 37, 116 S.E. 2d 194; *State v. Holland,* 216 N.C. 610, 6 S.E. 2d 217; *State v. Ray,* 195 N.C. 619, 143 S.E. 143; *State v. Green,* 187 N.C. 466, 122 S.E. 178.

We need not decide whether this prosecuting witness is an "interested" witness since an instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate feature of the case which does not require the trial judge to give the cautionary instruction *unless there is a request for such instruction. State v. Vance,* 277 N.C. 345, 177 S.E. 2d 389; *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398; *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745; *State v. Sauls,* 190 N.C. 810, 130 S.E. 848; *State v. O'Neal,* 187 N.C. 22, 120 S.E. 817.

In instant case defense counsel did not request cautionary instruction. We think it proper to here note that Judge Fountain fully charged the jury on every substantial feature of the case, defined and applied the law to the facts, and fairly stated the contentions of both defendant and the State. We are unable to find error prejudicial to defendant in this assignment of error.

**[5]** Defendant contends that the trial judge erred by failing to submit to the jury lesser included offenses of the crime of rape.

The necessity for submitting to the jury a lesser included offense of the one charged arises only when there is evidence to support the included crime of lesser degree. *State v. Watson,* 283 N.C. 383, 196 S.E. 2d 212; *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111; *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235; *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738; and *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732.

In *State v. Bryant, supra,* the defendant was charged with rape. All the evidence disclosed completed acts of intercourse. The prosecuting witness testified that the acts of intercourse were against her will and were accomplished by force and the threat of the use of a deadly weapon. The defendant admitted having intercourse with the prosecuting witness but contended that the acts were with her consent. The defendant objected to the trial judge's failure to submit the lesser included offense of assault with intent to commit rape. This Court in overruling this assignment of error stated:

> 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."

Similarly in *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423, all of the evidence revealed a completed act of sexual intercourse. The actual dispute related only to whether the act of intercourse was by consent or as a result of force or coercion.

There, this Court found no error in the failure of the trial judge to instruct the jury that they might find the defendant guilty of a lesser included offense.

In instant case, as in *Bryant* and *Arnold,* all the evidence shows a completed act of intercourse and a factual dispute as to whether the act was with the consent of the prosecuting witness or resulted from the defendant's use of force and coercion.

We are unable to distinguish instant case from *Bryant* and *Arnold,* and by virtue of the holdings in *Bryant* and *Arnold* this assignment of error is overruled.

**[6]** Defendant's contention that the imposition of the death sentence in this case constituted cruel and unusual punishment

prohibited by the Eighth Amendment to the United States Constitution has been consistently rejected by this Court in the recent cases of *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750; *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721; *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19. We reaffirm the holdings in these cases.

**[7]** Defendant contends that the trial judge erred in a ruling on the admission of evidence offered through Mrs. Doris Ball.

Mrs. Ball, who was called as a defense witness, testified that she and her husband were friendly with the Vicks and the Hardings and that the three couples had visited socially in the Vick trailer about a week before the alleged rape occurred. During her direct examination by defense counsel, the following occurred:

Q. Has George Vick ever made any passes at you?

OBJECTION SUSTAINED. EXCEPTION NO. 2

The record does not disclose what the witness would have said had she been permitted to answer the question.

The burden is upon the defendant to show prejudicial error, and we cannot know whether the trial judge's ruling is prejudicial without knowledge of what the witness would have said had she been permitted to answer. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416; *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513. Further, it is difficult to perceive how any responsive answer to this question could have been relevant.

We hold that Judge Fountain correctly sustained the State's objection.

**[8]** Defendant argues that Judge Fountain erred when he allowed the State to recall Shirley Harding as a rebuttal witness.

It is within the discretion of the trial judge to permit a party to introduce additional evidence after he has rested. This is so even after the jury has begun its deliberations. *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206; *State v. Jackson,* 265 N.C. 558, 144 S.E. 2d 584; *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736.

There is nothing in this record to show that defense counsel moved for a continuance on the ground that he was taken by surprise by the additional evidence or that he was precluded from offering evidence in rebuttal.

Judge Fountain properly exercised his discretionary power in allowing the State to recall the prosecuting witness.

**[9]** Finally, defendant contends that the trial judge erred in refusing to set aside the verdict of the jury as being contrary to the greater weight of the evidence. This motion is addressed to the discretion of the trial judge and is not reviewable on appeal. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664; *State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546; *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291; *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555.

The function of this Court is to determine whether errors were committed at trial. Even though this record discloses that defendant was apprehended, found to be an indigent, indicted by the grand jury of Beaufort County, arraigned, tried and sentenced to death within twelve days of the date of the alleged crime, our careful examination of this entire record does not disclose such prejudicial error as to warrant a new trial. Nevertheless, we are compelled to note the rather unusual tactics of defense counsel. For example, without moving for a continuance, he advances as his principal Assignment of Error the contention that he did not have ample time to prepare his client's defense.

If defendant deems himself entitled to further relief, a proceeding in the Superior Court under the provisions of Article 22 of Chapter 15 of the General Statutes is the proper mode for original determination of whether he has been denied the right of effective assistance of counsel. *State v. Wheeler,* 249 N.C. 187, 142 S.E. 2d 687. If he elects to so proceed, the Superior Court will, of course, appoint other counsel for this indigent defendant.

No error.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Chief Justice SHARP dissenting.

For the reasons stated by Chief Justice Bobbitt in his dissent in *State v. Bryant,* 280 N.C. 551, 559, 187 S.E. 2d 111, 116 (1972), and *State v. Arnold,* 284 N.C. 41, 52, 199 S.E. 2d 423, 430 (1973) (opinions in which I concurred), I would award a new trial on account of the court's failure to submit assault with intent to commit rape as a possible verdict. However, since the majority find no error in the trial below, for the reasons stated in my dissenting opinion in *State v. Williams,* 286 N.C. 422, 434, 212 S.E. 2d 113, 123 (1975), I dissent as to the death sentence and vote to remand for the imposition of a sentence of life imprisonment.

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IDA MAE QUICK, ADMINISTRATRIX OF THE ESTATE OF DONALD GARY QUICK v. UNITED BENEFIT LIFE INSURANCE COMPANY, AND JILL QUICK

No. 1

(Filed 14 April 1975)

1. **Insurance § 35— involuntary manslaughter of husband — right to life insurance proceeds — G.S. Chapter 31A**

A wife who was convicted of involuntary manslaughter of her husband was not convicted of a "wilful" killing within the meaning of G.S. 31A-3(3)a and thus was not a "slayer" who is barred by G.S. Chapter 31A from receiving the proceeds of a policy of insurance on the life of the husband.

2. **Insurance § 35— killing of husband — right to life insurance proceeds — common law**

G.S. Chapter 31A did not wholly supplant the common law which prevents a beneficiary in a policy of life insurance whose culpable negligence caused the death of the insured from collecting the proceeds of the policy.

3. **Insurance § 35— killing of husband — right to life insurance proceeds — admissibility of criminal conviction**

In a civil action to determine the right of a beneficiary who has caused the death of an insured to receive the proceeds of his life insurance policy, the record of the beneficiary's conviction of a "wilful and unlawful killing" is admissible to establish the disqualification of the beneficiary to receive the proceeds under G.S. Chapter 31A; however, when the wrongdoer is not disqualified from receiving the insurance proceeds by G.S. Chapter 31A and the common law must be relied on for such disqualification, the record of a criminal conviction of the wrongdoer for a crime not amounting to a "wilful and unlawful

killing," such as a conviction for involuntary manslaughter, is not admissible, and it is necessary to prove at the trial the factual circumstances relating to the killing from which the court can determine the issue.

4. **Insurance § 35— involuntary manslaughter of husband — right to life insurance proceeds — disqualification under common law**

Evidence not objected to that defendant had been convicted of the involuntary manslaughter of her husband was sufficient to support the court's conclusion that defendant was disqualified under common law from receiving the proceeds of an insurance policy on the life of her husband.

APPEAL by plaintiff-administratrix Quick, pursuant to G.S. 7A-30(2), to review decision of Court of Appeals reported in 23 N.C. App. 504, 209 S.E. 2d 323 (1974) (opinion by Vaughn, J., Parker, J., concurring, Campbell, J., dissenting), reversing the judgment of *Herring, D.J.*, 17 June 1974 Session of CUMBERLAND County District Court.

This is a civil action for declaratory judgment to determine the ownership of ten thousand dollars ($10,000.00) in life insurance proceeds. The actual controversy is between defendant, Jill A. Quick, and Ida Mae Quick, adminstratrix of the estate of Jill A. Quick's deceased husband, Donald Gary Quick.

The facts, which are not in dispute, are set out in the judgment of the trial court as follows:

"I. That the defendant, Jill A. Quick, shot and killed her husband, Donald Gary Quick, on the 23rd day of September 1972.

"II. That on October the 24th, 1972, the Cumberland County Grand Jury returned a true bill of indictment against the defendant, Jill A. Quick, for murder, being case #72 CR 28998.

"III. That the defendant, Jill A. Quick, was brought to trial at the March 12th Session of the Cumberland County Superior Court and was convicted by a Cumberland County Jury on the 15th of March, 1973, of Involuntary Manslaughter.

"IV. That pursuant to said verdict of the Cumberland County Jury, the Judge presiding, COY E. BREWER, sentenced the defendant, Jill A. Quick, to serve not less than five (5) or no more than seven (7) years in the State

Prison to be assigned to the Department of Corrections, Women Division.

"V. That there was in effect at the time of the said killing or more particularly, on September 23rd, 1972, a life insurance policy, acquired by Donald Gary Quick, the decedent, in the amount of $10,000.00, naming the defendant, Jill A. Quick, his wife, as beneficiary under the said policy.

"VI. That this action for Declaratory Relief was instituted by the Administratrix, Ida Mae Quick, of the State of South Carolina, and the Ancillary Administrator, Lester G. Carter, Jr., of Cumberland County, North Carolina, both adjudicated to be duly appointed.

"VII. That the defendant, United Benefit Life Insurance Co., was named a defendant in this proceedings, but withdrew from the said case after an Order allowing it to pay the proceeds of the policy, in the amount of $10,000.00 dollars, to The Clerk of Superior Court of Cumberland County; . . ."

The judgment also recites the stipulation of counsel for both parties "that the only issue to be decided [was] whether or not, Jill A. Quick, [was] barred from taking the proceeds of the aforementioned insurance policy, under G.S. 31A."

"Upon the aforementioned findings of fact and stipulation of counsel," the court made the following conclusions of law.

"(1) That Involuntary Manslaughter is an unlawful and wilful killing of another person, as set out in G.S. 31A-3(3)a; and the court further concludes that the defendant, Jill A. Quick is a 'Slayer' within the meaning of said Statute.

"(2) That the act committed by the defendant, Jill A. Quick, was against the public policy of this State - that - 'no person should be allowed to profit by his or her own wrong'; the Court concludes that by virtue of its inherent power as set out in G.S. 31A-15, that, Jill A. Quick, is barred from taking the proceeds as beneficiary under the aforementioned insurance policy."

The court entered judgment that the Clerk of Superior Court pay the insurance proceeds held by him to the ancillary administrator.

Defendant Quick appealed to the North Carolina Court of Appeals, which held (1) that a conviction of involuntary manslaughter is not a conviction of a "wilful and unlawful killing" within the meaning of G.S. 31A-3(3)a; and that defendant "Quick's conviction, therefore, does not make her a 'slayer' within the definition"; and (2) that "the General Assembly has elected to legislate in the subject matter of this controversy and that the policy so established supplants the common law rule which would not have allowed her to recover." 23 N.C. App. at 507, 209 S.E. 2d at 325.

Accordingly, the Court of Appeals reversed the judgment of the district court and remanded the case for entry of judgment consistent with its opinion. Judge Campbell dissented on the ground that G.S. 31A-15 is controlling and this was an unlawful act which bars any recovery by defendant Quick.

The plaintiff-administratrix appealed to this Court as a matter of right.

*Lacy S. Hair for plaintiff appellant.*

*Deborah G. Mailman for defendant appellee.*

COPELAND, Justice.

**[1]** The first question for decision is whether defendant Quick is a "slayer" as defined by G.S. 31A-3(3). If so, G.S. 31A-11 disqualifies her as a beneficiary under the policy.

G.S. 31A-3(3) provides:

> " 'Slayer' means
>
> "a. Any person who by a court of competent jurisdiction shall have been convicted as a principal or accessory before the fact of the *wilful and unlawful killing of another person; . . .*" (Emphasis supplied.)

The question, therefore, is whether the crime of involuntary manslaughter is a "wilful and unlawful killing" within the meaning of the above cited provision. A conviction of the crime of involuntary manslaughter establishes the commission of an "unlawful" act, punishable in the discretion of the court, not to exceed 10 years. G.S. 14-2; *State v. Stimpson,* 279 N.C. 716, 185 S.E. 2d 168 (1971). Thus, only the term "wilful" has significance.

The term "wilful" depends on the context in which it is used. 22 C.J.S. Criminal Law § 31(4) (1961). However, as used in criminal statutes, it generally means "the wrongful doing of an act without justification or excuse, *or the commission of an act purposely and deliberately in violation of law.* [Citation omitted.]" *State v. Arnold,* 264 N.C. 348, 349, 141 S.E. 2d 473, 474 (1965). (Emphasis supplied.) For the reasons stated below, we hold that "wilful" as used in G.S. 31A-3 refers to an "intentional" homicide.

N. C. Gen. Stats., Ch. 31A, enacted by Chapter 210, 1961 Session Laws, was based upon legislation submitted to the 1961 General Assembly by a Special Drafting Committee of the General Statutes Commission (hereinafter referred to as Committee). *See Special Report of the General Statutes Commission on An Act to Be Entitled "Acts Barring Property Rights"* (1961) (hereinafter cited as *Special Report).* This report stated that the Committee had "profited greatly from an outstanding and comprehensive" model disqualification act first proposed in 1936 by Mr. John W. Wade, Professor of Law, Harvard Law School. *See Special Report, supra,* at ii. Also, with specific reference to Article 3 of the proposed Chapter 31A ("Wilful and Unlawful Killing of Decedent"), the report stated that "[t]he proposed Model Act . . . has been substantially followed, as was done in 1941 in Pennsylvania." *See Special Report, supra,* at 11. For the complete Model Act, *see* Wade, *Acquisition of Property by Wilfully Killing Another—A Statuory Solution,* 49 Harv. L. Rev. 715, 753-55 (1936) (hereinafter cited as *Wade).* The disqualification statutes of both Pennsylvania and South Dakota are also based on Professor Wade's Model Act. *See* Chapter 88, Penn. Stats. Anno. (1972) ; Chapter 29-9, S. Dak. Comp. Laws.

Proposed section 31A-3(1)a was enacted unchanged by the 1961 General Assembly as G.S. 31A-3(3)a. In their comments to proposed section 31A-3(1)a, the Committee stated:

> "The proposed statute, § 31A-3 defines the terms 'slayer,' 'decedent' and 'property'.
>
> *"In subsection (1) it uses the term 'slayer' instead of felon or murderer and is limited to 'wilful and unlawful' killings. These latter words would prevent the statute's application to cases of involuntary manslaughter, justifiable or excusable homicide, accidental killing or where the slayer was insane.* It would include manslaughter if the killing

was intentional and unlawful [voluntary manslaughter]. . . . The definition of the term 'slayer' is very important because it signifies what kind of killing may disqualify one from acquiring property. The requirement that the killing be wilful and unlawful isn't the only possible rule, but does seem a fair policy criterion." *Special Report, supra,* at 12. (Emphasis supplied.)

Section 1(1) of Professor Wade's Model Act is substantively identical to G.S. 31A-3(3)a. It provides as follows: "As used in this Act: (1) the term 'slayer' shall mean any person who *wilfully and unlawfully* takes or procures to be taken the life of another; . . ." *Wade, supra,* at 721-22. (Emphasis supplied.) In his commentary on this particular provision, Professor Wade states:

"The definition of the term 'slayer' is particularly important, since it signifies what kind of killing disqualifies a man from acquiring property. The requirement that the killing be wilful and unlawful cannot be said to be the only possible rule; in fact, it 'is futile to attempt to arrive at a "true rule" by pure logic'. But a line must be drawn at some place. *Should a statute of this sort include manslaughter? The answer is doubtful, but it is believed that it should not, if the killing is involuntary.* If the wrong was not intentional, it is difficult to say as a matter of policy that the perpetrator should be prohibited from acquiring property." *Wade, supra,* at 722. (Emphasis supplied.)

Also, in an extensive analysis of Chapter 31A of the General Statutes, Professor W. Bryan Bolich, a member of the Committee, has made the following observations as to the definition of "slayer" as used in G.S. 31A-3:

"This, the principle definitorial section of the chapter, adopts the term 'slayer' instead of 'felon' or 'murderer' which occurs in a number of the statutes, and limits the bar of the chapter to a 'wilful and unlawful killing.' The object of the statute is to prevent profit through wrong, and any degree of wrong from murder down to misdemeanor might have been adopted as the basis of the disqualification.

"In selecting this degree of wrong as the one which disables a slayer from profiting by his crime through the acquisition of a proprietary benefit as a result of his victim's death, this section utilizes the criterion adopted by a

majority of the statutes and common law decisions on the subject—an intentional criminal homicide. As an expression of public policy it seems a fair standard which requires the killing to be both unlawful and wilful. *This duality of requirement excludes any killing by a noncriminal act such as mere negligence, a homicide which was justifiable or excusable or one committed while the slayer was insane, and by any non-wilful crime, including involuntary manslaughter. As used, 'wilful' would seem to mean such an act or omission entailing criminal responsibility on the part of the actor. This should include all cases of murder and of manslaughter when the killing was intentional and unlawful.*" Bolich, *Acts Barring Property Rights,* 40 N.C.L. Rev. 175, 193-94 (1962) (hereinafter cited as *Bolich).* (Emphasis supplied.)

In this State involuntary manslaughter is defined as an unlawful killing without malice, without premeditation and deliberation, and "without intention to kill or inflict serious bodily injury." *State v. Wrenn,* 279 N.C. 676, 682, 185 S.E. 2d 129, 132 (1971). In short, it is an unintended homicide. *See, e.g., State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Griffin,* 273 N.C. 333, 159 S.E. 2d 889 (1968); *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). In many cases, the crime arises when the evidence tends to show that the actor's unlawful killing of the victim was caused by his unjustified and wanton or reckless use of a weapon in such a manner as to jeopardize the decedent's safety. *See, e.g., State v. Harrington,* 286 N.C. 327, 330-31, 210 S.E. 2d 424, 427 (1974), and cases cited. Other states generally define the offense as an unlawful killing in the commission of an unlawful act not amounting to a felony (unlawful act type of manslaughter) or in the commission of a lawful act without due caution or circumspection (the gross negligence type). *See, e.g.,* W. LaFave & A. Scott, *Criminal Law,* § 75, 571-602 (West 1972); Annots., 161 A.L.R. 10 (1946); 99 A.L.R. 756 (1935); 23 A.L.R. 1554 (1923). Thus, it would appear, that the crime of involuntary manslaughter is not a "wilful" killing within the meaning of G.S. 31A-3(3)a.

The clearest pronouncement that we have been able to find on this question is *Prudential Ins. Co. v. Doane,* 339 F. Supp. 1240 (E.D. Pa. 1972). In that case, the court was called upon to interpret a Pennsylvania statute (based upon Wade's Model Act), which provided that "[t]he term 'slayer' shall mean any

person who participates, either as a principal or as an accessory before the fact, in the *wilful and unlawful killing of any other person.*" (Emphasis supplied.) The facts giving rise to that action were as follows.

Defendant Evelyn Doane shot and killed her husband, Isaac T. Doane, during a fight. *Mrs. Doane was acquitted of murder, but was convicted of involuntary manslaughter.* She did not appeal this conviction. Mrs. Doane was the beneficiary of two insurance policies issued by the Prudential Insurance Company of America on her husband's life. She was also the administratrix of his estate. Faced with inconsistent claims Prudential paid the death benefits into court and brought an "Interpleader action."

The court held: "Under Pennsylvania law, involuntary manslaughter is the *unintentional* killing of another without malice. [Citation omitted.] Hence, the Slayer's Act would not bar the receipt of insurance proceeds by one convicted of involuntary manslaughter." *Id.* at 1241-42.

**[1]** We hold, as did the Court of Appeals, that defendant Jill A. Quick was not a "slayer" within the meaning of G.S. 31A-3(3)a. Hence, proof of her conviction of involuntary manslaughter does not, *per se,* disqualify defendant from receiving the insurance proceeds under G.S. 31A-11.

The question remains, however, whether the provisions of Chapter 31A of the General Statutes completely supplant the common law principle, heretofore recognized by this Court, that one should not be allowed to profit by his own wrong. In considering this question, the pertinent provision is G.S. 31A-15, which provides as follows:

> "This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable."

In their comments to proposed section 31A-15 (codified as G.S. 31A-15), the Committee made the following observations:

> "This section specifically states that this Chapter is not penal in nature, *and does not purport to abrogate the common law or to cover every case of wrongful act that might bar property rights.*
>
> "There is a doctrine that if legislation undertakes to provide for the regulation of human conduct in respect to a specific matter or thing already covered by the common law, and parts of which are omitted from the statute, such omissions must be taken generally as evidences of the legislative intent to repeal or abrogate the same. [Citation omitted.] And while a court might not construe this legislation to be all-embracing and thus to supplant completely the common law on the subject, [citation omitted], *this section preserves the common law, substantive and procedural, as to all acts not specifically provided for in this Chapter.* While this Chapter seeks to provide for the situations in which the slayer may benefit from the decedent's death, some situations of wrong will inevitably arise which are not so covered but should be in accordance with the stated policy to prevent one from profiting by his own wrong. *Thus the fact that this Chapter covers only certain acts of wrongfully killing does not necessarily preclude other wrongful acts from barring property rights by common law, such as involuntary manslaughter or an acquitted killer in some cases.* In such instances the constructive trust concept and other non-statutory remedies remain available under the terms of this Chapter." *Special Report, supra,* at 31-32. (Emphasis supplied.)

The views of Professor Bolich on this question are also noteworthy. Specifically, he states:

> "While this chapter seeks to provide for the usual situations in which the slayer may benefit from the decedent's death, some cases of wrong will inevitably arise which are not so covered but should be in accordance with the stated policy to prevent one from profiting by his own wrong. *Thus the fact that this chapter covers only wilful and unlawful homicide does not necessarily preclude other wrongful killings from barring property rights by common law, such as an unintentional killing resulting from reckless*

*disregard for human life* or during the commission of a felony." *Bolich, supra,* at 221. (Emphasis supplied.)

Additionally, we observe that Professor Wade, in his comments on the Model Act, states that "[a]n earnest effort has been made in the proposed Act to take care of every situation in which the slayer may receive any benefit of any kind as a result of the decedent's death. But it is always possible, of course, that some situation may arise which is not expressly covered in Sections 3 to 11." He concludes, however, that as a result of Sections 15 and 2 of the Model Act, "the slayer will still be prevented from acquiring such benefit." *Wade, supra,* at 751. Section 15 of the Model Act is identical to the first full sentence of G.S. 31A-15. Article 3 of Chapter 31A has no provision similar to Section 2 of the Model Act.

Of course, it is a basic rule of statutory interpretation that the intent of the Legislature controls the interpretation of any statute. *See, e.g., Person v. Garrett,* 280 N.C. 163, 184 S.E. 2d 873 (1971); *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970); 7 Strong, N. C. Index 2d, Statutes § 5 (1968). Further, it is a familiar principle that statutes in derogation of the common law must be strictly construed. *See, e.g., Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925 (1955); *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107 (1950).

**[2]** Applying these well-settled rules to Chapter 31A, Article 3, of the North Carolina General Statutes, we hold that G.S. 31A-15 preserved the common law both substantively and procedurally, as to all acts not specifically provided for in Chapter 31A, and that the Court of Appeals erred in holding that N. C. Gen. Stats. Ch. 31A wholly supplanted the common law which prevents a beneficiary in a policy of life insurance whose culpable negligence caused the death of the insured from collecting the proceeds of the policy.

It may be that at the time the parties stipulated that the only issue to be decided was whether defendant Quick is barred "under G.S. 31A" from taking the proceeds of the insurance policy, they were under the misapprehension that the decisive question was whether she was a *slayer* as defined by G.S. 31A-3(3). If so, their misapprehension is immaterial for the stipulation was one of law and therefore not binding upon the court. *In re Edmundson,* 273 N.C. 92, 97, 159 S.E. 2d 509, 513 (1968);

*Moore v. State,* 200 N.C. 300, 156 S.E. 806 (1931). It did not eliminate G.S. 31A-15 from the case.

**[3]** Under G.S. 31A-13, one conclusively establishes the disqualification of the "slayer" by introducing in evidence the record of the proceeding in which the beneficiary was judicially determined to be a slayer as defined by G.S. 31A-3(3). Thus, in a civil action to determine the right of a beneficiary who has caused the death of an insured to take the proceeds of his life insurance policy, the record of the beneficiary's conviction of a "wilful and unlawful killing" would be introduced and admissible in evidence, not to prove guilt, but to prove the conviction as a separate relevant fact which would of itself bar the beneficiary from acquiring or retaining the proceeds. No other evidence of the crime than the specified court record would be necessary, and evidence that the "slayer" was not in fact guilty of the crime would be both immaterial and inadmissible. *See Special Report, supra,* Comments under proposed section 31A-13, 29-30.

In contrast, if the party seeking to disqualify the beneficiary cannot proceed under Chapter 31A—as when the jury in the criminal proceeding finds the wrongdoer guilty of involuntary manslaughter—then his only remaining remedy is to proceed under the common law. In this type of action, G.S. 31A-13 has no applicability because the alleged wrongdoer has not been determined a "slayer" within the purview of G.S. 31A-3(3). G.S. 31A-13 is simply a statutory exception to the universal rule that the record of a conviction in a criminal proceeding is not admissible in a subsequent civil action to prove the guilt or innocence of the person tried. *See, e.g., Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1 (1960); *Swinson v. Nance,* 219 N.C. 772, 15 S.E. 2d 284 (1941); Stansbury, N. C. Evidence (Brandis Revision) § 143 (1973). *See also Tew v. Durham Life Ins. Co.,* 1 N.C. App. 94, 160 S.E. 2d 117 (1968), where the Court of Appeals applied this rule.

In *Trust Co. v. Pollard,* 256 N.C. 77, 123 S.E. 2d 104 (1961), a wrongful death action, this Court, in an opinion by Justice Parker (later Chief Justice), held that defendant's motion to strike allegations in plaintiff's complaint, said allegations to the effect that defendant had been convicted of the crime of manslaughter in a criminal prosecution for the murder of the intestate, should have been allowed because evidence in support

thereof would have been incompetent. *Id.* at 81-82, 123 S.E. 2d at 108.

However, for purposes of the case *sub judice*, the most relevant portion of *Pollard* is that the plaintiff contended that the record of defendant's criminal conviction was admissible by virtue of G.S. 31A-13 and -15. In rejecting this argument, the Court stated:

> "Plaintiffs call to our attention 1961 Session Laws, Chapter 210, and particularly Article 4, Sections 13 and 15 of the statute. This statute is entitled, 'Acts Barring Property Rights,' and states in Article 4, Section 15 'This Chapter . . . shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong.' It is plain and clear that this statute is not applicable to the present case.
>
> "Applying the general and traditional rule . . . that evidence of a conviction and of a judgment therein rendered in a criminal prosecution is not admissible in a purely civil action like the present case to establish the truth of the facts on which it was based, and as we have no statute to the contrary, the defendant has successfully carried the burden of clearly showing that the record affirmatively reveals that the allegations of . . . the complaint . . . are clearly irrelevant, in that plaintiffs cannot present in evidence upon the trial the facts there alleged, and that their retention in the complaint will cause him harm or injustice." *Id.* at 81-82, 123 S.E. 2d at 108.

*Cf. Moore v. Young*, 260 N.C. 654, 133 S.E. 2d 510 (1963) (opinion by Justice Bobbitt, later Chief Justice, holding that plaintiff's conviction of manslaughter was not a bar to his suit for damages arising from the same automobile collision).

In a common law proceeding to disqualify the alleged wrongdoer the party seeking the remedy will find it necessary to produce at trial the factual circumstances relating to the killing of the decedent from which the court can determine the issue.

**[4]** In this case neither party offered evidence to establish the facts which preceded defendant's shooting her husband. The case was decided upon the "admitted facts set out in the judgment," that is, that Jill A. Quick shot and killed her husband; that she was indicted for the "murder" of her husband; that subsequently

she was found guilty of involuntary manslaughter; and that judgment had been imposed upon the verdict sentencing her to five-to-seven years imprisonment. As previously noted, the general rule is that such evidence is incompetent in a subsequent civil action, but this evidence was before the court without objection.

In this State, it is a well established rule that evidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have. *See* Stansbury, N. C. Evidence (Brandis Revision) § 27 (1973). "Where testimony sufficient if true to establish a fact at issue has been received in evidence without objection, a nonsuit cannot be sustained even if the only evidence tending to establish the disputed fact is incompetent." *Skipper v. Yow,* 249 N.C. 49, 56, 105 S.E. 2d 205, 210 (1958). *Accord, Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529 (1968).

Accordingly, applying the above legal principles to the instant case, we hold that the evidence before the trial court, whether it was competent or incompetent, was sufficient to support its conclusion of law No. 2 to the effect that under the common law of this State defendant Jill A. Quick was disqualified from receiving any insurance proceeds from the policy insuring her deceased husband's life. The trial court was justified in disqualifying Jill A. Quick since the killing, although unintentional, nonetheless resulted from her culpable negligence, that is conduct incompatible with a proper regard for human life. Culpable negligence proximately resulting in death comes within the purview of the common law maxim that no one shall be permitted to profit by his own wrong.

For the reasons stated herein, the judgment of the Court of Appeals is reversed and the cause is remanded to the Court of Appeals with directions that the cause be further remanded to the District Court of Cumberland County for reinstatement of the judgment of the trial court in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ERNEST FRANZILLE ARMSTRONG

No. 10

(Filed 14 April 1975)

1. **Rape § 1— definition — fear replacing violence**

Rape is the carnal knowledge of a female person by force and against her will, but fear, fright or coercion may take the place of actual physical force.

2. **Rape § 1— consent as defense — consent induced by fear or violence — no legal consent**

Although consent by the female is a complete defense to a charge of rape, there is no legal consent when it is induced by fear or violence.

3. **Rape § 5— no evidence of consent — sufficiency of evidence for submission to jury**

Evidence was sufficient to support defendant's conviction for rape where it tended to show that the 31-year-old defendant, who weighed 236 pounds, held his 69-year-old victim, who weighed 110 pounds, around the neck, he held his hand over her mouth, he dragged her into the bedroom of her home and raped her, the victim was alone in her home, was very frightened, was unable to call for help, resisted to the best of her ability, and at no time consented to defendant's advances.

4. **Criminal Law §§ 127, 157— parts of record proper — no error on face — motion in arrest of judgment denied**

The record proper in criminal cases ordinarily consists of (1) the organization of the court, (2) the charge, i.e., the information, warrant or indictment, (3) the arraignment and plea, (4) the verdict, and (5) the judgment; the face of the record proper in this case revealed no fatal defect, and denial of defendant's motion in arrest of judgment was proper.

5. **Constitutional Law § 36; Rape § 7— imposition of death penalty — constitutionality**

Imposition of the death penalty in this rape case was legally authorized and did not constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the U. S. Constitution.

6. **Rape § 6— evidence of rape only — submission of lesser included offenses — error favorable to defendant**

Where all of the evidence revealed a completed act of sexual intercourse and the only dispute between the State and the defendant was whether the act was accomplished by consent or by force, submission of the lesser included offenses of assault with intent to commit rape and assault on a female was error favorable to the defendant.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

State v. Armstrong

DEFENDANT appeals from judgment of *Hobgood, J.*, 18 March 1974 Regular Criminal Session, HARNETT Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the rape of Roena Massey on 11 November 1973 in Harnett County.

The State offered evidence tending to show that Roena Massey is the aunt of Sherill Donald Stewart. At approximately 5 p.m. on 10 November 1973 the defendant Ernest Franzille Armstrong and Sherill Donald Stewart were together in the town of Benson drinking scotch and beer. About 7:30 p.m. they went to the home of Roena Massey in the nearby town of Coats where they remained for approximately one hour. Roena Massey did not know defendant and had never seen him before. Both men stated that Stewart's wife and defendant's wife were first cousins. They left about 8:30 p.m., and Roena Massey went to bed around 9:30 p.m.

The two men toured several night spots in Harnett County and separated after returning to Benson. Defendant returned to the home of Roena Massey about midnight, and she was awakened when he rang the doorbell. She arose, turned on the light, unlocked the wooden door and then unlocked the storm door. Defendant stepped inside. Mrs. Massey said she thought it was her granddaughter and opened the door without paying much attention.

Defendant followed Mrs. Massey into the den. She asked him what he was doing there, and he replied: "Pem Pam [Sherill Donald Stewart] said send him one of your stockings." Mrs. Massey informed defendant she would do nothing of the sort. Defendant was staring at her and she commenced to back away while defendant was advancing upon her. Defendant said, "I tried to talk nice to you and you wouldn't listen but I bet you will." He threw his arms around her neck, placed his hand over her mouth and said, "Do like I tell you and I won't hurt you."

Defendant gagged Mrs. Massey with her panty hose, forced her into the bedroom and raped her. Defendant thereupon left after exacting a promise from her that she would not "put the law on him." Mrs. Massey then ran to the nearby home of her granddaughter, told her what had happened, and she called the police.

Mrs. Massey was examined by Dr. Doffermyre at 11 a.m. on 11 November 1973. She gave the doctor a history of having been raped the night before by a colored man whose name she did not know. The examination revealed the presence of sperm in all microscopic fields, and Dr. Doffermyre stated that unquestionably the patient had had intercourse. The bottom wall of the vaginal vault revealed a split in the mucous membrane one and one-half inches long, and the injury appeared to be recent.

The State's evidence further shows that Mrs. Massey was sixty-nine years of age and weighed approximately 110 pounds. She had lived in and around the town of Coats for approximately twenty years and had no criminal record. The police chief testified that her general reputation in the community was very good.

Defendant, testifying in his own behalf, stated that he and Stewart were drinking, and while they were at Mrs. Massey's home he told her his name was "Cherry" and she asked him to return later. In response to that invitation he returned about midnight and was admitted to her home. They engaged in sexual relations by mutual consent. Thereafter they talked for a while and she accompanied him to the front door when he departed.

On cross-examination defendant stated that he was thirty-one years old and weighed 236 pounds; that he had been convicted of destroying State property in Benton, Louisiana, and of other crimes in El Paso, Texas, Montgomery, Alabama, Jacksonville, Florida, Texarkana, Arkansas, and New Orleans, Louisiana.

Sherill Donald Stewart testified that he and defendant went to the home of Roena Massey about 7:30 p.m. on 10 November 1973 and stayed about forty-five minutes; that he left the room on one occasion while they were there and, of course, heard no conversation between defendant and Mrs. Massey during his absence. He stated that defendant said nothing about returning to Mrs. Massey's home but said he was going home when they parted about 9:30 p.m.

The trial court instructed the jury to return one of the following verdicts: Guilty of rape, guilty of assault with intent to commit rape, guilty of assault on a female, or not guilty. The jury convicted defendant of rape, and he was sentenced to

death. From that judgment he appeals to this Court assigning errors noted in the opinion.

*Robert Morgan, Attorney General, and William F. O'Connell, Assistant Attorney General, for the State of North Carolina.*

*Wiley F. Bowen, attorney for defendant appellant.*

HUSKINS, Justice.

The defense in this case is based on consent. Defendant contends the evidence relied upon by the State to show resistance on the part of Mrs. Massey is inconclusive and the trial judge failed to declare and explain the law, as required by G.S. 1-180, relative to Mrs. Massey's conclusion that resistance on her part would be useless. This constitutes the basis for defendant's first assignment of error.

The court charged on this point as follows:

"Now, I charge you for you to find the defendant guilty of rape the State must prove three things beyond a reasonable doubt:

First, that the defendant had sexual intercourse with Roena Massey.

Second: That the defendant used or threatened to use force sufficient to overcome any resistance she might make. Now, in reference to force the court instructs you that force necessary to constitute rape need not be actual physical force. Fear, fright or coercion may take the place of force. While consent by the female, Roena Massey, is a complete defense for the defendant, consent which is induced by fear of violence is void and is not legal consent.

Consent of the woman for fear of personal violence is void. Even though a man lays no hand on a woman yet if by an array of physical force he so overpowers her mind that she dares not resist or she ceases resistance through fear of great harm, the consummation of the unlawful intercourse by the man is as a matter of law rape.

The third point that must be proven to you by the evidence and beyond a reasonable doubt is that Roena Massey did not consent and it was against her will."

**[1, 2]** The quoted portion of the charge clearly enunciates the law of this State. Rape is the carnal knowledge of a female person by force and against her will. *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917 (1972). Fear, fright or coercion may take the place of actual physical force. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). Although consent by the female is a complete defense to a charge of rape, there is no legal consent when it is induced by fear of violence. *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826 (1965).

Mrs. Massey testified, among other things, that she was terribly frightened; that "he had done throwed his arm around my neck like that and was choking me (indicating) and hand come over my mouth. . . . I sure was frightened. . . . He was holding me by my neck. . . . I began to give up because I didn't know where he was going to kill me or what he was going to do to me and I was there alone in that house by myself. . . . I couldn't get away from him because he had me around the neck like this choking me and his hand over my mouth there weren't no way for me to. . . . He just kept pulling on me and seesawing me and zigzagging me until he got me in my bedroom. . . . I ain't never been no scareder since I have been born in the world than I was then. . . . Weren't no way in this world for me to yell for help no way."

**[3]** There is nothing in the testimony of Mrs. Massey to support the suggestion that she consented. The only reasonable inference to be drawn from her testimony is that she did not consent and that she resisted to the best of her ability. Her struggles ceased when she realized she was helpless to protect herself and was in fear of death or serious bodily harm at the hands of a thirty-one year old man weighing 236 pounds. Hence, in accordance with well established legal principles, there was ample evidence to support defendant's conviction for rape. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). Defendant's first assignment of error is overruled.

Failure of the court to set aside the verdict and arrest judgment constitutes defendant's second assignment of error. We find no merit in this assignment for the reasons stated below.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial

judge. *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970). The evidence amply supports the verdict. No abuse of discretion is shown.

A motion in arrest of judgment is made after verdict, designed 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). "In a criminal prosecution, however, judgment may be arrested when—and only when—some fatal error or defect appears on the face of the record proper." *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966).

**[4]** The record proper in criminal cases ordinarily consists of (1) the organization of the court, (2) the charge, *i.e.,* the information, warrant or indictment, (3) the arraignment and plea, (4) the verdict, and (5) the judgment. *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669 (1971). Here, the face of the record proper reveals no fatal defect, and denial of defendant's motion in arrest of judgment was proper. Defendant's second assignment of error is overruled.

**[5]** Finally, defendant contends that imposition of the death penalty is legally unauthorized and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. This contention has heretofore been considered and determined to be without merit in various cases, including *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). Defendant's third assignment based on this contention is overruled.

**[6]** It should be noted that all of the evidence in this case reveals a completed act of sexual intercourse. The only dispute between the State and the defendant is whether the act was accomplished by consent or by force. Under those circumstances there was no necessity to submit the lesser included offenses of assault with intent to commit rape and assault on a female. Lesser included offenses must be submitted only when there is evidence to support them. *State v. Watson,* 283 N.C. 383, 196

S.E. 2d 212 (1973); *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972). Submission of the lesser included offenses, however, was error favorable to the defendant and affords him no grounds for relief.

We have carefully examined the entire record and conclude that defendant received a fair trial, free from prejudicial error. The trial, verdict and judgment must therefore be upheld.

No error.

Chief Justice SHARP dissents as to the death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in *State v. Williams,* 286 N.C. 422, 434, 212 S.E. 2d 113, 123 (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. at 437, 212 S.E. 2d 113 at 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975).

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HAROLD GREENE, N. CARL MONROE, AND JERRY N. THOMAS, DOING BUSINESS UNDER THE NAME OF EQUITY ASSOCIATES, AND N. C. MONROE CONSTRUCTION COMPANY v. CITY OF WINSTON-SALEM

No. 15

(Filed 14 April 1975)

**Municipal Corporations § 29— ordinance requiring sprinklers in high-rise buildings — preemption by State law**

A municipal ordinance requiring sprinkler systems in high-rise buildings is a building regulation ordinance purporting to regulate a field in which the General Assembly has provided a complete and integrated regulatory scheme to the exclusion of local regulation and is invalid and unenforceable absent approval of the State Building Code Council pursuant to G.S. 143-138(b). G.S. 160A-174.

ON *certiorari*, prior to determination by the Court of Appeals, pursuant to G.S. 7A-31, to review the judgment of *Exum, J.*, at the 26 August 1974 Session of FORSYTH Superior Court.

Plaintiff Equity Associates, a partnership, entered into a contract with Monroe Construction Company to construct an eight-story motor inn on property owned by Equity Associates on Akron Drive in the City of Winston-Salem.

On 18 December 1973, defendant's Board of Aldermen enacted an ordinance which, in part, provided:

> AN ORDINANCE AMENDING THE FIRE PREVENTION CODE SO AS TO REQUIRE SPRINKLER SYSTEMS IN CERTAIN INSTANCES, ORDER 3238, ADOPTED DEC. 18, 1973
>
> * * *
>
> Section 14.6. *When Sprinkler Systems Required.*
>
> Except as otherwise provided herein, complete sprinkler systems shall be installed in all buildings erected from and after the effective date of this ordinance regardless of type of construction, exceeding five (5) stories or fifty (50) feet in height. The installation shall be in accordance with the National Fire Protection Pamphlet No. 13 (which is 1966 Edition incorporated herein by reference as fully as if set out verbatim herein), a copy of which Pamphlet shall be kept on file in the office of the Fire Prevention Bureau of the City. The term "buildings" as used in this section shall not be interpreted as including parking garages.

The plans and specifications for the building were prepared in accordance with the requirements of the North Carolina State Building Code (Building Code) and did not provide for the installation of a sprinkler system. Pursuant to § 103.2 of the Building Code, the plans and specifications were submitted to, and were approved by, the Engineering Division of the North Carolina Department of Insurance as being in compliance with the requirements of the Building Code.

Before adoption of the Ordinance on 18 December 1973, plaintiffs had made substantial expenditures and had incurred contractual obligations toward constructing the motor inn which totaled approximately $100,000.

On 7 February 1974 plaintiffs filed with defendant an application for a building permit for the proposed motor inn.

During the month of February, there were discussions concerning the sprinkler ordinance between the Building Inspection Supervisor for the City, two representatives of the City Inspections Office, the Chief of the Fire Prevention Bureau of the City, and an employee of plaintiff construction company, the project supervisor for this project. During these discussions plaintiff was advised that the sprinkler ordinance was a part of the Fire Prevention Code of the City of Winston-Salem, not a part of the Building Code, and that the City would require a complete sprinkler system for this eight-story building.

On 6 March 1974 defendant issued a building permit to plaintiff Harold Greene, one of the partners in Equity Associates, to construct an eight-story building on the property on Akron Drive, and plaintiffs, with notice of the enactment of the sprinkler ordinance, proceeded with construction without providing for a sprinkler system.

On 14 March plaintiffs' architect and engineer for the project requested a ruling from the Division of Engineering of the North Carolina Department of Insurance as to whether building projects in Winston-Salem must comply with the 18 December ordinance. In response to the inquiry, the Chief Engineer of the Division of Engineering of the North Carolina Department of Insurance wrote that, based upon the provisions of Chapter 143 of the General Statutes, particularly G.S. 143-138(e), he was of the opinion that the Winston-Salem Ordinance "would not be legally effective until it has been approved by the State Building Code Council and it should be noted that such ordinance has not been submitted to or approved by the Building Code Council."

On 11 April 1974 the Fire Marshal of Winston-Salem advised plaintiffs that unless they complied with the 18 December ordinance, it would be necessary "for us to withhold a certificate of occupancy or bring legal proceedings to enforce this requirement before this building may be used. . . ."

On 3 July 1974 this action was instituted challenging the validity and the enforcement against plaintiffs of the 18 December 1973 ordinance. The cause was heard on stipulated facts by Judge Exum at the 26 August 1974 civil term of Forsyth Superior Court. At that time the mechanical trades had completed a substantial portion of their work, and the finishing trades had commenced their work. At this stage of construction,

the installation of a sprinkler system would require that the walls and floors be partially torn out, and the resulting costs, including the costs of the sprinkler system, would amount to substantially more than $100,000.

It was stipulated that the City has neither sought nor obtained the approval of the State Building Council to the changes embodied in the 18 December 1973 ordinance and that neither the Building Code nor the provisions of G.S. 69-29 require a sprinkler system to be installed in the motor inn in litigation.

Judge Exum concluded, *inter alia,* that a justiciable controversy existed between the parties, determined that the ordinance was invalid and unenforceable, and thereupon enjoined the City from enforcing such ordinance. Defendant appealed.

*Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., Attorney for Appellant.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and William G. McNairy, Attorneys for Appellees.*

BRANCH, Justice.

The stipulated facts in this case present the question of whether the Winston-Salem ordinance requiring sprinkler systems in high-rise buildings is a building regulation ordinance subject to the approval of the State Building Code Council or a fire protection ordinance emanating from the police power of the City and therefore not requiring such approval. The answer to this question turns upon our construction of the relevant statutes.

G.S. 143-138 provides for the establishment of a North Carolina State Building Code. The statute, in relevant part, provides:

> (b) Contents of the Code.—The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of

ingress in buildings and structures; regulations governing construction and precautions to be taken during construction; regulations as to permissible materials, loads, and stresses; regulations of chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; regulations governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; *and such other reasonable rules and regulations pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.*

*The Code may contain provisions regulating every type of building or structure, wherever it might be situated in the State.*

* * *

(e) Effect upon Local Building Codes.—The North Carolina State Building Code shall apply throughout the State, from the time of its adoption. However, any political subdivision of the State may adopt a building code or building rules and regulations governing construction within its jurisdiction. The territorial jurisdiction of any municipality or county for this purpose, unless otherwise specified by the General Assembly, shall be as follows: Municipal jurisdiction shall include all areas within the corporate limits of the municipality; county jurisdiction shall include all other areas of the county. *No such building code or regulations shall be effective until they have been officially approved by the Building Code Council as providing adequate minimum standards to preserve and protect health and safety, in accordance with the provisions of subsection (c) above.* While it remains effective, such approval shall be taken as conclusive evidence that a local code or local regulations supersede the State Building Code in its particular political subdivision. Whenever the Building Code Council adopts an amendment to the State Building Code, it shall consider any previously approved local regulations dealing with the same general matters, and it shall have authority to withdraw its approval of any such local code or regulations unless the local governing body

makes such appropriate amendments to that local code or regulations as it may direct. *In the absence of approval by the Building Code Council, or in the event that approval is withdrawn, local codes and regulations shall have no force and effect.* (Emphasis supplied.)

This Building Code has been ratified and adopted by the State Building Code Council, pursuant to G.S. 143-138(b), and therefore has the full force and effect of law. *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189. Pursuant to this authority, the Code Council, by Chapter 9 of the Code, has prescribed standards for sprinkler systems, including provisions for the types of buildings which shall have automatic sprinklers.

G.S. 160A-174, the statute which delegates and limits the general ordinance-making powers of cities and towns, provides:

(a) 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.

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

(1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State of federal law;

(3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;

(4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.

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.

It has long been the law of this State that "towns and cities are parcels of the State; their corporate powers are emanations from the State for purposes of convenience, and it could never be allowed that they should contravene the policy of the State, or exercise powers not conferred, much less such as are either expressly or impliedly prohibited." *Weith v. Wilmington,* 68 N.C. 24. This well-settled doctrine is fully stated and summarized in *Asheville v. Herbert,* 190 N.C. 732, 130 S.E. 861:

> It is the accepted doctrine in this jurisdiction that the powers of a municipality [are], accurately described in Dillon on Municipal Corporations (5 ed.), sec. 237, as follows: '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 in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable.' *Smith v. New Bern,* 70 N.C., 14; *S. v. Webber,* 107 N.C. 962, 965; *S. v. Eason,* 114 N.C., 787, 791; *Love v. Raleigh,* 116 N.C., 296, 307; *S. v. Higgs,* 126 N.C., 1014, 1021; *Elizabeth City v. Banks,* 150 N.C., 107; [further citations omitted].
>
> All acts beyond the scope of the powers granted to a municipality are void. [Citations omitted.] In construing the extent of the powers of municipalities, the fundamental and universal rule is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it a fair effect, yet any fair, reasonable or substantial doubt as to the extent of the power is to be determined in favor of the public and against the municipality. [Citation omitted.] This grows out of the fact that the majority-will controls, and that minorities are bound by the acts of majorities, and that the public officers occupy a trust

relation in which the inhabitants of the city are *cestuis que trustent,* and the officers are trustees. . . .

We note that appellant construes the last sentence of G.S. 160A-174(b) as a grant of authority which supports the enactment of the ordinance of 18 December. We do not agree. Initially there can be no application of this portion of the statute to the present facts since the State has not made it unlawful to construct this motor inn without the inclusion of a sprinkler system. Further, the words "standing alone," found in this portion of the statute, direct our attention to the other portions of the statute that specify certain instances in which an ordinance is invalid because of inconsistency with State or federal law. The following section of the statute is especially pertinent:

> (b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
>
> * * *
>
> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

Almost a century ago, in *Town of Washington v. Hammond,* 76 N.C. 33, this Court stated the principle governing cases in which there is conflict between municipal ordinances and general State law:

> The true principle is that municipal by-laws and ordinances must be in harmony with the general laws of the State, and whenever they come in conflict with the general laws, the by-laws and ordinances must give way. The question does not arise, in our case, whether the State may not expressly confer upon a municipal corporation the power to pass local laws which shall exclude the general laws of the State on particular and enumerated subjects. By-laws and State laws may stand together, if not inconsistent . . . . [Citation omitted.]

*Accord: Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406; *State v. Stallings,* 189 N.C. 104, 126 S.E. 187; *State v. Freshwater,* 183 N.C. 762, 111 S.E. 161; *State v. Dannenberg,* 150 N.C. 799, 63 S.E. 946.

In *State v. Williams,* 283 N.C. 550, 196 S.E. 2d 756, this Court considered the validity of a local ordinance which made it unlawful for a person to possess beer on the public streets of Mount Airy. At that time G.S. 18A-35 provided that, except as otherwise provided in Chapter 18A of the General Statutes, the purchase, transportation, and possession of malt beverages by individuals eighteen years or older for their own use was permitted without restriction or regulation. In holding the local ordinance invalid, this Court, speaking through Justice Moore, stated:

> The General Assembly clearly intended to pre-empt the regulation of malt beverages in order to prevent local governments from enacting ordinances such as the one in question. . . .
>
> The ordinance in question is not consistent with the general law in that . . . the ordinance purports to regulate a field in which a state statute has provided a complete and integrated regulatory scheme to the exclusion of local regulations. . . .

Although the majority of cases dealing with a conflict between a municipal ordinance and a state statute have arisen in criminal actions, the same principles apply in civil causes. In *Tastee-Freez, Inc. v. Raleigh,* 256 N.C. 208, 123 S.E. 2d 632, a peddler of ice cream and other dairy products had procured a State license to carry on the business of dispensing these products from a mobile freezer unit along the streets and highways, including the streets of defendant city. G.S. 105-33(d) provided that the State licenses issued should constitute "a personal privilege to conduct the profession or business named in the State license." The City, by a provision incorporated in its own licensing ordinance, sought to prevent this licensee from peddling his products along the city streets. This Court held that, because the city ordinance purported to prohibit a person from exercising a privilege granted by a State license, the city ordinance was invalid and unenforceable.

A similar situation existed in *Staley v. Winston-Salem,* 258 N.C. 244, 128 S.E. 2d 604. In that case, an applicant for a municipal license to sell wines on his restaurant premises had complied with all of the requirements of the alcoholic beverage control statutes of North Carolina and the regulations of the State Board of Alcoholic Control adopted thereunder, but the

municipality had passed an ordinance which prohibited the sale of wine in this particular location. This Court unanimously held that, since the provisions of State law regulating the sale of alcoholic beverages permitted the sale of wine in plaintiff's restaurant, the City "could not set at naught a statewide statute permitting the sale of wine in such restaurants. Such sales are a permitted part of authorized business."

Appellant argues that the enactment of G.S. 69-29, requiring sprinkler systems in certain buildings, indicates that the General Assembly did not intend to vest in the State Building Code Council sole regulatory authority in this area. We do not think that the Legislature must retain sole authority, or completely delegate to one agency all authority, in order to provide a complete and integrated regulatory scheme which would exclude local regulation. Further, the intent to vest controlling regulatory authority in the Building Code Council appears within the provisions of G.S. 69-29 in that the Legislature provided that the installation of the sprinkler systems required by statute must ultimately be of such design, condition, and scope "as may be approved by the North Carolina Building Code Council."

The legislative intention to create a complete and integrated regulatory scheme is further evidenced by the language of G.S. 143-139(b), which delegates to the Commissioner of Insurance the responsibility of administering and enforcing the provisions of the North Carolina Building Code pertaining "to plumbing, electrical systems, general building restrictions and regulations, heating and air-conditioning, *fire protection* and the construction of buildings generally." (Emphasis supplied.) It is also noteworthy that the power delegated to the Commissioner of Insurance is subject to the power of the Building Code to adopt the procedural requirements necessary for the enforcement of the North Carolina Building Code.

Our contextual reading of the relevant statutes compels the conclusion that the statutes clearly show a legislative intent to provide a complete and integrated regulatory scheme, including regulations as to the installation of sprinkler systems, in all buildings and structures, wherever situate in North Carolina, except as expressly exempted by statute. The preemption of this field is modified by G.S. 143-138(e) to the extent that any political subdivision of the State may adopt a building code or building rules or regulations which may become effective when

officially approved by the North Carolina State Building Code Council. The City would have us interpret G.S. 160A-174 to empower it to ignore explicit statewide legislative enactments. Such an interpretation would, in effect, permit the City to amend the North Carolina Building Code by the simple expedient of codifying the contested ordinance as a part of its Fire Prevention Code and thereby to evade the clear requirements of G.S. 143-138(e). This result would elevate nomenclature above substance.

We hold that the challenged ordinance is not consistent with the general law of North Carolina in that it purports to regulate a field in which the General Assembly has provided a complete and integrated regulatory scheme to the exclusion of local regulation. Therefore, the ordinance is invalid and unenforceable.

The judgment of the Superior Court of Forsyth County is

Affirmed.

Justice EXUM took no part in the consideration or decision of this case.

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STATE OF NORTH CAROLINA v. DILLARD P. HART AND DREWRY HALL

No. 49

(Filed 14 April 1975)

1. **Statutes §§ 7, 10— amendment of criminal statute pending appeal — effect**

Where an amendment of a criminal statute does not reduce the punishment or otherwise remove any burden imposed on defendants by prior law, appellate courts will not give effect to such change in the law pending an appeal if the subsequent legislation (1) contains a savings clause or (2) manifests a legislative intent to the contrary, or (3) where there is a constitutional prohibition.

2. **Statutes § 5— construction — legislative intent**

In the interpretation of statutes the legislative will is the controlling factor.

3. **Statutes § 5— construction — object of statute**

A construction of a statute which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.

4. **Obscenity; Statutes § 10— dissemination of obscenity — amendment changing definition of obscenity — conviction under old statute**

Since the definition of "obscenity" in the former statute under which defendants were charged with dissemination of obscenity placed a heavier burden on the State to convict than the definition prescribed in the amendment to G.S. 14-190.1 *et seq.* by Chapter 1434 of the 1973 Session Laws, the amendment affords defendants no grounds on which to contend that their convictions under the former statutes are now illegal and must abate.

5. **Obscenity; Statutes § 10— dissemination of obscenity — adversary determination of obscenity — nonretroactivity**

The legislature intended that Chapter 1434 of the 1973 Session Laws, including the amendment to G.S. 14-190.2(h) prohibiting an arrest or indictment for a violation of G.S. 14-190.1 *et seq.* until the material involved has been declared obscene in an adversary proceeding and the material thereafter disseminated, should become effective 1 July 1974 and should be applied prospectively only; therefore, the amendment, which became effective during the pendency of defendants' appeal, did not inure to their benefit and abate the charges against them.

6. **Obscenity; Constitutional Law § 35— dissemination of obscenity — change in definition of "sexual conduct" — dual tests — ex post facto laws**

The insertion in G.S. 14-190.1 of a definition of "sexual conduct" conforming to the holding of *Miller v. California*, 413 U.S. 15, by the enactment of Chapter 1434 of the 1973 Session Laws, after the date of defendants' arrest for dissemination of obscenity, did not deny them due process or amount to an *ex post facto* application of the law when that definition is applied to them since a determination of whether pre-*Miller* material is obscene is made by testing the material under both *Miller* and the old test set forth in *Memoirs v. Massachusetts*, 383 U.S. 413.

ON *certiorari* to the Court of Appeals to review its decision, 22 N.C. App. 738, 207 S.E. 2d 766 (1974), arresting judgments pronounced by *Clark, J.*, 21 January 1974 Session, ALAMANCE Superior Court.

Defendants were charged in separate warrants with the unlawful and willful dissemination of obscene materials in violation of G.S. 14-190.1(a). Defendant Hall was arrested on 18 December 1972, and defendant Hart on 1 February 1973.

Defendants were found guilty in district court and appealed to the Superior Court of Alamance County for trial *de novo*.

On 28 January 1974 both defendants moved for dismissal on the ground that G.S. 14-190.1(a) had not been construed by the appellate courts of this State in accordance with the law

laid down in *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (decided 21 June 1973). Both motions were denied, and each defendant thereupon pleaded guilty "assuming that the statute is valid and constitutional." After determining by a pre-sentence inquiry and adjudication that defendants had freely, understandingly and voluntarily pled guilty, Judge Clark sentenced each defendant to six months in prison, suspended for two years upon the following conditions, "to which the defendant gave assent: pay a fine of $500.00 and the costs. That he not violate the statutes of this state relating to the sale or distributing under G.S. 14-190.1. He is not to engage or become employed in business of distributing obscene materials."

Each defendant appealed to the Court of Appeals, and that court treated the appeal as a petition for certiorari and granted the writ.

On 13 April 1974 the General Assembly ratified Chapter 1434, 1973 Session Laws, revising and rewriting the anti-obscenity statutes of North Carolina, *effective July 1, 1974.* Section 5 of Chapter 1434 provides that no person, firm or corporation shall be arrested or indicted for any violation of G.S. 14-190.1 et seq., "until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm or corporation is a respondent, and wherein such material has been declared by the court to be obscene . . . and until such person, firm or corporation continues, subsequent to such determination, to engage in the conduct prohibited . . . . "

The Court of Appeals, concluding that Chapter 1434 of the 1973 Session Laws contained no savings clause or other provision manifesting legislative intent that it should be applied prospectively only, held that defendants were entitled to the benefit of the adversary hearing provisions above quoted. Since defendants had not received such a hearing before these warrants were issued, that court concluded that the criminal actions against these defendants had abated. We allowed the State's petition for certiorari to review that decision.

*James H. Carson, Jr., Attorney General; Edwin M. Speas, Jr., Assistant Attorney General; Richard F. Kane, Associate Attorney, for the State of North Carolina, appellant.*

*Harriss, Ruis & Mulligan by Ronald H. Ruis, Attorney for defendant appellees.*

HUSKINS, Justice.

Prior to the enactment of Chapter 1434 of the 1973 Session Laws, G.S. 14-190.2(h) (1973 Cum. Supp.) provided in pertinent part:

> "Nothing in this section shall be construed as preventing any law-enforcement officer from arresting any person when that person is charged under a proper warrant or indictment with a criminal violation of this Article. . . ."

Chapter 1434 of the 1973 Session Laws, *effective July 1, 1974*, rewrote G.S. 14-190.2(h) to read as follows:

> "No person, firm or corporation shall be arrested or indicted for any violation of a provision of G.S. 14-190.1, G.S. 14-190.3, G.S. 14-190.4, G.S. 14-190.5, G.S. 14-190.6, G.S. 14-190.7, G.S. 14-190.8, G.S. 14-190.10, or G.S. 14-190.11 until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm or corporation is a respondent, and wherein such material has been declared by the court to be obscene or in the case of G.S. 14-190.10 or G.S. 14-190.11, to be sexually oriented and until such person, firm or corporation continues, subsequent to such determination, to engage in the conduct prohibited by a provision of the sections hereinabove set forth."

It thus appears that at the time these defendants were arrested G.S. 14-190.2(h) contained no provision prohibiting the arrest or indictment of an alleged violator of G.S. 14-190.1 et seq. until the material involved had first been the subject of an adversary determination and declared by the court to be obscene. That provision became the law on July 1, 1974—after defendants had been arrested, tried, and sentenced, but during the pendency of their appeals. We are thus confronted with the question whether the amendment to G.S. 14-190.2(h), effective July 1, 1974, during the pendency of this appeal, inures to the benefit of defendants and abates this prosecution.

**[1]** We note at the outset that the 1973 amendment to G.S. 14-190.2(h) does not *reduce* the punishment or otherwise *remove any burden* imposed upon these defendants by prior law. To the contrary, that amendment places an additional procedural burden upon the State to obtain an adversary judicial determination that the material in question is obscene, and thereafter dissemi-

nated by the accused, before he may be arrested or indicted. And no other provision of Chapter 1434 of the 1973 Session Laws reduces the punishment or otherwise removes any burden imposed on an accused by the law in effect prior to July 1, 1974. In that setting, appellate courts will not give effect to such changes in the law pending an appeal if the subsequent legislation (1) contains a savings clause or (2) manifests a legislative intent to the contrary, or (3) where there is a constitutional prohibition. *State v. Currie,* 284 N.C. 562, 202 S.E. 2d 153 (1974); *State v. Cameron,* 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied* 418 U.S. 905, 41 L.Ed. 2d 1153, 94 S.Ct. 3195 (1974); *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698 (1967).

Chapter 1434 of the 1973 Session Laws contains no savings clause; and we are aware of no constitutional prohibition which prevents giving retroactive effect to the changes wrought by the enactment of that chapter. In our view, however, there is in Chapter 1434 a *manifest legislative intent* that said chapter should be applied prospectively only and should not be applicable to pending prosecutions.

**[2, 3]** In the interpretation of statutes the legislative will is the controlling factor. "Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law." 73 Am. Jur. 2d, Statutes § 145 (1974). A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. *Ballard v. Charlotte,* 235 N.C. 484, 70 S.E. 2d 575 (1952). Where possible, the language of a statute will be interpreted so as to avoid an absurd consequence. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1 (1966); *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797 (1948); *State v. Scales,* 172 N.C. 915, 90 S.E. 439 (1916); *State v. Earnhardt,* 170 N.C. 725, 86 S.E. 960 (1915).

"Of course criminal statutes must be strictly construed. [Citations omitted.] But this does not mean that a criminal statute should be construed stintingly or narrowly. It means that the scope of a penal statute may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described. [Citations omitted.] Even so, an interpretation which leads to a strained construction or to a ridiculous result is not required and will not be adopted. *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596 [1968]. 'While a criminal statute

must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. And the rule that statutes will be construed to effectuate the legislative intent applies also to criminal statutes.' 7 Strong's N. C. Index 2d, Statutes § 10; *State v. Brown,* 221 N.C. 301, 20 S.E. 2d 286 [1942]; *State v. Hatcher,* 210 N.C. 55, 185 S.E. 435 [1936]; *State v. Humphries,* 210 N.C. 406, 186 S.E. 473 [1936]." *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970).

When Chapter 1434 of the 1973 Session Laws is subjected to these rules of construction, it is manifest that the legislature intended the changes wrought by that enactment to be prospective only beginning July 1, 1974. Chapter 1434 amended G.S. 14-190.1 et seq. by (1) changing the definition of "obscenity" fashioned in *Roth v. United States,* 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413, 16 L.Ed. 2d 1, 86 S.Ct. 975 (1966), to conform to the new definition of obscenity contained in *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973), (2) defining "sexual conduct" to conform to the holding in *Miller,* and (3) amending former G.S. 14-190.2(h) to prohibit the arrest or indictment of any person, firm or corporation for a violation of G.S. 14-190.1 et seq. until the material involved had been declared obscene in an adversary proceeding and the material thereafter disseminated.

The foregoing changes did not repeal the former anti-obscenity statutes but only amended them effective July 1, 1974. "As a general rule, except in so far as an amendment may operate as an implied repeal of a statute . . . , the amendment of a criminal statute does not affect the prosecution or punishment of a crime committed before the amendment becomes effective, but as to such crimes the original statute remains in force." 22 C.J.S., Criminal Law § 26 at 87 (1961).

**[4]** It appears that the definition of "obscenity" in our former statute under which these defendants are charged placed a heavier burden on the State to convict than the definition prescribed in *Miller v. California, supra.* Since the latest amendment to G.S. 14-190.1 through G.S. 14-190.11 (a codification of Chapter 1434 of the 1973 Session Laws) makes it easier for the State to convict violators, the amendment affords these defendants no grounds on which to contend that their convictions are now illegal and must abate.

**[5]** Further, we note that although Chapter 1434 of the 1973 Session Laws was ratified on April 13, 1974, the General Assembly specifically provided that the act become effective July 1, 1974. This clearly demonstrates the manifest intent of the General Assembly that Chapter 1434 should not be applied retroactively. Otherwise, we have an obviously absurd result: An act ratified on April 13, 1974 with its effective date postponed until July 1, 1974, and yet to be retroactively applied to all prior pending prosecutions! To further confound the hiatus, such an interpretation and application of Chapter 1434 would mean, *in effect,* that the State had no anti-obscenity statutes from April 13, 1974 through June 30, 1974, because prosecutions initiated during that period would not have become final before July 1, 1974, on which date all pending prosecutions would have to be abandoned. Such a result could not have been intended by the General Assembly and we will not adopt an interpretation which produces a result so obviously ridiculous. We hold that the Legislature manifestly intended that Chapter 1434 of the 1973 Session Laws should become effective on July 1, 1974, and should be applied prospectively only. It necessarily follows that the charges against these defendants were not abated by the enactment of Chapter 1434 of the 1973 Session Laws.

**[6]** Defendants next contend that insertion of a definition of "sexual conduct" into G.S. 14-190.1 by enactment of Chapter 1434 of the 1973 Session Laws, after the date of their arrest, denies them due process and amounts to an *ex post facto* application of the law when that definition is applied to them. This contention has no merit. It was advanced and rejected in *United States v. Thevis,* 484 F. 2d 1149 (5th Cir. 1973), and by this Court in *State v. Bryant and Floyd,* 285 N.C. 27, 203 S.E. 2d 27, *cert. denied* ..... U.S. ....., 42 L.Ed. 2d 188, 95 S.Ct. 238 (1974).

*State v. Bryant and Floyd,* 16 N.C. App. 456, 192 S.E. 2d 693 (1972), *remanded* 413 U.S. 913, 37 L.Ed. 2d 1036, 93 S.Ct. 3065 (1973), was remanded by the Supreme Court of the United States to the North Carolina Court of Appeals for further consideration in light of *Miller v. California, supra.* The Court of Appeals reconsidered the constitutionality of G.S. 14-190.1 as applied to the defendants in light of *Miller,* made an independent judgment on the facts and considered both the *Miller* and *Memoirs* definitions of obscenity. After applying the "dual standards test" of both *Miller* and *Memoirs,* the Court of Ap-

peals concluded that the film in question was obscene under *both* standards and again held that G.S. 14-190.1 was not unconstitutional on its face and not unconstitutional as applied to defendants. 20 N.C. App. 223, 201 S.E. 2d 211 (1973). On appeal to this Court, we affirmed. *State v. Bryant and Floyd,* 285 N.C. 27, 203 S.E. 2d 27, *cert. denied* ..... U.S. ....., 42 L.Ed. 2d 188, 95 S.Ct. 238 (1974).

The dual test was designed to protect, and does protect, defendants from any *ex post facto* application of the law. Whether pre-*Miller* material is obscene is determined by testing the material under both *Memoirs* and *Miller*. "This procedure avoids an *ex post facto* application of *Miller* and keeps *Memoirs* intact for the purposes of judging offenses committed prior to the Supreme Court decision in *Miller*. Unless the material is judged to be obscene under both *Memoirs* and *Miller* there can be no conviction." *United States v. Millican,* 487 F. 2d 331 (5th Cir. 1973), *cert. denied,* 418 U.S. 947, 41 L.Ed. 2d 1177, 94 S.Ct. 3233 (1974) ; *accord, State ex rel. Chobot v. Circuit Court for Milwaukee,* 61 Wis. 2d 354, 212 N.W. 2d 690 (1973).

Decision here is controlled by *State v. Bryant and Floyd, supra.* Defendants' voluntary pleas of guilty remove the necessity of proof by the State and present for review "only whether the indictment [warrant] charges an offense punishable under the Constitution and law." *State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135 (1971). Even so, an examination of the materials disseminated by defendants discloses hard-core pornographic publications which are obscene under both *Memoirs* and *Miller* definitions of obscenity. Therefore, since the warrants charge an offense under a constitutional statute, the verdicts and judgments must be upheld.

For the reasons stated, the decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the Superior Court of Alamance County to the end that the judgments pronounced by Judge Clark upon defendants' voluntary pleas of guilty may be reinstated.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MACK EDWARD JONES

No. 14

(Filed 6 May 1975)

1. **Criminal Law § 45— firing of pistol — experimental evidence — admissibility**

In a murder prosecution where deceased was shot and where defendant objected to admission of evidence of certain experiments conducted with the murder weapon on the ground that there was no evidence to indicate that the weapon was in substantially the same condition at the time of the experiments as it was at the time of the shooting, the failure of the State to show lack of substantial change in the weapon did not rise to the level of prejudicial error in the light of the fact that defendant offered no objection to the admission of the pistol into evidence, and there was no proof or even reasonable suggestion of tampering with or material change in the weapon; however, it would have been the better practice for the State to establish a chain of custody and offer testimony that no substantial change in the weapon had occurred.

2. **Criminal Law § 45— experimental evidence — admissibility — review on appeal**

Although experimental evidence should be received with great care, it is admissible when the trial judge finds it to be relevant and of probative value; even upon such finding the admission of experimental evidence is always subject to the further restriction that the circumstances of the experiment must be *substantially* similar to those of the occurrence before the court, and whether substantial similarity does exist is a question which is reviewable by the appellate courts in the same manner as is any other question of law.

3. **Criminal Law § 45— experimental evidence — similarity of conditions**

The trial court in a second degree murder case did not err in allowing evidence of certain experiments conducted with the murder weapon since the circumstances of the experiments were substantially similar to those surrounding the crime though the pistol contained only one bullet when the experiments were made as compared with the fact that the weapon had bullets in each chamber when the shooting occurred, and there was no specific showing as to the similarities or dissimilarities between the floor on which the experiments were conducted and the floor in defendant's bathroom where the crime occurred.

4. **Homicide § 5— second degree murder — intentional assault with deadly weapon**

If the State satisfies the jury beyond a reasonable doubt or it is admitted that a defendant intentionally assaulted another with a deadly weapon, thereby proximately causing his death, two presumptions arise: (1) that the killing was unlawful and (2) that it was done with malice, and nothing else appearing, the person who perpetrated such assault would be guilty of murder in the second degree.

5. **Homicide § 21— intentional assault with deadly weapon — sufficiency of evidence**

The trial court in this second degree murder prosecution did not err in denying defendant's motion for nonsuit where the evidence was uncontroverted that decedent met her death from a wound proximately caused by a pistol, and the State's evidence concerning the course of the death bullet and experimental evidence concerning the firing of the death weapon left defendant's theory of accident or misadventure with no substantial basis in fact.

6. **Homicide § 30— submission of lesser included offense — no prejudice**

Submission of the offense of involuntary manslaughter to the jury in a second degree murder prosecution was not prejudicial to defendant.

ON *certiorari* to review the decision of the Court of Appeals, 23 N.C. App. 162, 208 S.E. 2d 419, which found no error in the trial before *Crissman, J.*, April, 1974, Criminal Session of CABARRUS Superior Court.

Defendant was tried upon an indictment, proper in form, charging him with the murder of his wife, Carolyn Lawing Jones. Upon the call of the case, the solicitor elected to try defendant for second-degree murder or any lesser included offense that the jury might find. Defendant entered a plea of not guilty.

The evidence for the State tended to show the following facts:

Dr. Charles F. Carroll, Jr., District Pathologist and Medical Examiner for Cabarrus County, stipulated to be an expert in the field of pathology, testified that on 17 July 1971 he examined the body of Carolyn Lawing Jones in the morgue at the Cabarrus Memorial Hospital. During his examination he observed a perforating bullet wound in her right chest. From his examination, he concluded that the bullet entered the right chest near the vetebrae, thirteen and one half inches from the top of the head and one and one half inches to the right of the midline. The bullet exited in the back of the right chest sixteen and one half inches from the top of the head and three quarters of an inch to the right of the midline. In other words, the exit wound in the back of the body was about three inches below the entrance wound in the front of the body. In his opinion decedent's death was directly and proximately caused by the bullet wound. On cross-examination, he testified that he could not determine the position of decedent's body when the bullet entered. He

stated that the trajectory of the bullet through the body was with reference to the top of the head and that the path which the bullet took through the body would depend on the position of the torso at the time of the wound.

C. D. Eggers, a member of the Cabarrus County Sheriff's Department, testified that on 17 July 1971 he went to the combination restaurant and home of defendant. He observed a bullet lying on the floor in the center of the bathroom. He also identified a .32 caliber Colt pistol which he first saw lying on the table in the den. Defendant told the witness that the pistol belonged to him and was the weapon which caused his wife's death.

Glenn Mauer, stipulated to be an expert in the field of firearms identification and ballistics, testified that he received a Colt .32 AP caliber pocket model automatic loading pistol and a spent bullet from Officer Eggers on 3 August 1971. The bullet had been found in the bathroom of defendant's home. He conducted firearms identification tests with regard to the pistol and bullet and determined that the bullet was fired from this pistol. Over objection, he was allowed to testify as to experiments which he performed with the pistol to determine under what conditions it would fire when dropped. The evidence with regard to the experimental evidence is more fully set forth in the opinion.

Lewis Crooks of the Cabarrus County Sheriff's Office testified that on 17 July 1971 he received a telephone call at the Sheriff's Office from a person who identified himself as defendant. He recognized defendant's voice because he had known defendant for twelve or fifteen years prior to that date. The caller asked him to come out to "my place" because "I've just shot Carol." The witness asked whether an ambulance was necessary, and the caller replied that the deceased was already dead. The witness immediately went to the Jones premises and found defendant and Officer Ronald Ward there. The witness went into the bathroom, where he found the body of the deceased in a sitting position on the commode. He took defendant into custody and carried him to the Cabarrus County Jail. On cross-examination the witness testified that he did not think defendant told him during the telephone call that the shooting was an accident, but he recalled that defendant did so inform him at the scene. A mark appeared on the wall above the commode in photographs which were made on the night of the occurrence. He had no opinion as to what caused those marks.

Carroll Eggers, recalled, testified that he observed a gun wound on the body of deceased in the emergency room of the Cabarrus County Hospital on the morning after the shooting. He also testified that he picked the bullet up from the floor in the bathroom.

The State rested, and defendant moved for judgment as of nonsuit. The motion was denied.

Defendant presented evidence which tended to show the following facts:

Defendant testified that at about 11:30 p.m. on 17 July 1971 he and his wife were sitting in the dining room of the living quarters of their premises when he got up to use the bathroom. He asked her to call him if a customer came up to the gas pumps while he was in the bathroom. He was carrying a pistol in his pocket at the time because he had had some trouble on his premises, notably a couple of attempted robberies. He took the gun from his pocket as he started to take his belt loose so that the gun would not fall into the commode and placed it on the right-hand side of the commode. As he prepared to get off the commode, his wife came in and told him not to flush it because she had to use it. He pulled up his clothes, picked up the gun, and passed his wife as she entered the bathroom and prepared to sit on the commode. As he started to leave the bathroom, his wife began talking to him, and he turned to face her and continued fastening his clothes. He thought that at that point the gun was in his left hand. They had some further discussion, particularly related to selling the business in Cabarrus County and returning to Miami, Florida, where they had previously lived. When he finished fastening his clothes, he switched the pistol to his right hand, spun it over his finger, and was going to stick it into his pocket. As he executed this maneuver, the gun dropped from his hand and went off as he grabbed it, either "right at the floor or on the floor." Upon seeing blood on his wife's pajamas, he called for someone to call an ambulance. When he started to gather her up in order to take her to the hospital, she told him that she was dying. She died in his arms a moment or two later.

Defendant said that in 1962 he was convicted of assault on his wife, abandonment and nonsupport. On cross-examination defendant said that he had not had an argument with his wife that day and that he had consumed two beers on that day. He

did not know whether the gun fired when he grabbed it or when it hit the floor. The gun was a dual action, and it was not necessary to press both the safety and the trigger to cause it to fire. He then admitted that he was not sure about this latter statement.

Lewis Crooks, recalled as a witness for defendant, testified that defendant made a statement to him on the night of 17 July which substantially corroborated defendant's testimony.

Frank Edward Jones, the thirteen-year-old son of defendant and deceased, testified that he was awake when the fatal incident occurred and that he was standing in the hall outside the bathroom waiting to use the bathroom. His father was already in the bathroom, and he could see him through a crack in the door. His mother was sitting on the toilet. His father picked the gun up and started twirling it forward on his finger. The gun went off when it hit the floor. He later made a statement to the police out of the presence of his father.

William E. Pierce of the State Bureau of Investigation, stipulated to be an expert in the field of comparative chemistry, testified that he received a piece of yellow linoleum with a hole in it and a bullet from the Charlotte Crime Laboratory. He also received a small piece of tile and certain fragments. He found a very small yellow-and-white deposit on the back of the bullet. He concluded that the smear on the bullet was the same in appearance and elements of composition as the materials which composed the linoleum. On cross-examination he testified that the bullet "would have been skidding in some manner to have made that hole in the linoleum and gathered this stuff up." He had no opinion as to whether the bullet struck the linoleum.

Carroll Eggers, recalled, testified that on 18 July 1971 Frank Edward Jones told him that he saw his daddy pull a gun out of his pocket and start to twirl the gun; that the gun slipped out of his hand and fell on the floor; and that it discharged, hitting his mother. He further testified that as viewed from the photograph in evidence depicting the scene as the boy observed it, "there is no way to see anyone on the commode" from where the boy was standing.

Kenneth Crews, an attorney, testified that he went to the jail and talked with defendant. Several days later he went to the Jones premises and made photographs of a mark on the wall on

the right-hand and slightly above the lid of the commode. Defendant, who was present at the time, measured the distance from the seat of the commode to the mark as twenty-six inches.

Defendant rested and renewed his motion for judgment as of nonsuit. The motion was denied.

The jury returned a verdict of guilty of second-degree murder. Defendant appealed from judgment imposing a prison sentence of not less than twenty-five nor more than thirty years.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General T. Buie Costen and Associate Attorney Thomas M. Ringer, Jr., for the State.*

*Clarence E. Horton, Jr., for the appellant.*

BRANCH, Justice.

Defendant assigns as error the trial court's denial of his motion to suppress evidence of certain experiments conducted with the pistol which inflicted the fatal wound. His objection was predicated upon the grounds (1) that the experiments were not performed under conditions substantially similar to the conditions prevailing at the time of the fatal incident and (2) that there was no evidence to indicate that the weapon was in substantially the same condition at the time of the experiments as it was at the time of the shooting.

The evidence with regard to the experiments tends to show the following facts:

C. D. Eggers, a member of the Sheriff's Department of Cabarrus County, testified that he first saw the .32 caliber Colt pistol in question lying on the table in the den portion of defendant's premises on the night of the alleged murder. Defendant acknowledged to the officer that the gun was his and that it was the weapon which had shot his wife. Eggers produced a photograph which showed the gun lying on the table in the den.

Glenn Mauer, a firearms identification specialist stipulated to be an expert in the field of firearms identification and ballistics, testified that Officer Eggers delivered the weapon to him in Richmond, Virginia, on 3 August 1971, some 17 days after the alleged murder. On 5 August, Mauer conducted the tests in question. On cross-examination, Mauer stated that he was unable

to say whether the gun was in substantially the same condition on 3 August as on 17 July. After testifying that the pistol had both a thumb-level safety and a grip safety, he testified that he dropped the gun from heights of six inches, twelve inches, and up through forty-two inches, respectively, onto the wooden floor approximately one half to three quarters of an inch thick. The pistol would not fire. The witness stated that he did not know the kind of surface upon which the gun had dropped at the time of the shooting. After conducting these initial tests, he then placed tape around the grip safety of the firearm so as to make the safety ineffective and observed that it did not fire when dropped from a distance of twelve inches, but that it did fire when dropped from a height of eighteen inches. At the time he dropped the gun onto the wooden surface, there was only one bullet in the pistol, and he conceded that the gun might have been somewhat heavier if it had been fully loaded.

Mr. Eggers, recalled, testified that an Officer Ward, who at the time of the trial was an unavailable witness, delivered the pistol to him at the time of the fatal occurrence and that he did not, at that time, perform any tests on the bullet or the gun.

One of the best statements by this Court on the question of admissibility of experimental evidence is found in *State v. Phillips,* 228 N.C. 595, 46 S.E. 2d 720. In that case, the prosecution, over the defendant's objection, introduced evidence of experiments with the death pistol, which was fired at close range to determine whether there would be resulting powder burns. This Court approved the trial judge's ruling admitting this evidence and, speaking through Chief Justice Stacy, stated:

> The competency of experimental evidence depends upon its trustworthiness to aid in the proper solution of the problem in hand. [Citations omitted.] When the experiment is carried out under substantially similar circumstances to those which surround the original transaction, and in such a manner as to shed light on that transaction, the results may be received in evidence, although such experiment may not have been performed under *precisely* similar conditions as attended the original occurrence. The want of exact similarity would not perforce exclude the evidence, but would go to its weight with the jury. [Citations omitted.] Whether the circumstances and conditions are sufficiently similar to render the results of the experiment com-

petent is of course a preliminary question for the court, and unless too wide of the mark, the ruling thereon will be upheld on appeal. [Citations omitted.]

"The general rule as to the admissibility of the result of experiments is, if the evidence would tend to enlighten the jury and to enable them to more intelligently consider the issues presented and arrive at the truth, it is admissible. The experiment should be under circumstances similar to those prevailing at the time of the occurrence involved in the controversy. They need not be identical, but a reasonable or substantial similarity is sufficient."—*Edwards, J.*, in *Shepherd v. State,* 51 Okla. Crim., 209, 300 P., 421.

True it is, unless the requirement of substantial similarity exist, or be duly observed, the experimental evidence should be rejected. [Citations omitted.] This is largely a matter to be decided in the light of all the attendant facts and circumstances. The measure of permissible variation in the conditions of the experiment from those of the occurrence is usually determined by whether such variation would tend to confuse or to mislead the jury. The object of every trial is to find the truth of the matter in controversy. If the experimental evidence contribute to this end, it is admissible; otherwise it should be excluded. [Citation omitted.]

*Accord: State v. Atwood,* 250 N.C. 141, 108 S.E. 2d 219.

In *State v. Holland,* 216 N.C. 610, 6 S.E. 2d 217, the defendant was charged with murder of his three-year-old stepson, whose body was found floating in a nearby millpond. The trial judge permitted a witness to testify, over defendant's objection, as to an experiment with two boards which were thrown in the pond to determine the drift of the stream while the mill was in operation. There was no motion to strike this testimony.

The Court, holding that the failure to move to strike was a waiver of the defendant's exception, nevertheless stated:

. . . Such experiments and evidence as to the result thereof are relevant. [Citations omitted.] "Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear. . . . " [Citations omitted.] If the

evidence became irrelevant upon the latter showing through the defendant that the mill was not in operation on the date of the alleged homicide, defendant's failure to move to strike was, in effect, a waiver of the exception.

The defendant was charged with secret assault and a battery with a deadly weapon in *State v. McLamb,* 203 N.C. 442, 166 S.E. 507. His defense was alibi. The prosecuting witness testified that he saw defendant when he appeared suddenly at night at a window of the prosecuting witness's home and shot him. The State offered other witnesses who testified, over objection, that, when sitting at the place where the prosecuting witness was sitting, they were able to identify people appearing at night outside under lighting conditions similar to those in effect on the night of the alleged crime. Defendant assigned as error the admission of this testimony. The Court overruled this assignment of error and stated:

> Speaking to the subject, we find the following in 22 C.J., p. 755, sec. 842(1): "The conditions of a relevant occurrence may be artificially created in an experiment, and where the material facts bearing on the particular issue are precisely duplicated in the experiment, the result may be received in evidence. Such evidence is appropriate where the question to be determined relates to such matters as whether an object in a certain position can be seen from a given height above a designated spot, or from a given distance," etc. Section 843(3) at p. 756: "Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court, in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear." [Citations omitted.]

In *State v. Hedgepeth,* 230 N.C. 33, 51 S.E. 2d 914, defendant was charged with assault on a child with intent to commit rape. At trial, he offered witnesses to the effect that the day before the trial "was a cloudy, drizzly day, the whole sky was overcast." Defendant's witnesses, had they been permitted to testify, would have said that they went to the home of the girl on that day and were unable to look through the window and distinguish any object in the room while standing at distances varying from one to ten feet from the window. Mrs. Bowden, the principal witness for the State, testified that on the day

of the alleged crime she looked into the room from the outside and saw defendant with the child in a position consistent with the commission of the crime. Defendant had elicited testimony that the day of the alleged crime was a hazy, cloudy, overcast day. Mrs. Bowden, however, testified that although a hurricane was approaching, the sky was clear on the day of the alleged crime. The trial judge excluded the testimony of the three witnesses, and this Court, holding this ruling to be error, stated:

> While the similarity of the circumstances and conditions is a preliminary question for the court, we are of the opinion that its ruling here was a bit "too wide of the mark." The only evidence of guilt is contained in the testimony of Mrs. Bowden. Whether she could see through the window is a material factor in determining the truth of her statements. The testimony developed through the experiments tends sharply to impeach her testimony and assail her credibility. Hence, its exclusion was prejudicial to defendant. . . .

A cursory reading of *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889, leaves the impression that it supports defendant's position. There, over defendant's objection, the trial court allowed a non-expert witness to testify that, according to his experiments with the death gun, the gun could not be fired unless the hammer was pulled completely back before the trigger was pulled. The defendant's defense was that he and deceased were playing, and the gun went off when she grabbed it near the end of the barrel. Reversing the trial judge's ruling, this Court stated:

> There is no other evidence in the record as to how the safety device on this gun operates. There is no evidence in the record as to whether the safety device on the gun was on or off when it fired and killed Sylvia, or as to whether at that time it was cocked or not. There is no evidence in the record that when Millikan made his experiments the gun was in substantially the same condition as on the day Sylvia was killed. Defendant's defense is that the shooting of the gun resulting in Sylvia's death was by accident or misadventure. In our opinion the experimental evidence given by Millikan should have been rejected, because it does not appear from the evidence before us that his experiments were carried out under substantially similar

circumstances to those which surrounded the firing of the gun when Sylvia was killed. [Citation omitted.]

*Foust* is factually distinguishable from the case before us for decision. In *Foust,* the witness was not an expert in ballistics or firearm identification. Here the witness was stipulated to be an expert in firearm identification and ballstics. In *Foust* there was no evidence as to whether the safety device on the gun was on or off at the time of the fatal shooting. Here the expert witness testified that the safety device always required pressure on the handle of the pistol before it would fire.

**[1]** The decision in *Foust* was based partially upon the fact that there was no evidence to show that the gun was in substantially the same condition at the time of the experiment as on the day of the shooting. Defendant also relies upon the same argument to sustain his position. The rule applied to the admission of real evidence furnishes some guidance to our decision of this question. This rule is well stated in E. Cleary (Gen. Ed.), McCormick's Handbook of the Law of Evidence § 212 (2d Ed.), as follows:

> . . . Objects offered as having played such a direct role, e.g., the alleged weapon in a murder prosecution, are commonly called "real" or "original" evidence and are to be distinguished from evidence which played no such part but is offered for illustrative or other purposes. It will be readily apparent that when real evidence is offered an adequate foundation for admission will require testimony first that the object offered is *the* [original emphasis] object which was involved in the incident, and *further that the condition of the object is substantially unchanged.* If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimonially tracing the "chain of custody" of the

> item with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with. [Emphasis supplied; footnotes omitted.]

The failure of the State to show lack of substantial change in the weapon does not rise to the level of prejudicial error in light of the fact that defendant offered no objection to the admission of the pistol into evidence and particularly so since there is no proof or even reasonable suggestion of tampering with or material change in the weapon. We note, however, that it would have been the better practice for the State to establish a chain of custody and offer testimony that no substantial change in the weapon had occurred.

At this point we think it helpful to review briefly a few cases from other jurisdictions which are factually quite similar to instant case.

In *Mansfield v. Commonwealth,* 163 Ky. 488, 174 S.W. 16, the court approved the trial judge's ruling which permitted a witness to testify that a hammerless .38 Smith and Wesson pistol could not be discharged unless the safety device was pressed and the trigger pulled simultaneously. In that case, the actual death weapon was unavailable, and the testimony proffered was supported by other evidence that all Smith and Wesson hammerless pistols were of the same type and mechanism. The court's holding was not supported by reasoning which merits repetition.

The defendant was charged with murder in *State v. Ernst,* 150 Me. 449, 114 A. 2d 369. There the evidence revealed that defendant was seeking to apprehend the deceased, whom he had discovered in the process of stealing eggs, when the defendant's shotgun went off, fatally wounding the decedent. The defendant contended that the deceased grabbed the gun and started to pull it out of his hand and that this action caused the gun to discharge without fault of the defendant. Attempting to counteract this contention, the State produced as a witness a captain in the Maine State Police to whose qualifications as an expert defendant interposed no objection. This witness testified that he conducted certain tests to determine whether or not there was any mechanical failure in the operation of the gun. The tests, *inter alia,* consisted of dropping the gun from a distance of about thirty inches onto the floor by the butt and then

throwing the gun on its side several times at a distance of thirty inches to ascertain whether it would fire. The defendant objected to the admission of this evidence in the absence of a showing of a similarity of circumstances between the experiment and the occurrence itself. The court did not actually address itself to the question of similarity of conditions but merely stated that, in view of the position taken by the defendant, it was relevant for the State to introduce evidence as to the firing capacity of the gun.

In *Hodge v. State,* 60 Tex. Crim. 157, 131 S.W. 577, the defendant contended that the fatal shot was fired when his .38 caliber Smith and Wesson pistol struck the floor while in its holster. The State presented evidence which tended to show that, because the pistol was equipped with a safety notch upon which the hammer rested, it could not be fired by being struck a blow, and by inference could not have discharged when the hammer struck the floor. To meet this evidence, the defendant sought to introduce evidence to the effect that an experiment had been made with the pistol by fastening it in a secure place and striking the pistol hammer, while it rested on the safety notch, a slight blow with a hammer, which blow caused the pistol hammer to strike and explode the cartridge. The court excluded the testimony on the grounds that the experiment was not done in the same way the appellant claimed that the shot was fired, *i.e.,* by striking the floor. The appellate court held that the exclusion of this evidence was prejudicial to defendant and stated that if defendant could show "in any legitimate way that, although the hammer was on a safety notch, it could be made to explode a cartridge, he certainly would have a right to meet the state's case."

We find an excellent discussion concerning the similarity of conditions requisite for the admission of experimental evidence in *Love v. State,* 457 P. 2d 622 (Alaska). We quote from that case:

> As with other forms of circumstantial evidence, the trial judge may, in his discretion, exclude the experimental evidence after a determination that the probative value of the experimental evidence is outweighed by the possibility of prejudice, confusion of the issues or undue consumption of time. This discretion is, however, dependent upon a showing of substantial similarity of conditions by the proponent of the evidence.

As the court observed in *Tuite v. Union Pac. Stages, Inc.*, 204 Or. 565, 284 P. 2d 333 (1955), quoting from *Leonard v. Southern Pac. Co.*, 21 Or. 555, 28 P. 887 (1892):

> "The principle is that at best it is within the discretion of the court to admit any testimony whatever about experiments or similar occurrences. But in any event the conditions must appear to be substantially the same. It is not within the discretion of the court to admit evidence about experiments, unless the conditions are substantially alike." 284 P. 2d, at 345.

Another statement of this rule is found in *Ft. Worth & Denver Ry. v. Williams*, 375 S.W. 2d 279 (Tex. 1964):

> "Before it can be said that dissimilarity of conditions merely goes to the weight and hence presents a jury question, the judge must be able to say with some degree of certainty, that confusion will not occur and such dissimilarities as are disclosed are capable of explanation so as to be readily understood." 375 S.W. 2d, at 282.

In other words, if the differences of condition can be explained, so that the effect of those differences upon the experiment can be evaluated rationally, the judge may exercise his discretion and admit the evidence, for it can be helpful to the jury. But the judge cannot use his discretion to decide that despite a plain lack of substantial similarity in conditions he will, nevertheless, admit the evidence. In cases concerning the admissibility of experimental evidence, the foundation for admissibility should be scrutinized closely to determine whether the conditions surrounding the experiment were substantially similar to those of the alleged occurrence.

In applying the test of substantial similarity, the trial court should be guided by the following principles: Are the dissimilarities likely to distort the results of the experiment to the degree that the evidence is not relevant? Can the dissimilarities be adjusted for or explained so that their effect on the results of the experiment can be understood by the jury? In this connection the court must consider the purpose of the experiment and the degree to which the matter under experiment is a subject of precise science.

Absolute certainty is not required if the experiment would be considered valid by persons skilled or knowledgeable in the field which the experiment concerns.

This determination of whether substantial differences exist may not always be capable of a mechanical solution, but the same may be said about most trial court evidentiary determinations that employ notions of relevance or materiality. Frequently common sense provides a good guide to whether a factor entering into an evidentiary determination is substantial or merely unimportant.

**[2]** The rule concerning admission of experimental evidence has become somewhat confused by statements in our cases to the effect that the admission of such evidence rests in the discretion of the trial judge. In this jurisdiction a necessary corollary to such statement is that the trial judge's ruling must stand unless the appellate court finds an abuse of discretion. However, such conclusion had been negated by statements in our cases that the trial judge's ruling will not be disturbed unless "it is too wide of the mark," *State v. Phillips, supra,* or if the evidence upon which the ruling was based was "irrelevant." *State v. Holland, supra.* In fact, this Court has reversed a trial judge's ruling on this question without any discussion of the trial judge's discretion. *State v. Hedgepeth, supra.* Our review of the relevant case law convinces us that the correct rule as to the admissibility of experimental evidence is as follows: Although experimental evidence should be received with great care, it is admissible when the trial judge finds it to be relevant and of probative value. Even upon such finding the admission of experimental evidence is always subject to the further restriction that the circumstances of the experiment must be *substantially* similar to those of the occurrence before the court. Whether substantial similarity does exist is a question which is reviewable by the appellate courts in the same manner as is any other question of law. *State v. Carter,* 282 N.C. 297, 192 S.E. 2d 279; *Love v. State, supra.*

**[3]** Here, the experimental evidence tended to enlighten the jurors in their search for a true verdict. There remains the question of whether the experiment was conducted under conditions substantially similar to those existing at the time of the fatal shooting. The principal dissimilarities upon which defendant relies are (1) the pistol contained only one bullet when the experiments were made as compared with the fact that the

weapon had bullets in each chamber when the shooting occurred and (2) there was no specific showing as to the similarities or dissimilarities between the floor on which the experiments were conducted and the floor in defendant's bathroom.

Precise reproduction of circumstances is not required, and the effect of the differences which existed was explainable by the State's expert witness. Even though such explanation was apparently not called for upon direct examination or cross-examination, we do not perceive that the differences complained of distorted the experiments to the extent that the evidence became irrelevant. In our opinion the trial judge was not "too wide of the mark" in determining that the circumstances of the experiment were substantially similar to those surrounding the alleged homicide.

Conceding *arguendo* that the circumstances of the experiment did not meet the requirement of substantial similarity, defendant has failed to show prejudice because of the admission of the experimental evidence. Analysis of the effect of the experimental evidence reveals (1) that the fact that the gun fired at all during the experiments was favorable to defendant and supported his contention of accident or misadventure and (2) that the only possible prejudice to defendant resulting from the experimental evidence was that the pistol would not fire unless the safety on the handle of the weapon was depressed.

Prior to the offering of the experimental evidence, the expert witness, Glenn Mauer, testified *without objection* that State's Exhibit 5 (the death weapon) was an automatic loading pistol, and, in order to fire it, "one must depress the grip safety and apply pressure to the trigger. If pressure is applied to the trigger and the grip safety is not depressed then the firearm will not fire." It is a well-recognized rule in this jurisdiction that the admission of testimony over objection is ordinarily harmless error when testimony of the same import had previously been admitted without objection or is thereafter introduced without objection. *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423; *State v. Gaskill*, 256 N.C. 652, 124 S.E. 2d 873. Although the challenged evidence was a different *type* of evidence, its import was the same as that previously admitted without objection. The expert witness's unequivocal statement contained the same possibilities of damage to defendant's position as did the challenged experimental evidence.

We hold that the trial judge correctly admitted the experimental evidence.

Defendant next assigns as error the failure of the trial judge to grant his motion for judgment as of nonsuit on the charge of murder in the second degree.

**[4]** Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Winford, supra; State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447; *State v. Foust, supra.* If the State satisfies the jury beyond a reasonable doubt or if it is admitted that a defendant intentionally assaulted another with a deadly weapon, thereby proximately causing his death, two presumptions arise: (1) that the killing was unlawful and (2) that it was done with malice. Nothing else appearing, the person who perpetrated such assault would be guilty of murder in the second degree. *State v. Winford, supra; State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322. In the case *sub judice,* defendant's contention is that an accidental discharge of the deadly weapon caused the death of his wife. If, in fact, defendant unintentionally proximately caused his wife's death by the use of the pistol, in a manner which was not reckless or wanton, with no wrongful purpose, and while engaged in a lawful pursuit, the homicide would be excused on the ground of accident or misadventure. *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; 40 Am. Jur. 2d *Homicide* § 112, at 406. Defendant's contention that the homicide resulted from accident or misadventure was a denial that he committed the crime charged, and such contention was not an affirmative defense which resulted in the imposition of any burden of proof upon him. The burden remained upon the State to prove each and every element of the crime charged beyond a reasonable doubt. *State v. Woods,* 278 N.C. 210, 179 S.E. 2d 358; *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652; *State v. Fowler,* 268 N.C. 430, 150 S.E. 2d 731; *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. Williams,* 235 N.C. 752, 71 S.E. 2d 138.

**[5]** Here, it is uncontroverted that decedent met her death from a wound proximately caused by the pistol (State's Exhibit 5). However, the other elements of second-degree murder—malice and an unlawful killing—are not so easily met. There was no

evidence that the killing was unlawful and done with malice unless these elements of second-degree murder were supplied by the presumption arising from an *intentional* assault with a deadly weapon. Defendant's evidence was to the effect that the firing of the pistol was accidental. The State relies upon circumstantial evidence and contends that the downward course of the bullet as it passed through the body of deceased was contrary to natural laws and scientific principles, thereby directly refuting defendant's evidence that he accidentally dropped the pistol, which fired as it hit the floor or as he "grabbed it" just as the pistol struck the floor. The State argues that the course of the death bullet and the experimental evidence concerning the firing of the death weapon left the theory of accident or misadventure with no substantial factual basis.

In considering defendant's motion for judgment as of nonsuit, the trial judge must 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. If there is evidence, direct, circumstantial, or a combination of both, from which the jury can find that the offense charged was committed by the defendant, the motion for judgment as of nonsuit must be overruled. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44. When so considered, the State's evidence in instant case was sufficient to support a reasonable inference and a jury finding that defendant intentionally assaulted his wife with a deadly weapon, thereby proximately causing her death.

We hold that the trial judge correctly denied defendant's motion for judgment as of nonsuit on the charge of murder in the second degree.

**[6]** Finally, we agree with defendant's contention that the evidence did not require the submission of the lesser included offense of voluntary manslaughter; however, its submission to the jury was prejudicial to the State, not to defendant. *State v. Accor* and *State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332; *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525; *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364. Even had there been prejudice in the submission of voluntary manslaughter to the jury, such prejudice was cured by the fact that the jury never reached the consideration of this lesser included offense.

We have carefully examined every assignment of error as well as this entire record and find no error warranting a new trial.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. MARK DOUGLAS BURNS

No. 29

(Filed 6 May 1975)

1. **Criminal Law § 66— in-court identification — pretrial showup — admissibility**

In this rape prosecution, the victim's in-court identification of defendant as her assailant was of independent origin, there was no substantial likelihood of misidentification at a pretrial police station showup, and the in-court identification and evidence of the pretrial showup identification were properly admitted in evidence where the victim was with her assailant in a small, well lighted room for at least fifteen minutes, the victim gave police officers a description of her assailant which closely corresponded to defendant's appearance, the victim made no identification of others at six previous showups or from viewing over 1,500 photographs, other witnesses identified defendant as a man observed by them in the restaurant where the crime occurred at about the time of the crime, and the showup identification occurred a week after the crime and the in-court identification occurred less than two months after the crime.

2. **Rape § 1— threat of bodily harm**

A threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force and negates consent in a rape case.

3. **Rape § 5— sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for a rape which allegedly occurred in the rest room of a restaurant.

4. **Constitutional Law § 30; Criminal Law § 101— due process — statement by radio commentator — failure to instruct jury**

Defendant in a rape case was not denied due process by reason of the trial judge's failure to instruct the jury concerning criticism by an undesignated radio commentator of another jury which, during the same week, had found another defendant not guilty of rape where the record does not indicate the nature of such comment and does not show that any juror heard the statement of which defendant complains.

State v. Burns

5. Constitutional Law § 36; Criminal Law § 135; Rape § 7— death penalty for rape

Imposition of the death penalty for rape did not violate defendant's rights under the Eighth and Fourteenth Amendments.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to the death sentence.

APPEAL from *Cowper, J.*, at the 28 February 1974 Criminal Session of ONSLOW.

Upon an indictment, proper in form, the defendant was charged with the rape of Mrs. Deborah Williams. His defense was alibi. He was found guilty as charged and was sentenced to death. The in-court identification of the defendant by Mrs. Williams as the perpetrator of the offense was positive and unequivocal. Prior to such identification, a voir dire was conducted in the absence of the jury and the court made findings of fact as set forth below.

The testimony of Mrs. Williams, in the presence of the jury, was to the following effect:

She resides in Raleigh and on 10 January 1974 traveled to Onslow County to visit her husband, a member of the Marine Corps, stationed at the New River Air Station. Upon her arrival, they went to McDonald's Restaurant for their evening meal, arriving at the restaurant about 8:15 p.m. While her husband placed their order, Mrs. Williams went to the ladies' rest room. To reach it, she walked past tables and booths in the dining area to a door to the rest room area, which contained both a ladies' room and a men's room. As she did so, she observed a man in one of the booths staring at her. He wore a brown corduroy coat. His hair was cut short as if he were a member of the Marine Corps.

The entire restaurant, including the small ladies' room was well lighted. Entering the ladies' room, she tried several times to lock the door but it would not lock. As she was using the toilet, someone started to enter. She tried unsuccessfully to keep the door closed. The defendant came in, put a sharp object, which she could not see but believed to be a knife, against her neck and told her that if she did as he directed he would not hurt her. Turning around, the defendant fixed the door so that it would lock and locked it.

After forcing her to perform an unnatural sexual act, which she did because of her fear that if she refused he would kill her, he then proceeded to have complete sexual intercourse with her, which she did not resist because she feared he would kill her if she did not obey his instructions. Thereupon, he tied and gagged her with her own clothing and left the rest room, the entire episode having taken fifteen or twenty minutes.

Her assailant wore a brown corduroy coat and brown and white checked pants, was six feet tall and skinny. He had a medium colored mustache and dark hair. He was the man she had observed sitting in the booth and staring at her. The coat (State's Exhibit 3) which the defendant was wearing at the time of his arrest, one week later, looks like the one her assailant wore.

As soon as she released herself, Mrs. Williams returned to the dining area of the restaurant and told her husband she wanted to leave. When they got outside the restaurant she told him what had occurred. They went to the police station, where she told the officers what had happened and that her assailant was about as tall or taller than her husband (six feet), that he had dark hair and a dark mustache, wore a brown corduroy coat and was "real skinny," weighing, in her opinion, 120 to 125 pounds. (The defendant is six feet three inches tall and weighs 145 to 150 pounds.) Then she went to the hospital for a medical examination. (The examining physician testified that he found evidence of sexual intercourse within the preceding three or four hours, his examination having occurred at 10:00 p.m.)

She returned to the police station that evening and on the following day to look at different men whom the police had taken into custody and each of whom, in succession, the officers told her they were "almost positive" was the perpetrator of the offense. She did not identify any of these men as her assailant. During the following week, she looked at approximately 2,000 police "mug shot" photographs without identifying any of the subjects of these as her assailant. (No photograph of the defendant was among those so examined by her.)

One week after the offense, the officers again requested Mrs. Williams to come to the police station to view a man whom they "thought" was the man who had attacked her. She stood at the window of a darkened room while the officers brought the defendant out into a courtyard. He was not in a lineup. Mrs.

Williams then said she was "almost sure" this was her assailant but she wanted to see him closer. (The defendant was then brought into the room where Mrs. Williams was and she definitely identified him as her assailant.)

She is positive that the defendant is the man who raped her.

On the above mentioned voir dire, the defendant offered no evidence. The testimony of Mrs. Williams, the only witness for the State, was to the following effect:

The dining area and the rest room of the restaurant were well lighted. When she saw the defendant at the police station, a week after the attack upon her, she was inside the station, he outside, about 20 feet from her, standing with three other men (police officers), all in civilian clothes, one known to her. She then said she believed he was her assailant but she "really wanted to be positive" and, at her request, she was taken into the same room with the defendant and stood five or six feet from him. She thereupon told the officers the defendant was the man who had raped her. On the day following the offense, she had looked at approximately 2,000 pictures and, during the intervening week, had looked at several men at the police station at the request of the officers without identifying as her assailant any of these men or any of the men portrayed in the pictures she examined. Each time she went to the police station to look at a man in custody, the officers told her they were "pretty sure they had the guy." She testified, "My identification of the defendant here in the courtroom is based entirely upon what I observed that night at McDonald's, independent of anything I observed about the defendant at the police station." When, on the night of the offense, she described her assailant to the officers as weighing 120 to 125 pounds, she "just knew he was real skinny," she not being a judge of weight. Her husband was with her at this confrontation. He was not sure and wanted to see the defendant again, so the officers turned the defendant "sideways" so that her husband could get a side view.

At the conclusion of the voir dire, the court found:

The restaurant, including the rest room, was well lighted. The witness had an opportunity to observe her assailant fifteen to twenty minutes. She saw him face to face and was able to describe him and his clothing. She was called upon by the police officers on six occasions to view persons suspected of the

attack but did not identify any of them as her assailant. She looked through approximately 2,000 photographs of suspects without making any identification therefrom. One week after the attack, she was again called to the police station and asked to observe a man. On this occasion, she stated she thought this was the man who had attacked her and asked to see him closer, whereupon she was brought into a room with the suspect and identified him as her assailant. The defendant was then standing alone, there being no lineup. The in-custody viewing of the defendant one week following the alleged rape and the circumstances surrounding the same were not impermissibly suggestive and conducive to irreparable mistaken identity. The in-court identification of the defendant was of independent origin based on observations of the defendant on 10 January 1974, and based solely on what she saw at the time of the crime and does not result from any out-of-court confrontation.

The court thereupon overruled the defendant's objection to the above related testimony of Mrs. Williams concerning the identification of the defendant.

The husband of the prosecuting witness testified, without objection, to the following effect:

He and his wife reached McDonald's Restaurant between 8:00 p.m. and 8:15 p.m. He placed their order while she went to the rest room. He sat in the dining area facing the door to the rest room area. He observed the defendant come out of that door and walk rapidly out of the back door of the restaurant. The defendant was wearing a brown corduroy or suede jacket. About two minutes later, between 8:30 p.m. and 8:45 p.m. Mrs. Williams came out looking as if she were ill and asked him to leave, which they did. Outside the restaurant she told him what had happened and they went to the police station.

As the defendant walked from the door to the rest room area to the exit from the restaurant, Mr. Williams got a good view of his profile and noted a somewhat strange shape of the defendant's forehead. At that time he had no particular reason to observe the defendant except that the defendant appeared to be nervous. At the police station, Mr. and Mrs. Williams described the defendant to the officers as six feet tall, not as heavy as Mr. Williams, having a mustache, a little bushier than that of Mr. Williams, and dark hair but not as dark as that of Mr. Williams, and wearing a corduroy or heavy suede brown jacket.

He also examined the police collection of approximately 2,000 "mug shots" and looked at several suspects at the police station before he saw the defendant. Neither he nor Mrs. Williams identified any of the other men or the subject of any of the "mug shots" as her assailant. He is positive that the defendant is the man he saw come from the rest room area of the restaurant.

Donna Fountain, a waitress at the restaurant, testified, without objection, that she saw the defendant sitting in a booth in the dining area between 7:50 p.m. and 8:30 p.m. on the evening the rape occurred, "looking around." He was then wearing a brown corduroy jacket and had a mustache. She heard the door to the rest room area close and thereafter observed the defendant leave the booth in the dining area, following which she again heard the door to the rest room area close. That night she told the police that the man she had observed was tall, with dark hair and a mustache and was wearing a brown corduroy jacket.

Bernice Lee Graham, assistant manager of the restaurant, testified that he observed the defendant in the restaurant between 8:00 p.m. and 8:30 p.m. on the evening the offense occurred. The defendant's manner and response to Mr. Graham's inquiry attracted his attention. On January 17, one week after the offense, Mr. Graham again observed the defendant sitting in the rear booth of the dining area. On that occasion, upon being advised by one of the waitresses that she had found a piece of paper jammed in the door lock of the ladies' rest room, Mr. Graham checked and found this to be true. He did not remove it but returned to the dining area, took a good look at the defendant and called the police.

Detective Hassell of the Jacksonville Police Department testified that, on the night of the offense, Mr. and Mrs. Williams each gave him a description of her assailant, these being consistent. Upon his going to the restaurant, waitress Fountain told him she had observed a man fitting that description sitting in the restaurant and Manager Graham, without having previously been told what description had been given by Mr. and Mrs. Williams, similarly described the man he had observed. Detective Hassell then went into the ladies' rest room and found a small, folded piece of paper napkin about half an inch square.

Detective Lieutenant Reed of the Jacksonville Police Department testified:

The defendant's picture was not in the "mug books" examined by Mr. and Mrs. Williams. She did not identify, as her assailant, any of the six suspects she was shown prior to her identification of the defendant, saying, as to each, he was shorter, taller, or heavier than her assailant.

On January 17, Mrs. Williams identified the defendant as her assailant. She and her husband were inside the police station in a darkened room looking out a window into a courtyard. The defendant and three officers in civilian clothing walked out of the police station into the courtyard. The officers, though about the same height as the defendant, were substantially heavier. The defendant wore a brown coat (State's Exhibit 3). One of the officers also wore a brown coat, slightly lighter in shade. Mrs. Williams identified the defendant as her assailant but wanted a closer look to be sure, so the defendant was brought into a small room where Mr. and Mrs. Williams observed him at a distance of about three feet. She then positively identified him as her assailant.

Mr. Williams wanted a side view, so the officers had the defendant turn sideways. Mr. Williams then identified him as the man he saw coming from the rest room area of the restaurant. (The record at this point shows an exception by the defendant but the record does not show any objection to any question propounded to this witness.)

Before Lieutenant Reed and another officer arrested the defendant on the evening of January 17, they observed him for a substantial period as he sat in a booth in the dining area of McDonald's Restaurant, facing the door to the rest room area. As the officers went by, he covered his face with his hand. Lieutenant Reed, having been informed that one of the waitresses had found a plug of paper in the slot for the lock to the door of the ladies' rest room, went to the rest room and found a piece of folded paper napkin (State's Exhibit 4) jammed into the slot for the door lock, as the result of which the lock would not close.

The defendant was informed of the matter under investigation and was advised of his constitutional rights, including his right to counsel. He said he did not want a lawyer as he had

not done anything, having been at the "Devil's Den" (a so-called private club) all through the evening of January 10. Though asked to do so, he did not give the officers the name of any person who was with him there. When arrested, the defendant was carrying a small switchblade knife (State's Exhibit 6).

The defendant testified in his own behalf to the following effect:

He did not rape Mrs. Williams. He does not own any brown and white checked pants. On the night of January 10, he was at the "Devil's Den" at all times from 6:00 p.m. to approximately 11:00 p.m. Membership in the "Devil's Den" is obtained by being introduced to the manager and receiving her approval of the applicant's appearance. He was in McDonald's Restaurant on the evening when arrested but did not go into the rest room area, and put nothing in the door lock slot. He is a member of the Marine Corps, stationed at Camp LeJeune. The knife found in his pocket is his.

A waitress at the "Devil's Den," the bartender thereat and a member thereof all testified that they saw the defendant at the "Devil's Den" on the evening of January 10 prior to 8:00 p.m. None of them saw him there after 8:00 p.m. on that date. The "Devil's Den" is three miles from McDonald's Restaurant. The defendant had an automobile.

The defendant's commanding officer, his fiancee and her mother testified that his character is good.

*James H. Carson, Jr., Attorney General, and Sidney S. Eagles, Jr., Assistant Attorney General, for the State.*

*Cameron and Collins by William M. Cameron, Jr., for defendant.*

LAKE, Justice.

**[1]** The defendant contends that the trial court erred in admitting in evidence the in-court identification of the defendant by Mrs. Williams as her assailant. In this we find no error. Upon the defendant's objection to such testimony, the trial judge sent the jury from the courtroom and, in its absence, conducted a voir dire examination. Mrs. Williams was the only witness called on the voir dire. At the conclusion thereof, the court made findings of fact, as above set forth, and overruled the defendant's

motion to suppress the evidence pertaining to the identification of the defendant by Mrs. Williams. This was the proper procedure. *State v. Cross,* 284 N.C. 174, 178, 200 S.E. 2d 27; *State v. Stepney,* 280 N.C. 306, 314, 185 S.E. 2d 844; *State v. Gray,* 268 N.C. 69, 78, 150 S.E. 2d 1.

One of the court's findings, designated by it a conclusion, was that the in-court identification of the defendant was of independent origin and was based solely on what the witness saw at the time of the crime and was not the result of any out-of-court confrontation. The witness expressly so testified on the voir dire. The circumstances of the crime, committed in a small, well lighted room in which she was confronted by her assailant, a forcible intruder, who remained therein with her for at least fifteen minutes, were such as to afford ample opportunity for the formation of a mental picture of her assailant which would survive to the time of trial, irrespective of her pretrial confrontation with him thereafter at the police station. The trial court's findings of fact on the voir dire, supported as they are by ample evidence, are conclusive on appeal. *State v. Cross, supra,* at p. 181; *State v. Stepney, supra,* at p. 317; *State v. Morris,* 279 N.C. 477, 481, 183 S.E. 2d 634; *State v. Harris,* 279 N.C. 307, 311, 182 S.E. 2d 364; *State v. Gray, supra.*

In *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401, the defendant, as here, appealed from a conviction of rape. He, like the present defendant, contended that the state court's admission of the victim's in-court identification of him as her assailant and the admission in evidence of her testimony of her out-of-court identification of him constituted a violation of the Due Process Clause of the Fourteenth Amendment. In that case, the victim testified that she was seized from behind and thrown to the floor of a room of her residence lighted only by the light from an adjoining room. The rape was committed in a wooded area, two blocks from her home, to which area she was forced to walk, the offense being committed under the light of a full moon and the entire incident taking between fifteen minutes and half an hour. The victim gave the police a description of her assailant, including an estimate of his age, height and weight, and a description of his hair and complexion. Over a period of seven months between the offense and the trial, she viewed a number of suspects, some in lineups and others in showups, and was shown between 30 and 40 photographs, identifying none of these suspects as her assailant. Seven months after the

offense, the police called her to the police station to view the respondent who was exhibited to her in a showup consisting of two detectives walking the defendant past the victim. The police, at her request, required the defendant to say, in her presence, words spoken by her assailant at the time of the crime. It did not appear whether these words were spoken before or after the victim first identified the defendant as her assailant.

It is apparent that the present case is almost on all fours with *Neil v. Biggers, supra,* such differences as there are between the two situations indicating even greater reliability of the identification in the present case. The United States District Court granted habeas corpus, holding the showup identification procedure violated the Due Process Clause. The Supreme Court of the United States, speaking through Mr. Justice Powell, reversed, saying:

> "In *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967), the Court held that the defendant could claim that 'the confrontation conducted * * * was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.' Id., at 301-302, 18 L.Ed. 2d 1199. This, we held, must be determined 'on the totality of the circumstances.' * * *
>
> "Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:
>
> > '[W]e hold 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.' *Simmons v. United States,* 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968).
>
> * * *
>
> "Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable

misidentification.' *Simmons v. United States,* 390 U.S., at 384, 19 L.Ed. 2d 1247, 88 S.Ct. 967. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster* [*Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969)]. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as Stovall makes clear, the admission of evidence of a showup without more does not violate due process.

* * *

"We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

* * *

"We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and

voice, might not have satisfied Proust but was more than ordinarily thorough. She had 'no doubt' that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant.

* * *

"Weighing all the factors we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury."

In *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10, the defendant, charged with rape, assigned as error the admission, over his objection, of an in-court identification of him by the victim as her assailant. The ground of objection, as here, was that the witness had made an out-of-court identification under circumstances which were impermissibly suggestive and conducive to mistaken identification. We were there concerned only with the admissibility of the in-court identification testimony. Speaking through Justice Branch, we said:

"The practice of showing suspects singly to persons for purposes of identification has been widely condemned. *Stovall v. Denno* [388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967]; *State v. Wright* [274 N.C. 84, 161 S.E. 2d 581]. However, whether such a confrontation violates due process depends upon the totality of the surrounding circumstances. *Stovall v. Denno, supra.* * * *

"It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin."

In the present case, the trial court having found that the in-court identification was of independent origin, which finding was supported by substantial evidence on voir dire and is, therefore, conclusive upon appeal, there was no error in admitting the in-court identification of the defendant by Mrs. Williams. Her testimony so identifying the defendant was clear and unequivocal.

In addition to Mrs. Williams' husband, other witnesses identified the defendant as a man observed by them in the restaurant at about the time of the offense. He was arrested in the same restaurant one week later, on which occasion the lock to the door of the ladies' rest room was similarly jammed so that the door could not be locked. The defendant's evidence, designed to establish an alibi for the time of the offense, obviously fails to do so. Immediately after the offense was perpetrated, Mrs. Williams gave the police officers a description of her assailant which closely corresponded to the defendant's appearance. Her in-court identification of him occurred less than two months after the offense. Prior to her out-of-court identification of the defendant, one week after the offense, she viewed six other suspects, each of whom was exhibited to her at a showup as suggestive as was that involving the defendant, and she examined over 1,500 photographs. She did not identify any of these suspects or the subject of any of these photographs as her assailant. No photograph of the defendant was included among those examined by her. Prior to each of the other showups, just as at the showup of the defendant, the police officer having the man in custody told Mrs. Williams he was sure that suspect was her assailant. In each case, she pointed out some respect in which that suspect failed to conform to her mental picture of her assailant.

In the present case, the totality of the circumstances is such that, far from showing the out-of-court identification, one week after the offense, was "conducive to irreparable mistaken identification," it shows just the contrary. It shows a witness with a clear mental picture of her assailant, which was not blurred or confused by successive confrontations with suspects, each of whom she knew the police officers believed to be her assailant. Quite obviously, Mrs. Williams, in her identification of the defendant at the police station, was not influenced by the opinion of the officers nor was she interested in identifying someone just to be done with the matter. On the contrary, she laboriously searched through hundreds of photographs unsuccessfully and made trip after trip to the police station to view suspects. Clearly, her sole objective was to identify the right man and she would not yield to any other suggestion.

The prosecuting attorney, having introduced the clear, positive, in-court identification of the defendant by Mrs. Williams, did not offer before the jury any evidence concerning the out-of-

court identification by her until after the defendant had developed this by his cross-examination of Mrs. Williams in the presence of the jury. Having, himself, brought to the attention of the jury the fact of, and some of the circumstances surrounding, the out-of-court identification for the purpose of discrediting the in-court identification of him by Mrs. Williams, the defendant is not in a position to object to the introduction of testimony by the State for the purpose of giving the jury the complete picture of the proceeding at the police station, even if it be assumed that such evidence by the State would have been incompetent otherwise. *State v. Minton,* 234 N.C. 716, 724, 68 S.E. 2d 844; *State v. Hicks,* 233 N.C. 511, 518, 64 S.E. 2d 871; *State v. Warren,* 227 N.C. 380, 42 S.E. 2d 350; Strong, N. C. Index 2d, Criminal Law, § 39. See also, *State v. McVay* and *State v. Simmons,* 277 N.C. 410, 417, 177 S.E. 2d 874. Furthermore, the State's evidence as to the out-of-court identification merely added to the evidence elicited by the defendant the circumstances surrounding that identification which the defendant says impairs the reliability of the identification. Having, himself, shown the fact of the out-of-court identification, we do not perceive any prejudice to him by the subsequent showing of the circumstances under which it occurred.

Finally, as to this point, assuming, which we do not concede to be correct, that there was error in permitting Mrs. Williams to testify on redirect examination, and Detective Lieutenant Reed to testify on direct examination, concerning the out-of-court identification of the defendant by Mrs. Williams, we think it clear that such error was harmless beyond a reasonable doubt in view of the positive, unequivocal, in-court identification by Mrs. Williams, the identification of him by other witnesses as a man observed by them in the restaurant about the time of the offense and the evidence of the similarly jammed door lock one week later when the defendant was again in the restaurant. It is inconceivable that, had there been no evidence at all before the jury concerning the out-of-court identification, the verdict would have been different. New trials are not granted because of errors which cannot reasonably be believed to have contributed to the result reached in the trial court. *State v. Turner,* 268 N.C. 225, 232, 150 S.E. 2d 406; *State v. Beal,* 199 N.C. 278, 154 S.E. 604; *State v. Mundy,* 182 N.C. 907, 110 S.E. 93; Stansbury, North Carolina Evidence, Brandis Revision, § 9.

The defendant's contention that there was error in the denial of his motion for a directed verdict of not guilty is obviously without merit. Such motion is equivalent to a motion for a judgment of nonsuit. *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5; *State v. Davis,* 246 N.C. 73, 97 S.E. 2d 444. It is elementary that upon such motion the evidence for the State is deemed to be true, the State is entitled to the benefit of every inference in its favor which may reasonably be drawn therefrom and the defendant's evidence in conflict therewith is disregarded. Strong, N. C. Index 2d, Criminal Law, § 104, and the many cases there cited. "Where, taken in the light most favorable to the State, there is sufficient evidence from which a jury could find that the offense charged had been committed and that defendant committed it, nonsuit should be denied." *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365.

**[2, 3]** Rape is sexual intercourse with a female person by force and without her consent. *State v. Henderson, supra; State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190; *State v. Overman,* 269 N.C. 453, 469, 153 S.E. 2d 44; *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826. A threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force and negates consent. *State v. Henderson, supra; State v. Bryant,* 280 N.C. 551, 557, 187 S.E. 2d 111; *State v. Primes, supra; State v. Overman, supra; State v. Carter, supra.* The evidence in this record is ample to support the jury's findings that the offense charged in the indictment was committed and that the defendant was the perpetrator of it.

**[4]** There is no merit in the defendant's contention that he was denied due process of law by reason of the trial judge's failure to instruct the jury properly concerning criticism in the news media of another jury which, during the same week, had found another defendant not guilty of rape. See, *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 432, 183 S.E. 2d 652. The record does not indicate the nature of any such comment by the news media. We may not properly grant a new trial upon the defendant's mere assertion in his brief that, during the progress of his trial, some statement, vaguely described as critical, was made by some undesignated radio commentator concerning the acquittal of another defendant in another case by another jury. All that appears in the present record relative to this contention is that, following the argument of counsel to the jury and

immediately preceding the charge of the court to the jury, the court addressed the jury as follows:

> "THE COURT: Members of the jury, counsel has brought to my attention the fact that something has been said on the radio today with regard to another case that was tried here this week. I was not aware of that, but of course, I instructed you not to listen to anything or discuss this case with anyone. Did any of you hear a radio report this morning about this case?
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> "JURY IN UNISON: No.
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> "THE COURT: Thank you."

The record does not disclose any request by the defendant for further instruction to the jury upon this point or any motion by the defendant with reference thereto. Nothing in the record indicates that any juror heard the statement of which the defendant complains.

The defendant contends that he was "denied due process of law in that the State knowingly used false testimony of Officer, Lt. Jerry Reed, in questioning him on a lineup when the Court had already found as a fact that there was no lineup?" He also contends that the trial court erred in its charge to the jury "in referring to the testimony of Lt. Jerry Reed concerning a lineup after the Court had already found as a fact that there was no lineup." Suffice it to say, with reference to these two assignments of error, that the word "lineup" does not appear in the narration of the testimony of Detective Lieutenant Reed in the record, except in the cross-examination of this witness by the defendant and does not appear in the summary of the testimony of this witness contained in the charge of the court. The record further sets forth no question addressed by the prosecuting attorney to this witness and no objection to or motion to strike any portion of his testimony. It shows no effort by the defendant to call to the attention of the trial judge any alleged error in the judge's summary of the evidence in his charge to the jury. Minor discrepancies in such summary are deemed waived if not called to the judge's attention in time to afford him an opportunity to correct them. *State v. Fowler,* 285 N.C. 90, 97, 203 S.E. 2d 803. These assignments of error have no merit.

**[5]** The defendant's contentions that the imposition of the sentence of death upon him is a violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States have been considered and answered by this Court in detail in numerous recent decisions. No purpose would be served by further discussion of them. See: *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721, and *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19.

The remaining assignments of error made by the defendant are purely formal and require no discussion. There is no merit therein.

No error.

Chief Justice SHARP dissents as to the death sentence and votes to remand for the imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt (in which she and Justice Higgins concurred) in *State v. Jarrette,* 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422 at 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975).

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STATE OF NORTH CAROLINA v. RICHARD GORDON

No. 39

(Filed 6 May 1975)

**1. Constitutional Law § 30— nine months between offense and trial — no denial of speedy trial**

Defendant was not denied his right to a speedy trial where nine months elapsed between the offense and trial since the State offered evidence of congested court calendars, defendant acquiesced in the

delay for eight months before asking for a speedy trial, and defendant failed to show what two possible witnesses would have testified if they had lived until the time of the trial.

**2. Searches and Seizures § 4— search under warrant of adjacent apartment — standing of defendant to challenge evidence**

Defendant's rights were not violated by a search under warrant of an apartment located next door to defendant's apartment and by seizure of guns which defendant had placed in that apartment, and defendant had no standing to challenge introduction into evidence of the seized guns where defendant was not on the premises at the time of the contested search and seizure, defendant had no proprietary or possessory interest in the premises nor had he ever claimed any, and defendant was not charged with an offense that included, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

**3. Criminal Law § 76— in-custody statement — voluntariness**

Evidence was sufficient to support the trial court's finding that an in-custody inculpatory statement made by defendant to police officers after his arrest without a warrant was free and voluntary where such evidence tended to show that defendant signed a waiver and was questioned for ten or fifteen minutes about six hours after his arrest at which time he denied any knowledge of the murders, six hours later he made a full confession after being questioned for twenty-five or thirty minutes, and there was ample evidence that defendant was never promised anything or threatened in any way.

**4. Criminal Law § 84; Searches and Seizures § 1— items seized from crime scene and incident to lawful arrest — standing of defendant to challenge search**

Defendant lacked standing to complain of any search, legal or otherwise, which yielded bullet fragments, a small shot pellet, an empty 30-30 cartridge, a fired shotgun shell, a box of shotgun shells, a box of 30-30 shells, a brown bag, and a .32 caliber pistol where all items except the pistol were found at or near the crime scene and in the apartment located next to defendant's, and the pistol was seized incident to a lawful arrest and was in plain view of the arresting officer.

**5. Homicide § 21— death by shooting — first degree murder — sufficiency of evidence**

Evidence in a first degree murder trial was sufficient to be submitted to the jury, though the evidence did not show that the shots fired by defendant from a .32 caliber pistol were the ones that killed the two victims, where the evidence did show that defendant was present at the scene for the purpose of aiding and abetting his companions in the commission of the crimes, and that he actively participated by firing his pistol into the car where one of the decedents was sitting.

**6. Constitutional Law § 36; Homicide § 31— first degree murder — death penalty — constitutionality**

Sentence of death imposed in this first degree murder prosecution was constitutional.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to the death sentence.

APPEAL by defendant from *Ervin, J.*, at the 13 May 1974 Schedule "B" Criminal Session of MECKLENBURG Superior Court.

On indictments proper in form, defendant was convicted of the first degree murders of Steve Charles Helton and Sharon Williams. Defendant appeals from judgments imposing a sentence of death in each case.

The evidence for the State tends to show: On Friday, 17 August 1973, Steve Charles Helton was the evening manager and Sharon Williams was an employee of the Burger Chef Restaurant on Wilkinson Boulevard in Charlotte. The restaurant closed about 11:30 p.m. After locking the doors, Steve, Sharon, and two other employees cleaned the inside of the restaurant. At 11:53 p.m., they "clocked out," went outside, and picked up trash for a few minutes. Steve and Sharon then went to his automobile at the back of the parking lot and the other two employees, Stephanie Lynn Strawser and Donna Faye Bartlett, went to their automobiles at the front of the parking lot. As Stephanie and Donna were starting their automobiles, they saw flashes and heard popping noises and a sound "like a cannon" coming from the area of Steve's car. Stephanie and Donna saw two or three figures run from behind a dumpster to the corner of another building. Donna exclaimed, "Stephanie, they have been shot." The two girls were afraid to go to Steve's car because of the possibility there might "still be people back there." Instead, they went to a nearby grocery store, called the police, and then returned to the Burger Chef with three "bag boys." There they found Steve lying beside his car and Sharon slumped over in the front seat.

Officer J. A. Williams of the Charlotte Police Department arrived at the scene about 12:05 a.m. The window on the passenger side was broken and there were small indentations on the outside of the car door, just below the window, which appeared to be caused by shotgun pellets. There was a bullet hole about the center of the windshield and a large quantity of blood and glass inside the car.

Officer H. J. Booth of the Charlotte Police Department arrived on the scene about 12:07 a.m. He examined Steve and Sharon but was unable to detect a pulse.

Other officers discovered fresh footprints in a red mud field behind the building next to the Burger Chef and followed them to a railroad track nearby. There they found an empty 12-gauge shotgun shell. Officers also discovered an empty 30-30 cartridge case in front of Steve's car. Someone had pulled wires loose about the engine of this car.

Ellen Barbara Gilmore had known defendant for about one year. She lived with her sister at 2725 Craddock Circle in Apartment 3, and he lived at the same address in Apartment 2. On 17 August 1973, she saw defendant about 8:30 p.m. She did not see him any more that night but had a conversation with him at about midnight through an open door between the apartments. Prior to 17 August, defendant sometimes kept a rifle in a zipper bag and a handgun in Ellen's living room closet. On Saturday, 18 August, she looked in the zipper bag in the closet and observed a sawed-off shotgun, a handgun and a "long gun."

At about 1:30 a.m. on 21 August 1973, approximately twenty Charlotte police officers, acting on an informant's tip, went to 2725 Craddock Circle and surrounded Apartments 2 and 3. Eight officers with a search warrant entered and searched Apartment 3. In the living room closet they found a .22-caliber rifle, a 30-30 rifle, and a sawed-off 12-gauge shotgun. Shortly thereafter, approximately six officers entered Apartment 2. Defendant, who answered the door, was immediately arrested. The officers also arrested Ronnie Young and two women who were there. The officers found a .32-caliber pistol on a chair near defendant. They also found a "nightstick" belonging to a patrolman which had been missing about two weeks.

Lori Ann Alexander, who had been living with defendant in his apartment since late July 1973, was one of the women arrested there on this occasion. She saw defendant and Ronnie Young leave about 9:30 p.m. on the night of the crimes and saw them return about 12:00 or 12:30 a.m. They did not say where they were going. Ronnie Young and defendant returned together, followed shortly by Zack McCain. Ronnie left after about fifteen minutes and Zack left shortly thereafter.

Lori Ann, defendant, Ronnie Young, and another woman were taken to the police station at approximately 3:00 a.m. on

21 August. At the police station, defendant was given the usual *Miranda* warnings, and signed a waiver of his rights about 9:45 or 10:00 a.m. At that time, defendant denied knowing anything about the murders. Officers questioned defendant at this time for about fifteen minutes. At approximately 2:30 p.m., the officers returned to defendant with a signed statement made by Zack McCain that implicated defendant in the murders. Defendant again waived his rights and signed a full confession at 3:10 p.m. to the effect that he went to the Burger Chef on the night of 17 August with Zack McCain and Ronnie Young, intending to "snatch a money bag" when the restaurant closed. He stated that before going to the Burger Chef they went next door to Apartment 3 and procured a 30-30 rifle, a .32-caliber pistol, and a 12-gauge sawed-off shotgun which he had previously left there. They then went to the Burger Chef and hid behind the dumpster for about an hour until the restaurant closed. They knew the car Steve was driving and Zack pulled some wires loose so the car would not start. While Steve was putting some trash in the dumpster, Zack saw that he did not have a moneybag and said, "God Dammit" and shot the 30-30 rifle twice. Ronnie Young fired the shotgun at the glass in the door of Steve's car and defendant emptied the .32-caliber pistol at the car. They all then ran down the railroad track and continued to defendant's apartment. There defendant, who had expected no shooting, told Zack to get out of his house and Zack left.

Dr. Hobart Wood, the medical examiner for Mecklenburg County, performed an autopsy on the bodies of the victims at approximately 9:00 a.m. on 18 August. He testified that death of each victim was extremely rapid, if not instantaneous, caused from wounds received from a .30-caliber rifle bullet. There were also several small pellet-type wounds on Sharon's body. Dr. Wood did not find any bullet in either body that he would describe as a .32-caliber bullet.

Frederick Mark Hurst, assigned to the Crime Laboratory, Firearms and Tool Markings Division, of the State Bureau of Investigation, performed microscopic tests and test-firings with the 30-30 rifle and sawed-off shotgun. These tests showed that, in his opinion, the empty 30-30 cartridge case found near the scene of the shooting and bullet fragments taken from the bodies of the victims were fired from defendant's 30-30 rifle, and that the empty shotgun shell found on the railroad track was fired from defendant's sawed-off shotgun.

Defendant offered no evidence.

Other facts pertinent to decision are set out in the opinion.

*Attorney General James H. Carson, Jr., and Assistant Attorneys General Lester V. Chalmers, Jr., and Sidney S. Eagles, Jr., for the State.*

*Lacy W. Blue for defendant appellant.*

MOORE, Justice.

**[1]** Before pleading to the bills of indictment, defendant moved to dismiss for failure of the State to afford him a speedy trial. Defendant assigns as error the denial of this motion.

In support of his motion, defendant introduced death certificates of two possible witnesses, Isaac Harris and Mattie Howze. Harris was shot on 15 January 1974, while robbing a store, and died on 19 January 1974. Howze was doused with gasoline and set on fire on 29 December 1973, and died on 30 December 1973. Defendant contends that had his cases been tried earlier, these two persons might have been helpful in the presentation of his defense. He offered no evidence as to what either of these persons would have testified had they been called as witnesses.

In opposition to defendant's motion to dismiss, the State offered the testimony of Thomas F. Moore, Jr., the District Attorney for the Twenty-Sixth Judicial District, who testified in part that from 21 August 1973 to 20 May 1974 approximately 70 weeks of criminal court were held in Mecklenburg County, with an average of about 100 persons awaiting trial at all times; that during this period approximately 1200 cases were disposed of, including between 150 to 200 requiring jury trials; that it takes about four to six months to bring a jail case to trial in the county because of the condition of the docket; that it took two to three months longer to bring this case to trial because of pretrial publicity adverse to the defendant; that the delay was necessary in order to secure a fair trial for the defendant; that there were other criminal cases that did not receive the publicity this case received; that additional time was needed to prepare this case because of the technical legal aspects involved; that the availability of Judge Ervin to try the case, because of the legal technicalities involved, was an important factor involved in setting the case for trial.

The following facts were stipulated by the two Assistant District Attorneys representing the State and counsel for defendant:

"1. That the defendant, Richard Gordon, was arrested on this charge or these charges on August 21, 1973, and has been held in custody without privilege of bond since that date.

"2. That he was given a preliminary hearing in the Mecklenburg County District Court on September 26, 1973, and was bound over to Superior Court for trial on these charges at that time; that no bond was permitted by the District Court.

"3. That on November 5, 1973, the Grand Jury of Mecklenburg County returned a true bill against the defendant, Richard Gordon, in each case.

"4. That the defendant made a motion for speedy trial on April 11, 1974, and that the case was called for trial on Monday, May 20, 1974."

Based on the stipulation, the death certificates, and the testimony of District Attorney Moore, the trial judge made detailed findings of fact and then concluded as a matter of law:

"1. That the defendant has not been deprived of a speedy trial in the constitutional sense and that the defendant is not entitled to have this case dismissed, nor is he entitled to any other relief by virtue of his contention that he has been denied a speedy trial.

"2. That the evidence fails to disclose that the State has acted wilfully or that the State has been guilty of any neglect in its handling of the matter, the Court finding that the case has been called for trial on the first occasion on which it has been docketed and that there is no showing that the State handled this case in any fashion other than in the normal fashion in which serious criminal cases are handled and disposed of in Mecklenburg County Superior Court; that the defendant has failed to show that the fact that the case has not been called for trial prior to May 20, 1974, has in any wise prejudiced the defendant or that he has in any wise been harmed by virtue of the fact that the case was not called for trial prior to this date."

The right to a speedy trial has been considered by this Court in many cases, including *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971); *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Cavallaro,* 274 N.C. 480, 164 S.E. 2d 168 (1968); *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965).

The Supreme Court of the United States has also considered the constitutional guaranty of a speedy trial in various cases, including *United States v. Marion,* 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971); *Dickey v. Florida,* 398 U.S. 30, 26 L.Ed. 2d 26, 90 S.Ct. 1564 (1970); *Smith v. Hooey,* 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969); *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967); *United States v. Ewell,* 383 U.S. 116, 15 L.Ed. 2d 627, 86 S.Ct. 773 (1966); *Pollard v. United States,* 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957); *Beavers v. Haubert,* 198 U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573 (1905).

The length of delay is never *per se* determinative, although a delay of nine months, as in the present case, could contravene the defendant's right to a speedy trial under some circumstances. *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972).

The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Brown, supra; State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972). " . . . But this right is necessarily relative and is consistent with delays under certain circumstances. [Citation omitted.]" *State v. Spencer, supra.*

As we said in *State v. Harrell, supra:*

> "The word *speedy* cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in a particular case. Four factors should be considered in determining the reasonableness of a delay: the length of the delay, the reason for the delay, prejudice to the defendant, and waiver by the defendant. [Citations omitted.]"

The congestion of criminal court dockets has been consistently recognized as a valid justification for delay. Crowded dockets, lack of judges or lawyers, and other factors, make some

delays inevitable. *State v. Brown, supra; State v. George,* 271 N.C. 438, 156 S.E. 2d 845 (1967).

A delay from 21 August 1973, the date on which defendant was arrested, until 20 May 1974, the date of the trial, in view of the congested docket in Mecklenburg County, could hardly be considered "willful or oppressive." *Pollard v. United States, supra.* The burden is clearly on the accused to show that the delay was due to the neglect or willfulness of the prosecution. *State v. Brown, supra; State v. Ball, supra; State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Hollars, supra.* Defendant has failed to carry that burden.

Defendant here apparently acquiesced in the delay until 11 April 1974—the date on which he first asked for a speedy trial. " . . . A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. [Citations omitted.]" *State v. Johnson, supra.*

The record is devoid of any evidence of prejudice although defendant did state that he had expected to call the two deceased persons as possible witnesses. He did not attempt to show what he expected to prove by them had they been available. Nothing in the record suggests that his ability to present his defense was in any way impaired by the delay or by the death of those persons.

Defendant's contention that he has been denied his right to a speedy trial is without merit. This assignment is overruled.

**[2]** Prior to 17 August 1973, defendant sometimes left a rifle or pistol in Apartment 3, occupied by the two sisters, Ellen Gilmore and Brenda Barber, adjoining Apartment 2 in which defendant lived. On 18 August a shotgun, a pistol and a "long gun" in a zipper bag were seen by Ellen Gilmore in the closet of Apartment 3. On 21 August police officers, armed with a search warrant, went to Apartment 3, located and seized these guns. At trial they were identified by Ellen Gilmore as the ones or similar to the ones put in her closet by defendant. The State offered these guns in evidence. Defendant's counsel objected and moved to suppress for the reason that they had been seized in the course of an unlawful and unconstitutional search. This motion was overruled. The denial of this motion is the basis for defendant's second assignment of error.

Defendant contends that although the officers had a search warrant it was not introduced in evidence, and also, contrary to the State's contention, that he does have standing to challenge the introduction into evidence of the 30-30 rifle and other weapons seized in Apartment 3. " . . . The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures. . . . " *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1967).

As stated by Chief Justice Burger in *Brown v. United States,* 411 U.S. 223, 36 L.Ed. 2d 208, 93 S.Ct. 1565 (1973):

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

The search warrant in the present case, although not introduced in evidence at trial, was introduced on the *voir dire* hearing and complied with the provisions of G.S. 15-26. *See State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). Regardless of the validity of the search warrant, however, defendant had no standing to contest the search and seizure in this case. He was not on the premises at the time of the contested search and seizure; he had no proprietary or possessory interest in the premises, nor had he ever claimed any; and he was not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. Hence, the rights of defendant were not invaded by the search of Apartment 3. This assignment is overruled.

**[3]** Defendant next assigns as error the admission into evidence, over objection, of an in-custody inculpatory statement made by him to Charlotte Police Officers Gibson and Thompson after his arrest without a warrant. On defendant's objection to the introduction of the written statement, the trial court conducted an extensive *voir dire* hearing. Officer Gibson, Officer Travis, and the defendant testified. The court, considering this testimony and, by stipulation, the testimony of other officers

who had testified prior to the *voir dire* hearing, made detailed findings of fact, covering nine pages in the record, and in part concluded:

> "That the defendant was properly advised of his constitutional rights in accordance with *Miranda v. Arizona;*
>
> "That considering the totality of the circumstances, the defendant's confession was freely, understandingly, knowingly, and voluntarily made and that it was not the result of undue influence, compulsion, duress, physical abuse, or promise of leniency, and the State is entitled to offer said confession in evidence against the defendant.
>
> "That the defendant knowingly waived his right to counsel, both orally and in writing."

The evidence on the *voir dire* hearing fully supports the findings that the defendant's confession was free and voluntary. Defendant was questioned on three occasions on 21 August. An identification card was filled out between 6:00 and 7:00 a.m. At that time he was not questioned concerning the crimes. At 9:45 a.m., defendant signed a waiver and was asked questions for ten to fifteen minutes. He then denied any knowledge of the murders. Defendant made a full confession about 3:15 p.m., after being questioned for twenty-five to thirty minutes. There was ample evidence that defendant was never promised anything or threatened in any way, and that defendant completely volunteered his statement. These findings, having support in the evidence, are conclusive on appeal. *State v. Thompson,* 285 N.C. 181, 203 S.E. 2d 781 (1974); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481 (1968).

When the officers arrested defendant they had reasonable grounds to believe that defendant had committed the two murders and would evade arrest if not immediately taken into custody. Under these circumstances the arrest was proper, and the confession was in no wise tainted by an illegal arrest. G.S. 15-41 (repealed by Session Laws 1973, Chapter 1286, Section 26, effective July 1, 1975); *State v. Dickens,* 278 N.C. 537, 180 S.E. 2d 844 (1971); *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971).

Assuming, *arguendo,* that the arrest was illegal, this would not have made the statement *ipso facto* involuntary and inadmis-

sible. As Justice Branch stated in an excellent discussion of this point in *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969):

> "Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not *ipso facto* involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. *Voluntariness remains as the test of admissibility.*" (Emphasis added.)

The court, after carefully reviewing all the circumstances, found that the statement in question was voluntarily made. This assignment is overruled.

**[4]** Defendant objected to the introduction into evidence of two fragments of bullets, a small shot pellet, an empty 30-30 cartridge, a fired shotgun shell, a box of shotgun shells, a box of 30-30 shells, a brown bag, and a .32-caliber pistol. Defendant contends that it was error to admit these items because they were obtained by an unreasonable search and seizure.

The fragments of bullets and the shot introduced were taken from the bodies of the victims. The empty 30-30 cartridge was found at the scene of the shooting immediately after the shooting occurred. Tracks leading from the scene of the shooting led to where the empty shotgun shell was found. Both the empty 30-30 cartridge and the empty shotgun shell were identified as having been fired from the rifle and shotgun found in Apartment 3. The box of shotgun shells and the box of 30-30 cartridges were found with the shotgun and rifle. The .32-caliber pistol was found in Apartment 2 on a chair about two feet from where defendant was standing when arrested.

First, we note that, except for the .32-caliber pistol, these items were so located that defendant lacked standing to complain of any search, legal or otherwise. *Brown v. United States, supra; State v. Craddock, supra.* As to the .32-caliber pistol, it was seized incident to a lawful arrest and was in plain view of the arresting officer and was thus properly seized. *Chimel v. California,* 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034, *reh. den.* 396 U.S. 869, 24 L.Ed. 2d 124, 90 S.Ct. 36 (1969); *Harris v. United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *Preston v. United States,* 376 U.S. 364, 11 L.Ed. 2d 777,

84 S.Ct. 881 (1964); *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974). We find no merit whatever in this contention.

**[5]** At the close of the evidence defendant moved for judgment as of nonsuit. This motion was overruled and defendant assigns this as error.

"If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt." 2 Strong, N. C. Index 2d, Criminal Law § 106 (1967). *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506 (1974). An examination of the evidence in this case convinces us that it was properly submitted to the jury.

While the evidence does not show that the shots fired by defendant from the .32-caliber pistol were the ones that killed Sharon Williams and Steve Helton, the record discloses that the defendant was present at the scene for the purpose of aiding and abetting his companions in the commission of the crimes, and that he actively participated by firing his pistol into the car where one of the deceased was sitting. This was sufficient to require the submission of his cases to the jury. *See State v. Rankin,* 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Terry,* 278 N.C. 284, 179 S.E. 2d 368 (1971); *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95 (1967). This assignment is overruled.

**[6]** Defendant finally contends that the death penalty was unconstitutional at the time of the commission of these crimes. We have carefully considered and rejected defendant's argument in numerous cases; *e.g., State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). We reaffirm our position as there set out. No useful purpose would be served by further elaboration here.

It is noted that the court's charge was not brought forward in the record. Therefore, it is presumed that the jury was clearly charged as to the law arising from the evidence as required by G.S. 1-180. 3 Strong, N. C. Index 2d, Criminal Law § 158 (1967); *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453 (1970); *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305 (1968).

In view of the seriousness of the charges, we have carefully examined each of defendant's assignments of error. Our examination of the entire record discloses that the defendant has had a fair trial, free from prejudicial error.

No error.

Chief Justice SHARP dissents as to the death sentence and votes to remand for the imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in *State v. Avery,* 286 N.C. 459, 472, 212 S.E. 2d 142, 149 (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. JOHNNY H. BOYD

No. 7

(Filed 6 May 1975)

1. **Jury § 6— examination as to death penalty views**

The trial court in a first degree murder and first degree burglary case did not err in permitting the State to question prospective jurors about their beliefs on capital punishment.

2. **Jury § 7— death penalty views — challenge of jurors for cause proper**

The trial court did not err in allowing the State's challenges for cause of seven prospective jurors who stated that because of their personal opposition to capital punishment they could not under any circumstances return a verdict the consequences of which would be the imposition of the death sentence.

**3. Jury § 7— challenge for cause — disallowance — preservation of exception**

By exhausting his peremptory challenges and thereafter asserting his right to challenge peremptorily an additional juror defendant preserved his exception to the earlier denial of his challenge for cause of a juror.

**4. Jury § 7— challenge for cause — disallowance proper**

The trial court did not err in denying defendant's challenge for cause of a juror who stated positively that she believed in capital punishment if the crime "was proved by the evidence," and she would have to be satisfied of his guilt beyond a reasonable doubt.

**5. Jury § 7— peremptory challenges — number in capital case**

G.S. 9-21(a) and (b) allot peremptory challenges to both the State and the defendant on the basis of the number of defendants and not the number of charges against any one defendant; therefore, the trial court properly allowed the defendant who was charged with first degree murder and first degree burglary fourteen rather than twenty-eight peremptory challenges.

**6. Homicide § 12— felony-murder — prosecution for burglary and murder — no election required**

The trial court did not err in refusing to require the State to elect prior to trial whether it was proceeding on the felony-murder rule or on both indictments, one for murder and one for burglary, without recourse to the felony-murder rule.

**7. Homicide § 20— color photograph of deceased — admissibility to illustrate coroner's testimony**

The trial court did not err in allowing into evidence a color photograph of the deceased's body for the purpose of illustrating the coroner's testimony though there was available a black and white photograph depicting essentially the same scene.

**8. Criminal Law § 57— revolver seized at defendant's arrest — necessity for showing chain of custody**

Where officers seized a .32 caliber revolver in plain view at the time of defendant's arrest and recorded the serial number of the revolver, and a firearms expert identified the pistol at trial by its serial number and make, it was unnecessary for the State to show a chain of custody of the weapon in order to put it and the ballistics testimony about it into evidence.

**9. Burglary and Unlawful Breakings § 5— first degree burglary — intent to steal and intent to murder — necessity for proving both**

Burglary indictment charging that defendant "did break and enter, with intent, the goods and chattels . . . to steal, take and carry away *and* with intent to commit the crime of murder . . . " did not require the State to prove both the intent to steal and the intent to murder in order to prove defendant's guilt of burglary.

10. **Burglary and Unlawful Breakings § 6; Criminal Law §§ 135, 138— first degree burglary — instruction as to death penalty**

The trial court did not err in instructing the jury that as a consequence of a verdict of guilty of burglary in the first degree the defendant would be sentenced to death.

11. **Constitutional Law § 36; Burglary and Unlawful Breakings § 8— first degree burglary — constitutionality of death sentence**

Death penalty imposed in a first degree burglary case is constitutional.

Chief Justice SHARP and Justices COPELAND and EXUM dissent as to death sentence.

DEFENDANT appeals from the judgment of *Grist, J.*, July, 1974 Special Criminal Session, LINCOLN Superior Court.

Defendant, Johnny H. Boyd, was arrested on January 26, 1974, and charged in separate warrants with first degree murder of Augusta Pearl Henderson and first degree burglary of her dwelling, both alleged to have occurred on January 22, 1974. True bills of indictment were returned in both cases. On the State's motion and over defendant's objection both bills of indictment were consolidated for trial.

The State's evidence tended to show that Augusta Pearl Henderson, an 84-year-old retired school teacher who lived alone, was killed during the course of a burglary of her home in the early morning hours of January 22, 1974. Her home was discovered ransacked and she was found in her bed on the afternoon of January 22, dead from multiple bullet wounds. In a signed statement made to police officers after his arrest, introduced in evidence against him, defendant admitted his participation in the burglary and implicated two other persons. He denied any involvement in the killing, stating that this had occurred while he was searching another part of the house for money and valuables.

Various witnesses testified about two weapons used in the shooting. Paul Brown stated that defendant had borrowed his .22 caliber rifle the day before the burglary and returned it the next day after the crime had taken place. Coleman Kendrick identified a .32 caliber revolver found in defendant's possession when he was arrested as one belonging to Augusta Pearl Henderson. Expert testimony by B. J. Sloan, a firearms examiner, revealed that these were the two weapons with which Miss Henderson was shot and killed. Sloan testified that through the use

of a comparison microscope he examined at .32 caliber bullet taken from the deceased's body and another .32 caliber bullet that he test-fired from the revolver. Marks on the bullets made by the inside of the barrel matched, indicating that the two bullets were fired by the same weapon. Sloan also examined a spent .22 caliber cartridge casing found in Miss Henderson's bedroom with one test-fired from the rifle. The markings on the two cartridges made by the firing pin and the extractor indicated that the two cartridges had been fired from the same weapon. All other pertinent facts will be discussed in the body of the opinion.

Defendant declined to present evidence.

Judge Grist submitted the case to the jury on charges of first degree burglary and second degree murder. The jury returned a verdict of guilty of first degree burglary but announced that it was hopelessly deadlocked on the second degree murder charge. Judge Grist declared a mistrial on the murder charge and sentenced defendant to death on the burglary conviction.

*Attorney General Rufus L. Edmisten and Assistant Attorney General James E. Magner, Jr., for the State.*

*Robert C. Powell for defendant appellant.*

EXUM, Justice.

I

**[1]** Defendant's first four assignments of error relate to the selection of the jury. He contends that the State should not have been permitted to question prospective jurors about their beliefs on capital punishment. The argument is without merit. We continue to believe as we said in *State v. Crowder,* 285 N.C. 42, 46, 203 S.E. 2d 38, 41 (1974):

> "In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment."

*See also* G.S. 15-176.3.

**[2]** Defendant next says it was error to allow the State's challenges for cause of seven prospective jurors who stated that because of their personal opposition to capital punishment they

could not under any circumstances return a verdict the consequences of which would be the imposition of the death sentence. Defendant argues that a jury deprived of such persons is "conviction-prone" and biased in favor of the prosecution on the question of guilt. This argument has been consistently rejected by a majority of the United States Supreme Court, *Bumper v. North Carolina,* 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788 (1968); *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), and unanimously by this Court. *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142 (1975) and cases cited; *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975) and cases cited; *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968), cert. denied, 393 U.S. 1042, 21 L.Ed. 2d 590, 89 S.Ct. 669 (1969). We adhere to our former rulings on this point.

**[3, 4]** Defendant contends that his challenge for cause of Juror Graeber should have been allowed. What transpired as revealed by the record follows (questions unless indicated otherwise are by defendant's counsel):

"Q: Mrs. Graeber, do you feel like Mr. Boyd must have done something to be here, ma'am? Honestly?

"A: Well, I don't think they just go out and arrest someone without cause or reason.

"Q: So you think he must have done something in order to be here, committed some crime?

"A: I have a few mixed emotions about it.

"Q: You replied to the Solicitor's question about capital punishment—you replied that you had no scruples whatsoever—I thought by your answer that you might be prejudiced against him, and if you are, we'd like to know, of course.

"A: Well, I just feel very strongly for capital punishment, if the person, if it was proved of rape, murder, burglary.

"Q: And that would be without consideration of the circumstances of any particular case?

"A: I said if it was proved, by the evidence.

"Q: Just across the board.

"A: On rape, burglary, murder.

"Q: Let's go back to your feelings about Mr. Boyd and the fact that you say the police don't arrest somebody without reason. Do you feel that as he sits here, in your mind, he is innocent and will remain so until such time as the State proves beyond a reasonable doubt all the elements of the crimes charged against him?

"A: Yes, because he said so, and I usually take someone at their word until—

"Q: So, then, you can detach yourself to the point that you don't feel like he has done anything at the present time, is that right?

"A: I suppose so.

"Q: I don't mean to belabor it, but—

"A: I'm sorry, but I do have mixed emotions about it—I'm very sorry.

"Q: I'd like to challenge her for cause if it please the Court.

"COURT: Are you of the opinion that the police only arrest people who are guilty of something?

"A: No, sir, no, sir.

"COURT: And do you feel that just because a person is accused of a crime, they must be guilty of something or they wouldn't be here? Now, think about that.

"A: I have tried to think about it.

"COURT: Ma'am?

"A: I have tried to think about it, but I couldn't say the man is guilty until the circumstances proves it one hundred percent.

"COURT: That's what it's all about. As you see the defendant, now, the fact that he's been indicted, there's no evidence that he has committed any offense, is it?

"A: That's right.

"COURT: And before—so far as you're concerned, before you'll convict him of any crime, no matter how significant, you'd have to be satisfied beyond a reasonable doubt of all of the evidence necessary to convict him of that crime. Would you, or wouldn't you?

"A: I would have to be, yes.

"COURT: You want to question her any further?

"Q: Yes, sir. Now, Mrs. Graeber, you have heard, also, what has been said about the possible evidence arising on the offense of voluntary intoxication. Have my statements as to that prejudiced you in any way against the defendant?

"A: No, sir.

"Q: Are you prejudiced against the use of alcohol and narcotics to the extent that you could not follow the Court's charge, if the defense arises?

"A: No, sir.

"Q: You feel that after talking with the Judge and with me, that Mr. Boyd is innocent as he sits here, is that right, at the present time?

"A: Yes, sir.

"Q: You're sure of that?

"A: Yes, sir.

"Q: You're sort of smiling.

"COURT: Are you real sure, Mrs. Graeber?

"A: Yes, sir.

"COURT: If you serve on this jury, it will be one of the most important things that you do in your lifetime. I want you to be sure about your answer, and there can't be much equivocation one way or the other.

"A: Right.

"COURT: Do you feel that the defendant, as he sits beside his lawyer, that he is innocent and it's the question for

the State to prove him guilty beyond a reasonable doubt before you will find him guilty of any offense?

"A: Yes, sir.

"Defense counsel then questioned Mrs. Wagoner and Mrs. Grier.

"The Court then stated: Let the record show that you made a challenge for cause which was denied and Mrs. Graeber is excused peremptorily, making your fourteenth challenge. What do you say about the others? EXCEPTION No. 45."

Later during the jury selection defendant challenged Juror Ferris for cause and Juror Blackburn peremptorily. Both challenges were denied. By exhausting his peremptory challenges and thereafter asserting "his right to challenge peremptorily an additional juror" defendant preserved his exception to the denial of his challenge for cause of Juror Graeber. *State v. Allred,* 275 N.C. 554, 563, 169 S.E. 2d 833, 838 (1969). Defendant urges that Juror Graeber was biased against him merely because he had been arrested and charged, and that she expressed some difficulty in applying the "presumption of innocence" principle. While some of Mrs. Graeber's answers were equivocal, she stated positively: (1) that she believed in capital punishment if the crime "was proved by the evidence"; (2) "I couldn't say the man is guilty until the circumstances proves [sic] it one hundred percent"; and (3) that she would have to be satisfied of his guilt beyond a reasonable doubt. "Each party to a trial is entitled to a fair and unbiased jury. Each may challenge for cause a juror who is prejudiced against him. A party's right is not to select a juror prejudiced in his favor but to reject one prejudiced against him." *State v. Peele, supra,* 274 N.C. at 113, 161 S.E. 2d at 573 (1968). Here there is no showing of prejudice against defendant on the part of Juror Graeber. At most her answers reveal a fleeting quibble regarding the effect of defendant's having been arrested and formally charged. Judge Grist conscientiously pursued this point and her responses both to him and to further questions by defendant's counsel plainly sustain the implied finding by Judge Grist that she would require the State to prove defendant's guilt beyond a reasonable doubt. In *State v. Allred, supra,* we found reversible error in the denial of defendant's challenge for cause of a juror where "there was no basis for a finding, if such had been made, that

[the juror] was acceptable as a disinterested and impartial juror." 275 N.C. at 563, 169 S.E. 2d at 838. Here, to the contrary, there is ample basis for such a finding. *See State v. Watson,* 281 N.C. 221, 227-28, 188 S.E. 2d 289, 293 (1972); G.S. 9-14.

**[5]** Defendant's argument that he should have been allowed fourteen peremptory challenges for each capital charge against him, giving him twenty-eight such challenges in all is not persuasive and is contrary to the plain language of G.S. 9-21(a): "In all capital cases each defendant may challenge peremptorily without cause 14 jurors and no more." General Statute 9-21(b) provides, furthermore, that "[i]n all capital cases the State may challenge peremptorily without cause nine jurors for each defendant and no more." It is clear that these statutes allot peremptory challenges to both the State and the defendant on the basis of the number of defendants and not the number of charges against any one defendant. The murder and burglary bills of indictment were properly consolidated, G.S. 15-152; *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245 (1964), and once consolidated they became one case for the purpose of trial. The result for trial purposes is the same as if defendant had been tried simultaneously on several counts in one bill of indictment. *State v. Alridge,* 206 N.C. 850, 175 S.E. 191 (1934).

In *Alridge* three separate non-capital bills of indictment were returned against each of four defendants. The cases were consolidated without objection for trial. The defendants moved to be allowed 12 peremptory challenges apiece, or four challenges per bill of indictment. The governing statute as quoted in the opinion provided that in non-capital cases "every person on trial shall have the right of challenging peremptorily, and without showing cause, four jurors and no more." The trial court denied the motion, and this Court found no error. We held that each defendant was entitled to only four peremptory challenges, saying:

> "The theory of the law is that when two or more indictments for the same offense are consolidated, they are to be treated as separate counts of the same bill. *S. v. Stephens,* 170 N.C., 745, 87 S.E., 131; *S. v. Lewis,* 185 N.C., 640, 116 S.E., 259; *S. v. Malpass,* 189 N.C., 349, 127 S.E., 248;

> *S. v. Beal,* 199 N.C., 278, 154 S.E., 604. Consequently, if there is but one bill containing several counts, it would seem manifest that a defendant is not entitled to four peremptory challenges on separate counts in a bill, but that he should be allowed four challenges at the trial on the consolidated bill." 206 N.C. at 852, 175 S.E. at 192.

That defendant here objected to the consolidation of the cases does not distinguish this case in principle from *Alridge.* That objection raises only the question of whether the cases were properly consolidated. That these are capital cases again makes no material difference. See *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975) where we held it to be error, albeit harmless, for the trial judge to allow the State twenty-two and the defendant thirty-four peremptory challenges when two capital cases and one non-capital case were consolidated for trial.

II

**[6]** The denial of defendant's motion before trial that the State be required to elect whether it was proceeding "on the felony-murder rule or . . . on both indictments without recourse to the felony-murder rule" constitutes defendant's fifth assignment of error. While the murder indictment itself does not appear in the record it is set out verbatim in Judge Grist's instructions to the jury as alleging that the defendant did kill Augusta Pearl Henderson "with premeditation and deliberation, and of his malice aforethought," the form prescribed by G.S. 15-144. This indictment was sufficient to support a verdict of guilty of first degree murder on the theory that the killing was with malice and after premeditation and deliberation or in the perpetration of some other felony within the meaning of G.S. 14-17. *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972) ; G.S. 15-144 and annot. thereunder. Since the murder and burglary charges were consolidated for trial the State could proceed on each indictment separately without relying on the felony-murder rule. *State v. Thompson,* 285 N.C. 181, 203 S.E. 2d 781 (1974). Under this procedure had the defendant been convicted of both first degree murder and first degree burglary he could have been sentenced on both convictions. *Id.* at 187-88, 203 S.E. 2d at 785. If the first degree murder case had been submitted to the jury on the theory that the killing took place during the perpetration of the burglary and a conviction obtained thereby, the burglary charge would have been "merged into and made

a part of the first degree murder [charge]," *Id.* at 188, 203 S.E. 2d at 785, and "no additional punishment [could] be imposed for [the burglary] as an independent criminal offense." *State v. Williams,* 284 N.C. 67, 75, 199 S.E. 2d 409, 414 (1973). Judge Grist, after dismissing the first degree murder charge, submitted this case to the jury on each indictment separately without recourse to the felony-murder rule. We do not believe that the State was required to elect upon which theory it would proceed prior to the introduction of evidence. The evidence, theoretically, might have supported both, either, or neither theories. *See State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972); *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931). It clearly supported application of the felony-murder rule. *See State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818 (1972); *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1972), cert. denied, 409 U.S. 888, 34 L.Ed. 2d 145, 93 S.Ct. 194 (1972); *State v. Fox, supra.* In not relying on the felony-murder rule, Judge Grist was probably trying to avoid application of the merger doctrine. In any event the lack of a conviction on the murder charge makes this question moot.

III

**[7]** Objections to the introduction of certain evidence form the bases for assignments of error six, seven and eight. Defendant contends that the admission into evidence of a color photograph of the deceased showing the wounds which caused her death when there was a black and white photograph available depicting essentially the same scene was error. We cannot agree. Coroner McLean testified on *voir dire* that although the black and white photo was "better" and "larger" the color photograph did enable one to better distinguish blood stains from bullet holes on the deceased's bedcovers. The color photograph was used only to illustrate the testimony of the coroner. Part of his testimony dealt with comparing the bullet wounds in Miss Henderson's body with bullet holes he found in the bedcovers. "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 properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony." *State v. Atkinson,* 275 N.C. 288, 311, 167 S.E. 2d 241, 255 (1969); *accord, State v. Doss,* 279 N.C. 413,

183 S.E. 2d 671 (1971); *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955); *State v. Perry,* 212 N.C. 533, 193 S.E. 727 (1937).

Defendant objects to the admission in evidence of a .32 caliber "Spain" revolver (State's Exhibit No. 6) and expert testimony concerning ballistic tests performed with that weapon. The objection to the expert testimony is based on defendant's objection to the admission of the revolver. Defendant concedes that the expert testimony is admissible if the revolver was properly identified as the one found in his possession. The sole basis for defendant's objection to the admission of the revolver is his contention that a chain of custody between its seizure and its introduction into evidence was not established. Six witnesses testified to establish the chain of custody. Defendant concedes in his brief that "[e]ach of these witnesses other than Tony Wilson was able to indicate a positive identification of this pistol." Wilson, an identification specialist for the Gaston County Rural Police, testified on direct examination:

> "At the time I was an ID officer, I received certain evidence involving this case from Mr. Davis and others. I can identify State's Exhibit No. 6. I got that from Detective Davis. I received that pistol from Detective Davis on the 26th approximately 10:30 in the morning. . . .
>
> "I can identify State's Exhibit No. 7, a .22 rifle. I received that from Captain Homesley on the 26th. Along with the rifle and the pistol and other evidence, they were all taken to the Charlotte Crime Lab and at that time turned over to Mr. Sloan.
>
> "That is Mr. Sloan. I turned that over on February 1. During the time I had it, it was locked up in the evidence room, Gaston Rural Police Evidence Room. I was the only one that had a key to the evidence room. I'm the evidence officer. It had not been tampered with at all.
>
> "I took State's Exhibits 6, the pistol, 7, the rifle, 8, the box, 4, another box, 5 another box, that has been previously identified as to what is in them, and 8, the vial, over to this gentleman."

On cross-examination Wilson stated:

> "I received this gun from Mr. Davis, also. There is no other particular way I know it is the gun I received from

Mr. Davis other than it looks like the gun, the serial number on the bottom of it. I checked the number and it's recorded in the large folder. I haven't cross checked that since I've been here today. *I just assume that's the one he gave to me. It looks like it.*" (Emphasis supplied.)

Defendant seizes upon the emphasized portion of Wilson's testimony on cross-examination to support his proposition that Wilson was not able to make a positive identification of State's Exhibit No. 6 as being the weapon he received from Davis.

**[8]** The argument fails for two reasons. Defendant was found by arresting law enforcement officers—Thomas Reynolds, Jackie Barrett and Thomas McDevitt—underneath a single bed in an upstairs apartment. As he got out from under the bed a .32 caliber revolver was found on the floor underneath the head of the bed. Barrett examined the revolver at the scene and there wrote down the serial number. He identified State's Exhibit No. 6 as having "the same number that I have here where I wrote it down that day. . . . I made that notation on the same day I got the pistol. That pistol has the same serial number that I have here which I got off the butt of the gun. . . . [T]his type weapon is the first one I ever seen like it. I have not seen any others like it since then." Witness B. J. Sloan, a firearms expert, also identified State's Exhibit No. 6 by its serial number and make as the .32 caliber revolver upon which he made ballistic comparisons. With this kind of positive identification of State's Exhibit No. 6 by serial number and make it was unnecessary to show a chain of custody of the weapon in order to put it and the ballistics testimony about it into evidence. *See State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972); *State v. Fox, supra; State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645 (1958); *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936); McCormick, Evidence, § 212 at 527 (2d ed. 1972); 1 North Carolina Evidence 356, n. 11 (Brandis Revision 1973).

Even if the chain of custody type identification were required, Wilson's statements on cross-examination that he "assumed" the pistol was the one given him by Davis and that "it looks like it" would not vitiate his identificaton of the pistol so as to break the chain. See *State v. Simmons, supra,* and cases cited therein. These statements go at most to the weight to be accorded his testimony by the jury.

IV

Although defendant's ninth assignment of error is that his confession was improperly allowed in evidence, his brief concedes that he "is unable to make any persuasive argument concerning error on the part of the trial court in this respect." Since this is a capital case we have, at defendant's request, scrutinized the *voir dire* testimony relating to the admissibility of the confession. This portion of the trial covers 60 pages of the record. Judge Grist made extensive findings of fact, supported by the evidence, which in turn support his conclusions that the confession was made freely and voluntarily after the defendant had been duly advised of his constitutional rights, which he knowingly and understandingly waived before making his statement. There was no error in admitting the confession.

V

**[9]** The burglary indictment reads in part that defendant "did break and enter, with intent, the goods and chattels . . . to steal, take and carry away *and* with intent to commit the crime of Murder . . . . " (Emphasis added.) Defendant contends: (1) that for conviction under this indictment the State was required to prove both the intent to steal *and* the intent to murder; (2) there was no evidence that defendant intended to murder when he broke and entered the house; and (3) his motions for nonsuit should have been allowed. His tenth assignment of error is directed to Judge Grist's denial of these motions. Defendant has abandoned assignment of error eleven. Assignments of error twelve and thirteen are that Judge Grist should have instructed the jury to find both intents alleged before returning a guilty verdict on the burglary indictment. Guided by the authorities that follow we overrule assignments of error ten, twelve and thirteen.

*State v. Christmas,* 101 N.C. 749, 8 S.E. 361 (1888), is instructive on these questions. There defendant was indicted for feloniously entering the dwelling house of T. B. Lyman with intent to steal "the goods, chattels and money of . . . T. B. Lyman, and also the goods, chattels and money of Anna M. Lyman, in the said dwelling-house then and there being." The evidence tended to show that only the property of Anna M. Lyman was stolen. The trial court instructed the jury that they could convict the defendant if they found beyond a reasonable doubt that he entered the house with intent to steal property

of either Mr. or Mrs. Lyman. A motion in arrest of judgment on the ground that the indictment charged two distinct offenses was denied by this Court and we found no error in the trial.

Analogous rulings have been made in cases arising under G.S. 14-54 which make it a felony if one "breaks *or* enters any building with intent to commit any felony or larceny therein." (Emphasis supplied.) It has long been the law in this State in prosecutions under this statute and its similar predecessors that where the indictment charges the defendant with breaking *and* entering, proof by the State of either a breaking *or* an entering is sufficient; and instructions allowing juries to convict on the alternative propositions are proper. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297 (1965); *State v. Vines,* 262 N.C. 747, 138 S.E. 2d 630 (1964); *State v. Best,* 232 N.C. 575, 61 S.E. 2d 612 (1950); *State v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201 (1947); *State v. Houston,* 19 N.C. App. 542, 199 S.E. 2d 668 (1973), cert. denied, 284 N.C. 426, 200 S.E. 2d 662 (1973); N.C.P.I. Crim. 214.30.

In *State v. Simmons, supra,* defendant was tried upon a bill of indictment charging him with first degree murder "committed in the perpetration of the felony crime of burglary and the attempted perpetration of the felony crime of robbery." The defendant there complained of the trial judge's instructions which permitted the jury to find him guilty of first degree murder if it found that the killing was committed in the perpetration of a burglary or an attempted robbery. Justice Branch, for the Court, wrote:

> "The requirement that the indictment in such a case as this one be couched in the conjunctive rather than the disjunctive is a sound rule of criminal pleading designed to inform the defendant of the crime for which he stands charged. *State v. Sellers,* 273 N.C. 641, 161 S.E. 2d 15; 42 C.J.S. *Indictments and Information* § 166; 41 Am. Jur. 2d *Indictments and Information* § 96. However, where, as here, the felonies charged clearly constitute part and parcel of the same transactions, we perceive no useful purpose in requiring that the proof must indicate the commission of *both* crimes. A finding that the homicide was committed in the perpetration of *either* crime suffices to support the conviction of murder in the first degree. We hold that it was not prejudicially erroneous for the trial judge to instruct that sufficient evidence of the perpetration of either felony

would suffice to bring defendant within the felony-murder provision of G.S. 14-17." 286 N.C. at 695, ..... S.E. 2d at .....

We, therefore, hold that "[a]n indictment for burglary may lay the offense with several intents, as with intent to steal and intent to murder or to rape, as by alleging the several intents conjunctively in the same count." 12 C.J.S. Burglary § 32(a). Such an indictment is not duplicitous. It charges only one offense. Furthermore, when more than one intent is alleged the State need prove only one. It may prove more than one. Upon evidence of more than one intent the trial judge may submit the case to the jury on alternative theories. Cases from other jurisdictions which have considered these propositions have so held. *U. S. v. Thomas,* 444 F. 2d 919 (D.C. Cir. 1971); *State v. Berenger,* 161 N.W. 2d 798 (Iowa 1968); *State v. Fox,* 80 Iowa 312, 45 N.W. 874 (1890); *Hardeman v. State,* 15 Okla. Crim. 229, 175 P. 948 (1918). Judge Grist was apparently of the opinion that there was evidence only of an intent to commit larceny. He submitted the case to the jury on that theory alone. In this there was no error of which the defendant can complain.

VI

**[10]** Defendant's assignment of error fourteen brings forward his contention that Judge Grist should not have instructed the jury that as a consequence of a verdict of guilty of burglary in the first degree the defendant would be sentenced to death. There was no error in this instruction. We fail to see how it could prejudice the defendant. We held in *State v. Honeycutt, supra,* that it was not error for prospective jurors to be informed during *voir dire* examination in a capital case that the consequences of conviction would be a sentence of death. We have agreed with the contention of defendants that refusal to allow inquiry of prospective jurors as to their beliefs and attitudes toward capital punishment was error prejudicial to them. *State v. Bell,* 287 N.C. 248, 214 S.E. 2d 53 (1975); *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974). General Statute 15-176.4, in effect at the time of this trial, requires that the court in a capital case "upon request of either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty. . . ." Although the record does not reveal that a request for such an

instruction was made by either the State or the defendant it was not error to give such an instruction even in the absence of a request. See *State v. Britt, supra,* where we held that in a capital case if the jury appeared confused as to the possible consequences of its verdict, the trial judge's failure to instruct that a guilty verdict would result in a mandatory death sentence was error prejudicial to the defendant.

**[11]** Finally, defendant contends that it was unlawful to impose the death penalty in this case. This Court has heretofore considered and a majority has consistently rejected all of his arguments on this point and does so here. *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975) ; *State v. Avery, supra; State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975) ; *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974) ; *State v. Honeycutt, supra; State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974) ; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974) ; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974) ; *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974) ; *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973).

We have carefully considered the entire record and all of defendant's assignments of error. In his trial and conviction we unanimously find no error. A majority of the Court also hold that the sentence of death should be sustained.

For the reasons stated in the dissenting opinions in *State v. Williams,* 286 N.C. 422, 434-441, 212 S.E. 2d 113, 121-125 (1975), Chief Justice Sharp, Justices Copeland and Exum dissent from that portion of this opinion affirming the imposition of the death sentence and vote to remand for the imposition of a sentence of life imprisonment.

No error in the trial.

Death sentence sustained by majority vote.

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STATE OF NORTH CAROLINA v. RUFUS COLEY WATSON, JR.

No. 65

(Filed 6 May 1975)

**1. Homicide §§ 6, 27— mere words doctrine — instructions**

The trial court properly instructed the jury that mere words will not excuse a crime of murder and that words and gestures alone, where

no assault is made or threatened, do not constitute adequate provocation to reduce murder to manslaughter.

2. **Homicide § 28— words calculated to provoke assault — failure to instruct**

The trial court in a homicide prosecution did not err in failing to instruct the jury on the effect of language "calculated and intended" to bring on an assault where there was no evidence that defendant killed the deceased in self-defense and all the evidence tended to show that the fatal attack was brought on by the continued verbal abuses directed by deceased toward defendant.

3. **Criminal Law § 114— instructions — unwritten prison code**

In a prosecution for homicide committed while defendant and deceased were prison inmates, the trial court did not err in instructing the jury that the case is to be tried under the laws of the State and not under the customs and unwritten code existing within the prisons.

4. **Homicide § 25— instructions — cool state of blood**

The trial court in a first degree murder case did not err in instructing that a cool state of blood "does not mean the absence of passion or emotion, anger or emotional state, unless the emotion was such at the time to disturb the defendant's faculties and reason to the extent that he could not form a deliberate purpose and control his actions."

5. **Criminal Law § 34— evidence of another crime — admissibility**

In this homicide prosecution, evidence as to defendant's possession of a kitchen paring knife in violation of prison rules was admissible as circumstantial evidence of a planned killing.

6. **Criminal Law §§ 65, 71—shorthand statement of fact**

In this homicide prosecution, testimony describing the way defendant crossed a corridor and approached deceased as "Spirit of the moment" was admissible as a shorthand statement of fact or as lay testimony on the mental capacity and condition of defendant; however, the exclusion of such testimony did not constitute prejudicial error.

7. **Criminal Law § 113— summary of evidence — expression of opinion — misstatement**

In this homicide prosecution, the trial court did not imply that deceased had withdrawn from the controversy in its summary of the evidence, nor did the court commit prejudicial error in misstating the time interval between decedent's departure from defendant's bunk in a prison dormitory and defendant's attack on decedent.

DIRECT appeal pursuant to G.S. 7A-27(a) to review defendant's trial before *Bailey, J.*, at the 7 October 1974 Criminal Session of WAKE County Superior Court.

On 20 May 1974 the Wake County Grand Jury returned a "true bill" of indictment charging defendant, Rufus Coley

Watson, Jr. (hereinafter sometimes referred to as Watson or as defendant), with the first-degree murder of Roger Dale Samples (hereinafter sometimes referred to as Samples or as decedent) on 13 May 1974. At the 7 October 1974 Criminal Session of Wake County Superior Court defendant was arraigned and entered a plea of not guilty. Thereafter, following the presentation of the State's case, defendant offered no evidence and rested. The jury returned a verdict finding defendant guilty of second-degree murder. Judge Bailey entered judgment on this verdict sentencing defendant to life imprisonment, said sentence to commence at the expiration of a sentence defendant was then serving.

At trial, the State's evidence, summarized except where quoted, tended to show the following.

The killing occurred at the Polk Youth Center unit of the North Carolina Department of Correction. This unit is located in Raleigh. Specifically, the incident occurred in I-Dorm, which constituted one wing of the 300 building at Polk. I-Dorm can be described as an open-type single-story structure similar in interior design to the traditional army barrack. On 13 May 1974 there were approximately forty inmates housed in I-Dorm. They slept in twenty double bunk beds, three feet apart, ten of which were located on each side of the large rectangular sleeping area. An aisle, seven feet in width, separated the two rows of beds. It appears from the record that the majority of the I-Dorm inmates were assigned to kitchen duty at Polk. Both defendant and decedent lived in I-Dorm and worked in the kitchen.

At the time of this incident, defendant, a black, was twenty-years-old. He was serving a twenty-five year prison sentence on judgment imposed at the October, 1972, Session of Rockingham County Superior Court upon his plea of guilty to second-degree murder. The decedent, Samples, was white. Neither Samples' age nor the basis for his incarceration appears from the record.

Five inmates, previously sequestered, were called as witnesses for the State. All were residents of I-Dorm on the day in question. Although there were some discrepancies in how they recalled the incident, their testimony as to the events leading up to the killing was essentially the same. This combined

testimony, summarized in factual form, except where quoted, is as follows.

The defendant was called "Duck" by his fellow prisoners in I-Dorm. Samples, the decedent, was known as "Pee Wee." Although Samples was referred to as "Pee Wee," there appeared to be no relation between this nickname and his physical size. In fact, he was a strong man who worked out daily with weights.

The "hearsay" among the residents of I-Dorm was to the effect that Watson and Samples were "swapping-out." "Swapping-out" is a prison term that means two inmates are engaging in homosexual practices. Generally, prisoners that are "swapping-out" try to hide the practice from their fellow inmates. In particular, they try to hide it from any "home-boys" that may be in their particular unit. A "home-boy," in the prison vernacular, is a fellow inmate from one's own hometown or community. One of the State's witnesses, Johnny Lee Wilson, a resident of I-Dorm on the date of the offense, was Samples' "home-boy."

It appears that Watson and Samples had been "swapping-out" for several months. Approximately a month or so prior to the date of the killing, Watson and Samples had engaged in a "scuffle" while working in the prison kitchen. This appears to have been nothing more than a fist-fight. Samples was the winner. Although it is by no means clear from the record, it appears that this "scuffle" arose out of Samples' suspicion that Watson had been "swapping-out" with another prisoner.

At approximately 4:30 p.m. on the afternoon of the killing, Johnny Lee Wilson, Samples' "home-boy," saw Watson and Samples sitting together on a bunk in the back of I-Dorm. At this time, "they were close talking, they were close." Apparently, assuming that they were about to "swap-out," and not wanting to embarrass Samples, Wilson quickly turned around and left the dorm.

The authorities at Polk Youth Center conduct a "head count" every evening at 7:30 p.m. At this time, all of the prisoners are lined up in front of their respective dormitories. Following the count, the prisoners usually return to their respective dorms and watch television, write letters, etc. The lights in all of the dorms are "dimmed" at approximately 10:00 p.m. This is what the prisoners refer to as "lights out." During the remainder of the night, all the dorms remain partially lighted.

On the evening of 13 May 1974, following the "head count," Watson and Samples reentered I-Dorm. Thereafter, from approximately 8:00 p.m. until 10:00 p.m. (lights out), they were observed sitting on two adjacent bottom bunks, one being the bed directly under Samples' top bunk, "shooting the breeze."

Shortly before the lights were to be dimmed (10:00 p.m.), Watson and Samples began to argue. After several minutes, Watson got up and walked across the aisle, a distance of approximately seven feet, to his bunk. Samples subsequently followed him and renewed the dispute. At this time, both parties were seated on Watson's bottom bunk. During the course of the renewed argument, Samples was verbally abusing Watson and challenging him to fight. At one point, he said: "Nigger, nigger, you're just like the rest of them." He also told Watson that he was too scared to fight him and that all he was going to do was tremble and stay in his bunk. Finally, Samples made several derogatory and obscene references to Watson's mother. The prisoners refer to this as "shooting the dove." Generally, when a prisoner "shoots the dove," he expects the other party to fight. At this point, Watson told Johnny Lee Wilson, whose bunk was nearby on Watson's side of the room: "You better get your home-boy straightened out before I f—— him up." Responding to this statement, Samples said: "Why don't you f—— me up if that's what you want to do. All you're gonna do is tremble, nigger."

As Samples was making the above quoted statement, he was walking over to Wilson's bunk. Samples borrowed a cigarette from Wilson and then proceeded to his own bed. He got up in his bunk (top) and was more or less half sitting up with his back propped up against the wall. At this point, he renewed the argument with Watson, who was still in his bottom bunk on the opposite side of the room. He called Watson a "nigger" and "a black mother f——." While this was going on, Watson, without saying a word, either walked or ran across the aisle between the two rows of bunks and violently and repeatedly stabbed Samples with a kitchen-type paring knife. According to the State's witnesses, this occurred approximately two (2) to ten (10) minutes after Samples had left Watson's bed.

Lt. Carmen Phillips was in charge of all the dormitories at Polk Youth Center on the night in question. On 13 May 1974 he left his office to check on the dorms at approximately 10:05 p.m. When he reached I-Dorm he stopped and started talking

to two or three of the inmates through bars that separated the sleeping area from the outside hallway. As he was talking to one of the inmates, he heard the following statement repeated twice inside the I-Dorm sleeping area: "I'll kill your god——ass." Lt. Phillips backed up to where he could see in between the I-Dorm bars, and saw "a black hand, a swift up and down motion, like [it] was beating a man laying on the bed." At this point, Lt. Phillips ordered the men to stop fighting. He immediately proceeded to the doorway that led into the sleeping area. Once inside, he saw Watson standing in the aisle at the end of Samples' bunk bed. He was talking to another prisoner. Lt. Phillips heard him make the following statement: "I told the man to quit running his mouth at me." He immediately ordered Watson to come to the doorway area. Watson obeyed this order and when he arrived he gave Lt. Phillips a paring knife and told him that he had "done it."

Samples was immediately taken to the first-aid facility at Central Prison near downtown Raleigh. He was pronounced dead on arrival. A subsequent medical examination of the body revealed approximately fourteen to sixteen deep puncture wounds and lacerations. Samples died as a result of these wounds.

Although there had been stabbings and cuttings at Polk Youth Center on prior occasions, this was the first such incident that resulted in a prisoner's death.

Other facts pertinent to decision will be set forth in the opinion.

*Attorney General Rufus L. Edmisten by Associate Attorney Raymond L. Yasser, for the State.*

*Wright T. Dixon, Jr., for defendant appellant.*

COPELAND, Justice.

Defendant has brought forward thirteen (13) of thirty-four (34) assignments of error in his brief, the others having been abandoned. Rule 28, Rules of Practice in the Supreme Court. *Investment Properties v. Allen,* 281 N.C. 174, 188 S.E. 2d 441 (1972); *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968); *Pendergrass v. Massengill,* 269 N.C. 364, 152 S.E. 2d 657 (1967).

Defendant contends in his first series of assignments (Nos. 25, 30 and 33) that the trial court erred in charging the jury as to the type of provocation that could mitigate the killing to voluntary manslaughter. Specifically, defendant excepted and assigned error to the following italicized portions of the court's charge:

(1) After summarizing the evidence, and prior to fully instructing on first-degree murder, the court stated: "[*L*]*et me say here, that mere words will not form a justification or excuse for a crime of this sort. . . .*"

(2) In instructing the jury on voluntary manslaughter, the court stated: "[T]he defendant must satisfy you that this passion was produced by acts of Samples which the law regards as adequate provocation. This may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition. *However, words and gestures alone, where no assault is made or threatened, regardless of how insulting or inflammatory those words or gestures may be, does not constitute adequate provocation for the taking of a human life; . . .*"

Defendant brings forward two distinct, yet closely related, arguments in support of these assignments. We shall proceed to consider these contentions in the order set forth in defendant's brief.

A. *Mere Words as Sufficient Legal Provocation.*

**[1]** Defendant concedes that the above italicized portions of the court's charge represent a correct statement of the common law, accepted and recognized as the law of this State from the first reported cases. *See, e.g., State v. Tackett,* 8 N.C. 210, 219 (1820); *State v. Merrill,* 13 N.C. 269 (1829); *State v. Hill,* 20 N.C. 629, 635 (1839); *State v. Jarrott,* 23 N.C. 76, 82 (1840); *State v. Barfield,* 30 N.C. 344, 349 (1848); *State v. Howell,* 31 N.C. 485 (1849). *See also* 7 Encyclopedic Digest of N. C. Reports, Homicide § 39 (1918). Defendant further concedes that this rule is almost uniformly recognized throughout the United States. *See, e.g.,* Annot., 2 A.L.R. 3d 1292 (1965); 40 Am. Jur. 2d Homicide § 64 (1968); 40 C.J.S. Homicide § 47 (1944). Nonetheless, defendant contends that the doctrine in this State has gradually evolved into a *per se* rule that is not in accord with early judicial pronouncements of this Court. Therefore, he urges

us to modify the present rule. In support of this contention, defendant relies heavily on language contained in the following three cases: *State v. Norris,* 2 N.C. 429 (1796); *State v. Tackett, supra;* and *State v. Jarrott, supra.*

Initially, we point out that *State v. Norris, supra,* is not an opinion of this Court. It is simply a summarized report of the actual trial of defendant over which Judges Williams and Haywood jointly presided as circuit superior court judges. There were only four such judges in this State at that time and further there was no appellate court. *See* Clark, C.J., History of the Supreme Court of North Carolina, 177 N.C. 617, 619 (1919). The language defendant cities in his brief as the opinion of the Court is merely Judge Haywood's charge to the jury. We note that in his separate charge, Judge Williams told the jurors that he disagreed with certain portions of the law as previously stated by Judge Haywood and proceeded to instruct in accord with his own views. Accordingly, under these particular facts, this reported proceeding has no precedential value.

On the other hand, both *Tackett* and *Jarrott* are decisions of this Court and both contain language that tends to support defendant's contention. However, the exceptions to the "mere words" doctrine recognized in both cases are totally without relevance today. In any event, any language in these cases not in accord with the following statement of Justice Stacy (later Chief Justice), speaking for the Court in *State v. Benson,* 183 N.C. 795, 799, 111 S.E. 869, 871 (1922), is expressly overruled. "The legal provocation which will reduce murder in the second degree to manslaughter must be more than words; as language, however abusive, neither excuses nor mitigates the killing, and the law does not recognize circumstances as a legal provocation which in themselves do not amount to an actual or threatened assault. [Citations omitted.]" This assignment of error as it relates to the mere words doctrine is overruled.

B. *What Constitutes an Assault?*

**[2]** Defendant contends that since the trial court inserted the "mere words" doctrine into its charge it constituted prejudicial error not to proceed further and charge on what he calls the law of assault from provoking language. Defendant relies on the following cases in support of this argument: *State v. Perry,* 50 N.C. 9 (1857); *State v. Robbins,* 78 N.C. 431 (1878); *State v. Chavis,* 80 N.C. 353 (1879); *State v. King,* 86 N.C. 603

(1882); *State v. Fanning,* 94 N.C. 940 (1886); *Saunders v. Gilbert,* 156 N.C. 463, 72 S.E. 610 (1911); *State v. Kennedy,* 169 N.C. 326, 85 S.E. 42 (1915); *State v. Crisp,* 170 N.C. 785, 87 S.E. 511 (1916); *State v. Baldwin,* 184 N.C. 789, 114 S.E. 837 (1922); *State v. Strickland,* 192 N.C. 253, 134 S.E. 850 (1926); *State v. Maney,* 194 N.C. 34, 138 S.E. 441 (1927); *State v. Robinson,* 213 N.C. 273, 195 S.E. 824 (1938); *State v. Hightower,* 226 N.C. 62, 36 S.E. 2d 649 (1946); *State v. Franklin,* 229 N.C. 336, 49 S.E. 2d 621 (1948); *State v. McLawhorn,* 270 N.C. 622, 155 S.E. 2d 198 (1967). This contention has no merit. Furthermore, it is logically inconsistent with the rule that language, no matter how abusive, is never sufficient legal provocation to mitigate a homicide.

Many of the above cited cases involve the defendant's right to the benefit of perfect self-defense and deal specifically with the question of whether the defendant was at fault in bringing on the difficulty. The test, long employed in such cases, is whether the defendant used language *calculated and intended* to bring on the fight. If he did, then he is deemed to have been at fault and loses the benefit of perfect self-defense. *See. e.g., State v. Robinson, supra; State v. Crisp, supra; State v. Lancaster,* 169 N.C. 284, 84 S.E. 529 (1915); *State v. Rowe,* 155 N.C. 436, 71 S.E. 332 (1911); *State v. Fanning, supra; State v. Davis,* 80 N.C. 351 (1879); *State v. Robbins, supra; State v. Perry, supra.*

*State v. Hightower, supra,* is an excellent example of the legal consequences of abusive language in this situation. In that case, defendant and deceased were both inmates confined in a prison camp located in Wilkes County. Sometime prior to the homicide, defendant had been placed in solitary confinement for a number of days. Defendant believed this confinement resulted from a report deceased had made to prison officials regarding alleged acts of sex perversion on his part. On the day of the killing, defendant came out into the prison yard where the deceased and others were passing a ball. He put his arm around the deceased and walked with him back into the cell block. Thereafter, defendant tripped and stabbed the deceased, and when, before dying, the deceased managed to get up and run to the sink, defendant caught up with him and stabbed him five or six more times, stating: "G— d— you, I told you I was going to kill you." Defendant contended that deceased had called him a "G— d— black s.o.b." and that this had provoked the assault.

Defendant was tried before Judge Bobbitt (later Associate Justice and Chief Justice of this Court) at the August 1945 Session of Wilkes County Superior Court. Upon a verdict finding him guilty of first-degree murder, defendant appealed to this Court and assigned as errors, inter alia, the portion of the court's charge on the "mere words" doctrine and the failure of the court to charge on excusable homicide. This Court, in an opinion by Justice Barnhill (later Chief Justice), affirmed the judgment and answered these contentions as follows:

> "The court further instructed the jury 'that legal provocation that will reduce murder in the second degree to manslaughter must be more than mere words, for language, however abusive, neither excuses nor mitigates the killing,' and 'the law does not recognize circumstances as a legal provocation which in themselves do not amount to an assault or a threatened assault.' Such is the law in this jurisdiction. [Citations omitted.] *Here it was the deceased and not the defendant who is alleged to have used abusive language and thus induced the assault which resulted in death. S. v. Robinson,* 213 N.C., 273, 195 S.E., 824; *S. v. Rowe,* 155 N.C., 436, 71 S.E., 332; *S. v. Crisp,* 170 N.C., 785, 87 S.E., 511." 226 N.C. at 65, 36 S.E. 2d at 651. (Emphasis supplied.)

These decisions establish the following rules as to the legal effect of abusive language: (1) Mere words, however abusive, are never sufficient legal provocation to mitigate a homicide to a lesser degree; and (2) A defendant, prosecuted for a homicide in a difficulty that he has provoked by the use of language "calculated and intended" to bring on the encounter, cannot maintain the position of perfect self-defense unless, at a time prior to the killing, he withdrew from the encounter within the meaning of the law. These two rules are logically consistent and demonstrate that abusive language will not serve as a legally sufficient provocation for a homicide in this State.

These well-settled rules are clearly controlling in the instant case. Hence, *if defendant had provoked an assault by the deceased* through the use of abusive language and had thereafter killed the deceased, then it would have been for the jury to determine if the lanuguage used by defendant, given the relationship of the parties, the circumstances surrounding the verbal assertions, etc., was "calculated and intended" to bring on the assault. If the jury had found this to be the case, then defend-

ant would not have had the benefit of the doctrine of perfect self-defense, even though the deceased instigated the actual physical attack. But, here there was no evidence that defendant killed the deceased in self-defense. In fact, all of the evidence tends to show that the fatal attack was brought on by the continued verbal abuses *directed toward defendant by the deceased.* Under these circumstances, there was no basis for a jury determination of whether any of the words were "calculated and intended" to bring on the difficulty. Therefore, we find no error in the court's instructions or in the court's failure to give instructions. These assignments are overruled.

At this point, we note that in those few jurisdictions that permit abusive language to mitigate the degree of homicide, the majority hold that the words are only deemed sufficient to negate premeditation, thereby reducing the degree of homicide from first to second. Most of these courts reason that since the deceased had made no attempt to endanger the life of the accused, the action of the latter in meeting the insulting remarks with sufficient force (deadly or otherwise) to cause the death of the former, was beyond the bounds of sufficient retaliation to constitute sufficient provocation to reduce the homicide to manslaughter. *See* Annot., 2 A.L.R. 3d 1292, 1308-10 (1965). Although we expressly decline to adopt this minority view, we note that the jury in the instant case apparently applied the same reasoning and found defendant guilty of second-degree murder. Thus, even if the minority rule applied in this State, defendant would not be entitled to a new trial as a result of the instructions here given.

**[3]** Defendant next contends (Assignment No. 29) that the trial court committed prejudicial error in charging the jury as follows:

> "Now, ladies and gentlemen of the jury, this case is to be tried by you under the laws of the State of North Carolina, and not upon the rules and regulations and customs and unwritten code that exists within the walls of the North Carolina Department of Correction. I can't charge you on that law because I don't know that law. I think I know this one, and this is the law that you are trying this case under."

Defendant argues that this instruction "tends to discount as a matter of law all of the factual information" that the jury

was "entitled to consider, not as a law, but as a part of the factual background situation within which the incident took place." We find nothing in the charge to support such an inference. During the course of the trial, several of the State's witnesses (either present or former prison inmates) testified about a "prison code," i.e., a set of unwritten rules developed by the prisoners themselves. For example, one of the State's witnesses made the following statements on cross-examination:

> "In the prison system, if Watson had not fought after Samples had called him nigger, nigger, and talked about his mother, I guess, you know, everybody else probably would be jugging at him. What I mean by 'jugging at him,' I mean, messing with him, you know. Taking advantage of the fact that he won't stand up for himself. It is important that you stand up for yourself in the system because if you don't, somebody might get you down in the shower, you know. You might get dead-ended. It means if you don't take up for yourself, everybody picks on you."

Apparently, standing up for oneself was a vital part of this so-called "prison code." In this context, the import of the above instruction was clearly to inform the jurors that the case—like all other criminal cases tried in the North Carolina General Courts of Justice—had to be tried under the laws of this State and not upon any unwritten prisoners' code that existed within the walls of North Carolina's prisons. It is certainly not error for a trial judge to so instruct a jury. Furthermore, it appears that defendant's conduct even constituted a violation of the prisoners' code. We refer to the following re-direct testimony of the same witness previously quoted above: "Stand up for yourself in the prison system would not necessarily include using a knife. He could have run over there and fought with bare fists, that would have been standing up for himself . . . . "

Defendant's contention under this assignment is without merit. Therefore, it is overruled.

**[4]** Defendant next assigns error (No. 32) to that portion of the trial court's charge on the element of first-degree murder that requires a defendant to act with deliberation. Specifically, defendant excepted to the following portion of the court's charge:

> "A cool state of blood does not mean the absence of passion or emotion, but it means that notwithstanding that

anger or emotional state, unless the emotion was such at the time to disturb the defendant's faculties and reason to the extent that he could not form a deliberate purpose and control his actions."

Defendant argues that the above language tends "to make the instruction one in which the Defendant is required to be 'temporarily deprived of intellect, and therefore not an accountable agent,' rather than swayed by passion." In substance, it appears that defendant's objection is directed to the meaning of "deliberation" as that term applies to first-degree murder. In *State v. Benson, supra,* in an opinion by Justice Stacy (later Chief Justice), this Court defined deliberation as follows:

> "Deliberation means that the act is done in a cool state of the blood. It does not mean brooding over it or reflecting upon it for a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." 183 N.C. at 798, 111 S.E. at 871.

*Accord, State v. Johnson, supra; State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied,* 404 U.S. 840 (1971); *State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188 (1950); *State v. Steele,* 190 N.C. 506, 130 S.E. 308 (1925).

This Court has also defined "cool state of blood" as follows:

> " 'Cool state of blood' does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time unless such anger or emotion was such as to disturb the faculties and reason. [Citations omitted.]" *State v. Britt,* 285 N.C. 256, 262-63, 204 S.E. 2d 817, 822 (1974).

Although the *Benson* and *Britt* instructions are preferred, we find no fundamental difference between them and the instruction given in the instant case. In any event, since defendant was convicted of murder in the second degree, it is clear that any error in the judge's charge concerning the elements of first-

degree murder is harmless. *See, e.g., State v. Artis,* 233 N.C. 348, 64 S.E. 2d 183 (1951); *State v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924 (1949); *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7 (1939); *State v. Evans,* 177 N.C. 564, 98 S.E. 788 (1919). This assignment is accordingly overruled.

**[5]** In his next series of assignments (Nos. 5, 6, 7 and 8) defendant contends that the court erred in allowing, over his objection, testimony as to defendant's possession of a kitchen paring knife in violation of the rules of Polk Youth Center. This evidence was brought out by the district attorney during the redirect examination of two of the State's witnesses. Defendant argues that this evidence "comes within the prohibition against collateral circumstantial evidence to show the guilt of the defendant as to a particular crime," and that, in any event, the evidence was irrelevant and its admission was highly prejudicial. We disagree.

"Evidence of other offenses is inadmissible on the issue of guilt 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.*" 1 Stansbury, N. C. Evidence § 91 (Brandis Rev. 1973) (Emphasis supplied.) *Accord, State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820 (1971); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362 (1967); *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476 (1948).

In *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954), this Court, in an opinion by Justice Ervin, listed eight exceptions to the general rule of exclusion of evidence of a crime other than the one charged. This testimony clearly falls within the purview of Exception No. 2, i.e., a collateral act of the accused that tends to establish a specific intent or mental state that is an element of the crime charged. Certainly defendant's possession of the knife in contravention of well-known prison rules was admissible as circumstantial evidence of a planned killing. The "acid test" here is the logical relevance of this testimony to the first-degree murder prosecution. See *State v. McClain, supra* at 177, 81 S.E. 2d at 368. We believe this test has been met. *See generally* E. Cleary, McCormick on Evidence § 185 (1972). Even assuming, *arguendo,* that the admission of

this testimony was error, the error was clearly harmless. "Where there is abundant evidence to support the main contentions of the State, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result. [Citations omitted.]" *State v. Williams, supra* at 89, 165 S.E. 2d at 489. *Accord, Gasque v. State,* 271 N.C. 323, 340, 156 S.E. 2d 740, 752 (1967); *State v. Temple,* 269 N.C. 57, 66, 152 S.E. 2d 206, 212 (1967). These assignments are therefore without substance and hence without merit. They are overruled.

**[6]** Defendant next contends (Assignment No. 4) that the trial court committed prejudicial error in allowing the State's motion to strike certain testimony and in instructing the jury to disregard that testimony.

The following occurred on re-cross examination of the State's witness Wandzillak:

> "I had the impression that Samples had thought Watson was scared when he was lying on top of his bunk on his back. In crossing the corridor it was not a casual walk but a rush.
>
> "Q. How would you describe it?
>
> "A. Spirit of the moment.
>
> "MR. MITCHELL: Objection, motion to strike.
>
> "COURT: Allowed. You may disregard that answer of the witness."

Defendant argues that the above statement was admissible as either a shorthand statement of the facts, or as lay testimony on the mental capacity and condition of the defendant. We agree. Opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences. *See* 1 Stansbury, N. C. Evidence § 125 (Brandis Rev. 1973), and numerous cases cited therein. However, any error there may have been in sustaining the objection and motion to strike is not deemed sufficiently prejudicial to justify the award of a new trial. *Cf. State v. Gray,* 268 N.C. 69, 84, 150 S.E. 2d 1, 12 (1966).

**[7]** In his next two assignments (Nos. 9 and 28) defendant contends that the trial court erred in charging the jury in violation of G.S. 1-180 by an imperfect or an incorrect summation of the evidence. Specifically, defendant excepted to the following italicized portions of the charge:

> "That shortly prior to that time Mr. Watson and Mr. Samples had been first talking and later arguing, as I recall the evidence, sitting on Mr. Watson's bunk; that Mr. Samples left Mr. Watson's bunk and went to his bunk *procuring a cigarette from another inmate on the way and lay on his bunk smoking the cigarette up to and after the time when the lights went off; that at some period of time, variously testified as between four and ten minutes after Mr. Samples left the immediate presence of Mr. Watson and after the lights had been dimmed, Mr. Watson left his bunk, went over to Mr. Samples' bunk* and was seen to strike anywhere from eight to ten blows with his fist clinched as if it were a hammer, toward the chest area of Mr. Samples; . . . "

Defendant contends that the above charge contains two errors, to wit: (1) it implies that Samples had in fact withdrawn from the controversy and retired for the evening; and (2) it misstated the time interval between Samples' departure from defendant's bunk and defendant's subsequent attack upon Samples. These contentions have no merit. Our reading of the charge reveals no implication that the deceased, Samples, had "withdrawn from the controversy and retired for the evening." The judge was merely summarizing the evidence as he is required to do. G.S. 1-180. As to the second alleged error, it is conceded that the court may have misstated the time element as the evidence tended to show a two-to-ten minute interval as opposed to a four-to-ten. However, the record does not disclose that this error in the court's review of the evidence was brought to the attention of the court so that it could have been corrected. Generally, an inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction and will not be held reversible error when this is not done. *See, e.g., State v. Lampkins,* 286 N.C. 497, 506, 212 S.E. 2d 106, 111 (1975); *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Feaganes,* 272 N.C. 246, 158 S.E. 2d 89 (1967). *See also* 3 Strong, N. C. Index 2d, Criminal Law § 113 (1967). In any event, this misstatement is of little consequence since it mainly

related to the elements of premeditation and deliberation and defendant was found not guilty of first-degree murder.

We have closely examined all the assignments brought forward in defendant's brief and conclude that he has had a fair trial, free from prejudicial error.

No error.

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EULA S. BOWES v. MELLIE LEWIS BOWES

No. 17

(Filed 6 May 1975)

1. **Divorce and Alimony § 17— alimony — earning capacity — bad faith effort — insufficiency of evidence**

Plaintiff's evidence was insufficient to support a finding that defendant husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for plaintiff, and an award of alimony based on defendant's earning capacity rather than his actual earnings must be set aside, where the evidence tended to show only that defendant abandoned plaintiff, defendant earned in excess of $16,000 as a grading contractor in 1969, defendant incorporated his business in 1970 and placed himself on a weekly salary of $156.58, defendant earned $6,775.14 in 1970, defendant authorized a corporate loan of $2,360 to his son in 1973 for the son to make a down payment on a house, and defendant and his minor daughter in 1973 made a seven-day trip to the beach, a four-day trip to Canada, and a one-week trip to Las Vegas.

2. **Divorce and Alimony § 17— alimony — failure to exercise earning capacity — prima facie showing — burden of proof**

Even if plaintiff made a *prima facie* showing that defendant intentionally failed to exercise his earning capacity because of a disregard of his marital obligation to provide reasonable support for plaintiff, the burden did not then shift to defendant to offer explanation of his circumstances and negate plaintiff's showing since plaintiff had the burden of proof throughout the case.

Justice HUSKINS dissenting.

Chief Justice SHARP joins in the dissenting opinion.

ON *certiorari* to review decision of the Court of Appeals reported in 23 N.C. App. 70, 208 S.E. 2d 270 (1974) (opinion by Campbell, J., Parker and Vaughn, J.J., concurring), which

vacated the judgment entered by *Clark, D.J.*, at the 28 January 1974 Session of ROCKINGHAM County District Court and remanded the cause for further proceedings in accordance with its opinion.

Plaintiff-wife instituted this action on 28 September 1971 for divorce from bed and board, permanent alimony, alimony *pendente lite*, custody of a minor daughter, child support, and reasonable attorney's fees. The issue of abandonment was heard by a jury at the 28 August 1972 Civil Session of Rockingham County District Court. Upon a jury verdict that defendant-husband had abandoned plaintiff, District Judge Clark entered judgment awarding plaintiff a divorce from bed and board. In this judgment, District Judge Clark also ordered "that the matters of child custody, child support, permanent alimony and attorney fees be and are hereby retained for determination upon further hearing at this Session of Rockingham District Court."

On 1 September 1972 defendant filed notice of appeal from the judgment entered 30 August 1972 and the court signed appeal entries. Also, on this same date, District Judge Clark held an *in camera* hearing on the remaining issues. Following the presentation of the evidence, he entered an order filed 20 September 1972 awarding plaintiff custody of the minor child, exclusive possession and control of the home (owned by the parties as tenants by the entirety), and ownership of a 1965 Buick automobile. The order further provided that defendant was to make the following payments: (1) $249.12 (monthly mortgage payment on home); (2) $30.00 (weekly child support); (3) $40.00 (weekly support and maintenance of wife); and (4) $1,300.00 (plaintiff's legal fees). Defendant was also ordered to pay the annual ad valorem taxes on the home and to pay for the cost of the action.

On 27 September 1972 defendant filed a motion for reduction of alimony. After hearing the evidence and arguments on this motion, District Judge Clark entered an order 30 October 1972 modifying the judgment filed on 20 September 1972 to the effect that defendant no longer had to pay the ad valorem taxes on the home.

On appeal, the Court of Appeals, in an opinion filed on 12 September 1973, affirmed the judgment entered on 30 August 1972 awarding plaintiff a divorce from bed and board. However, the court vacated the judgments filed 20 September 1972

and 30 October 1972 on the grounds that the district court had no jurisdiction to hold the hearings or to enter the judgments pending the appeal. *Bowes v. Bowes*, 19 N.C. App. 373, 198 S.E. 2d 732 (1973). As a result, the cause was remanded for further proceedings on the issues of permanent alimony, child custody and support.

At the 28 January 1974 Session of Rockingham County District Court, District Judge Clark conducted two *in camera* hearings. The first was on the issue of permanent alimony, and the second was on the issues of child custody and support. As to the second hearing, the court filed an order on 21 February 1974 awarding custody of the minor child to defendant on the ground that the child was "unable to get along with her mother." On this appeal, however, we are not concerned with the second hearing.

The first hearing, on plaintiff's motion for permanent alimony, was held on 30 January 1974. At that time, in addition to the testimony offered by the parties, District Judge Clark, upon motion of plaintiff, also considered the stipulations agreed to by the parties in a final pre-trial order filed 29 August 1972, the testimony and evidence presented at the jury trial in August of 1972, and the evidence presented at the subsequent hearings on 1 September 1972 and 19 October 1972.

For purposes of our decision, it is necessary only to focus on the evidence bearing on the award of permanent alimony to the plaintiff-wife. The plaintiff's evidence, pertinent thereto, was as follows:

At the 19 October 1972 hearing, defendant gave the following testimony on direct examination:

> "I am on a weekly salary of $156.58 a week, which comes to a total of $8,298.16 per year. This salary comes from M. L. Bowes Construction Company, Inc., and I am the principal stockholder of this corporation. I have had my accountant prepare a statement of profit and loss for the year 1972—through August 31, 1972. . . .
>
> "The stockholder's equity of the corporation as of August 31, 1972, is $46,576.72. The equity as of January 1, 1972, was $65,429.78. My company lost approximately $18,000.00 during the nine-month period from January 1, 1972, through August 31, 1972. As of this date, my com-

pany has in its bank account the sum of $14,000.00. There are presently two notes due and owing by the company, which were personally endorsed by me—a $25,000 note and a $22,000 note. In addition, I have a piece of equipment that is in need of repair. I attempted to borrow money from the bank in order to trade this piece of equipment and purchase a new piece, but the bank wouldn't lend me any money for this purpose unless I paid off one of the notes that is already due there.

"I am not able to increase my salary with the company at the present time. My salary has been at its present level for approximately one year.

* * * *

". . . My company is losing money now because the costs keep going up each year, and I have to pay more salary and wages to get the help I need. Operating expenses are now higher because the equipment I now have needs to be replaced. I am in the grading and excavating business and in connection therewith, I have two D-C tractors, a Cat Motor Grader, a Bucyrus Crane, a 7-G Loader, 3 dump trucks, 3 tandems and sheepfoot roller. One of the tandems was turned over about two weeks ago, and I think it's a total loss—it's not in operation at this time.

"At the present time I have seven people on the payroll and I am four short. My son Ronnie works for me—he keeps the books and is familiar with the books and records of the company. I am in bad need of a shop to house my equipment in order to work on it. In this kind of weather, we are held up, and we haven't done anything this week so there is no income for this week. And when it rains like this in the winter time, we are more or less at a standstill, with no income.

"I live in the office. I bought a used mobile home for an office until I could build one, but I haven't yet been able to build and I have lived in the office to save expenses. There is a bedroom in the back of the trailer and I am sleeping on a bed that my wife threw away.

* * * *

"In regard to my business, gross receipts for the period January 1, 1971, through August 31, 1971, was $83,167.05.

Gross receipts for the same period of this year was $95,584.73. My gross receipts are up this year. The salaries and wages for the period, January 1, 1971, through August 31, 1971, were $39,256.39. . . ."

Also at the 19 October 1972 hearing, Frank Jones, C.P.A., who did the accounting work for Bowes Construction, gave the following testimony:

"The records that I received from the company indicate that this company had a loss of approximately $18,000 in the first nine months of the year 1972. The only thing that I determined myself was the depreciation for this eight months, the other figures were given to me by M. L. Bowes Construction Company, Inc."

Plaintiff also requested the court to take judicial notice of defendant's tax returns for the years 1964 through 1970. These returns had previously been introduced at the 1 September 1972 hearing. Plaintiff's Exhibit No. 4 submitted at that time is reproduced in full below:

DEFENDANT'S TAX RETURNS

(1964-1970 Stipulated Summary)

| *Year* | *Gross Receipts from Business* | *Depreciation Business Property* | *Adjusted Individual Gross Income* |
|---|---|---|---|
| 1964 | $102,238.27 | $12,045.04 | $ 4,637.43 |
| 1965 | 120,781.42 | 15,532.03 | 11,831.80 |
| 1966 | 151,424.38 | 16,276.94 | 12,092.44 |
| 1967 | 158,570.35 | 16,980.69 | 11,694.88 |
| 1968 | 171,323.62 | 15,771.07 | 14,608.24 |
| 1969 | 164,517.93 | 15,036.22 | 16,086.12 |
| *1970 (1/1/70-4/30/70) | 37,413.55 | 5,004.44 | 6,775.14 |
| *1970 (5/1/70-12/31/70) | 99,965.26 | 8,887.46 | |

*Prior to incorporation as of 5/1/70, Defendant operated as a sole proprietorship under the name of M. L. Bowes Construction Co.

Having requested the court to take judicial notice of the above evidence, plaintiff proceeded to offer the following testimony as to events subsequent to the 19 October 1972 hearing.

Plaintiff testified that through May of 1973 defendant paid her $75.00 per week as alimony and child support; that from 31 May 1973 to 31 August 1973 (with the exception of one week in June when defendant made no payment) defendant paid her $40.00 per week as alimony and child support; that on 31 August 1973 her minor daughter went to live with defendant in his office trailer, and that they later moved into a four-room rental house; and that from 5 September 1973 to 27 December 1973 (with the exception of three weeks when defendant made no payment) defendant paid her $62.00 per week as alimony.

Plaintiff also stated that during the summer months of 1973 her minor daughter and defendant took a seven-day trip to the beach, a four-day trip to Canada, and a one-week trip to Las Vegas.

As to her personal earnings, plaintiff testified that she worked at Leinwand's Department Store as an alterations clerk and made $60.00 to $70.00 per week after taxes. However, she stated that this job might be terminated at any time. In addition, she testified that she received $90.00 per month from the rental of a portion of the home. Concerning her reasonable support requirements, plaintiff introduced an itemized exhibit indicating that her total monthly expenses amounted to $558.37 ($6,700.44 per year).

Plaintiff called her son, Ronnie Bowes, who testified on direct examination that on 7 July 1973 he borrowed $2,300.00 from Bowes Construction for the purpose of making a down payment on a home. According to Ronnie, the terms of the transaction were as follows: "Pursuant to a verbal agreement, the loan need not be repaid until I am able to do so. I am being charged no interest on this loan." Ronnie further stated that defendant, his father and employer, had personally authorized and approved this transaction.

The pertinent evidence offered by defendant is summarized below:

He was the president and the principal shareholder of Bowes Construction Company, Inc. As president, he received a gross weekly salary of $200.00 ($148.83 net). His salary was

his only source of income and was determined by Mr. Frank Jones, the accountant and financial advisor for Bowes Construction. Bowes Construction had two notes outstanding at a local bank, one with a balance of $25,000.00 and the other with a balance of $20,000.00. [We note he had apparently reduced the balance on the second note by $2,000.00 since the 19 October 1972 hearing.] His own personal monthly living expenses, including the support of his minor daughter, amounted to $556.69 ($6,680.28 per year).

As to the financial aspects of maintaining the home in which his wife had been residing since their separation and subsequent divorce from bed and board, defendant presented the following statistics:

| | |
|---|---|
| Fair market value of home | $40,000.00 |
| Tax valuation of home | 30,000.00 |
| Equity in home | 27,000.00 |
| Monthly mortgage payment | 249.12 |
| Annual ad valorem taxes (city & county) | 547.45 |
| Annual insurance (home, loan, etc.) | 442.00 |

In rebuttal to plaintiff's testimony concerning the vacations, defendant testified that the beach trip was to a friend's house where the only expenses were for food and gas; that the Canadian trip was fully paid for by the Kiwanis Club; and that the Las Vegas trip, for which he paid most of the expenses, involved an annual army reunion that he had attended for the past three years.

Defendant also stated that he had moved into the four-room rental dwelling ($150.00 per month) because the one-bedroom mobile home he had previously occupied was too small for him and his minor daughter.

On cross-examination, defendant said that he did not know the 1973 gross income of Bowes Construction or the number of shares or percentage of outstanding stock held by the three individual shareholders of Bowes Construction. He did state, however, that he was the majority stockholder.

On re-direct examination, defendant testified that his accountant, Mr. Jones, would have the figures as to the 1973 gross income of Bowes Construction and the distribution of outstanding stock. However, Mr. Jones did not testify at this particular hearing as neither party called him as a witness.

After hearing the above evidence of the parties, including prior testimony and evidence adduced at previous hearings, District Judge Clark made the following findings of fact and conclusions of law.

"FINDINGS OF FACT

1. The plaintiff is a dependent spouse who is substantially in need of maintenance and support from the defendant.

2. The defendant is the supporting spouse from whom the plaintiff is substantially in need of maintenance and support.

3. The defendant abandoned the plaintiff as alleged in the complaint.

4. The plaintiff has reasonably necessary living expenses in excess of $558.00 per month over and above the amount of periodic installments due for the purchase and maintenance of the family residence in which she resides.

5. The defendant has special skills and earning capacity as a grading contractor which enable him to earn an income in excess of $14,500.00 per year from which to continue to provide the plaintiff with the same family residence and substantially the accustomed standard of living which she enjoyed while she lived with the defendant as man and wife; and that since the defendant separated himself from the plaintiff in 1970 he has failed to exercise his reasonable capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and minor child.

CONCLUSIONS OF LAW

The plaintiff is entitled to an award of permanent alimony consisting of exclusive possession and control of the family residence owned by the parties and periodic payments of support in keeping with the defendant's reasonable earning capacity, the reasonable needs of the plaintiff and the other circumstances of the case."

Based on the above findings of fact and conclusions of law, District Judge Clark ordered that plaintiff be awarded the exclusive possession and control of the family residence; that defendant was to pay the outstanding taxes due on said resi-

dence for 1973; that defendant was to make all mortgage payments on the deed of trust on said property, incuding those then in arrears; that defendant was to return a TV set and a TV antenna that he had previously removed from said residence; and that defendant was to pay into the office of the Clerk of Superior Court, for the use and benefit of plaintiff, $200 for the month of February, 1974, and $400 per month thereafter.

To the entry and signing of the foregoing judgment, defendant objected and took exception. On appeal, the Court of Appeals vacated the judgment on two grounds: (1) that there was no evidence to support the finding defendant was making a bad faith effort to earn a reasonable income; and (2) that the wife's earnings were not taken into account in determining the amount of permanent alimony. 23 N.C. App. at 72-73, 208 S.E. 2d at 272.

Plaintiff's petition for writ of certiorari to the Court of Appeals was allowed on 3 December 1974.

*Gwyn, Gwyn & Morgan by Julius J. Gwyn for plaintiff appellant.*

*O'Connor & Speckhard by Donald K. Speckhard for defendant appellee.*

COPELAND, Justice.

**[1]** The primary exception and assignment of error in the case at bar is based on the trial court's Finding of Fact No. 5. In that finding, the court, as a basis for its award, found that "defendant has special skills and earning capacity as a grading contractor which enable him to earn an income in excess of $14,500.00 per year . . . and that since the defendant separated himself from the plaintiff in 1970 he has failed to exercise his reasonable capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and minor child." The question presented by this assignment is whether there was sufficient evidence before the trial court to support an award based on earning capacity as opposed to actual earnings.

While it is true that an award of alimony may be based upon the supporting spouse's ability to earn as distinguished from his actual income, the rule seems to be applied only when it appears from the record that there has been a deliberate at-

tempt on the part of the supporting spouse to avoid his financial family responsibilities by refusing to seek or to accept gainful employment; by wilfully refusing to secure or take a job; by deliberately not applying himself to his business; by intentionally depressing his income to an artificial low; or by intentionally leaving his employment to go into another business. *See* Annot., 1 A.L.R. 3d 6, 47-49 (1965); 24 Am. Jur. 2d Divorce and Separation § 632 (1966); 27A C.J.S. Divorce § 233(3) (1959). *Accord, Harris v. Harris,* 258 N.C. 121, 128 S.E. 2d 123 (1962); *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912 (1960); *Sguros v. Sguros,* 252 N.C. 408, 114 S.E. 2d 79 (1960); *Davidson v. Davidson,* 189 N.C. 625, 127 S.E. 682 (1925); *Robinson v. Robinson,* 10 N.C. App. 463, 179 S.E. 2d 144 (1971). *See also* G.S. 50-16.5(a), which provides: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, *earning capacity,* condition, accustomed standard of living of the parties, and other facts of the particular case." (Emphasis supplied.)

In *Conrad v. Conrad, supra,* plaintiff-wife, who was seeking alimony without divorce, moved for alimony *pendente lite.* The substance of the evidence concerning the husband's ability to pay was that as an insurance salesman his net income during prior years had been $10,756.16 in 1956, $15,357.94 in 1957, $8,477.00 in 1958 and $3,916.43 for the first eight months of 1959. Defendant-husband explained his decline in income by a reduction in commissions paid by one of his largest accounts and an unfavorable ruling by the local insurance board. It was not contended that defendant had assets other than his income capacity. The trial court found that defendant was capable of earning $16,000.00 a year and awarded plaintiff-wife $600.00 per month alimony *pendente lite* and $1,000.00 attorney fees. This Court, in an opinion by Justice Rodman, reversed. Specifically, the Court stated:

> "The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Sguros v. Sguros,* [252 N.C. 408, 114 S.E. 2d 79.]
>
> *"To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity to*

*earn because of a disregard of his marital obligation to provide reasonal support for his wife. Davidson v. Davidson, supra.* There is no finding to that effect in this case." *Id.* at 418, 113 S.E. 2d at 916. (Emphasis supplied.)

In the *Davidson* case, cited in *Conrad,* the trial court had awarded alimony *pendente lite* which exceeded the net income of the defendant. Although this Court, in an opinion by Justice Adams, conceded that the award may be based on the income capacity of the husband, it nonetheless reversed the trial court and remanded the case for additional evidence concerning the value of the husband's "entire estate, and the net annual income that is or should be derived from his estate or labor." 189 N.C. at 627, 127 S.E. at 683.

The husband's ability to pay arose in a different context in *Sguros v. Sguros, supra.* Plaintiff-wife was seeking alimony without divorce and moved for alimony *pendente lite.* Defendant-husband had a Ph.D. degree in bacteriology and at the time the action was instituted was employed as a tobacco research technician at an annual salary of $10,740.00. He had an additional income from a Naval Reserve unit of approximately $1,000.00 per year. At the time of the hearing, however, he had resigned from these positions and had accepted a professorship at an annual salary of $8,000.00. He filed an affidavit stating that the opportunities for advancement in his field were greater as a university teacher than as a research technician. The trial court awarded alimony *pendente lite* based on an annual income of $11,800.00. On appeal, this Court, in an opinion by Justice Higgins, stated: "There is neither allegation nor evidence, nor finding his change of positions was otherwise than for the reason he assigns. Under the circumstances here disclosed, we hold he had the right, so long as he acted in good faith, to accept the professorship at Miami even though at a reduction in salary. The court should have fixed the monthly payments on the basis of a salary of $8,000." 252 N.C. at 411, 114 S.E. 2d at 82.

In the above cited cases the basic issue is the same, to wit: Is the husband, by reducing his income, primarily motivated by a desire to avoid his reasonable support obligations? In order to answer this question in the affirmative, and therefore base an award of alimony upon earning capacity as distinguished from actual earnings, the finder of fact must have before it sufficient evidence of the proscribed intent. "Intent being a mental attitude, it must ordinarily be proven, if proven at all, by cir-

cumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *State v. Murdock*, 225 N.C. 224, 226, 34 S.E. 2d 69, 70 (1945). *See generally* Stansbury, N. C. Evidence (Brandis Revision) § 83, 257 fn. 78 (1973).

In the instant case, plaintiff-wife contends that the proscribed intent may be inferred from the following facts: (1) In March of 1970 defendant established a separate bedroom for himself in the marital home; (2) on 1 May 1970 defendant incorporated his grading business as M. L. Bowes Construction Company, Inc.; (3) on 29 March 1971 defendant gathered up his personal effects and moved out of the marital home; and (4) in 1969 (the year prior to incorporation) defendant's net earnings were $16,086.12, while in 1970 (the year of incorporation) his net earnings were only $6,775.14. Plaintiff-wife argues that these facts are sufficient to establish a *prima facie* case that defendant intentionally depressed his income, or the corporate income, to an artificial low. Plaintiff speculates that defendant has been able to accomplish this objective in one or more of the following ways: (1) He has intentionally fixed a low corporate salary for himself; (2) he has diverted corporate earnings elsewhere; (3) he has failed to make a good faith effort to increase corporate earnings.

Based on a close examination of the record, we believe there is insufficient evidence to support allegations one (1) and three (3). Plaintiff produced no evidence to refute the explanations given by defendant. However, as to allegation two (intentional diversion of corporate earnings) plaintiff offered the following evidence in support of her contention: (1) Defendant authorized a corporate "loan" of $2,360.00 to his son, a vice-president and stockholder of the corporation, on 7 July 1973; and (2) defendant and his minor daughter, during the summer months of 1973, made a seven-day trip to the beach, a four-day trip to Canada, and a one-week trip to Las Vegas.

Although the above evidence appears to be inconsistent with defendant's net corporate salary and with net corporate earnings (or losses) for the period 1970 to 1973, it is not sufficient to establish that defendant intentionally diverted corporate funds in disregard of his marital obligation to provide reasonable support. Of course, as to the $2,360.00 "loan" to defendant's son, an employee and vice-president of the firm, it is undisputed

that this transaction involved corporate funds. However, defendant's evidence indicated that the loan was made so his son could make the down payment on a home. Conceding that this transaction may raise an inference that defendant was diverting corporate funds in disregard of his marital obligation, it falls far short of establishing this contention. Consequently, we conclude, based on the evidence in the record, that it is mere speculation to presume defendant authorized this transaction with the proscribed intent.

**[2]** Plaintiff, apparently aware of this failure of proof, argues that she has nonetheless offered sufficient evidence to shift the burden of producing evidence to defendant. Specifically, she contends: "The plaintiff carries the burden of proof. But, after offering sufficient evidence to establish a *prima facie* case in her favor, giving her the benefit of all reasonable inferences to be drawn therefrom, the risk of non-persuasion should shift to the defendant to offer explanation for his circumstances." Plaintiff cites Stansbury, N. C. Evidence (Brandis Revision) § 203 (1973), as authority for the above contention. Suffice it to say, the authority cited *clearly* fails to support this contention.

The burden of proof was on the plaintiff throughout the case. Defendant was under no legal duty to offer any explanation as to any of plaintiff's evidence (although we note he elected to do so). In fact, based on our examination of the evidence in this record, we are of the opinion that plaintiff has failed to make out a *prima facie* case for the award of alimony based on earning capacity. If plaintiff's allegations are true, as she contends, then she should have produced evidence in support thereof by employing the procedures provided for in Rules 34 and 45(c) of the North Carolina Rules of Civil Procedure. These discovery rules would have allowed her to examine and to produce at trial any pertinent corporate records supportive of her allegations. This, however, she did not do. Also, we note that plaintiff failed to subpoena defendant's corporate accountant and to examine him as an adverse witness pursuant to Rules 43(b) and 45(a) of the North Carolina Rules of Civil Procedure. These discovery rules provided plaintiff with an adequate means of developing the type of evidence she needed in this case. We fail to discern any unusual hardship an implementation of these rules would require.

In her brief, plaintiff states that "[i]f the Court of Appeals is correct, nothing short of the defendant's confession or other admission will serve as acceptable evidence." This contention has no merit whatsoever. Plaintiff could and most definitely should have used the discovery rules herein cited. Having failed to do so, she cannot now assert that only a confession or other admission was the only way she could have made out her case.

Defendant contended on appeal to the Court of Appeals that the trial court did not give due consideration to the earnings of both parties in determining its award of alimony. *See* G.S. 50-16.5(a), *supra.* The Court of Appeals agreed. Since this cause must be remanded for further proceedings, it is not necessary for us to fully discuss this assignment of error. Suffice it to say, it is clear that the wife's earnings must be taken into account. *See, e.g., Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218 (1966).

For the reasons herein stated, the judgment of the Court of Appeals is

Affirmed.

Justice HUSKINS dissenting.

The evidence shows that defendant's adjusted gross income in 1968 was $14,608.24 and in 1969 was $16,086.12. For the calendar year 1970 his adjusted gross income fell to $6,775.14. What is the explanation for this drastic reduction?

In March of 1970 defendant established a separate bedroom for himself and on 29 March 1971 completed the abandonment of his wife by moving out of the marital home and taking his personal effects with him.

Following the incorporation of his business on 1 May 1970, defendant placed himself on a weekly salary of $156.58. He now contends that sum represents his actual earnings and that any award of alimony to his wife must be based thereon, taking into account the separate earnings of his wife. On the other hand, plaintiff contends defendant has intentionally depressed his income to avoid his obligations to her and that the trial tribunal was justified in basing an award on defendant's earning capacity rather than on the meager earnings he acknowledges.

No satisfactory explanation appears in the record for defendant's drastic drop in income following the incorporation of his business. The majority blames the wife for having failed to utilize the discovery procedures provided in Rules 34 and 45(c) of the Rules of Civil Procedure. The majority says these discovery rules "would have allowed her to examine and produce at trial any pertinent corporate records supportive of her allegations. This, however, she did not do." I view the matter differently.

In my view the evidence adduced by the plaintiff was sufficient to support a finding, nothing else appearing, that defendant had incorporated his business for the purpose of intentionally depressing his income to an artificial low and was hiding behind the corporate structure to avoid his financial responsibilities to his wife. If he desired to avoid such findings and an award based on his demonstrated earning capacity prior to incorporation, the onus was on him to come forward with his corporate records, tax returns, receipted bills, and other pertinent documentary evidence, and negate plaintiff's prima facie showing. In light of the fact that all such records are in defendant's possession, it is unrealistic, and I think contrary to law, to require plaintiff to pierce defendant's corporate smoke screen by use of discovery procedures. If the records in his possession show what he says they show, it is no trouble for him to produce them in court. His failure to do so suggests rather strongly that plaintiff's position is correct.

The majority decision permits defendant to abandon his wife with impunity and then requires her to ascertain, at her peril, his true earnings as revealed by his corporate records. I would let him conceal that truth at *his* peril.

For the reasons stated I respectfully dissent.

Chief Justice SHARP joins in this dissent.

STATE OF NORTH CAROLINA v. DOUGLAS McALLISTER

No. 62

(Filed 6 May 1975)

1. **Criminal Law § 40— free transcript of separate trial — denial proper**

Denial of defendant's motion for a free transcript of a separate trial of defendant on similar charges in which nonsuit was entered was not prejudicial error inasmuch as the transcript requested was one of a separate and distinct proceeding rather than a prior proceeding in the present case, and defendant's attorney did not take advantage of any other formal or informal alternative methods for discovering the information sought.

2. **Criminal Law § 92— two charges of forgery and uttering — consolidation proper**

The trial court did not err in consolidating for trial two cases against defendant for forgery and uttering where the two checks involved were both dated September 6, 1973 and made payable to defendant in his assumed name, both were drawn on the checking account of a third person in the Union National Bank on numbered checks given to the third person when he opened his account, and both were deposited by defendant in his account with Central Carolina Bank in his assumed name.

3. **Criminal Law § 76— defendant's statement — voluntariness**

Evidence was sufficient to support the trial court's findings that officers made no offer of hope, reward, or inducement to the defendant to make a statement, there was no threat or show of violence to persuade or induce the defendant to make a statement, the statement was made voluntarily, knowingly, and understandingly at a time when defendant was in full understanding of his rights, and defendant purposely, freely, knowingly, and voluntarily waived each of those rights.

4. **Criminal Law § 86— defendant's use of heroin — cross-examination proper**

The trial court properly allowed the solicitor to cross-examine defendant concerning his use of heroin since the questions related to matters within the knowledge of the witness, not to accusations of any kind made by others, and were competent for the purpose of impeachment.

5. **Criminal Law § 114— reliance by jurors on own recollection of evidence — instruction proper**

The trial court's instruction that the jury must rely on its own recollection of the testimony and evidence and not just the testimony recapitulated by the court was in strict compliance with G.S. 1-180 and did not amount to an expression of opinion.

6. **Criminal Law § 168— error in instructions — necessity for calling to trial court's attention**

Generally, an inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction and a slight

inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction.

7. **Criminal Law § 163— assignment of error to failure to charge — necessity for setting out proper charge**

Where an assignment of error is based on failure to charge, it is necessary to set out the appellant's contention as to what the court should have charged.

8. **Forgery § 2— uttering forged check — authority to sign**

In a prosecution for forgery and uttering forged checks, the trial court did not err in failing to instruct the jury that the State had to prove that defendant did not have the authority to sign the checks where there was evidence that Robert Blake, whose signature appeared on the checks, was a fictitious character, and if a name signed to a negotiable instrument is fictitious, of necessity, the name must have been affixed by one without authority.

9. **Forgery § 2— elements of crime — sufficiency of instructions**

The trial court correctly charged on the three essential elements of forgery: (1) a false writing of the checks described in the indictments, (2) an intent to defraud on the part of defendant who falsely made the checks, and (3) an apparent capability of the checks to defraud.

10. **Forgery § 2— uttering forged check — words and figures of check in indictment — sufficiency**

Bills of indictment charging forgery sufficiently set out the manner or method of the alleged forgery and the person to whom the checks were uttered where the bills set out in exact words and figures the checks alleged to have been forged.

11. **Indictment and Warrant § 13— insufficiency of indictment — motion for bill of particulars proper**

Where the defendant thinks that an indictment fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 23 N.C. App. 359, 208 S.E. 2d 890 (1974), which found no error in the trial before *Brewer, J.*, at the April 8, 1974 Session of DURHAM Superior Court. We allowed certiorari on 30 December 1974.

Defendant was tried and convicted of two counts of forgery and two counts of uttering a forged check, and received prison sentences on each count.

Evidence for the State tends to show: Frederick A. Crowell patronized the Stallion Club in Durham on the night of 5 August

1973. He had with him eight or nine blank checks issued to him by the Union National Bank in Creedmoor where he had opened a checking account several days before. The checks were stamped with Crowell's account number but not with his name or address. He discovered the checks missing the next morning, 6 August. He was not sure where he had lost the checks but thought it must have been at the Stallion Club since he last remembered them as being in his coat while at the club. He immediately notified the bank of his loss.

At trial, Crowell identified two checks introduced in evidence by the State as being among those issued to him by Union National Bank and discovered missing on 6 August. The checks were written for the amounts of $249.60 and $350.00. Both were payable to one James D. Jones and were purportedly signed by one Robert Blake. Crowell at no time authorized anyone to sign the checks "Robert Blake" or to designate "James D. Jones" as payee.

On 14 August 1973, Paula Zion, a secretary at the Forest Hills Branch of Central Carolina Bank, opened a checking account for one James D. Jones. James D. Jones and defendant are one and the same person, although defendant did not tell this to Paula Zion at that time.

Defendant deposited the check for $249.60, dated 6 September 1973, to the account of James D. Jones at the Wellons Branch of Central Carolina Bank, and deposited the check for $350.00, also dated 6 Septemberr 1973, to the same account at the main office of Central Carolina Bank in downtown Durham. Both checks were drawn on the Union National Bank and were returned by that bank stamped "signature not authorized and no such account." These checks, together with other abuses of this account, resulted in losses to Central Carolina Bank of $1,416.89.

On 21 September 1973, defendant was taken into custody by Detective A. L. Parham of the Durham Police Department. Defendant was read his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and signed a written waiver thereof. Defendant told Detective Parham he found the checks in question at a dance and deposited them in an account he had already opened at Central Carolina Bank in the name of James D. Jones. He stated that no one else was involved in these checks.

Evidence for the defendant tends to show: Defendant occasionally used the name James Jones because, while living in New Jersey several years earlier, a "loan shark" company had threatened to kill him if he did not repay them, so he took the name "James Jones" and moved to New York City. He later came to Durham and opened an account at Central Carolina Bank in August 1973 under the name of "James Jones." He took a job as salesman for the Kirby Vacuum Cleaner Company. The two checks in question were paid to him by one Robert Blake in partial payment for three vacuum cleaners which Blake planned to purchase from him. Defendant testified he does not know what happened to the contracts he made with Blake for the sale of the vacuum cleaners, does not know Blake's address, and did not ask Blake for his identification or social security number when negotiating the sale for the vacuum cleaners.

Diane Perry, a niece of defendant, assisted him in some of the paper work involved in selling vacuum cleaners. She recalled seeing "around two" contracts for sale of vacuum cleaners to Robert Blake, although she did not know when in 1973 she saw them. After defendant was arrested, she saw James Odom going through defendant's briefcase, "taking papers out and leaving others in."

James A. Odom, who had been defendant's sales manager at the Durham branch of the Kirby Vacuum Cleaner Company, described defendant as a salesman with "wonderful potential." He carefully searched the briefcase where defendant kept his sales contracts and his search thereof yielded no contracts bearing the name "Robert Blake."

Cager Perry, defendant's nephew, is a musician in a musical group that sometimes plays at the Stallion Club. He has never seen his uncle there.

Other facts pertinent to decision are set out in the opinion.

*Attorney General Rufus L. Edmisten and Associate Attorneys Wilton E. Ragland, Jr. and C. Diederich Heidgerd for the State.*

*Thomas F. Loflin III for defendant appellant.*

MOORE, Justice.

Defendant brings forward nine assignments of error which we will treat separately.

**[1]** Defendant first contends that the court erred in refusing to grant his motion for a free transcript of a separate trial of defendant on similar charges in which nonsuit was entered. In support of this contention, defendant relies on *Britt v. North Carolina,* 404 U.S. 226, 30 L.Ed. 400, 92 S.Ct. 431 (1971). In *Britt,* the Supreme Court of the United States reaffirmed its previous holding that a transcript of prior proceedings must be given to an indigent defendant if the court determines the transcript is needed for an effective defense. That Court stated that in making this determination, the trial court should consider the value of the transcript to the defendant in connection with the trial for which it is sought and the availability of alternative devices that would fulfill the same function as a transcript. In applying those rules to the facts in *Britt,* the Supreme Court held that Britt's attorney could have obtained the information needed by simply making a request to the court reporter. The Court therefore held that under the facts in *Britt,* there was no showing of need and the denial of a free transcript was not prejudicial error.

As in *Britt,* the facts in the present case are important in determining the need of defendant's counsel for the transcript in preparing his defense. The most important fact is that in the present case the transcript requested was not of a prior proceeding in these cases, but was that of a trial in an entirely separate and distinct case. As in *Britt,* counsel for defendant in this case also represented him in the separate trial for which he sought to obtain a transcript. Furthermore, there is no indication in the record that defendant's counsel made any effort to obtain the information which he desired through other methods or that he attempted to procure such information by personally contacting the court reporter as suggested in *Britt.* Inasmuch as the transcript requested was one of a separate and distinct proceeding rather than a prior proceeding in the present case, and defendant's attorney did not take advantage of any other formal or informal alternative methods for discovering the information sought, we hold that under *Britt* the denial of his motion was not prejudical error. *See* 51 N.C.L. Rev. 621 (1973).

**[2]** Three cases against defendant for forgery and uttering were called for trial. The State moved to consolidate these cases. Defendant moved to sever and the court allowed consolidation of two of the cases over defendant's objection. Defendant assigns this as error.

The two checks here involved were both dated September 6, 1973 and made payable to defendant in his assumed name, James D. Jones or James Jones. Both were drawn on the checking account of Frederick A. Crowell in the Union National Bank on numbered checks given to Mr. Crowell by the bank when he opened his account, and both were deposited by defendant in his account with Central Carolina Bank in the name of James D. Jones, after he endorsed the checks as James Jones. Under these facts, this assignment obviously has no merit. " . . . When a defendant is charged with crimes of the same class and the offenses are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial, consolidation is authorized in the discretion of the court by G.S. 15-152. *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962); *State v. Johnson,* 280 N.C. 700, 187 S.E. 2d 98 (1972)." *State v. Anderson,* 281 N.C. 261, 264-65, 188 S.E. 2d 336, 339 (1972). (G.S. 15-152 was repealed effective 1 July 1975 by Session Laws of 1973, Chapter 1286, Section 26.)

**[3]** Defendant next contends that the trial court erred in permitting, over defendant's objection, the State's witness Detective Parham to testify regarding an out-of-court statement made by defendant to Detective Parham concerning the charges in these two cases.

By this assignment, defendant asserts that the warning given by the Durham police regarding his constitutional right to remain silent was insufficient due to the fact that the warning was not given in accordance with *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and G.S. 7A-451.

In *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968), this Court reviewed the exact warning and waiver of counsel given by Detective Parham to defendant in the present case. We there held, after quoting in the opinion the warning given to defendant and the waiver signed by him, that these were sufficient under *Miranda.* We then overruled the defendant's objection to the introduction of defendant's inculpatory state-

ments made by him to the officer of the Durham Police Department.

After *voir dire* hearing, the court in the present cases made findings of fact based on competent evidence, and concluded that there was no offer of hope, reward, or inducement to the defendant to make a statement; that there was no threat or show of violence to persuade or induce the defendant to make a statement; that the statement made to Detective Parham was made voluntarily, knowingly, and understandingly at a time when defendant was in full understanding of his rights; and that he purposely, freely, knowingly, and voluntarily waived each of those rights. Such conclusions, when supported by competent evidence, are conclusive on appeal. *State v. Thompson,* 285 N.C. 181, 203 S.E. 2d 781 (1974); *State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969). This assignment is overruled.

**[4]** By his next assignment of error defendant contends that the trial court erred in permitting the solicitor, over defendant's objection, to question him concerning his use of heroin.

On cross-examination, defendant testified without objection: "I started going under the name of James Jones approximately in 1969 or 1970. It was because someone was after me. I got the James Jones identification in New York. The medical card is for my medical treatment. When you are on welfare you can take that to any doctor to receive medical treatment." The solicitor then, over defendant's objection, asked defendant concerning his use of heroin. Defendant answered that he wasn't using heroin at the time of his return to North Carolina in July 1973, and that he never considered himself as having a habit.

As stated in *State v. Williams,* 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971): "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. [Citations omitted.] . . . . " In this case the questions related to matters within the knowledge of the witness, not to accusations of any kind made by others, and were competent for the purpose of impeachment. *See State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d

874 (1972); *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875 (1969). This assignment is overruled.

**[5]** The trial court, after reviewing some of the evidence, instructed the jury: " . . . I have not recapitulated all of the evidence in this case. I now instruct you that your verdict should be based on your own recollection of all of the testimony and not just the testimony recapitulated by the court." Defendant contends that by the quoted sentence the trial court is telling the jury that the court's recollection of the testimony is correct. Although the defendant does not set out what the trial court should have charged, it is noted that prior to the instruction complained of the court also told the jury, ". . . it is your duty to recall all of the evidence as best you can as it relates to each of these cases . . . , " and " . . . [y]our verdict is to be based on your own recollection of the testimony and evidence in each of these cases, not what the District Attorney may have argued to you as the evidence, or the attorney for the defendant, or even the Court, but your verdict should be based on your own recollection of the evidence and testimony in each of these cases."

In *State v. Tyson,* 242 N.C. 574, 89 S.E. 2d 138 (1955), we approved a similar statement by the trial judge. We hold that this instruction did not constitute expression of opinion but was in strict compliance with G.S. 1-180.

Defendant further contends, however, that the trial court in recapitulating the evidence misstated the evidence of Eugene Lindsey as to the amount of credits in defendant's bank account and incorrectly stated a part of Detective Parham's testimony. Defendant did not at the time request the court to correct those alleged errors.

**[6]** Generally, an inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction and a slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. As stated in *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203 (1965): "We have repeatedly held that an inadvertence . . . in recapitulating the evidence must be called to the attention of the court in time for correction. After verdict, the objection comes too late. *S. v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *S. v. Holder,* 252 N.C. 121, 113 S.E. 2d 15; *S. v. Adams,* 245 N.C. 344, 95 S.E. 2d 902." *See also* 3 Strong, N. C. Index 2d, Criminal Law

§ 113 (1967). In any event, the alleged errors were inconsequential and in no way prejudicial to defendant. This assignment is overruled.

**[7]** For his next assignment of error, defendant alleges " . . . the court erred in charging the jury on the elements of the crime of forgery alleged in the first count of each of the indictments in these two cases, in that such charge . . . was neither sufficient in law nor complete." This assignment of error does not comply with the requirement that where an assignment is based on failure to charge it is necessary to set out the appellant's contention as to what the court should have charged. *State v. Crews, supra; State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736 (1965). Notwithstanding, since a long prison sentence is involved, we have elected to discuss defendant's contention.

The trial court charged:

"I now instruct you, members of the jury, for you to find the defendant guilty of forgery in each of these cases the State must prove three things beyond a reasonable doubt. I have given you the definition of the term reasonable doubt.

"First, that the defendant falsely made this check; that is that he wrote this check, endorsed this check in the name of Robert Blake; that is that he actually wrote the name Robert Blake on the check and endorsed the check which was made out to James D. Jones; and second, that at the time the defendant made these checks he intended to defraud and third, that the checks appeared to be genuine.

"So, I instruct you, members of the jury, if you find from the evidence beyond a reasonable doubt that on the 6th day of September, 1973, the defendant Douglas Leon McAllister wrote these checks, that is completed the writing as you observed on the checks, and that he signed the name or forged the name Robert Blake to these checks, intending at that time to defraud, and that the checks appeared to be genuine, it would be your duty to return a verdict of guilty as charged bearing in mind, members of the jury, that you are to treat each of these cases of forgery separately. However, if you do not so find or have a rea-

sonable doubt as to one or more of these things it would be your duty to return a verdict of not guilty."

Defendant first contends that the trial court erred when it stated in the charge that one element of forgery was to find that the defendant endorsed the checks. Defendant admitted: "I signed the name James D. Jones on the back of those checks." So, that fact was not in dispute. In addition, in the same portion of the charge excepted to by defendant, the jury was instructed that in order to find defendant guilty the jury must find beyond a reasonable doubt that defendant actually wrote the name Robert Blake on the checks. We fail to see how the inclusion of an admitted fact could prejudice defendant.

**[8]** Defendant also contends that the trial court erred by failing to instruct the jury that the State had to prove that the defendant did not have the authority to sign the checks. Defendant bases this contention on *State v. Phillips,* 256 N.C. 445, 124 S.E. 2d 146 (1962). *Phillips,* however, is not applicable to the question raised by defendant. *Phillips* pertains to the sufficiency of evidence to go to the jury. There we stated: "The State makes no showing that the signing of the check was unauthorized and false. The court should have allowed the motion to nonsuit." To the contrary, in the present cases defendant in his brief admits that the State presented sufficient evidence from which the jury could find that neither the defendant nor Robert Blake had any authority from the owner of the checks to sign them. Thus, the facts in the present cases clearly distinguish them from *Phillips.*

Furthermore, there is evidence that Blake was a fictitious person. As stated in *Phillips:* "If the name signed to a negotiable instrument, or other instrument requiring a signature, is fictitious, of necessity, the name must have been affixed by one without authority, and if a person signs a fictitious name to such instrument with the purpose and intent to defraud—the instrument being sufficent in form to import legal liability—an indictable forgery is committed. . . . " And the fact that a " ' . . . purported maker of such check had no account in the bank is admissible as tending to prove that such purported maker was a fictitious person.' [Citation omitted.] . . . [I]t has been held that such testimony is *prima facie* evidence of the nonexistence of the maker. [Citation omitted.]" *Ibid.*

The trial court here clearly charged the jury that in order to convict defendant of forgery the State must prove three things beyond a reasonable doubt: (1) That he *falsely* made the check, that is, that he actually wrote the name Robert Blake on the check; (2) that at the time he intended to defraud; and (3) that the check appeared to be genuine. The word "falsely" as applied to the making of a check, in order to constitute forgery, implies that the check is not genuine, that in itself it is false. 36 Am. Jur. 2d, Forgery § 6 (1968).

The fact that the drawer of a check lacks authority is one characteristic which renders an instrument false, and an instruction including the requirement that there be a false making encompasses the requirement that the instrument be drawn by one who lacks authority. In *State v. Phillips, supra,* the Court discussed the requirement of " . . . the falsity of the instrument, *i.e., that it was executed without authority.*" (Emphasis added.)

**[9]** The evidence in the cases at bar tends to show that Mr. Crowell lost some checks with his account number thereon, and that later two of these checks purportedly signed by Robert Blake, payable to James Jones, an alias used by defendant, and endorsed by defendant in the name of James Jones, were deposited in an account opened by defendant in the name of James Jones. Further, the evidence tends to show that neither Robert Blake nor defendant had authority to sign these checks and that Robert Blake possibly was a fictitious person. This evidence was sufficient to permit a jury to find (1) a false writing of the checks described in the first count of the bills of indictment; (2) an intent to defraud on the part of defendant who falsely made the checks; and (3) an apparent capability of the checks to defraud. These are the three essential elements necessary to constitute the crime of forgery. *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22 (1968); *State v. Keller,* 268 N.C. 522, 151 S.E. 2d 56 (1966); *State v. Phillips, supra; State v. Dixon,* 185 N.C. 727, 117 S.E. 170 (1923). Here the court correctly charged on all the essential elements of forgery.

We also note that defendant did not seek to show by his evidence that he signed the check with the authority of Robert Blake, Frederick Crowell, or anyone else. Rather, defendant contended that he *at no time signed the checks* but merely took them from one Robert Blake, endorsed them, and deposited them in his account. It appears, therefore, that presence or absence

of authority was not in dispute in this case. We fail to see how defendant could have been prejudiced by the instruction on forgery in this case. This assignment is overruled.

Defendant by his next assignment of error contends that the following portion of the court's instruction to the jury is erroneous:

> "So, I charge you, members of the jury, if you find from the evidence and beyond a reasonable doubt that on the 6th day of September, 1973, the defendant Douglas Leon McAllister intending to defraud passed these checks which appeared to be genuine, but which he knew was [sic] falsely made, it would be your duty to return a verdict of guilty as charged in the bill of indictment, that is of uttering a forged check."

Defendant specifically contends that this portion of the charge omitted the essential element that the instrument involved has to be a forgery. The court, however, in the excepted portion of the charge, specifically said that the defendant would be guilty if, intending to defraud, he passed these checks which appeared to be genuine, *"but which he knew was [sic] falsely made."* (Emphasis added.) In the preceding paragraph the court had explained in detail that uttering a forged check was the fraudulent offering to another of a check which defendant knew to be falsely made but which appeared to be genuine. Taken together, these instructions included all the essential elements of the offense. As we said in *State v. Greenlee, supra:* "Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud. [Citation omitted.] . . . . " *See also* G.S. 14-120.

In construing the charge contextually as we are required to do, we hold that the charge as a whole presented the law fairly and clearly to the jury. 3 Strong, N. C. Index 2d, Criminal Law § 168 (1967); *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966); *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965). This assignment is overruled.

**[10]** Finally, defendant contends that the bills of indictment in these cases were fatally defective and that judgment should be arrested. Defendant contends that the bills charging forgery

fail to set out the manner or method of the alleged forgery. These bills of indictment set out in exact words and figures the checks alleged to have been forged. In *State v. Russell,* 282 N.C. 240, 192 S.E. 2d 294 (1972), we approved an indictment for forgery couched in the same language. There we said:

> "The purpose of an indictment 'is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction.' *State v. Burton,* 243 N.C. 277, 90 S.E. 2d 390 (1955); *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953); *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15 (1967).
>
> "G.S. 15-153 was enacted many years ago to simplify forms of indictment. (Chapter VI, 1811 Laws of North Carolina.) This statute provides that every criminal indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible, and explicit manner, and that an indictment shall not be quashed by reason of any informality or refinement if in the bill sufficient matters appear to enable the court to proceed to judgment."

On the authority of *State v. Russell, supra,* we hold the first counts in the bills of indictment sufficiently charged the essential elements of the crime of forgery.

Defendant, however, also contends that the counts which charge uttering forged checks are defective in that they do not specify to whom the checks were uttered. Again, this Court in *State v. Russell, supra,* approved a bill of indictment charging the uttering of the forged check in substantially the same words. The indictments in the present cases charged all the essential elements of the offense, that is, the offering of the forged instruments to another with the knowledge of the falsity of the checks and with intent to defraud. As we said in *State v. Bissette,* 250 N.C. 514, 108 S.E. 2d 858 (1959):

> "G.S. 15-151 . . . modifies the common law. It is not now necessary to name the injured party where prosecution is based on forgery or other fraud. It is, however, necessary to allege and prove the evil intent when fraud is the foun-

dation for the prosecution. *S. v. Phillips,* 228 N.C. 446, 45 S.E. 2d 535; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Horton,* 199 N.C. 771, 155 S.E. 866; *S. v. Reed,* 196 N.C. 357, 145 S.E. 691; *S. v. Edwards,* 190 N.C. 322, 130 S.E. 10; *S. v. Farmer,* 104 N.C. 887."

**[11]** The defendant in these cases made no motion for a bill of particulars. Speaking to the subject in *State v. Shade,* 115 N.C. 757, 20 S.E. 537 (1894), Avery, Justice, stated: " . . . Where the defendant thinks that an indictment . . . fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. *S. v. Brady,* 107 N.C. 826. . . . " *Accord, State v. Russell, supra.*

We hold that the bills of indictment in these cases properly charged the crimes of forgery and of uttering forged checks. This assignment is overruled.

All of defendant's assignments of error have been considered and all have been overruled. Hence, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 74

(Filed 6 May 1975)

1. **Insurance § 1— power of Insurance Commissioner to fix rates**

The only power the Commissioner of Insurance has to fix rates is such power as the General Assembly has delegated to and vested in him. Art. III, § 7(2) of the N. C. Constitution.

2. **Statutes § 5— construction of statutes in pari materia**

Statutes *in pari materia*, and all parts thereof, should be construed together and should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent.

3. **Insurance § 79.1— automobile liability rates — primary authority — Rate Office**

G.S. Chapter 58 clearly reveals the intent of the General Assembly to vest the Automobile Rate Office with primary authority to fix, adjust and propose automobile liability rates subject to the approval or disapproval of the Commissioner of Insurance, and the Commissioner has no concurrent authority with the Rate Office to fix or reduce rates. G.S. 58-246; G.S. 58-248.

4. **Insurance § 79.1—automobile liability rates — emergencies — energy crisis — authority of Insurance Commissioner**

The Commissioner of Insurance does not have blanket authority under G.S. 58-248.1 to consider immediate emergency situations such as the energy crisis and enter interim automobile liability rate orders based thereon, but the grant of authority to the Commissioner by the statute to order an alteration or revision in the rates charged or filed presupposes the failure of the Automobile Rate Office to perform its rate-making duties faithfully.

**5. Insurance § 79.1— automobile liability rates — sources of evidence**

In determining whether to order a rate alteration or revision under G.S. 58-248.1, the Commissioner of Insurance may consider evidence received not only through the Automobile Rate Office but from other sources as well.

**6. Insurance § 79.1— automobile liability rates — expenses and fair profit**

When existing or proposed automobile liability rates provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to selling and servicing the insurance, and a fair and reasonable profit, and no more, the Commissioner of Insurance has no authority to order alteration or revision of rates under G.S. 58-248.1.

**7. Insurance § 79.1— automobile liability rates — reduction based on energy crisis — order exceeding statutory authority**

The Commissioner of Insurance was without statutory authority to order an interim automobile liability rate reduction because of the energy crisis based on independent evidence received at a hearing where the record does not show that the Automobile Rate Office was not proceeding with due diligence in dealing with relevant factors spawned by the energy crisis. G.S. 58-9.6(b)(2).

**8. Insurance § 79.1— automobile liability rates — interim order — acceptance of proposal as true**

The Commissioner of Insurance has the statutory duty to consider automobile liability rate proposals in accordance with the standards contained in G.S. 58-248 and either approve or disapprove such proposals, but he has no authority merely to accept a proposal as being true and accurate for purposes of entering an interim order.

**9. Insurance § 79.1— automobile liability rates — reduction based on energy crisis — order not supported by evidence**

Interim order of the Commissioner of Insurance reducing automobile liability insurance rates based on the energy crisis was not supported by material and substantial evidence where appellants attempted to establish a trend in insurance paid claims based on motor vehicle statistics for two months, the trending procedures were premised on the assumption that the energy crisis and its ramifications will continue into the future but there was no expert testimony to that effect, and there was no expert testimony by anyone knowledgeable in the field of insurance rate making to support the use of appellants' statistical techniques for rate-making purposes or the use of two months experience in the energy crisis as a foundation for both a rate change and a change in rate-making procedures.

APPEAL by the Commissioner of Insurance and the Attorney General, intervenor, from decision of the Court of Appeals, 24 N.C. App. 228, 210 S.E. 2d 439 (1974).

On 29 June 1973 the North Carolina Automobile Rate Administrative Office made a filing with the Commissioner of Insurance on behalf of 284 member companies, proposing a

revision in the premium rates for bodily injury and property damage liability insurance applicable to private passenger automobiles and related miscellaneous classifications. The filing was made pursuant to G.S. 58-248 and was based on the companies' experience for the two accident years ending 30 June 1971 and 30 June 1972. The original filing proposed a 9.9% average rate increase, but was amended on 26 January 1974 to reflect subsequent increases which became effective 10 October 1973. The amended filing proposed an average increase of 2.3%.

On 21 January 1974 the Attorney General intervened on behalf of the using and consuming public under G.S. 114-2(8)(a).

On 27 November 1973 and 22 January 1974 the Commissioner conducted prehearing meetings pursuant to G.S. 58-248.1 in regard to the June 1973 filing. At the January meeting the Commissioner indicated that the rate hearing would involve energy crisis considerations and "could well result in a rate reduction rather than a rate increase as requested by the Administrative Office should the evidence point that way." In response thereto the Rate Office requested formal notice of the subject matter of the rate hearing. On 25 January 1974 the Commissioner issued formal notice of a public hearing to be held on 19 February 1974 for the purpose of considering seven enumerated subjects, including the 29 June 1973 Rate Office filing and, on the Commissioner's own motion, "the need for a rate reduction in private passenger (non fleet) automobile and motorcycle liability insurance due to the 'Energy Crisis' . . . . "

On 14 February 1974 the Attorney General filed a separate motion requesting the Commissioner to begin immediate consideration of an interim rate reduction attributable to the fuel crisis. The Attorney General's motion was granted by the Commissioner at the February 19 hearing and a Rate Office motion for continuance was denied.

The Commissioner convened the rate hearing on 19 February 1974, as planned, and held subsequent sessions on February 26 and 27 and March 5 through 8.

The first witness for the Attorney General was Joseph Register, an employee of the North Carolina Department of Motor Vehicles, who gave testimony for the Attorney General relating to various motor vehicle statistics including accident and

injury statistics for December 1973 and January 1974, the focal months for the subsequent energy crisis rate reduction order. Mr. Register also testified that in his opinion the energy shortage would continue for some time and accident rates would not return to pre-November 1973 levels. The Rate Office interposed objections to the use of this data for rate-making purposes, stating that it was not relevant or applicable to rate making. Similar objections to the introduction and use of motor vehicle statistics for rate-making purposes were made throughout the hearing.

The second witness for the Attorney General was David F. Crotts, an economist with the Attorney General's Office. Mr. Crotts was tendered and accepted as an expert in the field of statistics. He stated he prepared himself for testifying in this case by studying prior filings, by talking with two attorneys on the Attorney General's staff to get their understanding of the rate-making formula, and by discussing with Mr. Register the energy crisis and its effects on motor vehicle statistics. With this background he formulated "original ideas as to how to fit the effect of the energy crisis into the rate-making formula as it has been used in North Carolina since 1961." The witness then gave lengthy testimony relating to his calculations and conclusions in regard to the rate-making formula and the energy crisis.

Mr. Crotts applied various statistical methods and performed complex computations in analyzing motor vehicle statistics obtained from Mr. Register. As a result of these procedures he reached the conclusion that there is a significant statistical correlation between reported accidents and property damage claims paid by insurance companies *(i.e.,* paid claims will vary in accordance with reported accidents). A similar correlation was found to exist when he compared bodily injury paid claims with reported accidents, persons injured, and private passenger cars involved. The witness next calculated the average percentage change in reported accidents from one year to the next *(i.e.,* annual change) for an eleven year period and found a 7.36% average change; the average annual change in private passenger cars involved was found to be 7.67%; and the average annual change in persons injured was found to be 6.11%. These trends were then used to predict what reported accidents, persons injured, and private passenger cars involved would have been for December 1973 and January 1974 had there

been no energy crisis. The resulting predictions were compared to actual data for the months of December and January showing that reported accidents were actually 24.48% below the prediction, persons injured were actually 26.09% below the prediction, and private passenger cars involved were 29.78% below the prediction. The estimated reductions in reported accidents, persons injured, and private passenger cars involved were attributed to the energy crisis and its effects.

The statistical findings and conclusions were then applied to the most recent information available to the witness with respect to property damage and bodily injury claims paid so as to predict a "point estimate drop" and an "interval estimate drop" in both property damage claims and bodily injury claims. He estimated a point estimate drop of 27.23% and an interval estimate drop of 21.01% to 33.45% in property damage claims, and a point estimate drop of 12.97% and an interval estimate drop of 11.80% to 14.15% in bodily injury claims. The estimated drops in property damage and bodily injury claims were finally applied to the data on the Rate Office's amended filing in order to predict a percentage rate decrease attributable to the energy crisis. The predicted decrease in rates was adjusted during the 5 March 1974 session resulting in a final predicted interval decrease in bodily injury rates of 14.51% to 16.79% (midpoint 15.65%) and a decrease in property damage rates of 11.24% to 25.18% (midpoint 18.21%). In conclusion Mr. Crotts expressed his opinion, based on the assumption that the energy crisis and its ramifications would continue into the future, that the drops in paid claims would continue at the same predicted rates.

At the close of Mr. Crotts' direct examination the Rate Office deferred his cross-examination and called Michael A. Walters, vice-president and actuary with the Insurance Services Office. Mr. Walters was qualified as an expert in mathematics, but the Commissioner refused to recognize him as an expert on automobile liability insurance rate making.

Mr. Walters testified that two years of rate-making experience traditionally have been used in North Carolina for private passenger car rates, as compared with the two months of motor vehicles data utilized by Mr. Crotts "as the entire key underlying his testimony for the projection of future insurance costs." He further stated that the high correlation between motor vehicle accidents and subsequent insurance claims was not sur-

prising since such accidents are the only source of insurance claims, but indicated he had problems accepting Mr. Crotts' conclusions because of his assumption "that if it correlates on an annual basis, it must therefore correlate on individual monthly basis." A second criticism of Mr. Crotts' testimony noted the fact that accident statistics for December 1972 and January 1973 appeared to be unusually high. "Now if those values were arbitrarily high, then to conclude that the two months average for the most recent two months as being due entirely to the energy crisis, I think it would be tenuous." Further problems were raised by Mr. Crotts' assumption that the change attributable to the energy crisis in the two most recent months would be repeated throughout the entire year 1974. Mr. Walters said the purpose of collecting insurance statistics for a two-year period was to get a reasonable estimate and prospective look at insurance experience in this State.

Mr. Crotts was recalled and testified that the figures for December 1972 and January 1973 were not randomly high "when compared to the long-run trend of previous Decembers and previous Januarys." He also stated that forecasting on the basis of past trends and correlations could be used to make monthly projections.

At the 5 March 1974 session the Commissioner announced that he was ordering a rate reduction *based on the energy crisis.* On 6 March 1974 he filed an "interim" order in which he accepted the 29 June 1973 filing of the Rate Office "as true and accurate" for purposes of the interim order. The order contained specific findings in which the Commissioner summarized and adopted the testimony and conclusions of witness Crotts relating to the effects of the energy crisis on automobile liability insurance rates. The "CONCLUSIONS AND DECISION" portion of the order reads:

> "The North Carolina Commissioner of Insurance has authority to consider immediate emergency situations such as the present energy crisis in gasoline and to enter an interim order in consideration of the same.
>
> It is proper to consider the earnings from investment of unearned premium reserves and loss reserves.
>
> Upon the evidence presented and findings made herein, the North Carolina Commissioner of Insurance hereby con-

cludes that an overall rate level decrease of 13.21% in private passenger automobile liability insurance rates to be used in North Carolina for the future, as hereinafter set out, is warranted and will produce premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved, and provision for a fair and reasonable underwriting profit is warranted, justified, and in the public interest, and should be allowed.

This order shall remain in effect during the pendency of the energy crisis. Any party to these proceedings with evidence showing an appreciable change in any of the conditions underlying this order, may petition the Commissioner for an immediate hearing on such evidence and the hearing will be held within seven days of such petition. During the pendency of this interim order, the Commissioner will duly proceed with consideration of the 1973 filing which will result in a final order.

At the hearing held in the premises on March 5, 1974, counsel for the Rate Office stated to the Commissioner of Insurance that three weeks was the minimum time required by the insurance companies to make the necessary changes to implement this order. Because of the need for immediate action in the matter, the Commissioner stated that the order would become effective March 26, 1974.

Now, therefore, be it, and the same hereby is, ORDERED, that the private passenger automobile liability insurance rates for use in North Carolina in the future be decreased by 14.51% for bodily injury and 11.24% for property damage hereinabove set out to be effective on March 26, 1974.

This order shall remain in effect until modified by the Commissioner by subsequent interim order or final order."

A supplementary order, filed 8 March 1974, provided that the rate reduction would apply to every policy or policy renewal written, delivered or issued for delivery in this State on and after 26 March 1974 and to any such policy bearing an initial or renewal effective date of 26 March 1974 or thereafter.

The Rate Office appealed from the Commissioner's order to the Court of Appeals pursuant to the provisions of G.S. 58-9.4

et seq. The Court of Appeals, with Brock, C.J., dissenting, reversed the order of the Commissioner because (1) it is in excess of statutory authority of the Commissioner; (2) it is unsupported by material and substantial evidence in view of the entire record; and (3) it is affected by other errors of law. The Attorney General and the Commissioner of Insurance appealed to the Supreme Court pursuant to G.S. 7A-30(2), assigning errors noted in the opinion.

*John Randolph Ingram, Commissioner of Insurance, by Hugh R. Owen, Staff Attorney, for the Commissioner of Insurance, appellant.*

*Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Assistant Attorney General, for intervenor appellant.*

*Allen, Steed and Pullen, P.A., by Arch T. Allen, Thomas W. Steed, Jr., and Lucius W. Pullen; Broughton, Broughton, McConnell & Boxley, by J. Melville Broughton, Jr.; Sanford, Cannon, Adams & McCullough, by Hugh Cannon; Young, Moore & Henderson, by Charles H. Young, for the North Carolina Automobile Rate Administrative Office and individually named insurance companies, appellees.*

HUSKINS, Justice.

Appellants' assignments one and two allege the Court of Appeals erred in reversing the order of the Commissioner of Insurance on grounds that it was (1) in excess of his statutory authority and (2) not supported by material and substantial evidence. Due to the statutory framework underlying these contentions, we will consider them together.

The history and framework of North Carolina's insurance laws, codified as Chapter 58 of the General Statutes, were reviewed by Chief Justice Bobbitt in *In re Filing by Automobile Rate Office*, 278 N.C. 302, 180 S.E. 2d 155 (1971). With that background in mind, we limit our discussion to those provisions pertinent to the controversy here involved. For further background discussion, see also *Allstate Insurance Company v. Lanier*, 242 F. Supp. 73 (E.D. N.C. 1965), *aff'd* 361 F. 2d 870 (4th Cir.), *cert. denied* 385 U.S. 930, 17 L.Ed. 2d 212, 87 S.Ct. 290 (1966).

G.S. 58-9 sets out the general powers and duties of the Commissioner of Insurance and confers upon him the duty to

"[s]ee that all laws of this State governing insurance companies, associations, orders or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provisions of this Chapter which will prevent practices injurious to the public by insurance companies. . . ."

G.S. 58-9.4, enacted in 1971 to expedite the rate-making processes, provides for direct review by the Court of Appeals of "[a]ny order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest. . . ." This section also provides: "Any order or decision of the Commissioner, if supported by substantial evidence, shall be presumed to be correct and proper."

G.S. 58-9.5 establishes the procedures on appeal under G.S. 58-9.4 and provides that such an appeal stays the Commissioner's order or decision pending determination of the appeal.

G.S. 58-9.6 sets out the scope of review under G.S. 58-9.4 and provides that the Court of Appeals may reverse or modify a decision of the Commissioner which is (1) in violation of constitutional provisions, (2) in excess of statutory authority or jurisdiction of the Commissioner, (3) made upon unlawful proceedings, (4) affected by other errors of law, (5) unsupported by material and substantial evidence in view of the entire record as submitted, or (6) arbitrary or capricious.

G.S. 58-248.1, under which the Commissioner claims authority to enter the order contested in this case, confers authority on the Commissioner to enter orders directing revision of improper rates, classifications or classification assignments. To facilitate orderly discussion of the assignments and avoid repetition, the pertinent provisions of this statute will appear later in this opinion. For historical background of G.S. 58-248.1 and other changes in North Carolina insurance laws wrought by Chapter 381 of the 1945 Session Laws, see Wettach, The 1945 Revision of the Insurance Laws of North Carolina, 23 N.C.L. Rev. 283 (1945); Report of the Governor's Study Commission on Automobile Liability Insurance and Rates (N. C. April 15,

1971); Report of the North Carolina Commission on Revision of the Insurance Laws (January 30, 1945).

G.S. 58-248 establishes the procedures to be followed by the Rate Administrative Office in obtaining Commissioner approval of a rate change and enumerates the factors to be considered in determining the necessity for a rate adjustment. Under that section the Commissioner is authorized to compel production of any data "necessary to compile statistics for the purpose of determining the underwriting experience of automobile liability injury and property damage insurance" and to make that data available to the Rate Office "for the capitulation [sic] and promulgation of rates." The section contains the following statement in regard to approval or disapproval of rates by the Commissioner: "All such rates compiled and promulgated by such bureau shall be submitted to the Commissioner of Insurance for approval and no such rates shall be put into effect in this State until approved by the Commissioner of Insurance and not subsequently disapproved." Factors to be considered by the Commissioner and Rate Office in the rate-making process are enumerated as follows:

> "The Commissioner of Insurance in considering any rate compiled and promulgated by the bureau may take into consideration the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State. The amount of earnings may in an equitable manner be included in the rate-making formula to arrive at a fair and equitable rate.
>
> In determining the necessity for an adjustment of rates the Commissioner shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such other reasonable and related factors as are relevant to the inquiry. The bureau in promulgating and fixing rates shall consider the same factors and shall prepare and present such information, data, indexes and exhibits with the rate filing." G.S. 58-248.

G.S. 58-248 further requires the Rate Office to submit rate proposals to the Commissioner on or before July 1 of each calendar year and requires the Commissioner to approve or disapprove the proposals within ninety days.

With this statutory background, we turn to the appellants' contention that G.S. 58-248.1 vests the Commissioner with authority to order an interim rate reduction in this case.

**[1]** While the Office of Commissioner of Insurance is created by Article III, sec. 7(1) of the North Carolina Constitution, section 7(2) of that Article says his duties shall be prescribed *by law*. Hence, the power and authority of the Commissioner emanate from the General Assembly and are limited by legislative prescription. The only power he has to fix rates is such power as the General Assembly has delegated to and vested in him. *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971); *Comr. of Insurance v. Automobile Rate Office,* 19 N.C. App. 548, 199 S.E. 2d 479, *cert. denied* 284 N.C. 424, 200 S.E. 2d 663 (1973).

**[2]** We are further guided by rules of construction that statutes *in pari materia,* and all parts thereof, should be construed together and compared with each other. *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688 (1960). Such statutes should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent. *Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410 (1951); *McLean v. Board of Elections,* 222 N.C. 6, 21 S.E. 2d 842 (1942); *Thomasson v. Patterson,* 213 N.C. 138, 195 S.E. 389 (1938).

**[3]** Chapter 58 of the General Statutes clearly reveals the intent of the General Assembly to vest the Rate Office with primary authority to fix, adjust and propose rates subject to the approval or disapproval of the Commissioner of Insurance. G.S. 58-246 and 248. "The Commissioner *shall approve* proposed changes in rates, classifications or classification assignments to the extent necessary to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest." G.S. 58-248 (Emphasis added). Chapter 58 grants the Commissioner broad regulatory and supervisory powers for overseeing the faithful execution of the insurance laws of this State. But we find no provision in that chapter giving the Commissioner concurrent authority with the Rate Office to *fix* or *reduce* rates.

**[4, 5]** The Commissioner relies on the provisions of G.S. 58-248.1 which read in pertinent part as follows:

> "Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest."

We are of the opinion, and so hold, that when the quoted language is read aright it will not support the Commissioner's conclusion that he has blanket authority thereunder to consider immediate emergency situations such as the energy crisis and enter *interim* rate orders based thereon. To so construe the statute ignores the function of the Rate Office and infringes upon its authority to fix, adjust and propose rates. When G.S. 58-248.1 is construed *in pari materia* with the other provisions of Chapter 58, we think the legislative grant of authority to the Commissioner to order an alteration or revision in the rates charged or filed presupposes the failure of the Rate Office to perform its rate-making duties faithfully. Before the Commissioner can order, "to the extent stated in such order," a rate alteration or revision under G.S. 58-248.1, he must first make a determination that the rates charged or filed are excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest. In reaching that determination he "shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such other reasonable and related factors as are relevant to the inquiry." G.S. 58-248. The quoted language is broad enough to include evidence, if otherwise competent, received not only through the Rate Office but from other sources as well.

**[6]** In the application of these standards, "[p]roposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit." G.S. 58-248; *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971). When existing or proposed rates provide for these expenses and for a *fair and reasonable profit,* and no more, the Commissioner has no authority to order alteration or revision of rates under G.S. 58-248.1.

Appellants do not allege collusion, conspiracy or other deviations from established rate-making practices by the Rate Office. On the contrary, it appears the Rate Office has followed established rate-making procedures based on underwriting experience statistics as prescribed by G.S. 58-248. Appellants are the parties contending that established rate-making principles will result in excessive rates in light of the energy crisis. Therefore, the gist of this controversy involves the selection of rate-making techniques which will properly account for the effects of the energy crisis on automobile liability insurance rates. The authority and duty to account to the public for such an emergency situation lies primarily in the Rate Office until the Commissioner finds that a proposed accounting by the Rate Office will result in unreasonable or unfair profits or that the Rate Office has engaged in undue delay in reacting to the situation. Ordinarily, the law contemplates the revision of rates on an annual basis.

**[7]** Here the Rate Office's 29 June 1973 filing does not purport to deal with the energy crisis since it was based on a two-year experience period ending 30 June 1972. Indeed, the full effects of the energy crisis were not being publicly felt in November 1973 when the first prehearing meeting was held on that filing, and only two months data relating to the energy crisis was available at the final hearing. Consequently, this record, including the showing by appellants of one method for computing rates based on motor vehicle statistics and the "original ideas" of an expert statistician, who the appellants admit is not an expert in insurance rate making, will not support a conclusion that the Rate Office was not proceeding with due diligence in

dealing with relevant factors spawned by the energy crisis. We hold, therefore, that the Commissioner was without statutory authority to enter the rate reduction order and supplementary order based on independent evidence received at the hearing. G.S. 58-9.6(b)(2).

**[8]** Furthermore, we note that the Commissioner has the statutory duty to consider rate proposals in accordance with the standards contained in G.S. 58-248 and either approve or disapprove such proposals. He has no authority to merely *accept* a proposal as being *true and accurate for purposes of entering an interim order.* Such action by the Commissioner in his 6 March 1974 order also exceeded his statutory authority.

**[9]** Even if we assume *arguendo* that the Commissioner had authority under G.S. 58-248.1 to order an interim rate reduction based on the energy crisis, his order of 6 March 1974 must still fall because it is not supported by material and substantial evidence in view of the entire record as submitted.

Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *see* Hanft, Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina, 49 N.C.L. Rev. 635, 666-68 (1971); 2 Am. Jur. 2d, Administrative Law §§ 621 and 688 (1962). "Substantial evidence is more than a scintilla or a permissible inference." *Utilities Commission v. Trucking Company,* 223 N.C. 687, 690, 28 S.E. 2d 201, 203 (1943).

The insurance rate-making process is an attempt to predict the future by relying in large measure upon what has occurred in the past. Report of the Governor's Study Commission on Automobile Liability Insurance and Rates at 41 (N.C. April 15, 1971). Among factors to be considered in making this prediction are "the loss-trend and other relevant factors developed from the latest statistical data available" and "other reasonable and related factors as are relevant to the inquiry." G.S. 58-248. We have previously held, in the related area of fire insurance, that "reasonable and related factors" may be shown by "evidence, otherwise competent, of a cost trend, upward or downward, which continues from the past into the present, *and expert testimony, otherwise competent, that such trend may reasonably be expected to continue into the future,* so that future

costs will be higher or lower than present costs." (Emphasis added.) *In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 36, 165 S.E. 2d 207, 222 (1969).

The appellants in this case have avoided the use of traditional loss experience data as prescribed in G.S. 58-248, and have attempted to establish a trend in insurance paid claims based on motor vehicle statistics alone. When this evidence is scrutinized it appears that the trending procedures formulated by witness Crotts are admittedly premised upon the assumption that the energy crisis and its ramifications will continue into the future. But there is no expert testimony supporting the assumption that the energy crisis as it existed during December 1973 and January 1974 could reasonably be expected "to continue into the future" with the same disastrous effects so obvious during the two months in question. While Mr. Register did testify that he expected the energy shortage to continue for some time, his expertise in motor vehicle statistics does not warrant such an opinion and the Commissioner was not entitled to rely on it in entering his order. Likewise, there was no expert testimony by anyone knowledgeable in the field of insurance rate making to support either the use of witness Crotts' "original ideas" for rate-making purposes or the use of two months experience in the energy crisis as a foundation for both *a rate change and a change in rate-making procedures.* To the contrary, Mr. Walters, the only witness knowledgeable of insurance rate making, expressed serious doubts concerning the techniques used by appellants to conclude a rate reduction was warranted. The Commissioner's order in this case is not supported by substantial evidence in view of the entire record as submitted and therefore cannot stand. G.S. 58-9.6(b)(5).

For the reasons stated the decision of the Court of Appeals, reversing the order of the Commissioner of Insurance, is affirmed. The Commissioner's interim order filed 6 March 1974 and his supplementary order filed 8 March 1974 are vacated. The case is remanded to the Court of Appeals for further remand to the Commissioner of Insurance for disposition of the filing according to law.

Affirmed and remanded.

STATE OF NORTH CAROLINA v. TERRY STEPHEN HILL

No. 60

(Filed 6 May 1975)

1. **Constitutional Law § 30— speedy trial — 22-month delay between offense and trial**

Defendant was not denied the right of a speedy trial on a secret assault charge by a 22-month delay between the offense and trial where defendant was in prison during most of such time, the delay was due to over-crowded court dockets, a large number of capital cases and a limited number of criminal sessions, defendant made no request for trial, and defendant has shown no prejudice because of the delay.

2. **Criminal Law § 91— two assault charges based on same incident — denial of continuance of one charge**

Where defendant was charged in separate indictments with secret assault and with felonious assault, the trial court did not err in the denial of defendant's motion for continuance of the felonious assault charge made on the ground that the indictment in such case was returned just one day prior to trial and defendant was not informed of it until shortly before trial since both offenses arose out of the same occurrence and involved the same victim, the same attorney who had previously been appointed to represent defendant on the secret assault charge was appointed to represent defendant on the felonious assault charge, and the defense on the felonious assault charge would not be appreciably different from that on the secret assault charge.

3. **Constitutional Law § 34; Criminal Law § 26— double jeopardy — secret assault — felonious assault — same occurrence**

Defendant was not placed in double jeopardy by his convictions of secret assault and felonious assault with a deadly weapon with intent to kill inflicting serious injury growing out of the same occurrence since each offense has additional and distinct elements not present in the other.

4. **Assault and Battery § 15— secret assault — instructions**

In a prosecution for secret assault, the trial court did not err in charging the jury that it could find that the assault was committed in a secret manner if it found beyond a reasonable doubt that the victim did not know that he was to be attacked by defendant or that defendant had the intention of attacking him.

Chief Justice SHARP concurring in result.

ON *certiorari* to review decision of the Court of Appeals reported in 23 N.C. App. 614, 209 S.E. 2d 528 (1974) (opinion by Campbell, J., Britt and Vaughn, J.J., concurring), which found no error in defendant's trial before *Webb, S.J.*, at the 27 May 1974 Special Criminal Session of BURKE County Superior Court.

The criminal actions herein did not originate with warrants, but originated in the superior court under the following bills of indictment:

(1) *Indictment for Secret Assault* (# 72-CRS-6079, returned at the August 1972 Session). This bill charged that defendant, Terry Stephen Hill, "on the 1st day of July, 1972, . . . did, unlawfully, wilfully, maliciously and feloniously in a secret manner assault, beat and wound one, Jack A. Ledford by waylaying and otherwise, with a deadly weapon, to wit: A round metal bar approximately one and one-half (1½") inches in diameter and approximately fifteen (15") inches long with intent to feloniously kill and murder the said Jack A. Ledford. . . ."

(2) *Indictment for Felonious Assault* (# 72-CRS-6079-A, returned at the May 1974 Session). This bill charged that defendant, Terry Stephen Hill, "on the 1st day of July 1972, . . . did, unlawfully, wilfully and feloniously assault Jack A. Ledford with a certain deadly weapon, to wit: A Round Metal Bar approximately Fifteen (15") Inches Long and One and One-Half (1½") Inch [sic] in diameter with the felonious intent to kill and murder the said Jack A. Ledford inflicting serious injuries, not resulting in death, upon the said Jack A. Ledford to wit: Multiple skull fractures, multiple facial fractures, severe cerebral contusions, and multiple contusions and lacterations of the face and scalp, resulting in serious, painful, and permanent injuries about the head and face of Jack A. Ledford. . . ."

Relevant events occurring prior to defendant's trial, and stipulated to by the parties, are noted below:

On 1 July 1972, the date of the alleged offenses, defendant was incarcerated in the Western Correctional Center of the North Carolina Department of Correction located in Burke County. On 1 September 1972 upon return of the true bill charging defendant with secret assault Judge Sam J. Ervin III appointed defendant's present counsel, John H. McMurray, to represent him.

Defendant completed all sentences on unrelated offenses and was released from the Western Correctional Center sometime during the month of April, 1974. Upon his release defendant was transferred to the Caldwell County Jail for confinement pending his trial on the secret assault charge.

On 19 April 1974 defendant filed a motion praying that the court fix a reasonable bond for his appearance at the trial on the charge of secret assault, which had been scheduled for the 27 May 1974 Special Criminal Session. Arguments on this motion were heard before Judge Ervin on Saturday, 27 April 1974, in Morganton. Following this hearing, Judge Ervin did not enter a formal order but indicated that if defendant was not tried at the next term of criminal court, he would order his release on a One Thousand Dollar ($1,000.00) bond.

The following events occurred prior to the presentation of evidence at defendant's trial on 28 May 1974:

Defendant entered a plea of not guilty to the charge of secret assault (case # 72-CRS-6079). In addition, defendant filed a written motion to dismiss this case on the ground that he had been denied his constitutional right to a speedy trial. As to the charge of felonious assault (case # 72-CRS-6079-A), defendant stood mute, whereupon the court entered a plea of not guilty. Thereafter, defendant made an oral motion to continue this case (felonious assault) on the ground that he had first been apprised of this charge at the time he entered the courtroom, some ten minutes prior to the making of the motion. It appears from the record that bill # 72-CRS-6079-A had been sent to and returned as "true" by the Grand Jury on the preceding day, 27 May 1974, the first day of the Special Criminal Session. Following a voir dire hearing, both of defendant's motions were denied. Thereafter, over defendant's objection, the court granted the State's motion to consolidate these cases for trial. The court also appointed defendant's attorney in the secret assault case to represent him in the felonious assault case.

The State then offered evidence that tended to show the following:

On 1 July 1972 defendant was confined on the 14th floor of the Western Correctional Center. Jack A. Ledford was the only security guard in charge of the 14th floor on the 11:00

p.m. to 7:00 a.m. shift, commencing on 1 July 1972. Shortly after his arrival, he told the inmates "to stay the hell out of the halls." Reacting to this order, defendant told a fellow inmate that he was going to kill Ledford. Thereafter, Ledford permitted the inmates to watch television in the lobby area.

At approximately 12:00 o'clock midnight, Ledford announced that he was working two floors, the 13th and the 14th. Following this announcement, he went down to the 13th floor. During this period, defendant unscrewed a metal mop handle from a mop bucket. This handle was approximately fifteen inches in length. After securing the handle, defendant wrapped a towel around it, placed himself in the mop room, and hid beside the entrance door. When Ledford returned to the 14th floor, another inmate, Costner, asked him to go to the mop room so that he could return a broom. When Ledford and Costner reached the entrance to the mop room, Costner shoved Ledford into the room and defendant struck him several times on the head and across the forehead with the mop handle. Following the attack, defendant procured Ledford's keys and wallet, ran down one of the corridors, and tried to open a fire escape door. Unable to open this door, he ran back up the corridor and threw the keys and the wallet on the floor beside Ledford. Thereafter, defendant ran back down the corridor, entered his room and shut the door.

As a result of the attack, Officer Ledford received very serious injuries and was rendered unconscious for approximately sixteen days. After regaining consciousness, it was subsequently determined that he had lost the greater portion of his eyesight and was permanently incapacitated. At the trial, Ledford's wife, Nancy Ellen, described the nature and effect of his injuries as follows: "After July 2, 1972, physically, when he came home, Jack could not see for one thing. . . . Also, mentally, he didn't really realize he had any children. . . . You had to give him medication to be able to control [him]. . . . His teeth were wired together. He had to be fed by a blender only. He had tongs which were inserted five places in his skull to hold his face up. His face was crushed completely, powdered into little pieces and they had to hold the structure up by wires coming out of his cheekbone, bolted into his skull in five places. . . . He has not been able to work since he has been at home . . . . " Officer Ledford did not testify.

Defendant offered no evidence. Thereafter, the jury returned guilty verdicts as to both charges. The court entered judgments on these verdicts sentencing defendant to 20 years' imprisonment on the secret assault conviction and to 10 years' imprisonment on the felonious assault conviction, the latter sentence to run concurrently with the first.

*Attorney General Rufus L. Edmisten by Associate Attorney Richard F. Kane for the State.*

*John H. McMurray for defendant appellant.*

COPELAND, Justice.

**[1]** In Assignment of Error No. 1 defendant challenges the refusal of the trial court to grant his motion to dismiss the secret assault bill on the ground his Sixth Amendment right to a speedy trial had been denied.

Numerous decisions by the federal courts and by this Court have established the following four interrelated factors to be considered in determining if a defendant's right to a speedy trial has been violated. (1) The length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice resulting to defendant from the delay. *See, e.g., Barker v. Wingo,* 407 U.S. 514 (1972); *United States v. Macino,* 486 F. 2d 750 (7th Cir. 1973); *State v. O'Kelly,* 285 N.C. 368, 204 S.E. 2d 672 (1974); *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972) (citing nine cases); *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). *See also* Annot., 57 A.L.R. 2d 302 (1958), especially supplemental decisions.

In applying the above factors, the courts have adopted a balancing approach. *See, e.g., Barker v. Wingo, supra* at 530; *United States v. Macino, supra* at 752; *State v. O'Kelly, supra* at 371, 204 S.E. 2d at 674. Nevertheless, it is still necessary to examine each factor separately.

*Length of Delay.* The delay in the instant case is not insubstantial since it involves a period of some twenty-two months. However, we elect to view this factor merely as the "triggering mechanism" that precipitates the speedy trial issue. Viewed as such, its significance in the balance is not great. *See, e.g., Bar-*

*ker v. Wingo, supra* at 530; *State v. Harrell, supra* at 115, 187 S.E. 2d at 791.

*Reason for Delay.* In *Barker, supra,* the United States Supreme Court stated that "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." However, the Court went on to state that "[a] more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531. In this State, the burden of showing neglect or wilful delay is on the defendant. *See, e.g., State v. Harrell, supra; State v. Johnson, supra.* This burden has not been met in this case. In fact, the record shows that the delay was due to overcrowded court dockets, a large number of capital cases, and a limited number of criminal sessions.

*Assertion of Right to Speedy Trial.* Failure to demand a speedy trial does not constitute a waiver of that right, but it is a factor to be considered. In *Barker,* the Court emphasized that the assertion of the right "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." 407 U.S. at 531-32. However, the Court was quick to emphasize that the failure to assert the right will "make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* In the instant case, the record shows that defendant never requested his case to be placed upon the court calendar for trial.

*Prejudice.* This is the most elusive factor enunciated in *Barker.* As to prejudice, the Court offered the following guidelines:

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Of these, the most serious is the last,* because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U.S. at 532. (Emphasis supplied.)

Oppressive pre-trial incarceration was the only factor addressed by defendant during the course of the voir dire hearing on the speedy trial motion. Defendant testified about alleged inhuman treatment he received while incarcerated on unrelated offenses. However, the record does not reflect any causal relationship between defendant's alleged inhuman treatment and the indictment for secret assault.

Accordingly, in balancing the above factors, we believe the scales fall *heavily* in favor of the State. This assignment is therefore overruled.

**[2]** In Assignment of Error No. 2 defendant contends that the trial court committed prejudicial error in refusing to grant his motion for a continuance in the felonious assault case (# 72 CRS-6079-A). The thrust of defendant's argument appears to be that his trial under this second indictment would (1) call for a different defense; (2) require a reconsideration of his position; (3) deny him an opportunity to discuss a plea; and (4) deny him the opportunity to consider the effect of the two separate charges.

In most instances this would undoubtedly be a valid contention for "the constitutional guaranty of the right of counsel requires that the accused and his counsel shall be afforded a reasonable time for preparation of his defense." *State v. Gibson,* 229 N.C. 497, 501, 50 S.E. 2d 520, 523 (1948), *quoted with approval in State v. Moses,* 272 N.C. 509, 512, 158 S.E. 2d 617, 619 (1968) (per curiam). *Accord, State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964). In the instant case, however, we find no facts that would except defendant's motion for a continuance from the general rule that such a motion is addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only in case of manifest abuse. *See, e.g., State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Cox,* 281 N.C. 275, 188 S.E. 2d 356 (1972); *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972). *See also* 2 Strong, N. C. Index 2d, Criminal Law § 91 (1967). Defendant had been charged on 1 September 1972 with secret assault upon Jack A. Ledford on 1 July 1972. Present counsel was appointed to represent defendant on the same day this first indictment was returned. The subsequent charge of felonious assault arose out of the same beating of Officer Ledford on 1 July 1972. Present counsel was also appointed to represent defendant in this case. It appears to us that the defense on the charge of felonious assault

would not be appreciably different from that on the charge of secret assault. Furthermore, we believe that defendant has failed to show that any prejudice resulted from the trial court's denial of his motion. *Cf. State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975).

**[3]** In his next series of assignments, defendant contends that the two charges against him, both arising out of the same transaction and occurrence, constituted double jeopardy in that one offense was split into two parts.

Double jeopardy has long been a fundamental prohibition of our common law and is deeply imbedded in our jurisprudence. *See, e.g., State v. Battle,* 279 N.C. 484, 183 S.E. 2d 641 (1971); *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838 (1962); *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954); *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871 (1951); *State v. Midgett,* 214 N.C. 107, 198 S.E. 613 (1938); *State v. Mansfield,* 207 N.C. 233, 176 S.E. 761 (1934); *State v. Prince,* 63 N.C. 529 (1869). *See also* trial of William Penn and William Mead, 6 State Trials 952 (1816), and case of Edward Bushell for alleged misconduct as a juror at the Penn trial. *Id.* at 999. Rather than being a single doctrine, double jeopordy is actually comprised of three separate though related rules, prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following conviction, and (3) multiple punishment for the same offense. *See Patton v. North Carolina,* 381 F. 2d 636, 643-44 (4th Cir., 1967), *cert. denied,* 390 U.S. 905 (1968). *See also* Comment, Twice in Jeopardy, 75 Yale L. J. 262, 266 (1965). In the instant case, we are only concerned with the third rule.

The general rule in this State as to multiple punishments for the same offense is as follows: "When the facts constitute two or more offenses, wherein the lesser offense is necessarily involved in the greater . . . and when the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to a final judgment will be a bar to the second." *State v. Birckhead, supra,* 256 N.C. at 497, 124 S.E. 2d at 841. This statement was quoted from *Dowdy v. State,* 158 Tenn. 364, 13 S.W. 2d 794 (1929), and had previously been quoted with approval by Chief Justice Stacy in *State v. Midgett, supra.*

The above cited rule is generally referred to as the "same evidence test." *See* Comment, *Criminal Law—Multiple Punishment and the Same Evidence Rule,* 8 Wake Forest L. Rev. 243 (1972). For applications of the rule *see, e.g., State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971); *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Robinson,* 116 N.C. 1047, 21 S.E. 701 (1895). *Cf. State v. Hatcher,* 277 N.C. 380, 390, 177 S.E. 2d 892, 899 (1970). *See also State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971). A comparative analysis of the rule, contained in the law review comment, *supra,* is helpful:

> "For an offense to be the same in law as another offense, there must be at least partial reciprocity of the elements required by the legislative enactments. Therefore, in proving the required elements A, B, and C under one statute in the first indictment, and in proving the required elements A, B, and D under another statute in the second indictment, one will not run afoul of the former jeopardy rule. C, an element of the first is not an element of the second. D, an element of the second, is not an element of the first indictment. Therefore *each* offense required proof of an element which the other did not. It is of no consequence that element C resembles element D, nor that element D was less heinous than element C." 8 Wake Forest L. Rev. at 248.

"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. [Citations omitted.]" *State v. Birckhead, supra* at 498, 124 S.E. 2d at 842.

One of the clearest applications of this rule that we have been able to find is *State v. Richardson, supra.* In that case, defendant was charged with armed robbery and with felonious assault with intent to kill inflicting serious bodily injuries not resulting in death. Defendant was convicted of both charges and on appeal to this Court filed a motion to arrest the judgment on the conviction for felonious assault on the ground that it was a lesser included offense of armed robbery. This Court, in an opinion by Chief Justice Bobbitt, rejected this contention and denied defendant's motion. The Court's reasoning is instructive:

> "The crime of robbery includes an assault on the person. [Citation omitted.] The crime of armed robbery de-

fined in G.S. § 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in G.S. § 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in G.S. § 14-87.

"If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, as in *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964), and *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970), and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested. In such case, the armed robbery is accomplished by the assault with a deadly weapon and *all* essentials of this assault charge are essentials of the armed robbery charge. However, if a defendant is convicted simultaneously of armed robbery and of *felonious* assault under G.S. § 14-32(a), neither the infliction of serious injury nor an intent to kill is an essential of the armed robbery charge. A conviction of armed robbery does not establish a defendant's guilt of felonious assault." *Id.* at 628, 185 S.E. 2d at 107-08.

The two crimes in the instant case share common elements, but like the offenses in *Richardson,* each also contains distinct elements not found in the other.

The felony described in G.S. 14-31 is often referred to as malicious secret assault and battery with a deadly weapon (secret assault). The statute provides as follows:

"If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony punishable by a fine or imprisonment for not less than one nor more than twenty years, or both such fine and imprisonment."

The following elements therefore must be proven beyond a reasonable doubt in order to establish the crime of secret

assault: (1) secret manner; (2) malice; (3) assault and battery; (4) deadly weapon; and (5) intent to kill.

The felony described in G.S. 14-32(a) is often referred to as felonious assault. The statute provides as follows:

> "Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 20 years, or both such fine and imprisonment."

The following elements therefore must be proven beyond a reasonable doubt in order to establish the crime of felonious assault: (1) assault; (2) deadly weapon; (3) intent to kill; and (4) infliction of serious injury.

At this point, we note that Chapter 229, 1973 Session Laws substituted "20 years" for "10 years" in the above subsection. Chapter 229 became effective on 1 January 1974 and by express terms was not applicable "to any offense committed prior to the effective date." Section 5, Chapter 229, 1973 Session Laws.

The existence of three common elements (i.e., assault, deadly weapon and intent to kill) in both offenses does not preclude conviction for both since each requires proof of an element that the other does not. G.S. 14-32(a), *supra*, in addition to the above common elements, requires proof of the *infliction of serious injury*. This element must be proven in order to support a conviction under G.S. 14-32(a); but, it need not be shown at all in a prosecution under G.S. 14-31. Likewise, G.S. 14-31, *supra*, in addition to the above common elements, requires proof of *secret manner* and of *malice*. These elements must be proven in order to support a conviction under G.S. 14-31; but, they need not be shown at all in a prosecution under G.S. 14-32(a). In other words, secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill inflicting serious bodily injury. *See State v. Lewis*, 274 N.C. 438, 164 S.E. 2d 177 (1968) (indictment for secret assault under G.S. 14-31 will not support conviction for felonious assault under G.S. 14-32(a) since it contained no allegation that victim was seriously injured). *See also* 2 Strong, N. C. Index 2d, Criminal Law § 26 (1967). "While the law jealously protects a culprit from double punishment, it does not allow him to commit two separate and distinct offenses for the price of one . . . . " *State v. Rich-*

*ardson, supra,* 279 N.C. at 630, 185 S.E. 2d at 109, *quoting from People v. Thomas,* 59 Cal. App. 2d 585, 139 P. 2d 359 (1943). Accordingly, these assignments are overruled.

**[4]** In his next assignment of error, defendant contends that the trial court erred in charging the jury as to the meaning of secret manner in the crime of secret assault. Specifically, defendant excepted to that portion of the charge wherein the court instructed the jury if they were "satisfied beyond a reasonable doubt that prior to the time of the assault Jack Ledford did not know that he was to be attacked by [defendant], or that [defendant] had the intention of attacking him," then they would be justified, provided the State had proven all the other elements of the crime beyond a reasonable doubt, in finding that the assault had been committed in "a secret manner" and that defendant was guilty of the felony of secret assault.

Defendant argues that if the above quoted portion of the charge is a correct statement of the law of secret assault, then any assailant could be convicted of secret assault if the victim did not know the assailant had the intention of attacking him. This contention has no merit whatsoever. As previously noted, the "secret manner" of the assault is only one of the five elements that the State must prove beyond a reasonable doubt in order to establish the commission of this crime. Therefore, if the State sought a conviction under G.S. 14-31 and only proved that the assault was made in a secret manner, defendant would be entitled to judgment as of nonsuit. As to the above charge on the element of secret manner, we find no error. It is a correct statement of this element of the offense.

Finally, defendant contends that in charging the jury on secret assault the court failed to state any facts or contentions under which the jury could acquit defendant. "The general rule is that objections to the charge in stating contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction." *State v. Lampkins,* 286 N.C. 497, 506, 212 S.E. 2d 106, 111 (1975) ; *State v. Henderson,* 285 N.C. 1, 26, 203 S.E. 2d 10, 27 (1974). *See also* 3 Strong, N. C. Index 2d, Criminal Law § 163 (1967). This was not done in the instant case. Furthermore, when the charge is considered contextually, it appears to be sufficient.

The facts indicate that defendant left his victim, the young father of two minor children, with devastating physical and

mental injuries. He will carry these permanent injuries with him to the grave. Defendant has had a fair trial, free from prejudicial error and, therefore, for the reasons stated herein, the judgment of the Court of Appeals is

Affirmed.

Chief Justice SHARP concurring in result:

I concur in the Court's decision that there was no error in defendant's conviction of secret assault, a violation of G.S. 14-31, and felonious assault, a violation of G.S. 14-32(a). However, I deem it appropriate to point out that, because of fundamental differences between this case and *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971), *Richardson* is not controlling here. *Richardson* involved the felonies of armed robbery and felonious assault. The gravamen of armed robbery is the theft of the victim's property; the gravamen of felonious assault is injury to the victim's person. In the present case, the gravamen of the two charges for which defendant has been convicted is one assault, a single act of violence with one purpose causing one injury. It was one assault which met the specifications of two statutes. Unlike some states, we have no statute which limits punishment to a single sentence in situations such as this. *See* 8 Wake Forest Law Rev. 243 (1972). However, the Court accomplished this result by imposing concurrent sentences.

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LUTHER GILES v. TRI-STATE ERECTORS AND LIBERTY MUTUAL INSURANCE COMPANY

No. 95

(Filed 6 May 1975)

1. **Master and Servant § 69— workmen's compensation — award for all injuries**

Where a workmen's compensation claim is properly pending before the Industrial Commission, the injured employee is entitled to an award which encompasses all injuries received in an accident.

2. **Master and Servant § 69— workmen's compensation — single claim for all injuries**

An injured employee is required to file but a single claim for workmen's compensation, and the amount of the compensation payable

is predicated on the extent of the disability resulting from the accident.

3. **Master and Servant §§ 72, 93— workmen's compensation — foot injury within original claim**

Plaintiff's claim for compensation for any permanent partial loss of use of his right foot was embraced within his original claim for compensation and was pending when the Full Commission entered an award covering disfigurement and permanent partial disability to the right arm but failing to make any finding of fact or award with respect to plaintiff's right foot, although evidence of the amount of permanent partial disability of the foot had been presented to the hearing officer; therefore, the Court of Appeals erred in holding that the question of permanent partial disability of the right foot was not properly before the Commission.

ON *certiorari* to the Court of Appeals to review its decision reported in 23 N.C. App. 148, 208 S.E. 2d 408 (1974), affirming an award of the Industrial Commission.

Facts revealed by the record are narrated in the numbered paragraphs which follow.

1. Plaintiff was injured under compensable circumstances on 23 April 1970 when a bar joist dropped on his head. Liability under the Workmen's Compensation Act was admitted and plaintiff was paid compensation benefits during the period of temporary total disability and was paid compensation for a ten percent permanent partial disability of his right arm.

2. Plaintiff claimed additional compensation for the permanent partial disability of his right arm, for permanent partial disability of his right foot and for disfigurement. A hearing was conducted on 11 July 1972 before Deputy Commissioner Barbee to determine these matters. At that hearing plaintiff testified concerning all aspects of his injury. With respect to his right foot he said: "I have some difficulty with one foot. My right one. I do not want to have that foot operated on at this time if I can keep from it. The same tingling sensation is still there after they run a needle in it but it didn't help it." Counsel representing plaintiff at that time stated: "Your Honor, in the reports which have been filed there's some mention about this foot. I just wanted to make a record of the fact that he still does have this old foot. I don't know which way it's going to go."

Dr. Urbaniak's medical report dated 18 December 1970 was then stipulated into evidence, and it contained the following with respect to plaintiff's right foot:

"His main complaint today is paresthesias of the plantar aspect of his right foot. He states this has been present since he returned to consciousness following his accident. He apparently made no note of this previously, but examination today does reveal evidence of posterior tibial nerve compression behind the right malleolus. On percussing the nerve, he has sensation shooting out the bottom of his foot of 'pins and needles' type of feeling. On compression of the vascular system just above the malleolus, he has some reproduction of the sensations. He has normal sensation on the plantar aspect of the foot, however. With a tourniquet placed around the calf and inflated to 110 mm produced no symptoms at 2 minutes, but when it was released, he had paresthesias on the plantar aspect of his foot. He has good dorsalis and posterior tibial pulses. There is a very slight amount of swelling in the posterior tibial compartment on the right.

I believe this man has symptoms of a tarsal tunnel syndrome or compression of the posterior tibial nerve secondary to scar in all probability a result of the blow to this region during his accident.

Nerve conduction times are done on the right and left lower posterior tibial nerves across the ankle joint and the right is 5.8 milliseconds latency and the left 6.0 milliseconds latency and these are normal conduction latencies.

I have injected this area with Xylocaine and Cortisone and told him to return to me in about a month and if his symptoms persist, we may consider another block or eventually posterior tibial nerve decompression in this region."

It will be noted that Dr. Urbaniak placed no disability rating on plaintiff's right foot at this time.

In a letter to defendant's compensation carrier dated 18 March 1971, Dr. Urbaniak stated:

"RE: Luther Giles
Duke No. H9 2 791
C-512-16227

Dear Mr. Parker:

I will try to answer your questions about Mr. Giles' foot. If the surgery is necessary on Mr. Giles' foot, and I hope

that it is not, he should have no permanent partial disability following surgery. This would amount to decompressing the nerve which is causing his symptoms. However, it is hoped that this will subside following my last injection and quite often subsides without any treatment.

If surgery is necessary, he would have to spend about five days in the hospital and would lose no more than 2 weeks of work and possibly only about 10 days.

In other words, this requires a skin incision about the ankle, freeing up the nerve and application of a dressing about the ankle for about a week. The sutures could be removed in about 10 days."

3. Following the hearing on 11 July 1972, Deputy Commissioner Barbee found that plaintiff had sustained a twenty-five percent permanent partial disability of the right arm and awarded compensation for the additional fifteen percent, fixed the compensation for disfigurement, and made provision for counsel fees. Since Dr. Urbaniak had not rated the right foot, no compensation was awarded with respect to it. Both sides appealed to the Full Commission.

4. On 15 February 1973 the Full Commission struck the award for fifteen percent additional permanent partial disability to the right arm, increased the disfigurement award and reduced counsel fees which had been allowed by Deputy Barbee. The Full Commission then ordered that plaintiff be examined by Dr. Urbaniak "for the purpose of determining what amount of additional permanent partial disability, if any, this physician finds the plaintiff now has with reference to his right upper extremity."

5. Dr. Urbaniak conducted the examination as ordered on 25 May 1973. Then on 28 August 1973 Dr. Urbaniak testified before Commissioner Stephenson that in October 1970, when he rated plaintiff, he did not give him any permanent partial disability of the right foot but said he would give plaintiff a ten percent permanent partial disability of the right foot following his examination on 25 May 1973. The doctor called attention to the fact that a good portion of his note of 18 December 1970 involved "evaluation of this foot problem." Alluding to his examination of plaintiff on 25 May 1973, Dr. Urbaniak said:

"The disability to his foot, in fact, is disabling insofar as ability to use the foot. This is a problem. We have a name

for this. I mentioned here the tarsal tunnel syndrome. It is where the bone—the nerve goes through the bone there, the tunnel. Nerve goes through a tunnel in the bone, so to speak. This particular tarsal tunnel syndrome was originally described at Duke nearly 20 years ago, and it is disabling. It is like having a hot foot all the time. He has that condition. That is a nerve that goes through the tunnel of the bone. It is a bone on one side and kind of ligaments on the other side and they may squeeze the nerve, so to speak. . . . I don't think that any type of treatment will benefit him."

Dr. Urbaniak then gave plaintiff a twenty-five percent permanent partial disability rating on his right arm and a ten percent permanent partial disability rating on his right foot "based on the continued paresthesias and sensitivity over the posterior tibial nerve."

All evidence taken before Commissioner Stephenson was transcribed and referred to the Full Commission.

6. On 24 October 1973 the Full Commission entered its final order reinstating the award for fifteen percent additional permanent partial disability of plaintiff's right arm, approved an additional counsel fee, but made no finding and issued no award with respect to plaintiff's right foot.

7. Plaintiff's motion, filed 2 November 1973, to reconsider the matter with respect to his right foot was denied and he appealed to the Court of Appeals, claiming compensation for a ten percent permanent partial disability of that member. The Court of Appeals affirmed the award of the Industrial Commission, and we allowed certiorari to review that decision.

*John J. Schramm, Jr., Attorney for plaintiff appellant.*

*No counsel contra.*

HUSKINS, Justice.

This case turns on whether the Industrial Commission erred in failing to make findings of fact relative to permanent partial disability of plaintiff's right foot, if any, sustained by reason of his accident on 23 April 1970.

It is quite apparent from the record that plaintiff's right foot was still in the healing stage and not ready to be rated when Dr. Urbaniak's medical report dated 18 December 1970 was

composed. Hence that report contained no rating on the right foot. Even so, when the report was offered and received in evidence at the hearing before Deputy Barbee on 11 July 1972, plaintiff's counsel said: "I just wanted to make a record of the fact that he still does have this old foot. I don't know which way it's going to go." Thus all parties and the Industrial Commission were on notice that plaintiff had a foot involvement arising out of the accident that might, or might not, result in permanent partial disability, or loss of use of that foot.

More than ten months later when Dr. Urbaniak examined plaintiff on 25 May 1973 by order of the Full Commission, it was found that plaintiff's right foot had changed for the worse resulting in a ten percent permanent partial loss of use of it. The doctor rated the loss accordingly and stated that further treatment would be of no benefit. Thus the healing period had ended. That evidence, along with the doctor's evidence concerning plaintiff's twenty-five percent permanent partial disability of the right arm, was referred by Commissioner Stephenson to the Full Commission "for such disposition as it deems appropriate."

For some obscure reason, the Full Commission declined to make *any* finding of fact with respect to plaintiff's right foot and plaintiff appealed. The Court of Appeals upheld the Commission's action in this regard for that (1) plaintiff stipulated at the 11 July 1972 hearing that the issue before the Commission was "disfigurement and the amount of permanent partial disability to the arm," (2) plaintiff never brought up the alleged injury to his right foot until 2 November 1973 when he took exception to the failure of the Full Commission to award him compensation for ten percent loss of use of his foot, and (3) plaintiff stated in his notice of appeal to the Full Commission from Deputy Barbee's award that "all other grounds for appeal were waived and abandoned." The Court of Appeals concluded its decision by saying: "It was a too late attempt to do what should have been done some two years or more prior thereto."

It suffices to say that the record does not support grounds (1) and (2) and the third ground is not relevant to plaintiff's foot injury since the foot had not been rated on 11 July 1972 when Deputy Barbee heard evidence, found facts, and issued an award from which plaintiff appealed to the Full Commission. The question of plaintiff's right foot was not involved in that appeal. Rather, the appeal concerned plaintiff's dissatisfac-

tion with the amount awarded for disfigurement and defendant's dissatisfaction with the amount awarded for permanent partial disability to plaintiff's right arm.

**[1, 2]** Where a claim is properly pending before the Industrial Commission, as here, the injured employee is entitled to an award which encompasses all injuries received in the accident. The employee is required to file but a single claim, and the amount of compensation payable is predicated on the extent of the disability resulting from the accident. *Smith v. Red Cross,* 245 N.C. 116, 95 S.E. 2d 559 (1956). G.S. 97-31(14) fixes the amount of compensation payable for the loss of a foot and specifies that such amount is payable in addition to compensation paid for disability during the healing period and in lieu of all other compensation, including disfigurement. Thus the award of the Industrial Commission should, within statutory limits, compensate him for all disability suffered. *Watkins v. Motor Lines,* 279 N.C. 132, 181 S.E. 2d 588 (1971); *Rice v. Panel Co.,* 199 N.C. 154, 154 S.E. 69 (1930).

**[3]** It necessarily follows that plaintiff's claim for compensation for any permanent partial loss of use of his right foot was embraced by his original claim and was pending on 24 October 1973 when the Full Commission entered an award covering disfigurement and permanent partial disability to the right arm but failed to make any finding of fact or award with respect to plaintiff's right foot. No statute of limitations runs against a litigant while his case is pending in court. *Hanks v. Utilities Co.,* 210 N.C. 312, 186 S.E. 252 (1936); *Watkins v. Motor Lines, supra.* "Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the Commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation." *Hall v. Chevrolet Inc.,* 263 N.C. 569, 139 S.E. 2d 857 (1965). Here, no laches are shown and no statutory bar exists. Plaintiff's alleged disability to his right foot seems to have been "lost in the shuffle."

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Industrial Commission. That agency will consider the evidence in the record with respect to plaintiff's right foot, and any additional evidence either party may desire to offer

on the subject, make findings of fact thereon as to the amount of permanent partial disability, or loss of use, if any, of plaintiff's right foot and issue an award accordingly.

Reversed and remanded.

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STATE OF NORTH CAROLINA v. CHARLIE SMATHERS

No. 112

(Filed 6 May 1975)

1. **Criminal Law § 91— motion for continuance — constitutional grounds — appellate review**

Ordinarily, a motion for continuance is addressed to the sound discretion of the trial judge and his ruling is not subject to review on appeal in the absence of gross abuse; but when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court is reviewable on appeal.

2. **Constitutional Law § 31; Criminal Law § 91— motion for continuance — trial on day indictment returned — warrant charging different crime — time to prepare defense**

The denial of defendant's motion for continuance of a first degree burglary case deprived defendant of the opportunity fairly to prepare and present his defense where the case was called for trial on the same day the indictment was returned charging defendant with feloniously breaking and entering an occupied dwelling in the nighttime with intent to commit larceny, the warrant upon which defendant was arrested charged only the misdemeanor of breaking and entering for the purpose of threatening to kill an occupant of the dwelling, the judge's finding at the preliminary hearing was that probable cause had been shown that "a crime" had been committed, and the motion was based on the absence of unsubpoenaed witnesses who were allegedly in court at the beginning of the session a few days prior to defendant's trial.

3. **Criminal Law § 91— motion for continuance — absence of witnesses — insufficient showing**

Counsel's statement to the court in support of his motion to continue the trial because of the absence of alibi witnesses was insufficient where neither the names of the witnesses nor the substance of their expected testimony was divulged.

4. **Criminal Law § 91— motion for continuance — absence of unsubpoenaed witnesses**

Ordinarily the absence of witnesses upon whom a subpoena could have been served will not constitute ground for continuance.

State v. Smathers

APPEAL by defendant under G.S. 7A-27(a) from *Friday, J.*, 11 November 1974 Session of the Superior Court of HAYWOOD.

The two-week session of the Superior Court of Haywood County, which was scheduled to begin on Monday, 11 November 1974, convened on Tuesday, 12 November 1974. On 14 November 1974 the grand jury returned a bill of indictment which charged that during the nighttime about 1:00 a.m. on 19 June 1974, defendant did feloniously and burglariously break and enter the dwelling of Marion Burgess, then occupied by Marion Burgess, with the felonious intent to steal, take and carry away the goods and chattels of Marion Burgess "and with the felonious intent to commit an assault with intent to kill the said Marion Burgess. . . ."

On the same day the bill of indictment was returned the solicitor for the State called the case for trial. Defendant, through his court-appointed counsel, John I. Jay, moved for a continuance upon the ground that his defense was an alibi and he was unprepared for trial because of the absence of material witnesses whose testimony would establish his alibi. Counsel explained their absence as follows: "[T]hese persons were residents of the State of South Carolina—we issued no subpoenas. They were here at the beginning of the week and they indicated that they would voluntarily be here for trial. We attempted to contact them and have been unable to contact them through the week." He asked "the Court's indulgence to get the witnesses here" because "[t]his is a very serious matter, which could lead to his [defendant's] imprisonment for life. . . ."

The solicitor resisted the motion to continue on the grounds that defendant had been arrested on 30 June 1974 upon a warrant dated 29 June 1974; that he had been given a preliminary hearing on 19 July 1974 in the district court, which ordered him to give bond in the amount of $2,500.00 for his appearance at the November 1974 session of Haywood; that defendant remained in jail for want of bond; that the trial calendar for the November session had been filed with the Clerk of the Superior Court for more than 10 days prior to the session; that the absent witnesses were not under subpoena; and that defendant had filed no "affidavit as to what any witness would testify."

Upon Judge Friday's denial of his motion to continue defendant excepted and entered a plea of not guilty. The trial then proceeded.

The evidence for the State consisted of the testimony of Marion Burgess, aged 39, and of his son, Michael Edward Burgess, aged 13. Their testimony tended to show:

On the night of 19 June 1974 Burgess was at his home in the Hemphill section of Haywood County with his son Michael. The two were in bed asleep when, between 12:30 a.m. and 1:00 a.m., defendant gained entrance to the house by reaching through a broken pane covered with cardboard and unlocking the door from the inside. The sound awakened Burgess. Defendant, whom Burgess knew at that time, struck a match, turned on the light, and "laid" a .22 pistol on him. He pointed the gun at him "between his eyes" and told him if he moved he would shoot his brains out and that there were two more outside with shotguns. After a while defendant put the pistol back in the holster and asked Michael to make some coffee and to get him some .22 shells. Michael complied with both requests because, he said, he was afraid. When defendant got ready to leave he picked up a flashlight "worth $2.00 and something" and took it with him, along with the shells, "worth $1.00 and something."

Defendant testified "that he had been living in Greenville, South Carolina; that he did not particularly recall the night of the 19th of June 1974, but he knows that he was in Greenville, South Carolina, on that night and that he denies the accusations made against him."

The above summary encompasses defendant's statement of the evidence set out in his case on appeal. Seemingly counsel prepared the summary without the assistance of a stenographic transcript of the trial. However, the record shows a 50-day extension of time in which to serve the case on appeal, and the inclusion of the judge's charge verbatim shows clearly that the transcript was at hand. The following statement of evidence, which does not appear in defendant's summary, is taken from the judge's charge.

"Burgess said on cross-examination that he had known the defendant, and that he had drunk with him, and that he had seen him, that is, the defendant, drinking; and that the defendant had dated his daughter; that the defendant entered his

home in the nighttime and put him in fear on this 19th of June, 1974; and that he made complaint of this incident on the 29th of June, 1974; that he did not see the defendant between the 19th and the 29th; Mr. Burgess said that he did have a telephone in his home at this time; he said that he knew that the law was looking for the defendant and that the law would get him, and that was the reason for the ten-day delay; he said that he didn't aim to bother him if he hadn't come back on him; that Burgess was afraid of the defendant, because he was afraid that he would kill him; he said that his home was located about two hundred yards from the road, and that he woke up when the defendant came through the door.

* * *

"Mr. Smathers testified that he lived in Greenville, South Carolina; that on this night he was in Greenville, South Carolina, with his mother and sister, and nephew and children, and for the last two weeks he had been here in Haywood County, in jail; that on 29 June, 1974 he was in Waynesville with his mother and walking down the street and that he saw Burgess; that he had seen him before, two years prior to this time; that he had got drunk in his home; he said that Burgess had accused him of having a relationship with his wife; Smathers said that he did not own a pistol, that he had never owned a pistol; that he did not break into Burgess' house, that he was not guilty of this, and that he knew nothing about any pistol or any gunshots, or about breaking into the house; he did not push open any door to go in the house, and did not go in any door; he said that he had been convicted of nonsupport; larceny; that he had some traffic violations; of unlawful restraint; assault and public drunk."

In his charge the judge instructed the jury that in order to convict defendant of first degree burglary they must be satisfied beyond a reasonable doubt that during the nighttime, and while it was actually occupied, defendant broke and entered the Burgess dwelling with the intent to commit the felony charged in the indictment, that is, larceny. The judge treated as surplusage, and did not mention, the fact that the indictment also charged that defendant broke and entered the Burgess dwelling with "the felonious intent to commit an assault with intent to kill the said Marion Burgess."

Upon the jury's verdict, "guilty as to Burglary in the first degree, as charged in the Bill of Indictment," the court imposed

the mandatory sentence of life imprisonment, and defendant appealed.

*Rufus L. Edmisten, Attorney General, and Roy A. Giles, Jr., Assistant Attorney General, for the State.*

*John I. Jay and I. C. Crawford for defendant appellant.*

SHARP, Chief Justice.

Appellant's brief does not purport to comply with Rule 28 of the Rules of Practice in the Supreme Court of North Carolina. However, since defendant appeals a life sentence, we refrain from dismissing the appeal and consider his only assignment of error which suggests merit. This assignment is that "the trial court erred in not allowing defendant's motion for a continuance."

**[1]** The rule is firmly established that ordinarily a motion for continuance is addressed to the sound discretion of the trial judge and his ruling is not subject to review on appeal in the absence of gross abuse. But when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable.

"The authority to rule a defendant to trial in a criminal prosecution attaches only after the constitutional right of confrontation has been satisfied. The question is not one of guilt. Nor does it involve the merits of the defense he may be able to produce. It is whether the defendant has had an opportunity fairly to prepare his defense and present it. . . . The law must first say where the line of demarcation is and on which side the case falls. Constitutional rights are not to be granted or withheld in the court's discretion.

" 'The rule undoubtedly is, that the right of confrontation carries with it not only the right to face one's "accuser and witnesses with other testimony" [N. C. Const. art. I, § 23 (1971)], but also the opportunity fairly to present one's defense.' " *State v. Farrell,* 223 N.C. 321, 326-327, 26 S.E. 2d 322, 325 (1943). *See State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389 (1962).

**[2]** The specific question presented is whether the denial of defendant's motion for a continuance deprived him of his rights

under N. C. Const. art. I, § 23 (1971) to be informed of the accusation against him and to confront his accusers and the witnesses against him with other testimony.

We note first that the warrant which Burgess swore out on 29 June 1974—ten days after the alleged burglary—charged that between midnight and 1:00 a.m. on 19 June 1974 defendant feloniously broke and entered the occupied Burgess dwelling "with the intent to commit a felony therein, To-Wit, *threatening to kill the said Marion Burgess.*" (Emphasis added.) The warrant did not charge that the breaking and entering alleged was with the intent to commit larceny. We also note that at the "Probable Cause Hearing" the judge's finding was that "sufficient evidence has been presented to establish probable cause that *a crime* has been committed." (Emphasis added.)

Defendant correctly contends that the warrant which charged him with breaking and entering for the purpose of *threatening to kill* Marion Burgess charged only a misdemeanor under G.S. 14-54(b); that a mere oral threat to kill, unaccompanied by any assault, is neither a felony nor a crime. In his brief he asserts he received his first notice that he was charged with breaking and entering with intent to commit larceny when the indictment was returned on the day of the trial; that prior thereto he had reasonably believed he would be tried in the Superior Court upon a misdemeanor charge; that instead, he was tried for a felony which, until 8 April 1974, had been a capital crime; and that he was forced into a trial for which he was not allowed sufficient time to prepare his defense.

**[3]** Counsel's statement to the court in support of his motion to continue the trial because of the absence of witnesses to corroborate defendant's alibi was lacking in specificity and unsatisfactory. *See State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974). Neither the names of the witnesses nor the substance of the testimony they were expected to give was divulged. The only information imparted was that they were residents of South Carolina. For that reason alone elementary precaution would have required that they be subpoenaed on the day they were in the jurisdiction of the court.

**[4]** Ordinarily the absence of witnesses upon whom a subpoena could have been served will not constitute a ground for continuance. However, as counsel perceived when this case was called for trial, it involved "a very serious matter, which could

lead to his [defendant's] imprisonment for life." We also note: (1) The solicitor did not question counsel's statement that witnesses had come from South Carolina "at the beginning of the week." (2) Defendant himself was in jail and dependent upon others to subpoena his witnesses. (3) The record discloses counsel's knowledge that the witnesses were at court at the beginning of the week but it does not show that defendant knew of their presence. (4) Defendant was tried on Thursday and Friday of the first week of a two-week session.

**[2]** Under the circumstances, as disclosed by this record, we hold that defendant has not had an opportunity fairly to prepare and present his defense. Therefore, the judgment below is vacated and a new trial is ordered.

New trial.

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UNITED TELEPHONE COMPANY OF THE CAROLINAS, INC. v. UNIVERSAL PLASTICS, INC.

No. 20

(Filed 6 May 1975)

1. **Injunctions § 12— preliminary injunction — irreparable injury real and immediate — preserving of status quo**

   A prohibitory preliminary injunction is granted only when irreparable injury is real and immediate, and its purpose is to preserve the status quo of the subject matter involved until a trial can be had on the merits.

2. **Injunctions § 12— preliminary injunction — no showing of damage to plaintiff**

   The trial court erred in granting plaintiff telephone company a preliminary injunction prohibiting defendant from soliciting and selling advertising space on plastic telephone directory covers to be distributed to plaintiff's subscribers where the evidence disclosed no damage to plaintiff in the sale of advertisements in the yellow pages.

3. **Injunctions § 12— preliminary injunction — irreparable injury**

   An applicant for a preliminary injunction must do more than merely allege that irreparable injury will occur; the applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur.

ON *certiorari* pursuant to G.S. 7A-31 (a) for initial appellate review by the Supreme Court of the judgment of *McConnell,*

*J.*, at the 19 August 1974 Session of MOORE Superior Court, which granted plaintiff a preliminary injunction pending final determination of the cause.

Plaintiff alleged, in summary, that: It is a telephone utility corporation with the exclusive franchise for furnishing telephone service to subscribers in the towns and communities of Angier, Bonlee, Carthage, Robbins, Vass, Pinehurst, Southern Pines, Siler City, Pittsboro, Goldston, Fuquay-Varina, Kernersville and Gibsonville. In the course of its business plaintiff furnishes its subscribers with telephone directories that are placed in the homes or places of business of its subscribers. These directories remain the property of the plaintiff. Among the provisions of plaintiff's tariff on file with the North Carolina Utilities Commission is a provision which reads as follows:

> "Telephone directories distributed from time to time by the Company remain the property of the Company, shall not be mutilated and shall be surrendered upon request. No binder, holder, insert or auxiliary cover or attachment of any kind not furnished by the Company shall be attached to the directories owned by the Company, except that this prohibition shall not apply to a subscriber-provided binder, holder, insert, or auxiliary cover which is not so attached as to impede reference to essential service information or otherwise interfere with service.

Defendant, through its agents, is now engaged in the business of soliciting and selling advertising space on plastic telephone directory covers with the purpose of distributing these covers to plaintiff's subscribers, who will attach them to the directories in such a way as to completely envelop the front and back covers of the directories issued by plaintiff and obscure essential information printed on the inside of the front and back covers. The advertisements on the plastic covers will diminish the advertising value of the "yellow pages" in plaintiff's directories, make it difficult, if not impossible, to sell advertisement in the "yellow pages" and thereby reduce the income received by plaintiff for such advertisement. Defendant's distribution of the plastic covers constitutes unlawful interference with the contractual relationship of plaintiff with its subscribers and also constitutes a trespass on the property of the plaintiff. It is impracticable to require the plaintiff to prosecute a multiplicity of suits at law against the subscribers or defendant, so a temporary restraining order should be granted against the defendant.

Defendant answered and counterclaimed, in summary, as follows: The degree of competition between defendant's advertising program and plaintiff's advertising program is limited because, among other reasons, only approximately ten to sixteen local businesses in a particular community can participate in defendant's program while there is no limit upon the number of pages of advertising space that can be sold by plaintiff. An injunction against defendant would do substantial and irreparable harm to defendant. Plaintiff has a monopoly to provide telephone service but this monopoly does not extend to classified advertising. The plastic covers are distributed free to telephone subscribers for such use as they see fit, are "subscriber-furnished," do not impede any essential telephone service, and are not prohibited by the tariff. The tariff restrains interstate commerce and violates North Carolina and federal antitrust and fair-trade laws, and is an unwarranted interference with the subscriber's rights reasonably to use his telephone and telephone directory service. Plaintiff's concerted acts in attacking the lawful business of the defendant were done willfully, maliciously, and with reckless disregard of the rights of the defendant and entitle defendant to punitive damages.

This proceeding was instituted by the filing of the complaint on 4 April 1974, together with the issuance of a temporary restraining order, *ex parte* by Godwin, J., signed on 14 April 1974. On 17 July 1974, McConnell, J., conducted a hearing on plaintiff's request for a preliminary injunction. On 29 August 1974, McConnell, J., after considering the pleadings, affidavits, testimony, and arguments of counsel, issued a preliminary injunction, the effect of which was to restrain the defendant-appellant from the conduct of its business until this cause is finally determined. We allowed *certiorari* prior to determination by the Court of Appeals.

Other facts pertinent to decision are set out in the opinion.

*William D. Sabiston, Jr., and Hurley E. Thompson, Jr., by William D. Sabiston, Jr., for plaintiff appellee.*

*Smith, Moore, Smith, Schell and Hunter by Bynum M. Hunter and Benjamin F. Davis, Jr., for defendant appellant.*

MOORE, Justice.

Defendant appeals from the order granting the preliminary injunction pending trial on the merits. We do not decide here

the ultimate issues raised by the pleadings. The only question for review is whether plaintiff made a sufficient showing to justify the court's order granting a preliminary injunction.

**[1]** A prohibitory preliminary injunction is granted only when irreparable injury is real and immediate. Its purpose is to preserve the status quo of the subject matter involved until a trial can be had on the merits. 4 Strong, N. C. Index 2d, Injunctions § 1, p. 388 (1968); *In re Reassignment of Albright,* 278 N.C. 664, 180 S.E. 2d 798 (1971); *Hall v. Morganton,* 268 N.C. 599, 151 S.E. 2d 201 (1966); *Starbuck v. Havelock,* 252 N.C. 176, 113 S.E. 2d 278 (1960). The issuing court, after weighing the equities and the advantages and disadvantages to the parties, determines in its sound discretion whether an interlocutory injunction should be granted or refused. The court cannot go further and determine the final rights of the parties which must be reserved for the final trial of the action. 2 McIntosh, North Carolina Practice and Procedure 2d, § 2219 (1956); *In re Reassignment of Albright, supra; Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309 (1924). "In passing on the validity of an interlocutory injunction the appellate court is not bound by the findings of fact made by the issuing court, but may review the evidence and make its own findings. . . ." *In re Reassignment of Albright, supra. Accord, Conference v. Creech* and *Teasley v. Creech* and *Miles,* 256 N.C. 128, 123 S.E. 2d 619 (1962); *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319 (1953). As stated by Justice Lake, writing for the Court in *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545 (1968):

> "The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury to the applicant from the continuance of the activity of which it complains to the final determination of the action. [Citations omitted.] . . . An injunction *pendente lite* should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending. *Huskins v. Hospital* [238 N.C. 357, 78 S.E. 2d 116 (1953)]."

**[2]** The record in the present case fails to disclose evidence of any actual damage to plaintiff. Plaintiff's only witness James R. Thomas, its Division Commercial Manager and Assistant

Secretary, testified at the hearing that he had no detailed information that the distribution of defendant's cover had in any way affected the plaintiff's income received from advertisement in the yellow pages. Plaintiff offered no evidence that it has lost a single subscriber to its yellow pages by reason of defendant's activities or that a single advertiser on defendant's cover had failed to advertise in plaintiff's yellow pages. The record discloses that plaintiff's directory had 111 yellow pages for advertising and only 99 white pages for the directory proper and that defendant's cover had only eight advertisers, many if not all of whom also advertised in plaintiff's yellow pages. Thus, plaintiff's evidence fails to support the broad allegations of irreparable injury contained in its complaint. Similarly, while alleging irreparable injury, plaintiff's verified complaint fails to allege facts in support of its allegations.

**[3]** An applicant for a preliminary injunction must do more than merely allege that irreparable injury will occur. The applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur. " . . . 'It is not enough for the plaintiff to allege simply that the commission or continuance of the act will cause him injury, or serious injury, or irreparable injury; but he should allege the facts, from which the court may determine whether or not such injury will result.' [Citations omitted.]" *Pharr v. Garibaldi,* 252 N.C. 803, 815, 115 S.E. 2d 18, 27 (1960).

Defendant, by affidavit and by its verified answer, has set out in detail its damage. The preliminary injunction issued in this action has prevented defendant's agent from soliciting orders in this area, has discredited the good name of the defendant's business, has discouraged potential customers, and, in fact, has completely stopped defendant's business in the area served by plaintiff.

Since plaintiff has failed to show a reasonable probability of substantial injury through the continuance of defendant's business until the final hearing, we hold that it was error to grant the preliminary injunction and it is hereby vacated.

Upon this appeal it is not necessary for us to determine whether defendant has the right under the quoted tariff to solicit advertising and to manufacture and distribute the plastic covers with advertising thereon to plaintiff's subscribers, and we express no opinion upon that question. This and all other issues

raised by the pleadings will be determined at the final hearing of the cause.

Our ruling dissolving the preliminary injunction will have no bearing whatever on the rights of the parties when the action is tried on its merits. *Huskins v. Hospital, supra.*

For the reasons stated, the order of the trial court granting the preliminary injunction is reversed and the case is remanded to the Superior Court of Moore County for trial on its merits.

Reversed.

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EDNA H. NEAL, ADMINISTRATRIX OF THE ESTATE OF JERRY AUGUSTUS NEAL v. N. C. BOOTH AND SEABOARD COAST LINE RAILROAD COMPANY

No. 16

(Filed 6 May 1975)

1. **Railroads § 5— crossing accident — contributory negligence by motorist**

In a wrongful death action arising from a railway crossing accident, plaintiff's evidence failed to disclose that her intestate was contributorily negligent as a matter of law where it tended to show: defendants' train approached the unguarded crossing from the east at 80 mph without any signal from the train or the electrical warning device at the crossing; as the intestate drove slowly toward the tracks he faced the afternoon sun which was just to the right of the electrical warning signal; his view of the tracks to the east was obstructed by the railroad's depot, automobiles parked adjacent thereto, and boxcars on the side track, the first of three tracks at the crossing; because of these obstructions intestate was unable to see the train approaching on the third track until he crossed the side track; in the 21 feet between the tracks he was unable to stop; and the train struck the left side of his automobile.

2. **Railroads § 6— absence of warning signals — admissibility of evidence**

Testimony that a person nearby who could have heard and did not hear the sound of a whistle or the ringing of a bell, or could have seen the flashing of lights and did not see them, is some evidence that no such signal was given.

3. **Railroads § 5— approaching train — right of way — warnings**

A train has the right of way at a public crossing, but it is the duty of the engineer to sound the customary warnings of the train's approach.

**4. Railroads § 5— approaching train — motorist's reliance on warning**

A traveler on the highway has the right to expect timely warning of an approaching train, but the engineer's failure to give such warning will not justify an assumption that no train is approaching.

**5. Railroads § 5— approaching train — duty of motorist**

Before going upon the track, and at a point where lookout will be effective, a traveler must look and listen in both directions for approaching trains if not prevented from doing so by the fault of the railroad company; he has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed, but the fact that an automatic warning signal is not working does not relieve him of the duty to look and listen for approaching trains when, from a safe position, such actions will suffice to warn him of danger.

**6. Railroads § 5— crossing accident — nonsuit — exact measurements**

In an action arising out of a railroad crossing accident, mathematical possibilities and the results of exact measurements showing minimal space in which observations could be made should not be controlling factors in determining whether nonsuit should be allowed as a matter of law.

ON *certiorari* to review the decision of the Court of Appeals, reported in 22 N.C. App. 415, 206 S.E. 2d 766 (1974), affirming the judgment of *Hobgood, J.*, directing verdict for defendants at the 14 January 1974 Session of the Superior Court of JOHNSTON.

Action for wrongful death. Plaintiff's intestate, Jerry Neal, aged 16, was killed instantly at 4:38 p.m. on 15 November 1969 when the automobile he was operating was struck by defendant Seaboard Coast Line Railroad's train No. 85 at a grade crossing in the town of Kenly where the railroad's tracks intersect N. C. State Highway No. 222. Defendant Booth was the engineer on train No. 85.

Plaintiff alleged that the death of her intestate was proximately caused by the negligence of defendants in that (1) the Railroad failed to provide a crossbar or gate to obstruct Highway No. 222 when a train was approaching the intersection of its tracks with the highway; (2) the Railroad maintained its depot in such close proximity to its tracks and Highway No. 222 that it obstructed a traveler's view to the east as he traveled south toward the crossing; and (3) the train approached the much traveled crossing at a highly dangerous and excessive speed and without giving any warning of its approach. Defendants denied that they were guilty of any negligence and alleged

that Jerry Neal proximately caused or contributed to his death by driving upon the crossing in the path of the approaching train when, by the exercise of proper care, he could have seen and heard it coming.

Stipulations establish that at the time of the collision defendant Booth was the agent and employee of defendant Railroad, and that he was operating the train at a speed of approximately 80 mph.

Evidence for plaintiff tends to show:

Defendant Railroad maintains three parallel tracks which run in an east-west direction through the business district of Kenly. The rails of each track are five feet apart, and the distance from the center line of one track to the center line of the next is thirteen feet. The north track is a service or side track located within three feet of the depot's platform ramp. The other two tracks are main lines. Southbound trains run over the middle track; northbound trains, over the south track. In Kenly, Highway No. 222 is denominated Second Street. It is the main business street and intersects the railroad tracks at right angles in the center of town. This crossing is heavily traveled—especially on Saturday. On 15 November 1969 there were no gates or crossbars to prevent access to the crossing when a train was approaching.

The Railroad's station, a building 30.5 feet by 107.15 feet and 20 feet high, is located 42.1 feet north of the center line of the southernmost track and 52.5 feet east of the center line of Highway 222. The space between the west end of the depot and the highway is a parking area. Streets on each side of the Railroad, known respectively as North Railroad Street and South Railroad Street, parallel the tracks and cross Highway 222. The north wall of the station is 27 feet from the center line of North Railroad Street.

On the northwest and southeast corners of the intersection of the tracks and Highway 222, defendant Railroad maintains an electrical warning signal approximately 16-18 feet from the first track. This signal is a stand, 9-10 feet high, with four hooded lights, two facing north and two facing south.

On Saturday afternoon, 15 November 1960, about 4:38 p.m., Jerry Neal drove his automobile westerly along North Railroad Street to its intersection with Highway 222. After stopping at a

stop sign he made a left turn into the highway and proceeded south at a speed of about 5 mph toward the crossing 65 feet away. At that time his view of the tracks to the east was obstructed by the depot, by automobiles parked between it and the highway, and by two boxcars on the side track near the east end of the depot. The sun was then about eight degrees above the horizon and just to the right of the warning lights which faced him.

Jerry Neal drove onto the crossing, and on the third (the southernmost) track his automobile was struck on the left side by train No. 85, which approached the crossing from the east at 80 mph. A witness, who was purchasing gas at a pump on the south side of the crossing 100 feet from the point of collision, testified that she heard the impact but prior thereto she had heard no horn or whistle from the approaching train; nor did she hear any warning or see any flashing lights from the electric signal at the crossing. At the time of the collision the Chief of Police of Kenly was traveling west on South Railroad Street approaching its intersection with Highway No. 222. He testified that he saw debris from the collision flying in the air; that he did not hear any horns, signals or other warnings—nor did he hear the train. A witness, who testified that she was about 150 feet from the point of collision and "able to see the collision," said that after the collision the train carried the car down the track to the next intersection; that prior to the impact she heard no signals or warning that a train was approaching. Another witness, who heard the train and collision, testified positively that prior thereto "there were no bells, no horns, or whistles."

At the close of plaintiff's evidence, defendants moved for a directed verdict upon the grounds that plaintiff's evidence failed to show actionable negligence on the part of either of the defendants but, on the contrary, established as a matter of law that the negligence of plaintiff's intestate was the sole cause or a contributing cause of the collision which resulted in his death.

Judge Hobgood granted defendants' motion and, on appeal, the Court of Appeals affirmed. It held (1) that plaintiff's evidence, considered in the light most favorable to her, made out a prima facie case of defendants' actionable negligence, but (2) it also established intestate's contributory negligence as a matter of law since "it tends to show that . . . [intestate] was

traveling at the rate of 5 miles per hour and that his view was obstructed until he was 21 feet from the southernmost track." We granted certiorari.

*Mast, Tew & Nall and W. R. Britt for plaintiff appellant.*

*Maupin, Taylor & Ellis by Richard C. Titus for defendant appellees.*

SHARP, Chief Justice.

The Court of Appeals correctly held that plaintiff's evidence in this case is sufficient to establish prima facie that the negligence of defendants was a proximate cause of intestate's death. Thus, this appeal presents only the question whether the Court of Appeals erred in holding that plaintiff's evidence also established her intestate's contributory negligence as a matter of law. Defendant's motion for a directed verdict on the ground of intestate's contributory negligence cannot be sustained unless plaintiff's evidence, taken as true and interpreted in the light most favorable to plaintiff, so clearly shows intestate's negligence to have been a proximate cause of his death that it will support no other conclusion as a matter of law. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Perkins v. Cook*, 272 N.C. 477, 158 S.E. 2d 584 (1968).

**[1]** Taking plaintiff's evidence as true and giving her the benefit of every favorable inference which can reasonably be drawn from it, the evidence is sufficient to permit (but not to compel) the following findings of fact:

On 15 November 1969 at 4:38 p.m., defendants' train No. 85 approached the much traveled, unguarded highway crossing in the town of Kenly from the east at a speed of 80 mph without any signal from the train or the electrical warning device at the intersection. At that time plaintiff's intestate also approached the crossing after having stopped and turned left into the highway from an intersecting street 65 feet north of the crossing. As he drove slowly south he faced the afternoon sun, which was just to the right of the electrical warning signal. His view of the tracks to the east was obstructed by the Railroad's depot, automobiles parked adjacent thereto, and boxcars on the side track, the first of the three tracks at the crossing. Because of these obstructions intestate was unable to see the train approaching on the third track until he had crossed the side track.

In the 21 feet between the two tracks he was unable to stop. The train struck the left side of his vehicle, killing him instantly.

At this stage of the proceeding defendants' version of how and why the accident occurred is not in the record. Only plaintiff's evidence has been heard, and certain opposing inferences are permissible from it. We, of course, express no opinion as to its veracity or weight. However, assuming the facts set out above, we hold that the evidence does not establish intestate's contributory negligence as a matter of law and that the directed verdict was erroneously entered. *See Brown v. R. R. Co.* and *Phillips v. R. R. Co.*, 276 N.C. 398, 172 S.E. 2d 502 (1970); *Kinlaw v. R. R.*, 269 N.C. 110, 152 S.E. 2d 329 (1967); *Johnson v. R. R.*, 257 N.C. 712, 127 S.E. 2d 521 (1962); *Johnson v. R. R.*, 255 N.C. 386, 121 S.E. 2d 580 (1961).

The cases cited above establish the following principles which are applicable to this case:

**[2]** Testimony that a person nearby who could have heard and did not hear the sounding of a whistle or the ringing of a bell, or could have seen the flashing of lights and did not see them, is some evidence that no such signal was given. *Kinlaw v. R. R.*, *supra* at 116, 152 S.E. 2d at 333-334.

**[3-5]** The train has the right of way at a public crossing, but it is the duty of the engineer to sound the customary warnings of the train's approach. A traveler on the highway has the right to expect timely warning, but the engineer's failure to give such warning will not justify an assumption that no train is approaching. Before going upon the track, and at a point where lookout will be effective, "a traveler must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company." He has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed. But the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when, from a safe position, such looking and listening will suffice to warn him him of danger. "Where there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury." *Johnson v. R. R.*, 255 N.C. at 388-389, 121 S.E. 2d at 581-582.

**[6]** "Mathematical possibilities and the results of exact measurements showing minimal space in which observations could be made, should not be controlling factors in determining whether nonsuit should be allowed as a matter of law." *Johnson v. R. R.*, 257 N. C. at 716, 127 S.E. 2d at 524.

The decision of the Court of Appeals is reversed, and the case is remanded with directions that it be returned to the Superior Court for a trial *de novo*.

Reversed.

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STATE OF NORTH CAROLINA v. CECIL BOYD GRACE

No. 64

(Filed 6 May 1975)

1. **Criminal Law § 34— evidence of other crimes — competency to show common plan, identity**

In an armed robbery prosecution, testimony by a participant in the robbery that he and defendant had previously robbed three similar establishments and that defendant had used the same pistol in all of the robberies was admissible to establish a common plan or scheme embracing the commission of a series of related crimes which tended to connect the accused with the commission of the crime charged and was also competent on the question of identity.

2. **Criminal Law § 169— objection to evidence — same evidence admitted without objection**

When evidence is admitted over objection but the same evidence has theretofore been admitted without objection, the benefit of the objection is ordinarily lost.

3. **Criminal Law § 162— necessity for objection or motion to strike**

An objection must be made as soon as the objectionable question is asked and before the witness has time to answer; however, when inadmissibility is not indicated by the question and becomes apparent in the answer, the objection should be in the form of a motion to strike the answer or its objectionable part.

ON *certiorari* to review the decision of the Court of Appeals, 23 N.C. App. 517, 209 S.E. 2d 321, finding no error in the trial before *Brewer, J.*, 7 January 1974 Criminal Session of DURHAM Superior Court.

The State offered evidence which tended to show the following facts:

On the night of 17 August 1973, about 10:00 p.m., two young men entered the Farm Fresh Dairy Store in Durham and asked Lewis D. Walker, the owner and operator of the establishment, for cigarettes and a drink. He turned his back to them momentarily, and, upon turning around, he saw one of them removing a roll of bills from the cash register. When he tried to stop him, the other young man shot him with a brown .32 caliber pistol. They fled, taking with them about $400 of his money. He later attended a lineup but was unable to identify anyone as either of the robbers.

Darnell Malloy testified and admitted that he was one of the persons who committed the robbery on 17 August 1973. He stated that defendant did the shooting and that they had committed three other robberies in which defendant had used the same pistol. He also admitted that he had pled guilty to taking part in all four of the robberies. Since defendant's only assignment of error particularly relates to this witness's testimony and the testimony of Detective H. L. Hayes, we will recount the testimony given by them in greater detail in the opinion.

Defendant offered evidence to support his defense of alibi.

The jury returned a verdict of guilty as charged, and defendant appealed from judgment imposed on the verdict. The Court of Appeals found no error in the trial, and we allowed *certiorari* on 30 December 1974.

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

*Rudolph L. Edwards for the defendant.*

BRANCH, Justice.

The sole question presented by this appeal is whether the trial judge erred in admitting evidence of other crimes allegedly committed by defendant.

The witness Malloy testified, in part, as follows:

> . . . [H]e and Grace began to run around together. He had seen Grace with a .32 caliber automatic pistol. He saw Cecil Grace on August 17, 1973 at about three o'clock. Grace

had come by his house and asked if he wanted to go out *again* that night. They had planned to rob Jim's Party Store, but when they got there, there were too many people around. They rode around until they came to the Farm Fresh Dairy Store. That they went to the Farm Fresh Dairy Store and that he ordered a Coke and cigarettes; and when the man turned his back, he grabbed the money in the cash drawer. When the man turned around, he tried to push him away and Grace shot the man at that time. They got Four Hundred Dollars ($400) from the robbery which was divided equally between them. *He and Grace had robbed three other places before they robbed the Farm Fresh Dairy Store.*

Q. Did you ever rob any other place?

OBJECTION. OVERRULED.

Q. Did you ever rob any other places?

A. Yes, sir, we hit three other places.

Q. Let me ask you this, the times that you went to the other places did Cecil Boyd Grace carry this pistol with him each time?

A. Yes sir.

OBJECTION. OVERRULED.

EXCEPTION NO. 1

Q. Let me ask you this, how many other places did you and Cecil rob together, Mr. Malloy?

OBJECTION. OVERRULED.

A. We only robbed three other places.

Q. And over what period of time did you go to these other places?

A. It was about four weeks in all.

Q. Four weeks. What were these other three places that you went to, Mr. Malloy?

OBJECTION. OVERRULED.

A. We went to Wombles Grocery, B and D Market, and one way out on North Roxboro by the stadium. I don't know the name of that place.

EXCEPTION NO. 2 [Emphasis supplied.]

Detective H. L. Hayes, over objection, testified as to a statement made by the witness Darnell Malloy concerning the robbery and "three other robberies that he and Grace were involved in." The judge instructed the jury that this testimony was admitted solely for the purpose of corroborating the witness Malloy. Detective Hayes read a statement, signed by Malloy, which detailed the Farm Fresh robbery and substantially corroborated the testimony of the witness Malloy. At the end of the statement and above Malloy's signature, the following language appeared: "The above is a true statement as to what happened in the robbery at Womble's Grocery, King Cole, Junior, and D and B Market, and Farm Fresh Dairy Store."

The landmark case of *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364, in part states:

> The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. [Citations omitted.] . . .
>
> * * *
>
> The general rule excluding evidence of the commission of other offenses by the accused is subject to certain well recognized exceptions, which are said to be founded on as sound reasons as the rule itself. [Citation omitted.] The exceptions are stated in the numbered paragraphs, which immediately follow.
>
> * * *
>
> 6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. [Citations omitted.] Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

This Court has recognized the above-quoted exception to the general rule in numerous cases. *See, e.g., State v. Smoak,* 213 N.C. 79, 195 S.E. 72 (Defendant was charged with murder, and the State's evidence tended to show that he had insured his

daughter's life, poisoned her with strychnine, and immediately after the death attempted to collect the insurance proceeds. Evidence of the deaths of defendant's two wives from strychnine poisoning and of a non-fatal attack of strychnine poisoning of another person upon whom defendant had procured life insurance was admitted.); *State v. Pannil,* 182 N.C. 838, 109 S.E. 1 (Defendants were charged with larceny of oats, and bags of "sweet feed" bearing the marks indicating ownership in the prosecuting witness were found in defendants' barns. The evidence concerning the "sweet feed" was admitted on the theory that it showed common design to commit larceny.); *State v. Stancill,* 178 N.C. 683, 100 S.E. 241 (Defendants were charged with larceny of tobacco, and other thefts by the same people were admitted to show common design.); *State v. Boynton,* 155 N.C. 456, 71 S.E. 341 (Defendant was charged with illicit sale of liquor, and evidence of prior sales of liquor was admitted to show his habit of keeping liquor.). *See* Annotation, Robbery—Evidence of Other Robberies, 42 A.L.R. 2d 854, for an exhaustive collection of cases and a discussion of the question presented by this appeal. *See also* 2 J. Wigmore, Evidence §§ 304, 351 (3d Ed.).

**[1]** In instant case the challenged evidence relates to three previous robberies of similar establishments by the same persons and by the use of the identical pistol in the hands of defendant on each occasion. The collateral offenses were executed according to the same plan and method as was followed in the commission of the crime here charged and therefore tended to establish a common plan or scheme embracing the commission of a series of related crimes which tended to connect the accused with the commission of the crime charged. Further, since defendant's defense was alibi, we think that the evidence would also be competent on the question of identity.

**[2]** Prior to any objection to evidence concerning other crimes, the record shows that the witness Malloy testified that he and defendant had robbed three other places before they robbed the Farm Fresh Dairy Store. Even had the evidence of other crimes been incorrectly admitted, its admission would have been rendered harmless by the admission without objection of testimony of the same import prior to the offering of the evidence here challenged. In this jurisdiction, it is well established that when evidence is admitted over objection but the same evidence has theretofore been admitted without objection, the benefit of the

objection is ordinarily lost. *See, e.g., State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735; *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633; *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17; *State v. Owens,* 277 N.C. 697, 178 S.E. 2d 442; *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883.

**[3]** We also note that counsel for defendant objected *after* the witness Malloy testified that on the occasion of each robbery defendant carried the same pistol. Neither did he move to strike the answer. Our rule requires that an objection be made as soon as the objectionable question is asked and before the witness has time to answer. However, when inadmissiblity is not indicated by the question and becomes apparent in the answer, then the objection should be in the form of a motion to strike the answer or its objectionable part. In ordinary cases the objection is waived upon failure to follow this rule. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599; 1 D. Stansbury, North Carolina Evidence § 27 (Brandis Rev.). Neither was any objection or motion to strike directed to that portion of the written statement of the witness Malloy made to the witness Hayes, which specifically named the four places that defendant and Malloy had allegedly robbed.

For the reasons stated, we hold that there was no prejudicial error in the admission of evidence relating to other crimes allegedly committed by defendant.

The decision of the Court of Appeals is

Affirmed.

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STATE OF NORTH CAROLINA v. MICKEY BELL

No. 27

(Filed 6 May 1975)

**1. Homicide § 21— premeditation and deliberation — sufficiency of evidence**

The State's evidence of premeditation and deliberation was sufficient for submission to the jury of an issue of defendant's guilt of first degree murder where it tended to show that defendant and deceased had an argument, defendant then went home, armed himself with a pistol and brought on a second encounter with deceased at a store,

and when deceased attempted to flee, defendant ran him down and shot him five times, once from the back, causing death.

2. **Constitutional Law § 29; Jury § 7; Criminal Law § 135— jury selection — right to question as to death penalty views**

The trial court in a first degree murder case erred in refusing to allow defense counsel to question prospective jurors regarding their beliefs and attitudes about capital punishment.

APPEAL by defendant from *Bailey, J.*, at the October 16, 1973 Session of ROBESON Superior Court.

Defendant was tried upon an indictment which duly charged him with murder in the first degree of one George Bell, Jr., found guilty by the jury as charged and sentenced to death.

*Attorney General Rufus L. Edmisten by Assistant Attorney General Ann Reed for the State.*

*L. J. Britt, Jr., and Bruce W. Huggins for defendant appellant.*

EXUM, Justice.

Defendant's first assignment of error is the denial of his motion for nonsuit as to the charge of murder in the first degree. He contends there was insufficient evidence of premeditation and deliberation to be submitted to the jury. There is no merit to this contention.

The State's evidence is, in summary, to this effect: On August 11, 1973, shortly after 7:00 p.m. the deceased George Bell, Jr., was riding in a car being operated by one Leslie Chavis. As the car proceeded toward the Piney Grove School in Robeson County defendant, who was walking on the side of the road, said something to the occupants and Chavis brought the car to a stop. Defendant approached the car and began talking to George Bell. They moved to the rear of the car where they argued for about five minutes. During the course of the argument George Bell slapped defendant. After the argument George Bell re-entered the car and defendant continued to walk down the road. Chavis took George Bell to the home of Cleveland Hunt. At approximately 8:30 p.m. Hunt and George Bell walked about one-fourth of a mile to Horace Stanley's store. From there George Bell was taken to another store at Piney Grove in a truck operated by Freddie Jones. When George Bell got out of Jones' truck it was dark but lights from the store illuminated

the immediately surrounding area. Defendant, who was at or near the store, fired a pistol in George Bell's direction whereupon George Bell ran down the road into the darkness. Defendant ran after him. After the two passed into the darkness and out of view several more shots were heard. Shortly thereafter George Bell was found dead in the middle of the road. No weapons had been observed on George Bell at any time. A trail of blood was found leading from his body back down the road toward the store—a distance of some twelve to fifteen hundred feet. Post-mortem examination revealed the cause of death to be loss of blood caused by gunshot wounds in the deceased's chest. Two bullet entry wounds were found on the left side and one on on the right side of his chest. Two wounds, possibly caused by the same bullet, were found on his right arm. Still another bullet wound was found on his right buttock.

After being properly advised of his rights defendant made a voluntary statement to investigating officers, admitted into evidence, to this effect: When he and George Bell first argued George Bell threatened to cut defendant with a razor blade if he ever saw him again. Defendant then went home, got a .32 caliber Smith and Wesson revolver and went to the store where he and George Bell had their second encounter of the evening. Defendant called George Bell to come over where he was. As George Bell came across the road it appeared to defendant that he was reaching in his pocket for something. Defendant told him not to do that and shot at the ground in front of him. George Bell then started running down the road; defendant ran after and caught up with him. They argued briefly and George Bell started "coming on him." Defendant backed off but George Bell kept coming. Defendant shot George Bell three times and ran.

Defendant offered no evidence.

**[1]** From the evidence offered a jury could infer that after the initial argument between defendant and George Bell defendant went home, armed himself with a deadly weapon, and, being armed, brought on the second encounter. When George Bell attempted to flee, defendant ran him down and shot him five times, once from the back, causing death. The evidence is clearly sufficient to be submitted to a jury on the question of premeditation and deliberation. *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974), and cases cited; *State v. Johnson,* 278 N.C. 252, 179 S.E. 2d 429 (1971); *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960).

Upon motion of the Attorney General this Court allowed the record in this case as originally filed to be amended to include the following stipulations made by defendant and the State:

"I. The defendant was tried and convicted of first degree murder before James H. Pou Bailey, October 16, 1973, Session, Robeson County Superior Court.

"II. The record in the Bell case does not disclose that counsel for the defendant in any manner brought to the court's attention his desire that the jury be instructed as to the punishment for First Degree Murder.

"III. James Edward Britt was tried and convicted of First Degree Murder before James H. Pou Bailey, August 27, 1973 Session, Robeson Superior Court.

"IV. The jury in the BRITT case returned with a verdict of 'First Degree Murder, with mercy' and the court did not instruct the jury concerning the punishment for First Degree Murder.

"V. Counsel for the defendant in the case on appeal was aware of the ruling of the court in the BRITT case.

"VI. That because of the ruling laid down in the BRITT case, and as again verified by Judge Bailey to the Solicitor and Defense Attorney, *Judge Bailey ruled that defense attorney was not to be allowed to question prospective jurors as to their belief in capital punishment and as to their knowledge and understanding that a conviction of First Degree Murder would carry with it a punishment of death.*

"VII. Because he was aware of the court's previous ruling, counsel for the defendant made no motion for instruction to the jury concerning the punishment for First Degree Murder, and *no such instruction was in fact given to the jury.*

"VIII. Otherwise, in light of apparent uncertainty on the part of the jury in the case on appeal the counsel for the defendant would have requested an instruction to the jury concerning the punishment for First Degree Murder." (Emphasis supplied.)

Defendant contends that the actions of Judge Bailey emphasized above entitle him to a new trial by reason of our decision in *State v. Britt, supra.* With this we must agree.

In *Britt,* the case referred to in the stipulations, Judge Bailey refused to allow a defendant or the State to question prospective jurors concerning their beliefs and attitudes about capital punishment. Neither did he instruct the jury that a verdict of guilty of first degree murder would require the court to sentence the defendant to death. The jury in *Britt* appeared, however, to be confused with regard to the effect of its verdict. The verdict as returned by it was, "First-degree murder, with mercy." Judge Bailey responded that this was not a permissible verdict and that he would "not accept the recommendation of the jury as to punishment in the matter, *for punishment is entirely for the court.*" 285 N.C. at 268, 204 S.E. 2d at 826. After recognizing earlier decisions holding that normally the jury should not be informed regarding punishment we said in *Britt,* 285 N.C. at 272, 204 S.E. 2d at 828:

> "Nevertheless, we here reaffirm and adhere to the proposition that ordinarily it is not the duty of the trial judge in criminal actions to instruct the jury as to punishment. However, we recognize that in a capital case, there may be a 'compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties. . . .' *State v. Rhodes, supra.* Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts."

**[2]** In the case now before us no such confusion on the part of the jury is evident. We said, however, further and unequivocally in *Britt,* 285 N.C. at 267, 204 S.E. 2d at 825:

> "It was error for the trial judge to refuse to allow counsel for defendant and the Solicitor for the State to inquire into the moral or religious scruples, beliefs

and attitudes of the prospective jurors concerning capital punishment."

Consequently, even if an instruction to the jury on the effect, punishmentwise, of its verdict was not required under the strict holding of *Britt* on this point, refusal to allow inquiry of prospective jurors regarding their beliefs and attitudes about capital punishment constitutes prejudicial error entitling defendant to a new trial. While such inquiry may not produce challenges for cause by the defendant, questions must be allowed of prospective jurors which might lead to challenges either peremptory or for cause so that both the State and the defendant can "eliminate extremes of partiality . . . . " *State v. Honeycutt,* 285 N.C. 174, 179, 203 S.E. 2d 844, 848 (1974). See also *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974); and *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974).

It should be noted that the Legislature has enacted, effective as of July 1, 1974, Section 12 of Chapter 1286 of the 1973 Session Laws, codified as General Statutes 15-176.3 through 15-176.5, which in capital cases (1) permits advising prospective jurors of the consequences of a verdict of guilty, (2) requires upon request an instruction to the jury that the death penalty will be imposed upon the rendering of such a verdict, and (3) permits argument to the jury upon the consequences of their verdict.

Defendant's remaining assignment of error is directed to Judge Bailey's refusal to permit him to recross-examine one of the State's witnesses on a matter brought out on redirect examination by the State. Inasmuch as this incident is unlikely to occur at the next trial it is not necessary to consider it here.

For the reasons stated, there must be a

New trial.

JULIA YEARWOOD v. THOMAS RAY YEARWOOD

No. 70

(Filed 6 May 1975)

1. **Divorce and Alimony § 18— alimony pendente lite — transfer of automobile title**

The trial judge acted within his authority in directing defendant to transfer possession and title to an automobile as alimony *pendente lite*. G.S. 50-16.7(a) and (c).

2. **Divorce and Alimony § 18— alimony pendente lite — possession of home — mortgage payments — accruing equity**

In awarding alimony *pendente lite* to plaintiff, it was proper for the court to award plaintiff exclusive possession of the home owned jointly by the parties and to require defendant to make the monthly payments on the mortgage in order that plaintiff and their two children might have a place to live; however, the court erred in giving plaintiff "the equity accruing" in the jointly owned property to the extent of the mortgage payments made by defendant *pendente lite*.

ON *certiorari* to review the decision of the Court of Appeals affirming the judgment of *Read, J.*, entered 6 May 1974 in the District Court of DURHAM.

Plaintiff-wife instituted this action against defendant-husband on 22 March 1974 for alimony without divorce, custody and support of the two minor children of the marriage, and attorney's fees. She alleged that defendant's unexplained absences from home, his verbal abuse, and unprovoked assaults upon her had rendered her life burdensome and intolerable; that on 16 February 1974 she had been forced to flee with the children from the home; that she is the dependent spouse without sufficient means upon which to subsist during the prosecution of this action and to defray the expense of the suit.

Answering the complaint, defendant alleged that upon their last reconciliation on 6 September 1973 plaintiff had condoned all his previous marital misconduct; that thereafter he had devoted all his time and effort to making the marriage work, but plaintiff's attitude and insults had rendered his life burdensome and intolerable; and that she had provoked him to assault her. He denied, however, that "he beat her severely." Upon additional allegations of plaintiff's adultery and her abandonment of him, defendant prayed that he be awarded custody of the minor children and that he be granted an absolute divorce

from plaintiff or, in the alternative, a divorce from bed and board.

On 28 March and 3 April 1974 Judge Read heard plaintiff's motion for alimony *pendente lite,* child support, counsel fees and possession of the home. Upon supporting evidence the judge found the facts against defendant and in accordance with plaintiff's allegations. Upon these findings, on 6 May 1974, he entered the following order:

(1) That defendant surrender to plaintiff possession of the home, which they had previously occupied together and which they owned as tenants by the entirety subject to a mortgage. (2) That "as alimony" defendant pay directly to the mortgagee $110 per month, the amount of the mortgage payments on the home; "[t]hat the equity accruing from this date from the house payments will be that of the plaintiff alone." (3) That defendant transfer to plaintiff the title to the 1973 Volkswagen and that she assume the balance due on the vehicle, the sum of $1,500, payable at $72 a month. (4) That plaintiff have custody of the two children "with reasonable visitation rights to defendant." (5) That as "child support" defendant pay $50 a week into the office of the clerk of the superior court for the children's support and maintain the health, medical, and dental insurance then in effect on the two children. (6) That defendant pay to plaintiff's attorney the sum of $250 as reasonable attorney's fees.

From the foregoing order defendant appealed. The Court of Appeals affirmed in an opinion reported in 23 N.C. App. 532, 209 S.E. 2d 376 (1974). Upon defendant's petition we granted *certiorari.*

*Clayton, Myrick, McCain & Oettinger for defendant appellant.*

*No counsel contra.*

SHARP, Chief Justice.

Defendant's appeal to this Court presents these questions: In awarding alimony *pendente lite* to plaintiff, did the trial judge have authority to order defendant (1) to transfer to her title to the Volkswagen, and (2) to allot to her "the equity accruing" in the jointly owned home from the monthly mortgage payments, which defendant was ordered to pay?

As defined by N. C. Gen. Stats. 50-16.1(2) (Supp. 1974) "'Alimony pendente lite' means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce."

Upon application, pursuant to G.S. 50-16.8, a dependent spouse who is a party to any one of the actions listed in G.S. 50-16.1(2) is entitled to alimony *pendente lite* if the judge finds from the evidence presented (1) that such spouse is entitled to the relief demanded in the action and (2) that the dependent spouse has not sufficient means upon which to subsist and to defray the necessary expenses of the action. G.S. 50-16.3(a). Such alimony is specifically "limited to the pendency of the suit in which the application is made." G.S. 50-16.3(b). Alimony *pendente lite* (like alimony) "shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." G.S. 50-16.5(a).

Section (a) of G.S. 50-16.7 provides *inter alia:* "Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property as the court may order." Section (c) provides: "If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or alimony pendente lite as provided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228."

**[1]** Applying the foregoing statutes to the facts of this case we hold that the trial judge acted within his authority in directing defendant to transfer possession and title to the Volkswagen to plaintiff as alimony *pendente lite.* G.S. 50-16.7(a) and (c) clearly authorized the transfers. Defendant held title to two automobiles, a 1963 Falcon on which the record discloses no lien, and the Volkswagen on which was due a balance of $1,500, payable $72 a month. Plaintiff was awarded the encumbered vehicle and defendant was relieved of all responsibility for making the monthly payments. He has no cause to complain under the law or the facts.

**[2]** It was also proper to award plaintiff exclusive possession of the home and to require defendant to make the monthly payments on the mortgage in order that plaintiff and their two children might have a place to live. We hold, however, that the court erred in giving plaintiff "the equity accruing" in the jointly owned property to the extent of the mortgage payments made by defendant *pendente lite*. The judge's obvious purpose in this portion of his order was to give plaintiff a security interest in the parties' equity in the home so that, upon a sale of the property, prior to a division of the equity between them, plaintiff would receive the amount of the mortgage payments which defendant had made during the litigation. The facts in this case are indistinguishable from those in *Sguros v. Sguros*, 252 N.C. 408, 114 S.E. 2d 79 (1960), and the rationale of that case is controlling here.

In *Sguros*, the court awarded the plaintiff-wife exclusive possession of the home and ordered the defendant-husband to pay her $200 per month—$113.12 of which she was directed to pay on the mortgage. The court's order further provided that "the plaintiff shall have a lien on the house and lot . . . for any amounts she may pay on the mortgage . . . . "

In directing the modification of the order in *Sguros*, Justice Higgins, speaking for the Court, said: "A *pendente lite* order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Such is not the purpose and cannot be made the effect of an order. The order is modified by striking that part which attempts to create a lien." *Id.* at 412, 114 S.E. 2d at 82. The same modification must be made in this case.

This cause is returned to the Court of Appeals with directions that it be remanded to the District Court of Durham County with instructions to modify the order from which defendant appealed by striking that portion which attempts to award plaintiff "the equity accruing" from the monthly payments which defendant is required to make *pendente lite* on the mortgage upon the home.

Affirmed in part, reversed in part.

AXLER v. CITY OF WILMINGTON

No. 81 PC.

Case below: 25 N.C. App. 110.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

DAYS INN v. BOARD OF TRANSPORTATION

No. 47 PC.

Case below: 24 N.C. App. 636.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

DUGGINS v. BOARD OF EXAMINERS

No. 88 PC.

Case below: 25 N.C. App. 131.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 May 1975.

DUNN v. DUNN

No. 77 PC.

Case below: 24 N.C. App. 713.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

FINANCE CORP. v. LANGSTON

No. 68 PC.

Case below: 24 N.C. App. 706.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

GOLD v. PRICE

No. 50 PC.

Case below: 24 N.C. App. 660.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

HARDY v. TOLER

No. 51 PC.

Case below: 24 N.C. App. 625.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 May 1975.

IN RE MOORE

No. 67 PC.

Case below: 25 N.C. App. 36.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

KALE v. KALE

No. 78 PC.

Case below: 25 N.C. App. 99.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

KING v. ALLEN

No. 75 PC.

Case below: 25 N.C. App. 90.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

LAUTENSCHLAGER v. BOARD OF TRANSPORTATION

No. 83 PC.

Case below: 25 N.C. App. 228.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

LEASING, INC. v. DAN-CLEVE CORP.

No. 84 PC.

Case below: 25 N.C. App. 18.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 May 1975.

LUCAS v. STORES

No. 71 PC.

Case below: 25 N.C. App. 190.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 May 1975.

MOORE v. TRUST CO.

No. 52 PC.

Case below: 24 N.C. App. 675.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

OIL CO. v. OIL AND REFINING CO.

No. 82 PC.

Case below: 25 N.C. App. 82.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

SAMS v. SARGENT

No. 89 PC.

Case below: 25 N.C. App. 219.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. ALDERMAN

No. 65 PC.

Case below: 25 N.C. App. 14.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975. Appeal dismissed ex mero motu 6 May 1975.

STATE v. CARLISLE

No. 64 PC.

Case below: 25 N.C. App. 23.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. CASSELL

No. 66 PC.

Case below: 24 N.C. App. 717.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 May 1975.

STATE v. CHAVIS

No. 69.

Case below: 24 N.C. App. 148.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 May 1975.

STATE v. CURRY

No. 90 PC.

Case below: 25 N.C. App. 291.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. GARNETT

No. 111.

Case below: 24 N.C. App. 489.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 April 1975.

STATE v. GOINS

No. 29 PC.

Case below: 24 N.C. App. 468.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. GRAHAM

No. 58 PC.

Case below: 24 N.C. App. 591.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. HAMMOCK

No. 69 PC.

Case below: 25 N.C. App. 97.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. JONES

No. 9 PC.

Case below: 24 N.C. App. 280.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. McCREE

No. 73 PC.

Case below: 25 N.C. App. 115.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. OWEN

No. 60 PC.

Case below: 24 N.C. App. 598.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. PEASLEE

No. 59 PC.

Case below: 24 N.C. App. 695.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. SIMPSON

No. 87 PC.

Case below: 25 N.C. App. 176.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. VANCE

No. 80 PC.

Case below: 25 N.C. App. 92.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

STATE v. WALKER

No. 85 PC.

Case below: 25 N.C. App. 157.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

THOMPSON v. CITY OF SALISBURY

No. 57. PC.

Case below: 24 N.C. App. 616.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

TURNER v. LEA

No. 76 PC.

Case below: 25 N.C. App. 113.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

WALL v. WALL

No. 79 PC.

Case below: 24 N.C. App. 725.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 May 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

WHITE v. WHITE

No. 70 PC.

Case below: 25 N.C. App. 150.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 May 1975.

STATE OF NORTH CAROLINA v. WILLIS TONY CADDELL

No. 40

(Filed 6 June 1975)

1. **Criminal Law § 34— kidnapping case — evidence of beating and attempted rape**

The trial court in a kidnapping prosecution did not err in permitting the victim to testify that, after her assailant took her from her home and stopped his car in an adjoining county, he beat and attempted to rape her, or in permitting attending physicians to testify as to the nature and extent of her injuries, since the acts of her assailant were all part of a continuous sequence and the purpose for which her assailant carried the victim from her home and the violence of the assaults upon her and the injuries inflicted thereby were relevant to the charge of kidnapping.

2. **Criminal Law § 43— kidnapping — photographs of automobile, chisel and clothing**

In a kidnapping prosecution wherein the victim testified her assailant beat and attempted to rape her, the trial court did not err in admitting for illustrative purposes photographs taken of the interior and exterior of the automobile in which the victim was abducted, a bloody chisel found therein and articles of the victim's clothing found in and about the automobile in the area where the beating and attempted rape occurred.

3. **Criminal Law § 60— fingerprints — expertise of person lifting or taking prints**

The trial court did not err in the admission of fingerprints lifted from an automobile vent glass and a set of defendant's fingerprints taken after his arrest by SBI agents into whose expertise in the lifting and taking of fingerprints defendant was not permitted to inquire prior to their testimony concerning their search for, lifting and taking of the prints, since a fingerprint which was, in fact, properly lifted or taken may be used by an expert for comparison regardless of the previous training and experience of the person who lifted or took it.

4. **Criminal Law § 73— hearsay — cry for help — exclamation of passerby words of comfort**

Testimony concerning a kidnapping and assault victim's cry to a passerby, "Please help me," his exclamation, "Oh, my God!" and words of comfort by the victim's father was not offered to prove the truth of the matters so stated and was not objectionable as hearsay.

5. **Criminal Law § 89— statements to officer — corroboration**

An officer's testimony concerning statements made to him by a kidnapping victim on the night of the offense was competent for the purpose of corroborating the victim's previous testimony.

6. **Criminal Law § 89— corroborative testimony — discrepancy**

The trial court did not err in admitting for corroborative purposes testimony that a kidnapping victim said, "Please help me; there is a

man going to kill me," when the victim had testified that she asked the witness for help and told him she was "being raped" since either version tended to show she was being assaulted by a man and was in need of assistance and the discrepancy was of no consequence.

**7. Criminal Law § 96— withdrawal of evidence — harmless error**

Error in permitting the State, over objection, to show by cross-examination of defendant that he was arrested eight times after he left North Carolina was harmless where the court almost immediately reversed its ruling and directed the jury to disregard the testimony.

**8. Criminal Law § 34— testimony as to arrest for another crime — harmless error**

Error in permitting an officer to give rebuttal testimony that defendant voluntarily told the officer that he had been arrested in St. Louis for larceny of an automobile after defendant had testified the arrest in St. Louis was for a traffic violation was harmless in the light of the record of defendant's former arrests, convictions, imprisonments and escapes introduced in evidence by defendant through a psychiatrist.

**9. Criminal Law §§ 63, 89— insanity — rebuttal testimony — comparison of defendant's manner on witness stand and elsewhere**

Rebuttal testimony by an officer concerning the manner in which defendant talked and acted while he was bringing defendant back from another state as compared with defendant's manner on the witness stand, including testimony that during the trip defendant did not "roll his eyes or roll his head," was relevant and competent if defendant's performance on the witness stand afforded a basis for the belief that defendant was putting on a show in an effort to convey to the jury the impression that he was not sane; if not, the testimony was harmless error.

**10. Kidnapping § 2— sufficiency of evidence**

The State's evidence was sufficient for the jury in a kidnapping prosecution where it tended to show a seizure and carrying away and a substantial asportation of the victim by defendant with the intent to commit the felony of rape.

**11. Criminal Law § 114— instructions — no expression of opinion**

When the charge in this kidnapping prosecution is construed contextually and as a whole, the trial court did not express an opinion concerning the fact of the taking and carrying away of the victim in instructing the jury that defendant would not be guilty if defendant was completely unconscious of what transpired when the victim "was taken violently from her driveway at her residence, put in an automobile and held down by an arm, and, thereafter, was beat about the head and sexually molested."

**12. Criminal Law § 46— instructions on flight — no presumption of guilt**

Trial court's instruction on flight was proper without the inclusion of a statement that no presumption of guilt arises from evidence of flight.

**13. Criminal Law §§ 5, 112— insanity — burden of proof**

The trial court did not err in instructing the jury that defendant has the burden of proving the defense of insanity.

**14. Criminal Law §§ 5, 112— instructions on insanity**

The trial court did not err in instructing the jury that defendant was legally insane if he did not know the nature and quality of his act "or did not know that it was wrong" rather than instructing that defendant was insane if he did not know the nature and quality of his act or was "incapable of distinguishing between right and wrong in relation to such act" since both instructions are substantially the same.

**15. Criminal Law § 5; Homicide § 7.5— insanity — unconsciousness**

The defenses of insanity and unconsciousness are not the same in nature, for unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind; as a consequence, the two defenses are not the same in effect, for a defendant found not guilty by reason of unconsciousness, as distinct from insanity, is not subject to commitment to a hospital for the mentally ill.

**16. Criminal Law § 5; Homicide § 7.5— unconsciousness — affirmative defense — overruling of prior decision**

The holding in *State v. Mercer*, 275 N.C. 108, that "unconsciousness is never an affirmative defense" is overruled.

**17. Criminal Law § 5; Homicide § 7.5— unconsciousness — affirmative defense — burden of proof**

While unconsciousness, or automatism, is a complete defense to a criminal charge separate and apart from the defense of insanity, it is an affirmative defense, and the burden rests upon the defendant to establish this defense, unless it arises out of the State's evidence, to the satisfaction of the jury.

**18. Criminal Law § 112— instructions — unconsciousness — burden of proof — error favorable to defendant**

The trial court's instructions that unconsciousness is never an affirmative defense and that defendant has no burden to prove he was unconscious constituted error in defendant's favor and could not have prejudiced him in any way.

Chief Justice SHARP concurring in result and dissenting in part.

Justice COPELAND joins in the dissenting opinion.

APPEAL by defendant from *Robert Martin, S.J.*, at the 20 May 1974 Special Criminal Session of GUILFORD.

Upon an indictment, proper in form, the defendant was convicted of kidnapping Catherine Sutton and was sentenced to imprisonment for life. The indictment charges that the offense occurred 16 March 1971. The delay in the trial was due to the inability of the police officers to locate and arrest the defend-

ant, for whom a warrant was issued the day after the alleged offense, until he was located and taken into custody in Grand Rapids, Michigan, in October 1973.

The defendant entered pleas of not guilty and not guilty by reason of insanity. He was represented at his trial and upon appeal by the Public Defender of Guilford County. Contrary to the advice of his counsel, the defendant testified in his own behalf and, through his witness, Dr. Robert Rollins, Director of the Forensic Unit at Dorothea Dix Hospital, introduced in evidence the records of that hospital concerning his commitments thereto and the various diagnoses and reports made by its staff concerning his then mental condition.

The State's evidence was to the following effect:

At the time of the alleged offense, Catherine Sutton was fourteen years of age. She resided with her parents on Highway 62 in southern Guilford County, approximately one mile from the Randolph County line. Catherine then weighed about 105 pounds and was about five feet six inches tall.

At approximately 6:00 p.m., it still being daylight, her father left home in his automobile on an errand. As he drove away, Catherine walked down the driveway to the mail box, across the road and approximately 250 feet from the house. As she did so, she noticed an automobile proceeding along the highway following her father's car. She got the mail from the mail box and, as she recrossed the road, she noted that the other car turned around. She proceeded back up the driveway. When she had gone about one-third of the distance to the house, the automobile she had previously noticed stopped beside the mail box. The driver got out and raised the hood. Catherine called to ask if he had car trouble. The driver replied that he did and asked her to come to the car. She refused but told him she would go to her house and telephone for assistance. He asked if he might use the phone and she told him he could do so and resumed her walk up the driveway. She thereupon heard someone running behind her. The man seized her around the neck so that she could not scream or breathe, dragged her to the car and forced her into it, continuing to hold his arm around her neck so that she could not speak. Holding her down on the front seat with his elbow on her neck, he drove to a farm road and down it into a wooded area, in Randolph County, some three miles, by road, from the Sutton home.

After demanding that Catherine engage in an unnatural sexual act, which she refused to do, her captor choked her with his hands, then removed his own belt, put it around her neck and, running the tongue through the buckle, pulled it tight. Catherine was able to continue to get her breath only because she had put her hands between her neck and the belt. Her captor then pulled off her clothing, she resisting to the best of her ability with her hands. Taking a metal tool from the back seat of the car, he struck her about the head with it several times, lacerating the skin so that she bled profusely from these wounds. He then drove his fingers deeply into her private parts and, as she was still struggling, attempted to have sexual intercourse with her. He struck her in the face several times with his fist and she lost consciousness for a brief period. When she regained consciousness, he was still on top of her but she did not open her eyes, wishing him to think she was dead. He got out of the car and ordered her to do so. When she did not move, he pulled her out of the car and as she lay on the ground again attempted to have intercourse with her. He then got up and, after saying he would be back in a minute, ran away.

Catherine then heard another man (Mr. Whitt, owner of the farm to which she had thus been taken) call out. She called to him for help. Going to his house, she was given assistance and her father was called by telephone. She was taken to the hospital, examined and treated.

Catherine positively identified the defendant in court as the man who so seized her, forced her into his automobile, transported her to the wooded area and attacked her. Prior to such in-court identification, the court, on the motion of the defendant, conducted a voir dire in the absence of the jury. On this voir dire, Catherine testified that she saw her assailant's face before they reached the wooded area and during the above described struggle on the front seat of the automobile. About half an hour elapsed from her seizure in her driveway to the arrival of Mr. Whitt at the place where the defendant left her. Approximately 30 hours after the attack upon her, investigating police officers showed her a group of 13 photographs from which she selected a photograph of the defendant as that of her assailant and, thereafter, identified another photograph of him. At the end of the voir dire, the court found, as Catherine had testified, that her in-court identification of the defendant was based solely on what she saw at the time of the offense and did not result from any

pretrial identification procedures which were suggestive and conducive to mistaken identification and, therefore, such in-court identification of the defendant by her was admissible in evidence. The defendant does not attack this finding on appeal.

Catherine's testimony as to her discovery in the woods beside the abandoned car of her captor and her condition at that time was corroborated by the testimony of Mr. Whitt and Catherine's father. Dr. A. K. Maness, Jr., and Dr. Robert Phillips, physicians in Greensboro, who examined and treated Catherine in the emergency room of the hospital to which she was taken immediately after her rescue, testified that she had sustained multiple and severe lacerations of the scalp, bruises about the face and neck and deep penetration of the vaginal area, resulting in a great deal of bleeding and necessitating substantial suturing.

Investigating police officers testified to finding extensive blood stains throughout the interior of the automobile and upon a metal chisel and a brown leather belt found therein and introduced in evidence. Photographs of the exterior and interior of the automobile were identified by these officers and introduced in evidence, along with articles of Catherine's clothing found in or about the automobile by the officers and identified by her. Investigating officers also testified to their lifting of certain latent fingerprints, from the interior of the window glass on the driver's side of the automobile, and a print made upon the above mentioned chisel by a bloody palm. These the officers compared with the defendant's fingerprints and palm print, obtained following his arrest, and identified them as those of the defendant.

The defendant testified in his own behalf at considerable length. His direct testimony was an incoherent jumble of his contacts and controversies with other people in the morning and early afternoon of 16 March 1971, and his wanderings subsequent to that date. It had no relation to the alleged offense and did not purport to establish an alibi for the time thereof. Its apparent purpose was to convey the impression that he was and is mentally deranged and unable to remember any of his actions concerning Catherine Sutton. The only portion of his direct testimony remotely relating to the present charge against him was a denial that he had ever seen Catherine Sutton prior to the time when she took the witness stand and his statement: "I never did a degrading thing like this before. I have been

charged with nothing like this. I don't believe it. And if I did this, there is something wrong."

On cross-examination the defendant admitted that photographs of the automobile in which Catherine Sutton was carried away from her home and assaulted were pictures of his car. He further stated that he remembered nothing about the events of 16 March 1971 after he drove his car over an embankment at some time during the day prior to the attack on Catherine Sutton. He denied having taken any LSD pills or other drugs that day, except aspirin for a headache. The remainder of the cross-examination related to whether or not he made certain statements to the officer who brought him back to North Carolina from Michigan concerning his activities while absent from North Carolina, his seeing a police poster in Baltimore stating he was wanted in North Carolina for kidnapping and rape, his prior convictions, hospitalizations and self-inflicted wounds.

The defendant also called as his witness, contrary to the advice of his counsel, Dr. Robert Rollins, then Director of the Forensic Unit at Dorothea Dix Hospital in Raleigh and an expert psychiatrist. Through Dr. Rollins, the defendant introduced in evidence the contents of reports of the staff of Dorothea Dix Hospital of its findings and conclusions on eight separate commitments of the defendant to that institution. Seven of these were from January 1956 to May 1964, the last being a commitment for examination in connection with the present charge.

These reports of the hospital staff show that his first commitment to the hospital was pursuant to an order of the Superior Court of Durham County on 12 January 1956, which order stated that the defendant had been found incapable of pleading to bills of indictment then pending against him by reason of insanity and ordered that he be confined in the hospital until such time as the hospital authorities found he had regained his sanity and was capable of standing trial. The several reports of the hospital staff state:

In 1956, 1962 and 1963, the defendant received electric shock treatments at the hospital. On 10 February 1956, the staff diagnosis of the defendant was "psychotic depressive reaction in an individual with an anti-social personality" and it was the opinion of the staff that he had recovered from his psychosis and was no longer mentally disordered. This report shows that

the defendant was then under a prison sentence in Ohio, in addition to the criminal charge against him in Durham County. The admitting physician on that occasion stated in the hospital record that his "impression" was that the defendant was then suffering from "acute schizophrenic process." The defendant was returned to the Superior Court of Durham County for trial and was there convicted of larceny and given consecutive sentences totaling 40 years.

In 1974, in connection with the present charge, Dr. Rollins, himself, examined the defendant to determine his competency to stand trial. His diagnosis was: "One, that he was without psychosis; that is, he was not insane, and, two, he had a social personality disorder," which "some people" would interpret as meaning that the defendant was "just mean." His report of that examination included the following:

> "Since the age of 15 the client has spent most of his time in some type of state institution, either a correctional facility or a psychiatric hospital. His admissions to Dorothea Dix Hospital began in 1956 when he was transferred from Central Prison. He's had at least seven admissions to Dorothea Dix Hospital and has received diagnoses including sociopathic personality disturbance, antisocial reaction, and psychotic depressive reaction. Many of his admissions to this hospital have been either by criminal court order or as a transfer from Central Prison. He has also been treated in the State Hospital in Ohio where he was admitted at least three times and was diagnosed sociopathic personality, antisocial reaction. At Spring Grove Hospital in Maryland, he was diagnosed schizophrenic reaction, paranoid type. The client has a history of escapes from this and other hospitals as well as escapes from correctional facilities. His hospitalizations at Dorothea Dix Hospital have usually been characterized by hostile, belligerent and manipulative behavior and resulting in the client becoming involved in fights with other residents. * * * It might be noted that the client has a history of mutilating himself in order to manipulate his environment. * * * It was a consensus of the group [of staff members examining the defendant], in spite of the client's somewhat limited manner of expressing himself, that he was competent to stand trial at the present time. * * * It was learned that the client has allegedly been arrested in several states for traffic violations and

in at least one state for burglary. * * * [I]t is the opinion of the medical staff that Mr. Caddell is competent to plead to charges of kidnapping and rape. * * * PSYCHIATRIC DIAGNOSIS: Without psychosis, not insane. Sociopathic personality disorder."

Hospital records of other commitments of this defendant show that on these occasions he was returned by the hospital to Central Prison, having been found "normal as to any kind of brain disease at that time" and having been diagnosed as "sociopathic personality disturbance, anti-social reaction."

On these occasions the records show that the staff found the defendant was not insane. When in the hospital he was "a severe management problem," requiring continuous surveillance to prevent escape.

The hospital report of the defendant's commitment to it, on 4 February 1964, states:

"His family hired a number of lawyers who succeeded in obtaining his release from prison in the fall of 1963. * * * He says that on Thanksgiving Day he had dinner with his family and was moving into new quarters which he had rented near to his job. A man whom he had known in prison persuaded him to drive off in a car and they went to a grill and then to the house where the patient had rented a room. The man rented a room in the same house, went to sleep, and ultimately vanished completely. The patient drove the man's car and was charged with having stolen it when it turned out to be a stolen car."

On that occasion the hospital staff diagnosis was, "without psychosis (Not Insane) * * * Willis Caddell does know the difference between right and wrong." The staff having concluded that he was then not insane, he was sent back to the Superior Court of Guilford County for trial on the charge of larceny of the automobile.

In response to a question as to what he meant by the term "manipulating one's environment," Dr. Rollins testified, "I believe Mr. Caddell, on occasion, seeks to either present himself as mentally not responsible or to blame other people for his problems, in order to escape the consequences of his behavior."

He further testified that he had diagnosed the defendant's condition as "sociopathic personality and anti-social reaction"

and that characteristics of that condition are "meanness toward other human beings," "an inability to get along with people," "an inability to abide by the rules of society," and, in the case of Mr. Caddell, "extreme aggressiveness toward other human beings."

At the time of the defendant's commitment to Dorothea Dix Hospital in connection with the present charge, Dr. Rollins was unable to carry out the order of the court to determine whether the defendant was able to distinguish right from wrong on 15 March 1971, and made no such determination.

In rebuttal, the State called as its only witness, Agent Marshall of the State Bureau of Investigation, the officer who, in 1973, returned the defendant to North Carolina from Michigan for trial in the present case. Agent Marshall testified that on the entire trip (by automobile) the defendant talked lucidly and "completely different" from the manner in which he talked on the witness stand. On that trip from Michigan to North Carolina, "He did not roll his eyes or roll his head." He then told Agent Marshall that he had been arrested in St. Louis in connection with larceny of an automobile, that the St. Louis Police Department discovered he was wanted in North Carolina and that he had a "mental history," so they committed him to a mental hospital in St. Louis for observation pending his extradition to North Carolina and that he escaped from that hospital. He also told Agent Marshall that, while in Baltimore, he went to the Police Department to obtain a permit to carry a gun so that he could be a security guard and, while having his fingerprints taken for that purpose, saw on the bulletin board a poster stating that he was wanted in North Carolina for kidnapping and rape. He was picked up for return to North Carolina in Grand Rapids, Michigan. All these statements by the defendant to Officer Marshall were "volunteered statements."

*Rufus L. Edmisten, Attorney General, and Alan S. Hirsch, Associate Attorney, for the State.*

*Wallace C. Harrelson, Public Defender, for defendant.*

LAKE, Justice.

We find no merit in the defendant's several assignments of error relating to the admission of evidence.

**[1]** The defendant contends that, upon his trial in Guilford County, on the charge of kidnapping therein, it was error, over

his objection, to permit Miss Sutton to testify that, after the car stopped in the wooded area in Randolph County, her assailant beat and attempted to rape her and to permit attending physicians to testify as to the nature and extent of her injuries. The acts of her assailant, to which Miss Sutton so testified, were all parts of a continuous sequence, consuming in its entirety approximately 20 minutes and occurring within a total distance of not over three miles. It is perfectly apparent that the abuse of Miss Sutton for the gratification of her assailant's sexual desires was the purpose of his seizing her and forcibly carrying her from her home to the wooded area.

It is well established that, as a general rule, in a prosecution for a particular crime, the State cannot introduce, as part of its case in chief, evidence tending to show that the accused has committed another distinct, independent, or separate offense, but it is equally well established that this rule does not apply when the two crimes are parts of the same transaction and, by reason thereof, are so connected in time or circumstance that one cannot be fully shown without proving the other. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364. The State, having introduced evidence of the bare bones of the offense charged in the indictment (kidnapping), is not precluded thereby from showing the entire transaction. Evidence of facts relevant to the crime charged is not inadmissible merely because it also shows the defendant to have been guilty of an additional crime. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423; Stansbury, North Carolina Evidence, Brandis Revision, §§ 91, 92. The purpose for which her assailant carried Miss Sutton from her home is obviously relevant to the charge of kidnapping. The violence of the assaults upon her and the injuries inflicted thereby are also relevant thereto. The separation of the State into counties has a bearing upon the venue for the trial of criminal offenses, but not upon the relevancy of evidence.

**[2]** For the same reason, there was no error in permitting the State to introduce in evidence photographs taken of the interior and exterior of the automobile in which Miss Sutton was abducted, the bloody chisel and belt found therein and articles of Miss Sutton's clothing found in and about the automobile in the wooded area to which she was taken and where the beating and the attempted rape occurred. The jury was properly instructed that the photographs were admitted for the purpose of illustrating the testimony of the witness by whom they were identified and not as substantive evidence.

**[3]** There was no error in admitting into evidence fingerprints lifted from the interior of the vent glass on the driver's side of the automobile and the set of the defendant's fingerprints taken after his arrest. The contention of the defendant is that these prints were lifted and taken by agents of the State Bureau of Investigation, into whose expertise in the lifting and taking of fingerprints he was not permitted to inquire prior to their testimony concerning their search for, lifting and taking of the prints. Neither of these witnesses was asked to express any opinion concerning these matters. Each testified as to what he, himself, did. The defendant had full opportunity to cross-examine each of the witnesses, following his direct testimony, concerning the methods used in lifting and taking the prints. He did not do so.

The subsequent witness, who compared the fingerprints in question and identified a print taken from the car vent glass as that of the defendant, and who, himself, lifted the bloodied palm print from the chisel used in the beating of Miss Sutton and identified it as the palm print of the defendant, was stipulated by the defendant to be an expert in the field of fingerprint examination and identification. There was no objection by the defendant to the admission in evidence of this far more damaging print taken from the chisel. Obviously, some expertise is desirable in the lifting and taking of fingerprints, in order to assure usable prints, but a fingerprint, which was, in fact, properly lifted or taken, may be used by an expert for comparison, regardless of the previous training and experience of the person who lifted or took it. We do not perceive how an inexpertly lifted fingerprint could be transformed by that process into the fingerprint of a person who did not make it.

**[4]** The defendant next contends that the court violated the hearsay rule in admitting into evidence certain out-of-court statements. In the first place, some of these statements are not hearsay at all. The cry of the badly battered girl to Mr. Whitt, "Please help me," his exclamation, "Oh, my God!" upon his discovery of her and Mr. Sutton's words of comfort to his stricken daughter, when he came to her in the Whitt home, could not, by any stretch of the imagination, be deemed to have been offered to prove the truth of the matters so stated. Thus, they are not objectionable as hearsay. *State v. Crump*, 277 N.C. 573, 585, 178 S.E. 2d 366; *State v. Griffis*, 25 N.C. 504; Stansbury, North Carolina Evidence, Brandis Revision, § 141.

**[5, 6]** Testimony of Officer Marshall concerning statements made to him by Miss Sutton on the night of the offense were admitted for the purpose of corroborating her previous testimony and the jury was so instructed. It was competent for that purpose. Likewise, it was not error to refuse to strike Mr. Whitt's testimony that when he discovered Miss Sutton in the woods she said, "Please help me; there is a man going to kill me," her prior testimony having been that she asked Mr. Whitt for help and told him she was "being raped." In this connection, the discrepancy is of no consequence. Either version tended to show she was being feloniously assaulted by a man and was in need of assistance. To be admissible for corroborative purposes it is not necessary that the prior statement of a witness be in the exact words of her testimony at the trial, it being sufficient that the two are consistent. See, Stansbury, North Carolina Evidence, Brandis Revision, § 52.

**[7, 8]** Technically, it was error to permit the State, over objection, to show by cross-examination of the defendant that he was arrested eight times after he left North Carolina. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174. However, the court, almost immediately, reversed its ruling and directed the jury to dismiss that matter from their minds as if they had never heard it. It was also technical error to permit Officer Marshall, called as a witness for the State in rebuttal, to testify that the defendant, while Officer Marshall was bringing him from Michigan to North Carolina, voluntarily told the officer that he, the defendant, had been arrested in St. Louis in connection with larceny of an automobile, the defendant, on direct examination, having testified that the arrest in St. Louis was for a traffic violation. However, in view of the record of the defendant's former arrests, convictions, imprisonments and escapes introduced in evidence by the defendant, himself, through Dr. Rollins, it is inconceivable that this testimony by Officer Marshall contributed, to any appreciable degree, to the defendant's conviction in this case. It must be deemed harmless error. These technical errors do not afford any basis for the granting of a new trial.

**[9]** Over objection, Officer Marshall testified, in rebuttal, concerning the manner in which the defendant talked and acted on their trip together from Michigan to North Carolina, as compared with his manner on the witness stand, testifying specifically that, en route from Michigan, he did not "roll his

eyes or roll his head." Dr. Rollins, the defendant's witness, had previously testified that the defendant "on occasion seeks to * * * present himself as mentally not responsible * * * in order to escape the consequences of his behavior." A reasonable inference from the question of the prosecuting attorney to Officer Marshall is that, while the defendant was testifying, he rolled his eyes and head in such a manner as to cause the District Attorney to believe that he was putting on a show in an effort to convey to the jury the impression that he was not sane. The trial judge was, of course, in a position to know whether the defendant's performance on the witness stand afforded basis for such belief. If so, the testimony of Officer Marshall in this connection was relevant and competent. If not, it would not be relevant but would seem, beyond question, to be harmless. We note that Officer Marshall did not express any opinion concerning the defendant's sanity while he and the defendant traveled together. He merely stated facts observed by him, from which facts the jury could draw its own conclusion as to the defendant's performance on the witness stand.

**[10]** Clearly, there was no error in the denial of the defendant's motion for judgment of nonsuit. Considering the State's evidence in the light most favorable to the State, as must be done upon such a motion, Strong, N. C. Index 2d, Criminal Law, § 104, it is abundantly sufficient to support findings that the offense of kidnapping was committed and that the defendant was the perpetrator of it. This being true, the motion for judgment of nonsuit was properly denied. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289; *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772. As Justice Sharp, now Chief Justice, said in *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897, "In our decisions, *kidnapping* is defined generally as the unlawful taking and carrying away of a human being against his will by force, threats, or fraud." It was there held that there must be a substantial asportation of the victim. It is unnecessary in the disposition of this assignment of error to determine whether the unlawful taking and carrying away of the victim must be with a felonious intent. Here, the evidence for the State, taken to be true, clearly shows both a substantial asportation and a seizure and carrying away with the intent to commit the felony of rape.

**[11]** The defendant next contends that, in violation of G.S. 1-180, the court expressed an opinion concerning the fact of the taking and carrying away of Miss Sutton in the following

excerpt from the court's instruction upon the defense of unconsciousness, which defense we discuss below:

> "Now, members of the jury, as I have told you, the defendant contends that he was unconscious at the time that Catherine Sutton was taken from the driveway of her residence and put in an automobile and then taken to a point two and a half miles away to an old sawmill road in Randolph County. * * * If you find that the defendant was completely unconscious of what transpired *when Catherine Sutton was taken violently from her driveway at her residence, put in an automobile and held down by an arm, and, thereafter, was beat about the head and sexually molested* * * * then he would not be guilty, and it would be your duty to so find." (Emphasis added.)

The court, in its charge, had previously told the jury that the State must prove the defendant is guilty beyond a reasonable doubt, correctly defining that term, and had further stated: "The Court expresses no opinion or intimations of opinion as to what the facts are. That is for you to determine. You determine what the facts are from your consideration of the evidence in the case * * * What any of the evidence does show, if anything, is exclusively a matter that you pass upon.

Almost immediately after the statement of which the defendant complains, the court, in concluding its charge, instructed the jury that if the jury found "from the evidence beyond a reasonable doubt" that the defendant "wilfully and intentionally took Catherine Sutton and carried her from her residence, the driveway of her residence in Guilford County to a point on an old sawmill road some two and a half miles away in Randolph County, against her will, by taking her forcibly from the driveway of her home, placing her in an automobile and taking her in the automobile to the place in Randolph County on an old sawmill road, and without lawful authority, and this constituted a substantial carrying away, it would be your duty to return a verdict of guilty of kidnapping," but if the jury did not so find, or had a reasonable doubt as to any one or more of those things, it would be the duty of the jury to return a verdict of not guilty.

It is well established that in determining whether there is error in the court's charge to the jury requiring a new trial, the charge must be construed contextually and as a whole. Strong, N. C. Index 2d, Criminal Law, § 168. So construed, we

find no basis for a new trial in the above quoted portion of the court's instruction concerning the defense of unconsciousness.

**[12]** The defendant assigns as error the following portion of the charge:

> "Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish defendant's guilt."

The defendant asserts that the court erred in failing to add to this instruction a statement that no presumption of guilt arises from evidence of flight. It is true that flight of the defendant does not give rise to a presumption of his guilt of the offense charged. *State v. Gaines*, 260 N.C. 228, 132 S.E. 2d 485; Stansbury, North Carolina Evidence, Brandis Revision. § 178. However, it is not necessary so to instruct the jury and the above quoted instructions by the trial judge was free from error.

**[13]** The defendant assigns as error the following instruction concerning the burden of proof with reference to the defense of insanity:

> "The defendant has the burden of proving that he was insane. However, unlike the State, which must prove the defendant's guilt beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction."

As the defendant concedes in his brief, this instruction is in accord with numerous decisions of this Court. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305, decided 14 April 1975; *State v. Atkinson*, 275 N.C. 288, 314, 167 S.E. 2d 241, reversed as to death penalty only, 403 U.S. 948; *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232; *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348; *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852; and many others. In the Swink case, Justice Ervin, speaking for this Court, said:

> "Since soundness of mind is the natural and normal condition of men, everyone is presumed to be sane until the contrary is made to appear. This presumption of sanity applies to persons charged with crimes, but it is rebuttable. (Citations omitted.) These considerations give rise to the

firmly established rule that the burden of proof upon a plea of insanity in a criminal case rests upon the accused who sets it up. But he is not obliged to establish such plea beyond a reasonable doubt. He is merely required to prove his insanity to the satisfaction of the jury."

In *State v. Creech, supra,* speaking through Chief Justice Stacy, this Court said:

"It is the law of this jurisdiction that an affirmative defense, *e.g.,* drunkenness or insanity, which partakes of the nature of a plea of confession and avoidance, is to be satisfactorily proved by the defendant unless it arises out of the evidence produced against him. (Citations omitted.) The *onus* of showing 'justification, excuse or mitigation,' to the satisfaction of the jury, is on the defendant. (Citations omitted.) * * * The presumption that the accused was sane and responsible for his acts persists until the contrary is shown to the satisfaction of the jury. Therefore, if the jury are left in doubt as to the sanity or responsibility of the accused, the presumption prevails."

The defendant contends that the long line of decisions of this Court so stating the rule as to the burden of proof of insanity should be overruled. This we decline to do.

**[14]** As to what constitutes insanity as a defense to a criminal charge, the court instructed the jury:

"The defendant was insane if, at the time of the alleged crime and as a result of mental disease or defect, he either did not know the nature and quality of his act *or did not know that it was wrong.*" (Emphasis added.)

The defendant contends that this instruction places upon the defendant a greater burden than is imposed upon him by a test of insanity as stated in *State v. Swink, supra,* where this Court said:

"It is a well-settled rule in the administration of criminal justice in this State that an accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he

is doing, or, if he does know this, *incapable of distinguishing between right and wrong in relation to such act.*" (Emphasis added.)

We perceive no substantial differences between the italicized portion of the instruction given by the trial judge and the italicized portion of the rule stated in *State v. Swink, supra,* insofar as the nature of the burden placed upon the defendant is concerned. In fact, the language so used by the trial judge is precisely that used by Lord Chief Justice Tindall in McNaghten's case, 8 Eng. Rep. 718 (1843), from which the law of this State with reference to the test of insanity as a defense to a criminal charge derives. In *State v. Harris, supra,* Chief Justice Stacy, speaking for the Court, uses the two expressions interchangeably, saying:

"The test of responsibility is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. * * * [I]f 'the accused should be in such a state of mental disease as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong,' the law does not hold him accountable for his acts. * * * "

Furthermore, in *State v. Swink, supra,* after stating the test as above quoted, Justice Ervin said, "The trial judge charged the jury, in substance, that to establish the prisoner's plea of insanity it must be 'clearly established' that he did 'not know the nature and quality of the act he was doing, or if he did know it, that *he did not know he was doing what was wrong*'." (Emphasis added.)

The court said that it was error to charge that a plea of insanity must be "clearly established" but said nothing about the remainder of the charge. We find no merit in this assignment of error.

We come now to the defendant's contention that the trial court erred in its instruction with reference to the burden of proof in connection with the defense of unconsciousness. That instruction was:

"Now, members of the jury, a person cannot be held criminally responsible for acts committed while he is unconscious. Unconsciousness is never an affirmative defense. Where a person commits an act without being conscious

thereof, such an act is not criminal even though if committed by a person who was conscious it would be a crime. The defendant has no burden to prove that he was unconscious. If you find that the defendant was completely unconscious of what transpired when Catherine Sutton was taken violently from her driveway at her residence * * * then he would not be guilty, and it would be your duty to so find."

The defendant contends that the instruction that the defendant does not have the burden of proof on this issue and the instruction that the jury would find him not guilty, if it found he was "completely unconscious of what transpired" at the time of the alleged offense, are inconsistent and the court should have charged the jury to find the defendant not guilty unless they found beyond a reasonable doubt that he was conscious of what allegedly transpired.

This assignment of error has merit if, but only if, under the law of this State, a criminal defendant relying upon the defense of unconsciousness, also called automatism, does not have the burden of proof thereof. If the burden of proof is upon the defendant on this issue, the error in the charge was favorable to the defendant and does not entitle him to a new trial.

The defense of unconsciousness, or automatism, while not an entirely new development in the criminal law, has been discussed in relatively few decisions by American appellate courts, most of these being in California where the defense is expressly provided by statute. In *Bratty v. Attorney General for Northern Ireland,* All E. R. 3 (1961) 523, Lord Denning observed: "Until recently there was hardly any reference in the English books to this so-called defense of automatism. There was a passing reference to it in 1951 in *R. v. Harrison-Owen* [1951] 2 All E. R. 726." The only express reference to it which we have found in our Reports is in *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328, which we discuss below.

Unconsciousness, as a defense to a criminal charge, is discussed briefly in most of the textbooks and treatises on criminal law, the most extensive treatment of it, which has come to our attention, being in LaFave and Scott, Criminal Law, § 44 (1972), where it is said, "[a] defense related to but different from the defense of insanity is that of unconsciousness, often referred to as automatism: one who engages in what would

otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness." In *State v. Mercer, supra,* at p. 119, this Court said: "Upon the present record, defendant was entitled to an instruction to the effect the jury should return verdicts of not guilty if in fact the defendant was *completely* unconscious of what transpired when [the victims] were shot." See also: 21 AM. JUR. 2d, Criminal Law, § 29; 22 C.J.S., Criminal Law, § 55; Burdick, Law of Crime, §§ 216, 217 (1946); Brill, Cyclopedia of Criminal Law, §§ 124, 128 (1922); Bishop, Criminal Law, §§ 388, 395 (9th ed. 1923); Wharton, Criminal Law and Procedure, § 50 (Anderson's Edition 1957); Weihofen, Mental Disorder as a Criminal Defense, pp. 121-122 (1958); Miller, Criminal Law, § 39 (1934).

**[15]** The defenses of insanity and unconsciousness are not the same in nature, for unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind. As a consequence, the two defenses are not the same in effect, for a defendant found not guilty by reason of unconsciousness, as distinct from insanity, is not subject to commitment to a hospital for the mentally ill.

The California Penal Code, § 26(5), provides: "All persons are capable of committing crimes except those belonging to the following classes: * * * Three. Lunatics and insane persons. * * * Five. Persons who committed the act charged without being conscious thereof. * * * " The Oklahoma statute is identical. Thus, the courts of these states have, quite correctly, held that the defenses of insanity and unconsciousness are not the same. *People v. Hardy,* 33 Cal. 2d 52, 198 P. 2d 865; *People v. Methever,* 132 Cal. 326, 64 P. 481; *Carter v. State* (Okla. Ct.), 376 P. 2d 351. Similar legislation is in effect in Arizona, Idaho, Montana, Nevada, South Dakota and Utah. See, LaFave and Scott, supra, at n. 7.

Sources of unconsciousness, recognized as a defense by courts and textwriters, include somnambulism *(Fain v. The Commonwealth,* 78 Ky. 183), somnolenture, hypnotism (see, *People v. Worthington,* 105 Cal. 166, 38 P. 689), cerebral concussion, delirium from fever or drugs, diabetic shock *(Corder v. Commonwealth* [*Ky.*], 278 S.W. 2d 77); epileptic black-outs *(Smith v. Commonwealth* [*Ky.*], 268 S.W. 2d 937; *People v. Magnus,* 92 Misc. 80, 155 N.Y.S. 1013), and drunkenness. Unconsciousness due to voluntary drunkenness was held no defense in *Lewis v. State,* 196 Ga. 755, 27 S.E. 2d 659.

It is generally said that amnesia, in and of itself, is not a defense to a criminal charge. *Thomas v. State,* 201 Tenn. 645, 301 S.W. 2d 358; *Bratty v. Attorney General for Northern Ireland, supra* (Lord Denning's opinion); Miller, Criminal Law, § 39(a) (1934); 21 AM. JUR. 2d, Criminal Law, § 30; 22 C.J.S., Criminal Law, § 55. In *Thomas v. State, supra,* the Supreme Court of Tennessee quoted Gray, Attorneys' Textbook of Medicine, § 96.01 (3rd ed. 1949), as follows:

> "Amnesia, loss of memory, may lead to crimes entirely unknown to the culprit at a later date. That is rare. More frequently, the accused, remembering full well what he has done, alleges amnesia in false defense. He is a malingerer. To prove his innocence or guilt may be most difficult. * * * Failure to remember later, when accused, is in itself no proof of the mental condition when crime was performed."

The principal point of difference among the few reported decisions on the defense of unconsciousness is with reference to the burden of proof. In *People v. Hardy, supra,* the California Supreme Court said:

> "In *People v. Nihell,* 144 Cal. 200, 77 P. 916, where defendant claimed he was unconscious by reason of epilepsy, it was held that the burden was on him to establish the peculiar mental condition upon which he relied, and the Court stated * * * 'Men are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem, they must impart that knowledge by affirmative proof.' This is merely another way of saying that defendant has the duty of going forward with the evidence, and it is entirely consistent with the rule that defendant has only the burden of producing evidence which would raise a reasonable doubt in the minds of the jury."

In *Bratty v. Attorney General for Northern Ireland, supra,* the accused killed a girl, a passenger in his car, by strangling her with her own stocking. He testified that a "blackness" came over him and that "I didn't know what I was doing; I didn't realize anything," and that he had previously had "feelings of blackness and headaches." There was medical testimony that he *might have been* suffering from an attack of psychomotor epilepsy, a disease of the mind which could cause ignorance of

the nature and quality of acts done. There was no medical evidence of any other pathological cause for a state of automatism. The trial judge refused to submit the defense of automatism to the jury but did submit the defense of insanity, which the jury rejected. The House of Lords held: "The trial judge was justified in not putting the defense of automatism to the jury since the evidence attributed any involuntariness in the appellant's act solely to a disease of the mind and there was no sufficient evidence of automatism, apart from insanity, to be left to the jury." The Lord Chancellor (Viscount Kilmuir) said:

> "It is necessary that a proper foundation be laid before a judge can leave 'automatism' to the jury. That foundation, in my view, is not forthcoming merely from unaccepted evidence of a defect of reason from disease of the mind.
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> * * *
>
> "[In *Hill v. Baxter* [1958] 1 All E. R. 193 [1958] 1 Q.B. 277] Lord Goddard expressed the view that the onus of proving the defendant was in a state of automatism was on him because automatism is akin to insanity and further is a fact exclusively within his own knowledge. The other members of the court reserved this point.
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> * * *
>
> "(If one subtracts the medical evidence directed to the establishment of psychomotor epilepsy, I am of the opinion that there was not any evidence on which a jury could properly have considered the existence of automatism. Counsel for the appellant directed our attention to the appellant's statement, to his evidence and to his previous conduct. In my view they do not provide evidence fit to be left to a jury on that question. They could not form the basis of reasonable doubt.
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> * * *
>
> "[N]ormally, the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily and the prosecution need go no further. But, if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary mens rea—if indeed the actus reus—has not been proved beyond a reasonable doubt."

Lord Denning was of the opinion that while the ultimate burden rests on the prosecution to prove every element essential in the crime, it was entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes. He said:

> "[I]f the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred. * * * The necessity of laying this proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury * * * . The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say 'I had a black-out:' for 'black-out' as Stable, J., said in *Cooper v. McKenna* [1960] Qd. R. at p. 419, 'is one of the first refuges of a guilty conscience and a popular excuse.' The words of Devlin, J., in *Hill v. Baxter* [1958], 1 All E.R. at p. 197 [1958], 1 Q.B. at p. 285, should be remembered:
>
> 'I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.' "

Although unconsciousness, or automatism, is a defense separate and apart from insanity, in that it may not be the result of a disease or defect of the mind, it does not necessarily follow that the two defenses are different in law with respect to the burden of proof. Somnambulism and epilepsy, two sources of the defense of unconsciousness, have been said to be like unto insanity. See: *Tibbs v. Commonwealth,* 138 Ky. 558, 128 S.W. 871; *Zimmerman v. State,* 85 Tex. R. 6, 215 S.W. 101; *Oborn v. State,* 143 Wis. 249, 126 N.W. 737; 21 AM. JUR. 2d, Criminal Law, § 29, note 6; 22 C.J.S., Criminal Law, § 64; Burdick, Law of Crime, § 216 (1946); Brill, Cyclopedia of Criminal Law, § 127 (1922); Bishop, Criminal Law, § 395 (9th Ed. 1923); LaFave and Scott, Criminal Law, § 44 (1922); Miller, Criminal Law, § 39(a) (1934); Wharton, Criminal Law and Procedure, § 50 (Anderson's Ed. 1957).

In *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104, Justice Barnhill, later Chief Justice, speaking for this Court, said:

> "[I]t has long been settled in this State that although the burden of establishing the *corpus delicti* is upon the

State, when 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."

This rule was quoted as the ground for decision in *State v. Brown,* 250 N.C. 209, 108 S.E. 2d 233, and *State v. Johnson,* 229 N.C. 701, 51 S.E. 2d 186. It has been applied to the following defenses, denominated "affirmative" defenses: *Drunkenness. State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473; *State v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *State v. Cureton,* 218 N.C. 491, 11 S.E. 2d 469; *State v. Creech, supra. Self Defense* and *Mitigation. State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461. *Insanity. State v. Creech, supra; State v. Hairston, supra;* In *State v. Arnold,* 35 N.C. 184, Chief Justice Ruffin, speaking for the Court, said the burden was upon the defendant, charged with murder, to prove he was under the age of 14, and so without legal capacity to commit the crime.

An affirmative defense is one in which the defendant says, "I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * * . " In *Bratty v. Attorney General for Northern Ireland, supra,* the House of Lords, and in *People v. Hardy, supra,* the California Court, were of the opinion that, once the defendant has introduced substantial evidence of unconsciousness, or automatism, the ultimate burden of proving consciousness, beyond a reasonable doubt, rests upon the prosecution, because an element of crime is the presence of *mens rea* at the time the act was done. The defense of insanity is said to be distinguishable because the law presumes sanity. We are unable to perceive a reasonable basis for distinction, in this respect, between *insanity* and *intoxication* on the one hand and *unconsciousness* from a different cause, on the other. In all three defenses the contention is the same—the defendant did the act, but should not be convicted because the requisite mental element was not present. The same presumption, which casts upon the defendant, claiming insanity, the burden of proving it to the satisfaction of the jury, and thus to negative the presence of *mens rea,* applies also to the defendant who asserts a temporary mental lapse due to concussion, somnolentia, epilepsy or the like.

In *State v. Mercer, supra,* the defendant, according to the State's evidence, went to the home of his estranged wife, armed

with a pistol. When she refused to admit him, upon his knocking at the locked door, he kicked the door open, entered and immediately shot and killed his wife, her woman companion and the infant son of the other woman. His testimony was that he became "blank in his mind" when his wife ordered him off the porch and "when he became conscious, he was standing on the porch and the pistol, which was beside his head clicked." There was no medical, or other, evidence establishing any pathological explanation of the alleged "black-out." This Court, saying there was no evidence of insanity, held, as one of several grounds for a new trial, that the trial court's charge to the jury was deficient in that it limited the jury's consideration of the alleged unconsciousness to its bearing upon the matter of premeditation and deliberation. We said, "Unconsciousness is never an affirmative defense."

**[16]** Upon further reflection, we are convinced that we erred in *State v. Mercer, supra,* in saying, "Unconsciousness is never an affirmative defense." In that respect, *State v. Mercer, supra,* is hereby overruled.

Our research has disclosed no decision, other than *State v. Mercer, supra,* in which any court has held that the defendant's uncorroborated and unexplained testimony that, at the moment of his otherwise criminal act, he "blacked-out," and so does not remember what, if anything, he did, is sufficient to carry to the jury the question of unconsciousness as a defense. As above noted, the House of Lords has declared the law of England to be otherwise. *Bratty v. Attorney General for Northern Ireland, supra.* We need not presently determine whether, in that respect, *State v. Mercer, supra,* correctly applied the law of North Carolina.

**[17]** We now hold that, under the law of this State, unconsciousness, or automatism, is a complete defense to a criminal charge, separate and apart from the defense of insanity; that it is an affirmative defense; and that the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury.

**[18]** In the present case, the learned trial judge fell into error, in his instruction as to the burden of proof on the question of unconsciousness, by reason of our own error in *State v. Mercer, supra,* but his error therein was in the defendant's favor and

could not have prejudiced him in any way. It does not, therefore, afford a basis for granting him a new trial.

Numerous other assignments of error set forth in the defendant's case on appeal are purely formal or, not having been brought forward in his brief, are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court; *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239; Strong, N. C. Index 2d, Criminal Law, § 166.

No error.

Chief Justice SHARP, concurring in result and dissenting in part.

I am in accord with the decision that no prejudicial error was committed in defendant's trial below and that his conviction should be affirmed. I do not agree, however, that in order to reach this proper result it is necessary to repudiate our unanimous holding in *State v. Mercer,* 275 N.C. 108, 117, 165 S.E. 2d 328, 335 (1969), that "unconsciousness is never an affirmative defense."

The rationale of *Mercer* is that (1) one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness; (2) in every prosecution the State has the burden of establishing beyond a reasonable doubt the identity of the defendant and that he voluntarily committed the unlawful act charged; and (3) when it proves these essential elements of its case it necessarily disproves the defense of unconsciousness.

Seemingly the majority have concluded—in my view, entirely erroneously—that at one point in his charge the trial judge put upon defendant the burden of proving his defense of unconsciousness, and that unless we confess error in *Mercer* and now hold that unconsciousness is an affirmative defense, a new trial must be awarded for prejudicial error in this case. Since a charge must be construed contextually, in order to put in proper perspective defendant's exceptions to it, as well as the majority's analysis of it, the charge is briefed below in pertinent part.

In the beginning, immediately after reading the indictment, which charged defendant with kidnapping Catherine Sutton, Judge Martin instructed the jury as follows:

"The defendant has entered a plea of 'not guilty'. The fact that he has been indicted is no evidence of guilt. Under our system of justice, when a defendant pleads '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."

Next, after briefly summarizing the evidence of both State and defendant and after defining kidnapping, the judge stated defendant's contention "that he had no knowledge of and did not consciously commit the act charged in the indictment, and that he was unconscious at the time the alleged act was made."

Subsequently, with reference to defendant's claim of unconsciousness, the court charged:

(D) "Now, members of the jury, as I have told you, the defendant contends that he was unconscious at the time that Catherine Sutton was taken from the driveway of her residence and put in an automobile and taken to a point two and a half miles away to an old sawmill road in Randolph County.

"Now, members of the jury, a person cannot be held criminally responsible for acts committed while he is unconscious. Unconsciousness is never an affirmative defense. Where a person commits an act without being conscious thereof, such act is not criminal even though if committed by a person who was conscious it would be a crime. *The defendant has no burden to prove that he was unconscious.* (If you find that the defendant was completely unconscious of what transpired when Catherine Sutton was taken violently from her driveway at her residence, put in an automobile and held down by an arm, and, thereafter, was beat about the head and sexually molested, by having fingers and a hand placed in her vagina, then he would not be guilty and it would be your duty to so find.) (E) (Emphasis added.)

* * *

"So, members of the jury, the Court charges you that if you find from the evidence beyond a reasonable doubt that on or about the 16th day of March 1971, Willis Tony Caddell *wilfully and intentionally* took Catherine Sutton and carried

her from her residence, the driveway of her residence in Guilford County, to a point on an old sawmill road some two and a half miles away in Randolph County, against her will, by taking her forcibly from the driveway of her home, placing her in an automobile and taking her in the automobile to the place in Randolph County on an old sawmill road, and without lawful authority, and that this constituted a substantial carrying away, it would be your duty to return a verdict of guilty of kidnapping.

"However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty . . . ."

Defendant assigns as error that portion of the charge included above between the letters (D) and (E). Specifically, he contends that the sentence enclosed in parenthesis immediately preceding the letter (E) contains two prejudicial errors: (1) the judge assumed, and thereby expressed the opinion, that it was an established fact defendant had violently taken Catherine from her driveway, put her in an automobile and thereafter sexually assaulted her; and (2) the judge laid upon defendant the burden of proving unconsciousness, thereby making his plea an affirmative defense in contravention of *Mercer*.

With reference to contention (1) I will concede that any reader, considering the challenged sentence *out of context*, would be justified in assuming that defendant's identity as the kidnapper had been admitted or determined. However, the majority opinion disposes of this assignment of error by citing the well-established rule that "a charge must be construed contextually and as a whole," and then noting (1) that the judge had begun his charge by saying to the jury, "It is now your duty to decide from this evidence what the facts are"; (2) that immediately before reviewing the facts he told the jury the Court expresses no opinion or intimations of opinion as to what the facts are. . . . You can determine what the facts are from your consideration of the evidence in the case; (3) that immediately after reviewing the facts he again warned the jury that what "this evidence does show is a matter for you and you alone to consider, to weigh and pass upon"; and (4) that in his final mandate he told the jury to acquit defendant if they were not satisfied beyond a reasonable doubt that he "wilfully and intentionally took Catherine Sutton and carried her from her residence. . . . "

When the charge is considered "contextually and as a whole" I agree with the majority that the challenged sentence provides no basis for a new trial on the ground that the judge violated G.S. 1-180. By the same token, it seems to me utterly impossible that any juror could have construed this charge to place the burden of proof on defendant to establish his plea of unconsciousness.

As heretofore noted, at the beginning of the charge the jury were told the defendant had *no* burden to prove his innocence; that the burden was on the State to prove his guilt beyond a reasonable doubt. Later, in words too plain to be misunderstood, the judge charged that a person cannot be held criminally responsible for acts committed while he is unconscious even though such acts would be criminal if committed by a conscious person, and that *unconsciousness is never an affirmative defense.* He then said, *"The defendant has no burden to prove that he was unconscious.* If you find that the defendant was completely unconscious of what transpired when Catherine Sutton was taken violently from her driveway . . . put in an automobile [etc.] . . . he would not be guilty and it would be your duty to so find." (Emphasis added.)

Defendant contends the last sentence in the preceding paragraph put the burden on defendant to establish his defense of unconsciousness notwithstanding the positive statement which immediately preceded it that defendant had no such burden. This contention, I believe, will not withstand analysis. The instruction, "If you find that defendant was completely unconscious of what transpired when Catherine Sutton was taken violently from her driveway at her residence . . . then he [defendant] would not be guilty and it would be your duty to so find," makes no reference to burden of proof. The sole import of this instruction is that defendant would not be guilty unless he *knowingly* committed the act on which the bill of indictment is based. The instruction as given was entirely correct. Had the jury made the finding that defendant was unconscious at the time of the kidnapping it would certainly have been its duty to acquit him of the charge.

Although I do not entertain the idea that the jurors were even momentarily confused by the challenged instruction, were we to assume the possibility that they might have been, surely their confusion was dispelled by the judge's final mandate to acquit defendant unless they were satisfied beyond a reason-

able doubt he *"wilfully and intentionally"* took Catherine Sutton without lawful authority from her driveway, placed her in an automobile and carried her into Randolph County. Proof beyond a reasonable doubt that defendant acted *wilfully* and *intentionally* negates unconscious action.

I can perceive no conflict between the judge's charge in this case and our decision in *Mercer*. On the contrary, the judge meticulously followed the law as laid down in that case. Hence, upon the present record, there is no need to consider whether the *Mercer* holding that unconsciousness is never an affirmative defense should be reaffirmed or overruled. Notwithstanding, the majority purport to overrule it upon the grounds stated in that opinion. Since I consider those grounds unsound I am constrained to express my contrary view.

In writing the well documented opinion in *Mercer*, Chief Justice Bobbitt pointed out that if a person is actually unconscious when he does an act which would otherwise be criminal, the absence of consciousness not only excludes the existence of any specific mental state, but also excludes the *possibility of a voluntary act* without which there can be no criminal liability. Unconsciousness, therefore, can never be an affirmative defense, which imposes the burden of proof upon the defendant, because the State has the burden of proving the essential elements of the offense charged, and "a voluntary act is an absolute requirement for criminal liability." LaFave and Scott, Criminal Law 181 (1972). Although the defense of unconsciousness "is sometimes explained on the ground that such a person could not have the requisite mental state for commission of the crime, the better rationale is that the individual has not engaged in a voluntary act." *Id.* at 337. "Criminal responsibility must be judged at the level of the conscious." *State v. Sikora*, 44 N.J. 453, 470, 210 A. 2d 193, 202 (1965).

In a specific-intent crime the State must prove that the accused voluntarily did a particular act for a specific purpose. Thus, in a prosecution for burglary in the first degree the State must prove that the defendant broke and entered an occupied dwelling (in the nighttime) with the specific intent to commit the felony alleged in the bill of indictment. *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968). A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. *State v. McLaughlin*, 286

N.C. 597, 213 S.E. 2d 238 (1975); *State v. Hamby* and *State v. Chandler,* 276 N.C. 674, 174 S.E. 2d 385 (1970).

In prosecutions for "general-intent offenses" the State need only prove that the defendant intended to do the act which the law declares criminal. "[I]ntent in the meaning of the criminal law is present in all cases where the act is done voluntarily or willingly, that is, through no compulsion or lack of mental capacity." 1 Burdick, Law of Crimes § 129 j. (1946). "The general criminal intent necessary to convict is deduced from the doing of the criminal act." *See* Annot., 8 A.L.R. 3d 1246 *et seq.* (1966).

Common law kidnapping is a general-intent crime. As defined in our decisions, it is the unlawful taking and carrying away of a human being against his will by force, threats, or fraud. *State v. Dix,* 282 N.C. 490, 493, 193 S.E. 2d 897, 898 (1973). Thus, in kidnapping "the criminal intent is the intent to do the act prohibited." 1 Wharton Criminal Law and Procedure § 372 (1957). The purpose for which the person is kidnapped is immaterial. It is enough that the prohibited act is done voluntarily. *See* 51 C.J.S., *Kidnapping* § 1 (1967).

Whether the offense charged be a specific-intent or a general-intent crime, in order to convict the accused the State must prove that he voluntarily did the forbidden act. Here I note that in *In Re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970), in an opinion expressing the views of five members of the Court, Mr. Justice Brennan said: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364, 25 L.Ed. 2d at 375, 90 S.Ct. at 1073.

The plea of unconsciousness is analogous to a plea of accident or of alibi, neither of which is an affirmative defense. Each plea merely negates an essential element of the crime charged. The plea of accidental homicide imposes no burden upon the defendant because the State cannot convict unless it first proves that the killing was culpable. "The claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt." *State v. Phil-*

*lips,* 264 N.C. 508, 513, 142 S.E. 2d 337, 340 (1965). When proof of defendant's presence at the scene of the crime charged is essential to his guilt, his plea that he was elsewhere and therefore could not have committed the crime is merely a denial of guilt, not an affirmative defense. To convict, the State must prove beyond a reasonable doubt that he was present at the scene and participating. "Such proof, of course, would demolish an alibi." *State v. Malpass* and *State v. Tyler,* 266 N.C. 753, 754, 147 S.E. 2d 180, 181 (1966). Similarly, proof of a voluntary act negates unconsciousness; voluntary action and unconsciousness cannot coexist.

When the State's evidence tends to show that, at the time in question, a defendant was "up and about," acting as if he had full possession of his faculties and knew what he was doing, it makes out a prima facie case of consciousness, and nothing else appearing, the law will assume he was conscious. *State v. Mercer,* 275 N.C. 108, 118, 165 S.E. 2d 328, 336. Thus no issue of unconsciousness or automatism arises until some evidence of it is adduced. If the defendant offers such evidence, or if it is elicited from the State's own witnesses, the jurors must determine whether they are satisfied beyond a reasonable doubt that defendant voluntarily committed the act. From the beginning of the case and throughout the trial the burden remains upon the State to establish defendant's guilt beyond a reasonable doubt. This rule is supported by both reason and authority.

In *Government of the Virgin Islands v. Smith,* 278 F. 2d 169 (3rd Cir. 1960), defendant, who was charged with involuntary manslaughter by automobile, defended on the ground that he was suddenly stricken by an epileptic seizure and was unconscious at the time of the accident which resulted in a death. In its findings, the trial court said that the question was whether defendant's evidence convinces the court that he had a seizure which rendered him unconscious. In awarding a new trial, the Court of Appeals said: "This was an erroneous statement of law for the defendant did not have the burden of convincing the court he had an epileptic seizure. On the contrary, his burden was merely to go forward with the evidence to the extent necessary to raise a doubt . . . as to the defendant's consciousness . . . . " *Id.* at 173. In arriving at this conclusion the Third Circuit Court of Appeals relied heavily upon the reasoning of the Supreme Court of California in *People v. Hardy,* 33 Cal. 2d 52, 198 P. 2d 865 (1948), which is briefed below.

In *Hardy,* the defendant, whose defense was unconsciousness, was convicted of first degree murder. On appeal she assigned as error the trial court's charge that when the evidence shows a defendant acted as if he was conscious the law presumes he was then conscious, and that presumption remains until overcome by a preponderance of evidence to the contrary. In ordering a new trial the court said that this instruction deprived the defendant of the benefit of the "cardinal rule in criminal cases that the burden rests on the prosecution to prove the offense beyond a reasonable doubt." *Id.* at 63-64, 198 P. 2d at 871.

"The mere fact that there is a presumption which tends to support the prosecution's case does not change the amount or quantum of proof which the defendant must produce. . . . The prosecution is required to prove the offense beyond a reasonable doubt and, in so doing, may rely on any applicable presumptions. The defendant, on the other hand, is not required to prove his innocence by a preponderance of the evidence, but only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury. . . . 'Men are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem, they must impart that knowledge by affirmative proof.' This is merely another way of saying that defendant has the duty of going forward with the evidence, and it is entirely consistent with the rule that defendant has only the burden of producing evidence which would raise a reasonable doubt in the minds of the jury." *Id.* at 64-65, 198 P. 2d at 872. *Accord, People v. Wilson,* 66 Cal. 2d 749, 59 Cal. Rptr. 156, 427 P. 2d 820 (1967). *See Fain v. Commonwealth,* 78 Ky. 183, 39 Am. Rep. 213 (1879).

In *Bratty v. A.-G. for N. Ireland,* 3 All E.R. 523 (1961), a case from which the majority opinion quotes extensively but which does not support its conclusion, the Lord Chancellor and each of the four Lords who considered the case with him, expressed views in accord with those of *Hardy.*

The Lord Chancellor (Vicount Kilmur), while noting that "a defence of automatism is very near a defence of insanity," said, "Nevertheless, one must not lose sight of the overriding principle, laid down by this House in Woolmington's case (21), that it is for the prosecution to prove every element of the offence charged. One of these elements is the accused's state of mind; normally the presumption of mental capacity is suffi-

cient to prove that he acted consciously and voluntarily and the prosecution need go no further. But, if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary mens rea—if indeed the actus reus—has not been proved beyond reasonable doubt. . . ." *Id.* at 531.

"My conclusion is, therefore, that once the defence have surmounted the initial hurdle to which I have referred and have satisfied the judge that there is evidence fit for the jury's consideration, the proper direction is that, if that eveidence leaves them in a real state of doubt, the jury should acquit." *Id.* at 532.

Lord Morris agreed that if, during the trial, defendant advanced the defense of unconsciousness in explanation of the act, "and if such explanation was so supported that it had sufficient substance to merit consideration by the jury, then the onus which is on the prosecution would not be discharged unless the jury, having considered the explanation, were sure that guilt in regard to the particular crime charged was established so that they were left in no reasonable doubt." *Id.* at 537.

Lords Tucker and Hodson each agreed with the views of both the Lord Chancellor and Lord Morris.

Lord Denning began his remarks by saying: " 'When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused.' The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily. . . ." He then noted that (1) an act is not involuntary "simply because the doer does not remember it . . . (or) could not control his impulse to do it" or "because it is unintentional or its consequences are unforeseen"; (2) automatism which results from drunkenness cannot lead "to a complete acquittal"; (3) "if the involuntary act proceeds from a disease of the mind, it gives rise to a defence of insanity, but not to a defence of automatism." These exceptions noted, Lord Denning perceived that "the category of involuntary acts is very limited." *Id.* at 532-533.

While Lord Denning did not doubt that there were "genuine cases of automatism and the like" he observed that "black-out" was a popular excuse and "one of the first refuges of a guilty conscience," and he doubted that without help of scientific evi-

dence the layman-juror could distinguish the genuine from the fraudulent. In his opinion the evidence of the defendant himself would *rarely* be a sufficient foundation for the defense unless supported by medical evidence which pointed to the cause of the unconsciousness. He was convinced, however, that "[o]nce a proper foundation is thus laid for automatism, the matter becomes at large and must be left to the jury. As the case proceeds, the evidence may weigh first to one side and then to the other; and so the burden may appear to shift to and fro. *But at the end of the day the legal burden* comes into play and requires that the jury should be satisfied beyond reasonable doubt that the act was a voluntary act." (Emphasis added.) *Id.* at 535-536.

The *decision* in *Bratty* was that the trial judge had not erred when he refused to submit to the jury defendant's defense of unconsciousness. In my view this was clearly correct, for the evidence was that the defendant remembered and gave the police a detailed account of the manner in which he had murdered his victim, and his only explanation for his conduct was that "something terrible" came over him and that he "didn't mean to do what really happened." *Id.* at 526. Obviously such testimony constituted neither a "proper foundation" nor "evidence fit to be left to the jury on the question."

In discussing the relationship between the defenses of automatism and insanity, the "Law Lords" noted that the defendant acquitted by reason of insanity could be detained in a hospital where he was not a continuing danger to the public, whereas one acquitted on the ground of unconsciousness was unconditionally released. LaFave and Scott have noted the judicial tendency to characterize instances in which the condition of unconsciousness is likely to recur as insanity rather than automatism so that the defendant may be committed. LaFave and Scott, Criminal Law § 44, p. 337 (1972).

It is quite obvious that judges everywhere distrust the plea of unconsciousness and apprehend that jurors may repose hasty confidence in it. I think, however, there is no need for such concern, since jurors are sensible people too. For example, the jurors who tried this case were no more impressed with defendant's plea of automatism than is this Court. In my view we can safely assume that ordinarily a defendant's unsupported plea of blackout will aid the prosecution rather than the defense. But however that may be, were we to deny a defendant the defense of

unconsciousness unless his testimony tending to establish unconsciousness be corroborated by medical testimony, we would violate a fundamental and long-established principle of our criminal jurisprudence—that defendant has no burden to prove his innocence and that he is entitled to testify in his own behalf. N. C. Const. art. I § 23 (1971); G.S. 8-54.

"In criminal trials the jury must try every pertinent issue of fact the evidence conduces to prove. When evidence is offered, the sole question for the court is, will it conduce to prove any fact material in the case? and if the law gives an affirmative response, the evidence must be admitted." *Fain v. Commonwealth, supra,* 78 Ky. at 188-189, 39 Am. Rep. at 216 (1879). "The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. . . . *That is a question* within the exclusive province of the jury. However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true." *People v. Wilson, supra,* 66 Cal. 2d at 762, 59 Cal. Rptr. at 165, 427 P. 2d at 829 (1967).

It is quite possible that to require corroboration of a defendant's testimony that he was unconscious at the time the act with which he is charged was committed would, in effect, deprive an accused, who was actually unconscious at the time in question, of that plea. Presumably such a person would have no recollection of the acts with which he is charged. In such a case if his automatism resulted from a concussion of the brain caused by an injury or attack which he does not remember, he might well be in no position to provide the testimony upon which to base a hypothetical question an expert medical witness might answer in his favor. Unconsciousness resulting from unknown causes, or as the first manifestation or symptom of a previously undiagnosed condition or disease, might create similar problems.

In support of its thesis that the defense of automatism should be equated with the affirmative defense of insanity, the majority opinion says, "An affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because. . . .'" A plea of unconsciousness, however, is not routinely one of confession and avoidance. Assuming a genuine case of unconsciousness—and the majority opinion concedes the possibility—the defendant who had been unconscious could not always know for certain whether he committed the act charged, and it therefore

seems most unlikely he would admit having done so. Of course, until the jury is satisfied beyond a reasonable doubt that the defendant indeed committed the act charged, his mental condition at the time is irrelevant. In this case the defendant did not admit he kidnapped Catherine. On the contrary he denied having done so.

Specifically, he said: "But if I did this, which I don't think I could—I never did a degrading thing like this before. I have been charged with nothing like this. I don't believe it. And if I did this, there is something wrong. . . . No, I have never seen the lady and didn't know who she was until I seen her walk up here on the stand. . . . I don't even know where she lives at. I never seen the lady before in my life, as far as I know. . . . I say I don't know nothing about driving a car out there."

The opinions in both *Mercer* and *Bratty* point out the fundamental difference in the pleas of insanity and automatism. A plea of insanity raises this question: Was the defendant, at the time he committed the offense charged, so incapacitated from *a disease of the mind* that he was incapable of knowing the nature and quality of his act, or if he did know, was he incapable of distinguishing between right and wrong with relation thereto? No such question arises upon a plea of unconsciousness. One who is completely unconscious *cannot* know the nature and quality of his act or judge whether it is right or wrong. He is incapable of any voluntary action. Automatism "means unconscious involuntary action, and it is a defence because the mind does not go with what is being done." Automatism is action by one who has no knowledge of action, "no consciousness of doing what was being done." *Bratty* at 527.

For the reasons stated herein I concur in the decision of the Court that there is no reversible error in the trial below, but I dissent from the statement in the majority opinion that unconsciousness is an affirmative defense. In my view unconsciousness, as held in *Mercer*, is never an affirmative defense.

Justice COPELAND joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. CHARLES D. THOMPSON

No. 41

(Filed 6 June 1975)

1. **Criminal Law § 15; Jury § 2— change of venue — jurors from another county — prominence of victim — newspaper publicity**

In this kidnapping and murder prosecution, the trial court did not abuse its discretion in the denial of defendant's motion for a change of venue or for a jury to be summoned from another county on grounds that the prominence of the victim and inflammatory publicity contained in the local newspapers would prevent a fair trial in the county or by jurors drawn from the county.

2. **Criminal Law § 76— admissibility of confession — findings and conclusions — appellate review**

Findings of fact made by the trial judge after conducting a *voir dire* hearing on the admissibility of a confession are conclusive and binding on the appellate courts if supported by competent evidence, but the conclusions of law drawn from the facts found are reviewable by the appellate courts.

3. **Criminal Law § 75— confession — Miranda warnings — necessity for determination of voluntariness**

Even though there was ample evidence that the procedural requirements of *Miranda* were employed by officers upon the taking of in-custody statements from defendant, it must still be determined whether, under all of the surrounding circumstances, defendant made the statements voluntarily and understandingly.

4. **Criminal Law § 75— confession — youthfulness — low mentality**

Defendant's youth and low mentality, standing alone, were not sufficient to render his confession involuntary; nor does the fact that the confession occurred after prolonged interrogation necessarily render it involuntary.

5. **Criminal Law § 75— confession — father's advice to waive rights — prolonged interrogation**

Defendant's confession was not rendered involuntary because his father, a policeman, told him to sign waivers of his rights or because the record discloses prolonged interrogation of a highly impressionable young man where defendant had ready access to his family and friends, before each interrogation defendant was warned of his constitutional rights, including his right to counsel, and the record discloses an absence of promises, threats or other coercive actions.

6. **Criminal Law § 106— necessity for evidence in addition to confession**

While a conviction cannot be sustained upon a naked extrajudicial confession, the case should be submitted to the jury if the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with the confession, show that the crime was committed and that the accused was the perpetrator.

7. **Homicide § 21; Kidnapping § 2— sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for kidnapping and murder where, in addition to defendant's confession, there was evidence tending to show that defendant had the opportunity to steal the pistol which was shown to have fired the fatal bullets, and that on the night of the crime defendant had in his possession an automobile similar to the one belonging to deceased, a large sum of cash, a pistol the same color as the one which fired the bullets into deceased's body, and some empty shells.

8. **Constitutional Law § 36; Criminal Law § 135— death penalty for murder**

Death sentence was constitutionally imposed for first degree murder.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

APPEAL from *Martin (Robert M.), S.J.*, May 1974 Special Term of the RUTHERFORD County Superior Court.

Defendant was tried upon two bills of indictment, proper in form, charging the murder and kidnapping of Van Gudger Watkins. Prior to trial defendant moved (1) for change of venue or special venire on grounds of adverse pretrial publicity and (2) for dismissal because of denial of effective assistance of counsel. Both of these motions were denied.

The State's evidence tended to show the following facts:

Terry Watkins, nephew of the victim, testified that on 18 February 1974 decedent bought a 1972 Chevrolet four-door hardtop from him. On the following Wednesday morning (20 February 1974), he saw the same automobile which he had sold to his uncle. The windows of the car were smoke-stained, and one could not see into the car.

Clarence Simmons, of the Rutherford County Sheriff's Department, testified that he had known decedent and that he observed his body at a rural cemetery at Doggett's Grove in Rutherford County about 7:45 p.m. on 20 February. The body was lying face down on the ground and was clothed in trousers, cowboy boots, a hat, a yellow shirt, and a blue denim jacket. There was blood on the face. The body was taken to the hospital morgue, where an autopsy was conducted by Dr. Paul Hurt in the presence of the witness and three other law enforcement officers.

Dr. J. Paul Hurt, stipulated to be an expert in the field of pathology, testified that he conducted an autopsy on the body of Van Watkins on 21 February 1974 in the presence of law enforcement officers. His examination revealed that decedent had been shot at least four times; two wounds appeared in the left upper chest, two wounds in the right back. One of the bullets in the left upper chest had traveled through the right ventricle of the heart and entered the abdominal cavity. This wound caused perforation of the heart and resulted in death. Decedent also received a blow on his head which caused compound skull fractures, but this blow was inflicted after death. The doctor removed from the body four bullets which he gave to one of the law enforcement officers.

Sheriff Blaine Yelton testified that he had a conversation with defendant about 9:02 p.m. on 2 March 1974, in the presence of defendant's parents, Earl Hatcher, and Hollis Pressley. Upon defendant's objection to the admission of statements made during this conversation, the trial judge excused the jury and conducted a *voir dire* hearing. Detailed facts relating to the evidence on *voir dire* appear in the opinion. After conducting the *voir dire*, the trial judge made findings of fact and concluded that the statement made on this occasion was freely, understandingly, voluntarily, and intelligently made after a voluntary and intelligent waiver of right to counsel.

The jury returned, and the witness testified before the jury that defendant told him that he had killed Van Watkins. On 19 February 1974, between 7:00 and 7:30 defendant was walking up a street in Forest City when he saw decedent drive up, get out of his car, and reach into his pocket to pull out his keys. As decedent reached into his pocket, a roll of money fell out. Defendant then decided to rob decedent. After Watkins entered his establishment, defendant followed him inside, and by use of a .22 revolver forced him to re-enter his car. They then drove to the cemetery at Doggett's Grove, where Watkins gave him the money and told him that he would never get away with the crime. He then shot Watkins five times because he knew that decedent could identify him. In order to be sure that decedent was dead, defendant hit him on the back of the head with a large piece of concrete. Defendant proceeded to Shelby in Mr. Watkins' automobile and rented a room at the Governor's Inn Motel, where he later brought his girl friend, Vanessa Whitworth. They watched television and then went to bed. During

their stay at the motel, he showed her the gun and the money and told her he got the money from a credit union. Thereafter he drove the automobile to an area behind Dunbar School and set it afire. On 25 February he hid the pistol in a tree. A few minutes after completing this statement, defendant took the Sheriff and other officers to the tree, where they retrieved the pistol. He admitted that he took the gun from P. G. Woods's automobile on 19 February.

On cross-examination the Sheriff testified as to two previous, exculpatory statements which defendant had made, including one which inculpated two other persons who were subsequently exonerated. He denied that he told defendant that, unless he confessed to the crime, he would have to recommend the death penalty. This answer brought an angry and disruptive response from defendant, who threw law books at the Sheriff and shouted at him to "quit lying." The trial judge excused the jury during defendant's outburst, admonished defendant to keep quiet on pain of contempt or other measures to control his disruptive conduct, and declared a recess. At the end of the recess, the Court denied defendant's motion for mistrial based upon defendant's own outburst.

Vanessa Whitworth testified that she was with defendant on the night of 19 February 1974 in his room at the Governor's Inn Motel in Shelby. She did not remember what kind of car defendant was driving on that night but stated that she remembered the word "Impala" on the dashboard. During her stay at the motel, she saw a gun in a drawer, and she saw defendant put three empty shells in an ashtray in the room.

On cross-examination, she stated that the officers who came to question her told her that, if she did not tell the truth, she could be charged with murder and get the death penalty. She did not recall anyone's telling her that defendant was going to get the death penalty.

The State offered evidence through S.B.I. agents which tended to show that the pistol which defendant pointed out to the officers (State's Exhibit 4) was the weapon which fired the bullets taken from the body of deceased.

P. G. Woods testified that on 17 February 1974 defendant rode with him to their place of employment, Fieldcrest Mills. Before getting out of the car at the plant, the witness opened the glove compartment to get some matches. In the glove com-

partment at that time was a .22 caliber pistol. The witness locked his car upon leaving it. They arrived at work about 11:00 p.m. About 5:00 a.m. the following morning, defendant told the witness that he had caught up with his work and that he wanted the keys to the car so that he could lie down in the car until witness got off at 7:00 a.m. He gave the keys to the car to defendant but did not authorize him to take it anywhere. When his shift was over, he saw that his car had been moved in the parking lot. He found defendant in the car, and they went home. When the witness arrived at home, he did not lock his car. That afternoon about 3:00 p.m., he went to the glove compartment for some matches, discovered that the revolver was missing, and reported the theft to the Forest City Police Department. The witness identified State's Exhibit 4 as being the pistol which was in his glove compartment. He testified that the pistol was loaded with six rounds of ammunition at the time it was taken.

The State rested, and defendant unsuccessfully moved for judgment as of nonsuit.

Both of defendant's parents testified in his behalf as to his prior emotional problems and to circumstances surrounding his confession.

At the close of all the evidence, defendant renewed his motion for judgment as of nonsuit, which motion was again denied.

The jury returned a verdict of guilty as charged in both bills of indictment, and the Court imposed the mandatory sentence of death on the murder charge and life imprisonment on the kidnapping charge. Defendant appealed.

*Attorney General James H. Carson, Jr., by Assistant Attorney General Charles M. Hensey, for the State.*

*Robert W. Wolf and Charles V. Bell for defendant.*

BRANCH, Justice.

**[1]** Defendant assigns as error the trial judge's denial of his motion for change of venue or for a jury to be summoned from a county other than Rutherford. Defendant based his motion on the grounds that the prominence of the victim and the inflammatory publicity contained in the local newspapers would pre-

vent a fair trial in Rutherford County or by jurors drawn from that county. After considering defendant's affidavit, the record, and oral arguments of counsel, Judge Martin denied defendant's motion.

The newspaper accounts upon which defendant depends do not appear to be beyond the bounds of propriety or to be inflammatory. Neither does defendant show that the prominence of the victim has unfairly affected his trial. This record does not disclose that defendant exhausted his peremptory challenges or that defendant had to accept any juror objectionable to him.

Defendant's motion was addressed to the sound discretion of the trial judge. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721; *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123; *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457. No abuse of discretion on the part of the trial judge is shown.

This assignment of error is overruled.

The principal question presented by this appeal is whether the trial judge erred in denying defendant's motion to suppress evidence of in-custody statements made by defendant to police officers.

During the direct examination of Blaine Yelton, Sheriff of Rutherford County, the solicitor inquired about statements made by the defendant to the Sheriff. Upon defense counsel's objection, the jury was excused and a *voir dire* hearing conducted.

On *voir dire* Sheriff Yelton testified that about 5:20 p.m. on 27 February 1974, pursuant to his request, defendant's father, a sergeant on the police force in Spindale, North Carolina, brought defendant to the jail for the purpose of interrogation concerning a gun which had been taken from P. G. Woods. Defendant signed a waiver of his constitutional rights, including waiver of counsel, on this occasion, but the Sheriff stated "it is possible that he did not at first want to sign the waiver of rights and that his father told him to sign it . . . . " The Sheriff could not recall whether the murder of Watkins was mentioned at this first encounter. This interrogation lasted for over an hour, and upon its completion defendant was taken into custody upon authority of a telegram from the North Carolina Parole Board indicating a revocation of defendant's parole. Defendant was questioned several times during the night or early morning hours of 28 February. According to the Sheriff's notes, the second

interrogation occurred at 1:35 a.m. on 28 February, and the last questioning during this interval took place about 5:00 a.m. on 28 February. He could not say whether defendant had any sleep or food during the night of 27 February. The Sheriff next questioned defendant at 1:55 p.m. on 28 February. At this time defendant's father was present, and defendant signed a waiver of his constitutional rights at the suggestion of his father. Prior to signing the waiver, defendant asked his father if he should answer questions, and the father on two occasions said that it was up to him and another time or two told his son that he had nothing to hide and should therefore talk to the Sheriff. After signing the waiver, defendant made statements implicating Alexander Hamilton and Randy Wesley and also to some degree incriminating himself in the murder of Watkins. Another interrogation took place at 7:50 p.m. on 28 February in the presence of Alexander Hamilton, Randy Wesley, Officers Hatcher, Simmons, Chambers, and the Sheriff. Following this interrogation defendant was charged with murder, and Hamilton and Wesley were released without being charged. On 1 March the Sheriff, together with Officers Hatcher and Pressley, questioned defendant for about an hour and a half concerning inconsistencies in his previous statements.

On 2 March defendant was again questioned and at that time told the Sheriff where he could find the murder weapon. Search for the weapon was made to no avail.

On the night of 2 March about 7:00 p.m. defendant's mother and father were allowed to talk to him, and after they had talked with him for about thirty minutes, defendant's mother told the Sheriff that defendant wanted to make a statement. On this occasion, in addition to the Sheriff, Officers Pressley, Hatcher, and defendant's mother and father were present. The Sheriff again advised defendant that he had a right to remain silent, that anything that he said could be used against him in a court of law, that he had a right to have an attorney present during any questioning, and that he did not have to answer any question until he talked to this attorney. In addition, the Sheriff stated that he read defendant's rights to him and that defendant signed a waiver of his constitutional rights, including waiver of counsel, before making any statement. The Sheriff denied that he ever told defendant that it might be easier on him if he confessed or that he would recommend the death penalty if defendant did not tell the truth. He said that at this time defendant seemed remorseful and was crying part of the time.

Dorothy Thompson, defendant's mother, testified that when she talked to her son on 2 March, he told her that the Sheriff had told him that if defendant didn't tell the truth, the Sheriff would recommend the death penalty. At that time her son was very upset and was crying and trembling. Upon her inquiry the Sheriff told her that he told the defendant about the death penalty "to get him to tell the truth because he [the Sheriff] had been on so many wild goose chases." She gave testimony which indicated that defendant was mentally and emotionally unstable. She was present when defendant made his statements on 2 March, and, according to her testimony, the Sheriff on several occasions suggested details to which defendant consented. She admitted that defendant told her that he killed Watkins, but only after the Sheriff had mentioned the death penalty to him.

Forrest Thompson, defendant's father, testified that, prior to arriving at the Sheriff's Department on 27 February, he asked defendant whether he had killed Watkins, and defendant had replied in the negative. At the initial questioning, defendant at first refused to sign a waiver of rights, but he, the father, told him to go ahead and sign it. The witness stated that he so advised his son because "I felt like if he didn't kill the man, he could go ahead and talk to them freely." It was his opinion that had he not told his son to sign the waiver, the boy would not have signed it. The father was in the police station at that time as an officer of a municipality in Rutherford County, and if he had not been a policeman, he would have told his son not to say a word. With regard to the length of interrogation, the witness testified:

> I brought him to the jail somewhere around 3:15 to 3:30 and I left the jail at approximately 5:00 a.m. the next morning on the 28th. I stayed at the jail because Charles was in the Sheriff's office being interrogated continuously from 3:30 p.m. until 5:00 a.m. the next morning. He never told the Sheriff that he had killed the deceased but he remained in the Sheriff's office all this time. He was placed in a cell at approximately 4:30 or a quarter to five, in fact the Sheriff never put him under arrest until about 2:00 a.m., no warrant was issued for him but the Sheriff kept telling him I've got papers to put you in the jailhouse right now but he never produced those papers until about 2:00 a.m. The papers were for violation of probation and it was

a telegram that he had received that gave him the authority to pick Charles up.

* * *

During the time I was at the jail he did not have anything to eat and I left about five a.m., none of us had anything to eat. There were quite a few men interrogating him, Sheriff Yelton, Earl Hatcher, Charles Chambers and Johnny Wilkins all interrogated him. I was not present during all of the interrogation. The room where the interrogation took place was an eight by ten room, everyone was sitting down at a table, there were no windows in the room.

During the interrogation he didn't appear nervous until over in the morning, then he got real nervous. After I left at 5:00 a.m. the next time I returned to the jail was about noon on the 28th and when I got to the jail he was in the Sheriff's office, but I don't recall who was in there with him. When I went in he appeared nervous and he was sleepy then because he said he didn't go to bed until after he eat [*sic*] breakfast that morning and this was a little after noon then.

The witness further testified that he himself, at the direction of the Sheriff, arrested Alexander Hamilton, whom defendant first implicated in the criminal act. This individual was later released when it appeared that he had nothing to do with the crime. The father also stated that his son made five confessions in reference to this case, all of which statements were reduced to writing by the Sheriff. He said that two of the confessions were taped and that during these taped sessions, "the Sheriff would ask Charles about it and go over it and if Charles wouldn't say anything about it the Sheriff would go back until he got it down to just where he wanted it. He would get it down to where he wanted it and then say let's tape it. On one occasion Charles refused to tape it, but I myself asked him to go ahead and tape it. . . ."

I did not tell him to sign all of the waivers. I told him to sign the first one, and I directed him to sign the last one. Charles refused to sign the last one until I directed him to so do, he was crying very heavily and trembling and lying on my wife's lap. That's when I kept telling him that the Sheriff and what he had said about

the death penalty didn't mean anything. I am definitely convinced that the Sheriff told my son about the death penalty.

On cross-examination the witness said that the law enforcement officers advised defendant of his rights every time that he, the father, was present at the questioning but that he was not there all the time when the Sheriff was asking questions. He conceded that the Sheriff had no control over him, could not fire him, and could not order him to do anything. The services he performed in the investigation of the case and in the taking into custody of the others implicated by his son were services done at the request of the Sheriff. The father explicitly stated that the services he rendered were done as "a private citizen."

Sheriff Yelton, recalled on *voir dire,* testified that he could not recall confronting defendant with his prior criminal record, "but it is possible that I did." The Sheriff further denied making suggestions to defendant as to what he should say in his confession and stated that counsel was not appointed for defendant immediately after he was charged because defendant's father told him that they were going to employ private counsel. He stated that the father's involvement in the case was more a matter of courtesy than of law enforcement activity.

Dr. Robert Rollins, a licensed physician and specialist in psychiatry, Director of Forensic Services for the Division of Mental Health Services of the North Carolina Department of Human Resources and Director of the Forensic Unit at the Dorothea Dix Hospital in Raleigh, testified that, as a result of the psychiatric evaluation of defendant at Dorothea Dix Hospital in April, 1974, he had formed certain conclusions with regard to defendant's mental condition. He indicated that defendant had an I.Q. of 55, which indicated that he was mildly mentally retarded, "a person whose intellectual functioning is below the average, particularly in the areas of judgment." He further stated that in the three areas tested, defendant functioned at fifth-grade level in reading ability, third-grade level in spelling, and fourth-grade level in arithmetic. He stated that defendant was easily influenced by other people, "more easily intimidated than the average person," although, of course, most average people can be intimidated. He stated that as a result of hearing the tape played in open court prior to his testimony, he felt that "Mr. Thompson was obviously upset and under stress at the time he gave an opening account of the events that he was

asked about and that he responded to various questions that were put to him." He further stated that defendant was, in his opinion, "a person who had some diminished responsibility although I do consider him to be responsible under the usual rules and circumstances that you describe, but it is my opinion that he is influenced by other people to waive his rights." In short, it was the witness's opinion that, with regard to the waiver of rights, defendant "was not acting of his own free will." In summary, the doctor's opinion was as follows:

> It is my honest feeling that that statement reflected not so much a willing and voluntary accounting of the events recalled by the defendant as it did agreeing that the facts put to him by other persons were correct. I, of course, have only heard that one time.

On cross-examination by the solicitor, the witness stated that his assessment of the situation was that defendant "found himself in trouble and first tried to get out of it as people often do, but characteristically mentally retarded people do so by saying they had nothing to do with it. He was through circumstances urged by his father to participate in the process and his next story was that it wasn't him but some other people then if I understand it correctly the next story was that it was just him." The witness further testified that a person with defendant's I.Q. could satisfactorily perform in a textile plant, "and I think with some effort he could pass the North Carolina driver's license exam."

The State presented other evidence with regard to the taking and the transcribing of defendant's statement, all of which evidence tended to show that defendant voluntarily waived his rights and made a statement in accordance with the requirements of *Miranda* and that his utterances were freely and voluntarily made.

After hearing the evidence, the Court made the following findings of fact:

> The Court finds as a fact from the testimony that Charles Thompson was interrogated by the Sheriff of Rutherford County several times commencing in the afternoon of February 27th and concluding on March 2, 1974, in connection with the investigation of the death of Van Watkins; that on February 27, 1974, the Defendant was

brought to the Sheriff's office by the Defendant's father and thereafter legally held in jail by reason of a parole violation; that before any questioning by the Sheriff he was warned of his Constitutional rights and signed a waiver of his rights which appear of record.

The Court further finds that after interrogation on several occasions the law enforcement officers would check out the matters brought out on interrogation and upon discovering inconsistencies and confronting the Defendant, other statements were made by the Defendant, later implicating other persons who were formerly charged along with the Defendant with the murder of Van Watkins; that upon each interrogation the Defendant was warned of his Constitutional rights and each time signed a waiver of those rights; that subject to the implication of other persons by the Defendant and on the evening of March 2, 1974, the Defendant's mother and father visited him in the jail and were allowed to confer with their son in private and thereafter informed the Sheriff that their son wished to talk with him and that a statement was made by the Defendant on the evening of March 2, 1974, which appears of record.

The Court finds as a fact that before making any statement and before he was interrogated, the Defendant was warned by the Sheriff of his Constitutional rights; that he was advised before any questions were asked him that he must understand his rights; that he had the right to remain silent and not make any statement; that anything he said could and would be used against him in a Court; that he had the right to talk to a lawyer for advice before he was asked any questions; that he had the right to have anyone else with him that he requested that he was advised that if he could not afford a lawyer, one would be appointed by the Court before any questioning; that if he desired to answer questions without a lawyer present, he had the right to stop answering questions at any time; that he had the right to stop answering questions until he had the opportunity to talk to a lawyer.

The Court further finds that the Defendant signed a waiver of his rights on each occasion before he was interrogated to the effect that he had read a statement of his rights and understood what his rights were; that he

was willing to make a statement and answer questions; that he did not want a lawyer at that time; that he understood what he was doing and that no pressure or threat had been made to him and no threat or coercion had been used against him by anyone; that each of these warnings and waiver of rights had been offered by the State and has been received in evidence for the purpose of the Voir Dire.

The Court further finds as a fact that the defendant's father has engaged in law enforcement for the past ten years; that for the past four years he has been a police officer for the Town of Spindale; that prior to that time he was a deputy sheriff for Rutherford County; that he accompanied his son to the Sheriff's office on February 27th and remained with him throughout the night and was present during the questioning by the Sheriff's Department; that thereafter he visited his son in the jail and in the Sheriff's office from time to time for the next several days; that the Defendant's mother visited her son at the jail and at the Sheriff's Department several times during the period from February 27th until March 2nd; that the parents of the Defendant were never refused the right to see and talk with their son both in the company of the Sheriff and privately; that the Defendant had the opportunity of rest in the jail facilities and the opportunity to have regular meals in the jail; that the Rutherford County jail was a practically new building, being less than a year old, and was equipped with proper and adequate facilities for caring for persons incarcerated therein.

The Court further finds that the Defendant is 19 years of age and is mildly retarded, went through the 9th grade, holds a valid North Carolina driver's license since he was 16 years of age and for some time prior to February 27, 1974, was regularly employed in the textile industry and that he knows the difference between right and wrong.

The Court further finds as a fact that subsequent to the implication of other persons by the Defendant in connection with the death of Mr. Van Watkins the Defendant's father and mother voluntarily went to the jail of Rutherford County and was there allowed to talk privately with their son; that after talking with their son for some period of time the Defendant's mother went to the Sheriff and

informed him that their son had a statement to make to the Sheriff; that thereupon the Sheriff in the presence of the Defendant's mother and father and in the presence of Mr. Hatcher of the State Bureau of Investigation and in the Sheriff's private office again warned the Defendant of his Constitutional rights; that he was advised that before any questions were asked he must understand his rights; that he had the right to remain silent and not make any statement; that anything he said could and would be used against him in a Court;

That he had the right to talk to a lawyer for advice before any questions were asked him or have with him anyone else during questioning; that if he could not afford a lawyer, one would be appointed for him by the Court before any questioning, but if he desired to answer questions without a lawyer present that he had the right to stop answering questions at any time; he also had the right to stop answering questions at any time until he talked to a lawyer; that the Defendant signed a waiver of rights which appears as State's Exhibit No. 3 for the Voir Dire to the effect that he had read the statement of his rights and understood what they were; that he was willing to make a statement and answer questions; that he did not want a lawyer at that time; that he understood and knew what he was doing; that no promises or threats had been made to him and no pressure of coercion of any kind had been used against him by anyone; that the rights and waiver of rights included on one sheet of paper and entitled State's Exhibit No. 3 was signed by Charles Thompson and witnessed by Sheriff Yelton and Earl Hatcher at 9:02 P.M. on March 2, 1974.

The Court finds as a fact that opportunity to exercise the constitutional rights of the Defendant were accorded to the Defendant throughout the interrogation; that he thoroughly and fully understood his rights;

That the defendant requested no attorney and did not refuse to make a statement to Sheriff Yelton; and by doing so, knowingly, intelligently and understandingly waived any constitutional rights accorded to the Defendant and intelligently, knowingly and affirmatively waived the right to have counsel present with him at the time of making a statement to Sheriff Yelton.

The Court finds that the Defendant freely, understandingly, voluntarily and intelligently made a statement to Sheriff Yelton at approximately 9:05 P.M. on March 2, 1974, without undue influence, coercion or duress and without any promise, threat, reward or hope of reward; that he had been fully advised of his constitutional rights and understood his rights; that after being advised of his rights he knowingly and intelligently waived his right to counsel at the time of interrogation and making of statement to Sheriff Yelton.

It is therefore adjudged that the Defendant's answers and statement to Sheriff Yelton are competent and can be admitted into evidence before any jury.

**[2]** Upon the motion to suppress, the trial judge properly excused the jury and conducted a *voir dire* hearing to determine the admissibility of the challenged in-custody statements. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, *cert. denied,* 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784. It is now well settled in this jurisdiction that after conducting a *voir dire* hearing, the trial judge's findings of fact, if supported by competent evidence, are conclusive and binding on the appellate courts. Nevertheless, the conclusions of law drawn from the facts found are reviewable by the appellate division. *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363. In *State v. Pruitt, supra,* we said:

In instant case there was plenary evidence that the procedural safeguards required by the *Miranda* decision were recited by the officers and that defendant signed a waiver stating that he understood his constitutional rights, including his right to counsel. Even so, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made. *State v. Bishop, supra; State v. Gray, supra; State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution does not, however, standing alone, control the question of whether a confession was voluntarily and understandingly made. The answer to this question must be found from a consideration of the entire record. *Davis v. North Carolina,* 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895; *Blackburn v. Alabama,* 361 U.S. 199,

80 S.Ct. 274, 4 L.Ed. 2d 242; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753.

**[3]** Here, as in *Pruitt,* there was ample evidence that the procedural safeguards required by *Miranda* were employed by the officers upon the taking of the statements from defendant. Nevertheless, we must still determine whether, under all of the surrounding circumstances, defendant voluntarily and understandingly made the inculpatory statements.

Some of the factors to be considered in deciding whether a statement is voluntarily and understandingly made are set forth in the case of *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581. There Justice Huskins, speaking for the Court, said:

> "The test of admissibility is whether the statement by the defendant was in fact made voluntarily." *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. See also *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *State v. Livingston,* 202 N.C. 809, 164 S.E. 337. The admission is rendered incompetent by circumstances indicating *coercion* or *involuntary* action. *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619. The "totality of circumstances" under which the statement is made should be considered. *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620. Mental capacity of the defendant, *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396, whether he is in custody, *State v. Guffey, supra,* the presence or absence of mental coercion without physical torture or threats, *State v. Chamberlain, supra,* are all circumstances to be considered in passing upon the admissibility of a pretrial confession and in passing upon the voluntariness of a waiver of constitutional rights. [Emphasis supplied.]

The fact that the defendant was youthful and that he made the challenged statements in the presence of police officers does not render the statements inadmissible, absent mistreatment or coercion by the officers. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561; *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738. Neither does a subnormal mentality, standing alone, render a confession incompetent if it is in all other respects voluntarily and understandingly made. If a person has the mental capacity to testify and to understand the meaning and effect of statements made by him, he possesses sufficient mentality to make a confession. Nevertheless, his mental capacity, or his lack of it,

is an important factor to be considered in determining the voluntariness of a confession. *Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d 242; *State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171; *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396.

**[4]** In this case defendant is a nineteen-year-old mildly retarded person who, according to an expert witness, was more easily intimidated than the average person. He was described by Dr. Rollins as "a person who has some diminished responsibility although I do consider him to be responsible under the usual rules and circumstances." It would seem to follow that a person who is responsible under usual circumstancese possesses sufficient intelligence to testify and to know the meaning and effect of a confession. We, therefore, are of the opinion that defendant's youth and his lack of high mentality, standing alone, were not sufficient to render his confession involuntary. Nor does the fact that the confession occurred after prolonged interrogation necessarily render the statement involuntary. 29 Am. Jur. 2d *Evidence* § 550 at 605. There remains, however, the decisive question of whether coercion rendered defendant's in-custody statements involuntary and therefore inadmissible into evidence.

*State v. Edwards,* 282 N.C. 201, 192 S.E. 2d 304, is in many respects factually similar to instant case. There the defendant, a retarded eighteen-year-old boy, was questioned concerning a murder on the night of 23-24 September 1971. He was advised of his constitutional rights and at that time denied any knowledge of the crime. On the night of 24 September defendant was again questioned, and while the interrogation was under way, a bondsman for defendant in another case "turned him in." He was then in custody, and the questioning continued until about 1:30 a.m., at which time he began to cry and made inculpatory statements. The *Miranda* warnings were given, but defendant was without counsel and was without the advice of friends or family at that time. This Court held that a confession so elicited was not voluntarily made.

In the landmark case of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 602, 16 L.Ed. 2d 694, defendant, a seriously disturbed, uneducated boy who was plagued with sexual fantasies, confessed after being interrogated for two hours by police officers. He was not advised of his right to counsel, and at trial the confession was offered into evidence. The Supreme Court found error in the admission of the confession and used the case as

the vehicle for the now familiar procedural safeguards required in all cases involving inculpatory statements.

In *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977, the defendant, a twenty-two-year-old Mexican boy, was in police custody and made incriminating statements after having been denied the right to consultation with his employed counsel, who was on the premises seeking to see his client. In that case the police urged the defendant to make a statement without advising him of his right to remain silent. The Supreme Court held that under these circumstances it was error to admit the confession into evidence.

In *State v. Thorpe, supra,* our Court rejected a confession made by a retarded twenty-year-old accused who was not advised of his right to counsel at the time of his interrogation.

In *Davis v. North Carolina,* 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895, a confession was obtained after defendant, an escaped prisoner, was taken into custody and interrogated daily for sixteen days. During that time neither family, friends, nor counsel saw defendant. His arrest sheet contained a memorandum, in part, as follows: "Do not allow anyone to see defendant or allow him to use the telephone." He was fed two sandwiches a day, sometimes supplemented by "peanuts and stuff." Defendant had stated that he had stolen certain goods found in his possession from a place on the railroad between Canton and Asheville. While handcuffed, he was walked along the railroad from Canton to Asheville and was unable to point out the place from which he had stated that he stole the property. He was carried to the scene of the crime in order to observe his reactions. The trial court admitted the confession, but the Supreme Court reversed, stating:

> . . . Davis went through a prolonged period in which substantial coercive influences were brought to bear upon him to extort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court. [Citations omitted.] . . .

Instant case differs from the above-discussed cases in which confessions were held to have been erroneously admitted. In none of these cases were there members of the family, friends, or counsel of the accused present during the questioning. We find cases from other jurisdictions which present factual situations

more similar to instant case and provide guidance for our decision.

In *Atwell v. State,* 244 Ark. 739, 427 S.W. 2d 1, the defendant challenged the voluntariness of the confession of guilt. The Court upheld the voluntariness of the confession and specifically pointed to the facts that one of the police officers present during the interrogation was the accused's brother and that that officer did not testify at the trial as constituting "a persuasive indication that the accused's constitutional rights were not infringed." The Court also noted that the defendant admitted on cross-examination that he was informed of his rights and that subsequent to that information he did make an admission of guilt.

In *State v. Alexander,* 252 La. 564, 211 So. 2d 650, the defendant contended that there was error in the introduction into evidence of his written confession on the ground, *inter alia,* that his mother exhorted him to tell the truth. In rejecting his contention, the Court stated: "It is true defendant's mother exhorted him to tell the truth prior to his confession. She was present while the deputy Bonvillain talked to her son. The evidence, however, refuted any suggestion of intimidation or coercion. Under the circumstances, the mother's exhortation does not render the confession involuntary."

Likewise, in *Anglin v. State,* 259 So. 2d 752 (Fla. App.), the defendant, a fifteen-year-old boy, contended that he was coerced into making a confession by remarks of his mother. The testimony of the arresting officer revealed that the mother, who was with the defendant at the time of his arrest, told him to tell the truth, or "she would clobber him." Prior to interrogation, the defendant's rights were explained to him, and he and his mother each signed a card acknowledging that they understood his rights. The mother again told him to tell the truth about what had happened, and that this time he gave a statement implicating himself in the crime. In rejecting the defendant's contention that he was coerced, the Court stated:

> It may well be that an admonition by a parent to her teenage son to tell the truth is held in some psychological circles to constitute a deprivation of the child's constitutional rights. We have not reached such a conclusion in this jurisdiction. The moral upbringing of a child to be a useful citizen necessarily encompasses advice by a parent for the

child to be truthful. The motherly concern of this parent for her offspring and at the same time her concern for the basic precepts of morality are to be commended. We find no element of a threat or coercion on the part of this mother and hold that the controverted confession was freely and voluntarily given by the appellant.

In *Fuller v. United States*, 407 F. 2d 1199 (D.C. Cir.), *cert. denied*, 393 U.S. 1120, 89 S.Ct. 999, 22 L.Ed. 2d 125, the defendant was being held and asked to speak with her son. The officer who had the defendant in custody replied that he had no objection to the mother's talking to her son but that, because he had the responsibility for defendant, he would have to remain present during their conversation. The defendant had previously been warned of his rights and had thereafter made an inculpatory statement to the police. When the oficer explicitly indicated to the defendant that he would have to remain present during this conversation with his mother, the defendant replied that the officer's presence would "be all right." At no time was the officer's presence during this conversation objected to by either the defendant or his mother. With the officer present, the mother asked the defendant what he had done, and the defendant repeated his prior admission that he had killed a woman. The Court, noting that both the mother and the son were aware of, and acquiesced in, the presence of the officer, and that defendant had been advised of his rights, held that there was no error in admitting into evidence the defendant's admission of guilt made to his mother during this conversation.

Finally, we find particular guidance in *State v. Estrada*, 63 Wis. 2d 476, 217 N.W. 2d 359. In that case, the defendant was arrested, advised of his constitutional rights, and further advised of the particulars of the case. In response to official inquiry, the defendant stated that he understood his rights and questioned the detective as to what evidence led the police to believe that he was involved. He talked freely with the police about his whereabouts during the night of the crime in question, and at no time during this initial interrogation did he exercise his right to silence by requesting that the interrogation cease. After approximately an hour and fifteen minutes of interrogation the defendant was booked and placed in the jail for the night. On the following morning, after a routine lineup, the defendant was taken to the District Attorney's office, where

he was again advised of his rights by the District Attorney and asked whether he would like to make a statement. The defendant replied that he desired to remain silent. At this point, his father, who had been present in the District Attorney's office, asked for permission to talk to his son. This request was granted, and the two of them had a conversation, after which the defendant's father indicated that his son wished to make a statement. The defendant was then asked whether he in fact desired to make a statement, and he replied in the affirmative. Thereupon he made a full confession to the crime for which he was charged. In upholding the lower court finding of voluntariness, the Court emphasized the fact that the defendant was amply advised of his rights and made a statement only after being able to consult with his father.

**[5]** It is difficult to apply the recognized rules of law to the facts of this case. On the one hand, the record discloses prolonged interrogations of a highly impressionable young man. On the other hand, it is clear that this arrest was not his first encounter with law enforcement officers. He had ready access to family and friends, including a father with many years of police experience. It is not controverted that before each interrogation defendant was fully warned of his constitutional rights, including his right to counsel. In fact, this record discloses a notable absence of promises, threats, or other coercive forces which ordinarily render confessions involuntary.

Defendant's counsel emphasized the fact that the confession was rendered involuntary because defendant's father told him to sign waivers of rights. It must be borne in mind that although the father, Forrest Thompson, was a police officer, he was not in this case a "person in authority" in the sense of having defendant in his control or custody. He was present as defendant's father and by courtesy of the Sheriff. Even in this capacity, the record does not show that he threatened defendant or held out any promise or hope which would overbear defendant's will. We think the fact that defendant had previously been involved with criminal activities indicates that this longtime police officer did not dominate his son. It is reasonably inferable that the father's acts were, in effect, admonitions to his son to tell the truth. Our Courts have consistently held that such admonitions, even by police officers holding an accused in custody, do not render confessions involuntary. *State v. Pruitt, supra; State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300.

There was ample evidence to support the trial judge's findings, and those findings in turn support the trial judge's conclusions that the defendant freely, understandingly, voluntarily, and intelligently made a statement to Sheriff Yelton about 9:05 p.m. on 2 March 1974, without undue influence, coercion, or duress, and without any promise, threat, reward, or hope of reward; that he had been fully advised of his constitutional rights and understood his rights; that after being advised of his rights, he knowingly and intelligently waived his right to counsel at the time of interrogation and making of statement to Sheriff Yelton.

We hold that the trial judge correctly overruled the motion to suppress defendant's confession.

Defendant's contention that he was denied assistance of counsel is without merit. The record reveals that he was told on several occasions that he was entitled to counsel and that counsel would be appointed for him if he so desired. In addition, the Sheriff stated that counsel was not immediately appointed because members of defendant's family indicated that they would employ private counsel. Further, the arguments offered in support of this assignment of error were necessarily considered and decided in the preceding assignment of error.

**[6, 7]** Defendant assigns as error the denial of his motions for judgment as of nonsuit. Defendant correctly contends that his conviction cannot be sustained upon a naked extrajudicial confession. However, it is equally well settled that if the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with an accused's confession, show that the crime was committed and that the accused was the perpetrator, the case should be submitted to the jury. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735; *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232; *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396. Here, in addition to the confession, there was evidence which tended to establish, *inter alia,* that (1) on the night of the crime defendant had in his possession an automobile similar to the one belonging to deceased; (2) defendant had in his possession a large sum of cash on the same night; (3) defendant had opportunity to steal the pistol which was shown to have fired the fatal bullets; (4) on the same night defendant had in his possession a pistol described as being "the same color" as the one which fired the bullets into

deceased's body; and (5) on the night of the crime he was with his girlfriend, who saw him with empty shells in his possession.

We are of the opinion that there was ample extrinsic evidence, when taken with the confession and considered in the light most favorable to the State, to carry the case to the jury. This assignment of error is overruled.

**[8]** Finally, defendant asserts that the trial judge erred by imposing the death sentence. The questions raised by this assignment of error were considered and found to be without merit in *State v. Jarrette, supra. Accord: State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894; *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335; *State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255; *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280; *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262; *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214; *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238; *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106; *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142; *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113; *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712; *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750.

Because of the imposition of the death sentence, we have carefully reviewed this entire record and find no prejudicial error in the trial of this case.

No error.

Chief Justice SHARP dissents as to the death sentence and votes to remand for the imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in *State v. Avery,* 286 N.C. 459, 472, 212 S.E. 2d 142, 149 (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be

imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

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STATE OF NORTH CAROLINA v. ERNEST JOHN VINSON

No. 48

(Filed 6 June 1975)

1. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of juror opposed to capital punishment**

The trial court in a rape case did not err in excusing for cause a juror who stated on her *voir dire* examination that under no circumstances and regardless of the evidence would she return a verdict of guilty if it meant imposition of the death penalty.

2. **Jury § 5— prospective jurors — names drawn by deputy sheriff — jury selection begun anew**

Although there is no requirement for the clerk of court personally, or through an assistant or deputy clerk, to make the random drawing of the names of those on the jury panel for interrogation concerning their fitness to serve as jurors so as to render illegal such drawing by someone else, when it was brought to the attention of the trial court that some of the names had been drawn by a deputy sheriff, the court did not err in nullifying the proceedings and starting anew by returning to the hat or box from which drawn the names of the nine jurors already accepted by both sides, discarding the names of all jurors already challenged successfully by either party, and giving defendant fourteen and the State nine peremptory challenges, the maximum allowed by G.S. 9-21(a) and (b), without regard to any peremptory challenges either the State or defendant may have exercised theretofore.

3. **Jury § 7— challenges**

Challenges for cause are without limit if cause is shown, while peremptory challenges may be exercised within the limits allowed by law.

4. **Jury § 6— examination of jurors**

While a wide latitude is allowed counsel in examining jurors on *voir dire,* the form of the questions is within the sound discretion of the court.

5. **Jury § 6— examination of prospective jurors — hypothetical questions**

On the *voir dire* examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed.

**6. Jury § 6— examination of prospective jurors — verdict under certain facts**

The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

**7. Jury § 6— examination of prospective jurors — unsupported assumption — subquestions**

The trial court in a rape case did not err in excluding a question to prospective jurors which was based on the unsupported assumption that "everyone on the jury is in favor of capital punishment and is in favor of that punishment for this offense" and which contained two subquestions dealing with different points of inquiry.

**8. Jury § 6— examination of prospective jurors — facts mitigating death penalty**

The trial court properly disallowed a question seeking to elicit information concerning "any" circumstances or set of facts which would mitigate a juror's views on the death penalty in a rape case.

**9. Jury § 6— examination of prospective jurors — insanity — unconsciousness**

The trial court properly disallowed questions to prospective jurors relating to hypothetical circumstances in which defendant "couldn't control his actions," "was not conscious of his act" or "did not intentionally or wilfully commit the act" since the questions were manifestly confusing and contained inadequate statements of the law.

**10. Jury § 6— examination of prospective jurors — repetitious questions**

The trial court properly limited further repetitious questions to a prospective juror concerning the hypothetical defense of insanity where the juror indicated he "didn't know how to answer that question."

**11. Criminal Law §§ 71, 89— statements to detective — corroboration — use of word "rape"**

A detective's testimony concerning what a rape victim told him during his investigation of the incident was competent to corroborate the previous testimony of the victim; furthermore, the victim's use of the word "rape" during that investigation did not constitute an opinion on a question of law.

**12. Criminal Law § 66— photographic identification — failure to hold voir dire**

The trial court in a rape case did not err in admitting without a *voir dire* examination the testimony of a detective concerning the victim's identification of a photograph of defendant prior to trial where the victim on direct examination had already made an in-court identification of defendant and on cross-examination gave explicit testimony of the pretrial identification, all without objection or request for a *voir dire* examination, and there is nothing in the record suggesting the pretrial procedure was impermissibly suggestive.

**13. Criminal Law § 77— self-serving declaration**

In this rape prosecution, the trial court did not err in the exclusion of testimony by a psychiatrist that defendant professed no knowledge of any crime of rape since the testimony constituted hearsay and was inadmissible as a self-serving declaration.

**14. Criminal Law § 53— medical expert — drug use by defendant — exclusion of opinion**

The trial court's exclusion of a psychiatrist's opinion on direct examination as to the extent of drug use by defendant, if erroneous, was not prejudicial since substantially the same testimony was given on redirect.

**15. Criminal Law §§ 53, 88— cross-examination — treatment of defendant**

Answers of a psychiatrist on cross-examination to questions concerning the course of treatment of defendant were pertinent to matters covered on direct examination and were admissible.

**16. Rape § 5— sufficiency of evidence**

The State's evidence was sufficient for the jury in a rape prosecution where testimony of the prosecutrix tends to show that defendant had intercourse with her by force and against her will.

**17. Rape § 6— failure to define "sexual intercourse"**

The trial court in a rape prosecution did not err in failing to define "sexual intercourse" and to charge that rape requires penetration by the male organ where all the State's evidence clearly points to two completed acts of penetration, there was no evidence to the contrary and the defense was not grounded on lack of penetration since, under these circumstances, the term "sexual intercourse" conveyed the idea of completed intercourse, including actual penetration.

**18. Criminal Law § 112— reasonable doubt — lack of evidence**

The trial court in a rape case did not err in failing to instruct the jury to consider the "lack of evidence" as well as the evidence in the case where the evidence was not circumstantial but was direct and amply sufficient to support the verdict.

**19. Criminal Law § 5— failure to charge on insanity**

The trial court in a rape case did not err in failing to charge on insanity or lack of mental capacity where defendant did not make a formal plea of insanity or request such instructions and there was no evidence in the record tending to show that he was insane or lacked requisite mental capacity to commit the crime, evidence of low mentality in itself not being sufficient to raise a defense to a criminal charge.

**20. Constitutional Law § 36; Criminal Law § 135— death penalty for rape**

Imposition of the death penalty for rape did not constitute cruel and unusual punishment.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

State v. Vinson

DEFENDANT appeals from judgment of *Rouse, J.*, 18 March 1974 Criminal Session, WILSON Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the rape of Norma Coleen Ferguson on 5 December 1973 in Wilson County.

The State's evidence tends to show that on 5 December 1973 Norma Coleen Ferguson was employed at Fiberglass and Sports, 450 Black Creek Road in Wilson. At 12:45 p.m., defendant entered and said he wanted to look at life preservers. He picked out three and followed Mrs. Ferguson around to the cash register where she prepared a sales slip. When she looked up and told him the price, defendant was pointing a gun at her head and said, "You scream, I'll kill you." Mrs. Ferguson backed away from the cash register and said, "Take the money." Defendant replied, "Get in the back room." He placed the pistol at her head and backed her into the back room which was used for an office. Then he said, "Get naked." She pleaded with him to no avail and he cocked the pistol saying, "Get naked or I'll kill you." She removed the bottom part of her pantsuit and defendant raped her twice, first bent across the desk and thereafter on the floor. Between the two acts he held the cocked pistol to her head and forced her to perform an unnatural sex act upon him.

Defendant told Mrs. Ferguson he was going to kill her "at least ten or fifteen times." He prowled around the office opening drawers. He opened the cash register and removed approximately $40.00 from it. He went through her purse, removed a bottle of diet pills and forced her to swallow a handful of them, threatening to kill her because she was swallowing them too slowly. Finally, defendant removed her car keys from her purse, went outside, and drove away in her car.

Police officers were summoned and Mrs. Ferguson told them what had occurred. She was taken to the Wilson Clinic and examined by Dr. Kirkland. This examination showed evidence of recent intercourse and the presence of active sperm in the vagina. Dr. Kirkland stated that Mrs. Ferguson was quite upset, very nervous and distraught, and told him that a black man entered the place where she worked, forced her at gunpoint to perform an unnatural sex act, and raped her; that he forced her to take ten or eleven tablets he found in her pocketbook and thereafter left in her car.

Thomas Edwards, a driver for Roadway Express, arrived at the Fiberglass and Sports place of business on Old Black Creek Road about 1 p.m. on 5 December 1973 to make a delivery. No one was in the sales room but he heard a lady's voice in the office say, "Oh my God, why?" Hearing nothing more, he assumed she had received bad news over the telephone and decided to leave her alone. As he left he heard her say, "I only got a dollar in my pocketbook, all the money is in the cash register." He drove about one-half mile to a telephone and told his supervisor to call "that lady up there at that office" because she either got bad news or was in terrible trouble. The supervisor called, and when Mrs. Ferguson answered the phone she sounded all right. When Mr. Edwards returned to make the delivery, a dark black man stuck his head out and, ascertaining that Mr. Edwards had a piece of freight to deliver, said, "Well, take it around to the back door and we'll take it around there." Mr. Edwards drove his truck to the back gate, found it locked, waited five minutes and left again. Following a second telephone call, and with his suspicions aroused, he returned to the Fiberglass and Sports place of business and found the officers already there. Mr. Edwards identified the defendant as the man he saw on that occasion.

In response to a call, Detective Moore with the Wilson Police Department went to Fiberglass and Sports and found Mrs. Ferguson sitting in a chair crying and sobbing. Her clothing and her hair were in disarray. She said she had been raped by a black man and described him as young, no beard or moustache, with uncombed and unkempt hair but not an Afro, and about as tall and heavy as Detective Moore.

A day or two thereafter, Detective Moore gave Mrs. Ferguson a stack of twelve black and white photographs of black males and requested her to examine them to see if she recognized her assailant from any of the photographs. She took the stack and laid them aside one by one, faceup, "and when she got to the photograph of Ernest John Vinson, she said, 'That's the man.' " Mrs. Ferguson positively identified defendant as her assailant.

Defendant did not testify. His only witness was Dr. Eugene V. Maynard, a psychiatrist and a former Regional Director of Forensic Psychiatry at Cherry Hospital in Goldsboro. Dr. Maynard testified that he examined and observed the defendant in December 1973 and performed a series of tests; that it was his diagnosis that defendant was suffering from mental retarda-

tion, with an I.Q. of 76 and a mental age of approximately fifteen or sixteen years, and that defendant had an antisocial personality. Dr. Maynard further stated that defendant said he was suffering from drug dependence from all known varieties of drugs. "In a psychiatric evaluation, you largely have to go by what the patient tells you. You don't see him take the drugs."

On cross-examination, Dr. Maynard said: "When I stated that the defendant had antisocial personality, that is a relatively new term. It used to be known as psychopathic personality. The psychopath personality is the type of individual who we feel has a very limited, if any, conscience. They are given to committing acts of an illegal nature without any concern for the consequences, without concern for the present. They have no close ties or affiliations with any other people. They are given to acts of violence off times [sic] without any qualms of conscience or concern for the consequences." With reference to drug addiction, Dr. Maynard stated that while defendant was at Cherry Hospital he showed no signs of drug withdrawal and that it had not been necessary to treat defendant with any type of drugs while he was there. Dr. Maynard had no opinion as to whether defendant was dependent on drugs.

The jury convicted defendant of rape and he was sentenced to death. He appealed to this Court assigning errors noted in the opinion.

*Rufus L. Edmisten, Attorney General, by Claude W. Harris and Charles M. Hensey, Assistant Attorneys General, for the State of North Carolina.*

*Robert A. Farris, Attorney for defendant appellant.*

HUSKINS, Justice.

**[1]** A prospective juror stated on her voir dire examination that under no circumstances and regardless of the evidence would she return a verdict of guilty if it meant imposition of the death penalty. She was excused for cause, and defendant assigns error on that ground.

There is no merit in this assignment. The juror was properly excused for cause. *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Ward,* 286 N.C. 304, 210 S.E. 2d 407 (1974); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974).

**[2]** During jury selection the following proceedings were held in chambers with only the defendant and his counsel, the district attorney, the clerk, the court reporter and the judge present:

> "After nine (9) jurors had been seated, it was brought to the attention of the Court that some of the names of the jurors from the jury panel drawn at random from a box had been in fact drawn by a deputy sheriff, rather than the clerk. The court directs that all of the jurors who had been seated both by the defendant and the State shall be returned to the panel. All jurors who had been challenged by the State or the defendant are removed from the panel. The trial shall proceed and the selection of the jury shall begin anew, with the defendant to be allowed a total of fourteen (14) challenges, in addition to any challenges heretofore exercised and the State is allowed a total of nine (9) challenges in addition to any challenges heretofore exercised. The clerk is directed to return the names of all the jurors who had been passed by the State and the defendant and all remaining jurors in the original panel to the box to be selected and called at random by the clerk. This finding and order was entered in the presence of the defendant and in the presence of his counsel and the solicitor out of the presence of the jury. To the foregoing procedure the defendant through his counsel consents; also the solicitor."
>
> DEFENDANT'S EXCEPTION NO. 3

Defendant assigns the foregoing proceedings as error for that (1) the nine jurors seated had been drawn by a deputy sheriff "in abrogation of N.C.G.S. § 9-5" and (2) the court awarded the State nine challenges in addition to the peremptory challenges it had already exercised, a violation of G.S. 9-21. Defendant says the statute forbids such an expansion "even by a purported consent."

It should be observed at the outset that G.S. 9-5 prescribes the procedure for drawing the panel of jurors from the jury box at least thirty days prior to the session of court in which they shall serve. It has no application in the context of this episode.

The quotation above set out is all the record contains concerning this assignment. It is apparent, however, that a jury panel was drawn by the clerk or his assistant or deputy as re-

quired by G.S. 9-5 and that all jurors so drawn had been summoned and had reported for jury duty. Preparatory to selection of a jury in this case the names of the entire panel had been placed on separate scrolls or slips of paper and placed in a hat or box (not the jury box) from which names were drawn at random for interrogation concerning their fitness to serve as jurors. It was this drawing in which some of the names were in fact drawn by a deputy sheriff rather than the clerk. When this fact was brought to the attention of the able trial judge, he, in his discretion, adopted the procedure heretofore set out. We see no error and no prejudice in the action taken.

We find no language in Chapter 9 of the General Statutes which requires the clerk of the court personally, or through an assistant or deputy clerk, to make the random drawing of the names of those on the panel from a hat or box so as to render illegal such drawing by someone else. Be that as it may, the trial judge, in an abundance of caution, nullified the proceedings and started anew, returning to the hat or box from which drawn the names of the nine jurors already accepted by both sides and discarding the names of all jurors already challenged successfully by either party. The judge then announced that defendant would have fourteen peremptory challenges and the State would have nine, the maximum allowed by G.S. 9-21(a) and (b), completely disregarding any peremptory challenges either the State or the defendant may have exercised theretofore. This demonstration of fairness should be commended, not condemned. *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796, *cert. denied* 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143 (1973). The record does not disclose how many peremptory challenges, if any, were used by defendant or the State. We perceive no possible prejudice to defendant.

The trial judge is empowered and authorized to regulate and supervise the selection of the jury to the end that both defendant and the State receive the benefit of a trial by a fair and impartial jury. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd as to death penalty* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). Defendant has shown no prejudicial error. This assignment is overruled.

Defendant's second assignment is based on Exceptions Nos. 2, 4, 5, 6, 7, 8, 9, 10 and 11 relating to the voir dire examination of veniremen during the selection of the jury.

The following reproductions serve to illustrate the points defendant seeks to raise:

DEFENSE COUNSEL: "Mr. Jernigan, if it was shown to your satisfaction that the defendant couldn't control his actions and didn't know what was going on at the time of this indictment, would you still be inclined to return a verdict which would cause the imposition of the death sentence?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 2

DEFENSE COUNSEL: " . . . Now, as I understand it, everyone on the jury is in favor of capital punishment and is in favor of that punishment for this offense. Now, is there anyone on the jury, because of the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of sentence other than death for the offense of rape?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 4

DEFENSE COUNSEL: "Now, is there, Mrs. Rouse, can you think of any circumstance or any set of facts in which a defendant is charged and convicted of rape, that you would not be in favor of the death penalty?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 5

DEFENSE COUNSEL: "If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a verdict of guilty?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 6

DEFENSE COUNSEL: "Well, if you are satisfied from the evidence, that a person did not intentionally or wilfully commit the act in question, would you still return a verdict, if you were satisfied from the evidence, beyond a reasonable doubt, that the act was committed, would you still return a verdict of guilty knowing that the sentence would be a mandatory death sentence?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 7

DEFENSE COUNSEL: "Well, in other words, Mr. Ash, are you saying that even if you are satisfied that the de-

fendant did not know right from wrong, you might still return a verdict that would cause him to be sentenced to the gas chamber?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 8

DEFENSE COUNSEL: "Well, Mr. Ash, if you are satisfied from the evidence, that at the time of the purported offense, that the defendant did not know right from wrong, would you still return a verdict of guilty, knowing as you now know what the punishment would be?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 9

COURT: "He has answered the question. Isn't that true, sir, that you said you didn't know how to answer that question?" DEFENDANT'S EXCEPTION NO. 10

DEFENSE COUNSEL: "Mr. Ash, is there any reason that hasn't been asked of you, why you would not give the defendant the benefit of the rule that would require him to know right from wrong before he would be guilty?"

OBJECTION SUSTAINED. DEFENDANT'S EXCEPTION NO. 11

Defendant states in his brief that Exceptions Nos. 4 and 5 "involve a question, first to the entire panel, and then to an individual juror as to their beliefs and attitudes concerning capital punishment for the crime charged. . . . The remainder of the questions to which his Honor sustained objections by the solicitor involved defendant's effort to perceive whether prospective jurors would accept an insanity defense." Defendant contends the inquiries were proper for those purposes and exclusion of them by the court constitutes prejudicial error.

"In selecting the jury, the court, or any party to an action, civil or criminal, has the right to make inquiry as to the fitness and competency of any person to serve as a juror." *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969). We pointed out in *Allred* that the voir dire examination of jurors has a double purpose: (1) to ascertain whether grounds exist for challenge for cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. "The presiding judge shall decide all questions as to the competency of jurors." G.S. 9-14 (1969). His ruling on such questions is not subject to appellate review unless accompanied by some imputed error of

law. *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796, *cert. denied* 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143 (1973).

**[3]** We said in *State v. English,* 164 N.C. 498, 80 S.E. 72 (1913): "The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one." Challenges for cause are without limit if cause is shown, while peremptory challenges may be exercised within the limits allowed by law. *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967).

**[4]** While a wide latitude is allowed counsel in examining jurors on voir dire, the form of the questions is within the sound discretion of the court. "In this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. [Citation omitted.] The overwhelming majority of the states follow this rule." *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied* 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973); *accord, State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974).

**[5, 6]** On the voir dire examination of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. 47 Am. Jur. 2d, Jury, § 203 (1969); *see Christianson v. United States,* 290 F. 962 (6th Cir. 1923); *Sherman v. William M. Ryan & Sons, Inc.,* 126 Conn. 574, 13 A. 2d 134 (1940); *Pope v. State,* 84 Fla. 428, 94 So. 865 (1922); *State v. Henry,* 197 La. 999, 3 So. 2d 104 (1941); *State v. Pinkston,* 336 Mo. 614, 79 S.W. 2d 1046

(1935); *State v. Bryant, supra; State v. Huffman,* 86 Ohio St. 229, 99 N.E. 295 (1912).

Types of questions which have been considered improper include "those asking a juror what his verdict would be if the evidence were evenly balanced; if he had a reasonable doubt of a defendant's guilt; if he were convinced beyond a reasonable doubt of a defendant's guilt; or questions asking him whether he would, in a specified hypothetical situation, vote in favor of the death penalty. . . . Also, it has been considered improper to ask jurors hpothetical questions concerning issues, especially certain criminal defenses, which may never be raised at the trial." 47 Am. Jur. 2d, Jury, § 203 (1969); *see Proctor v. People,* 101 Colo. 163, 71 P. 2d 806 (1937); *Commonwealth v. Calhoun,* 238 Pa. 474, 86 A. 472 (1913); Annot., Jury—Voir Dire —Hypothetical Question, 99 A.L.R. 2d 7, 23, § 4[a] (1965).

In *State v. Jackson,* 284 N.C. 321, 200 S.E. 2d 626 (1973), the Court held that the trial judge properly sustained the State's objection to the following question asked by defendant's counsel: "I ask you now collectively if you find from the evidence relating to any or all the facts in this case, in view of all the evidence, that it is susceptible of two reasonable interpretations; that is, one leading to his innocence and one leading to his guilt, I will ask you now if you will adopt that interpretation which points to innocence and reject that of guilt?" There, Justice Branch, speaking for the Court, said: "The hypothetical question posed in instant case could not reasonably be expected to result in an answer bearing upon a juror's qualifications. Rather it could well tend to commit, influence or ask the jury for a decision in advance of hearing all of the testimony." *See also State v. Bryant, supra; State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. denied* 414 U.S. 1132, 38 L.Ed. 2d 757, 94 S.Ct. 873 (1974).

In applying the foregoing principles to this case, we first focus on Exceptions Nos. 4 and 5 relating to the jurors' "beliefs and attitudes concerning capital punishment for the crime charged." The defendant's right of inquiry in this regard is the right to make *appropriate* inquiry concerning a prospective juror's moral or religious scruples, beliefs and attitudes toward capital punishment. *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974). "The extent of the inquiries, of course, is subject to the control and supervision of the trial judge." *State v. Carey,* 285 N.C. 497, 206 S.E. 213 (1974).

**[7]** With reference to Exception No. 4, we first note the question was premised on the statement that "everyone on the jury is in favor of capital punishment and is in favor of that punishment for this offense." Such an assumption is not supported by the record before us. Secondly, the question contains two subquestions dealing with different points of inquiry. This form makes the question inherently ambiguous and totally confusing to prospective jurors. Therefore, the question was properly rejected.

**[8]** In regard to Exception No. 5, defense counsel sought to elicit information concerning *any* circumstances or set of facts which would mitigate the juror's views on the death penalty in a rape case. The question could not reasonably be expected to elicit information bearing upon the juror's qualifications and a consequential challenge for cause, and was overly broad for the purpose of eliciting information relevant to the exercise of a peremptory challenge. No prospective juror should be required to answer questions of such scope and generality. *State v. Washington, supra.* The question exceeded the bounds of propriety and was properly disallowed.

Defendant further contends that the exclusion of the questions noted by Exceptions Nos. 2 and 6-11 denied him the right to inquire "whether prospective jurors would accept an insanity defense." While in certain cases appropriate inquiry may be made in regard to whether a juror is prejudiced against the defense of insanity, we have carefully reviewed defendant's contentions under the circumstances here presented and find that the trial judge properly exercised his discretion. *See United States v. Cockerham,* 476 F. 2d 542 (D.C. Cir. 1973); Annot., Jury—Voir Dire—Hypothetical Question, 99 A.L.R. 2d 7, 23 n. 15 (1965); Annot., Juror—Prejudice Against Defense, 112 A.L.R. 531 (1938).

**[9]** With reference to Exceptions Nos. 2, 6 and 7, we note the questions relate to hypothetical circumstances in which defendant "couldn't control his actions," "was not conscious of his act" or "did not intentionally or wilfully commit the act." The law relating to and distinguishing the defense of insanity and the defense of unconsciousness has been fully discussed by this Court in *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975), and *State v. Caddell,* 287 N.C. ....., ..... S.E. 2d ..... (1975). Suffice it to say that the questions propounded by defense counsel here were manifestly confusing, contained in-

adequate statements of the law, and were properly excluded. *State v. Bryant, supra.*

**[10]** Exceptions Nos. 8, 9 and 11 relate to the examination of Mr. Ash, a prospective juror who, for reasons which this record fails to disclose, was not a member of the jury finally empaneled. The remaining exception, No. 10, concerns the trial court's statement that Mr. Ash had answered the question propounded by defense counsel. Nothing else appears in this fragmentary record concerning the examination and answers of this prospective juror. We assume the trial court was correct in its observation that the juror had indicated he "didn't know how to answer that question." That being the case, the trial court properly limited further repetitious questions concerning the hypothetical defense of insanity. *State v. Bryant, supra; Grizzell v. State,* 164 Tex. Crim. 362, 298 S.W. 2d 816 (1956).

Moreover, since Mr. Ash did not serve on the jury in this case, we perceive no possible prejudice to defendant. The record does not show why or at whose instance he was excused. Lack of prejudice is further accentuated by the fact that the evidence offered at the trial was wholly insufficient to raise the defenses of insanity or unconsciousness and require the trial judge to charge the jury on legal principles applicable thereto.

We find no merit in any of the exceptions upon which defendant's second assignment is based. The assignment is therefore overruled.

In his next contention, based on assignments three, four and six, defendant argues the trial court erred in admitting improper evidence over his objection and in excluding competent evidence elicited by him at trial.

**[11, 12]** Assignments three and four, relating to the testimony of Detective Moore, are patently without merit. The testimony of this witness in regard to what Mr. Ferguson had told him during his investigation of the incident clearly corroborates the previous testimony of Mrs. Ferguson and was admissible for that purpose. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Rose,* 251 N.C. 281, 111 S.E. 2d 311 (1959). Furthermore, it is settled that Mrs. Ferguson's use of the word "rape" during that investigation did not constitute an opinion on a question of law. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968). Similarly, there is no merit to the argument that the trial court erred in admitting *without a voir dire examina-*

*tion* the testimony of this witness concerning Mrs. Ferguson's identification of a photograph of defendant prior to trial. Mrs. Ferguson on direct examination had already made an in-court identification of defendant and on cross-examination she gave explicit testimony of the pretrial identification, all without objection or a request for a voir dire examination. Moreover, there is nothing whatever in the record suggesting this pretrial procedure was conducted in an impermissibly suggestive manner. Under these circumstances a voir dire examination was not necessary, especially since one was not requested at the time objection was made to the testimony of Detective Moore. *State v. Cook, supra; State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534, *cert. denied* 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970).

Assignment six is based upon five exceptions, Nos. 16-20, to the trial court's rulings on certain aspects of Dr. Maynard's testimony.

**[13]** Exception No. 16 is directed to the trial court's action in sustaining the State's objection to the following question: "At any time in your conference with him, did the defendant indicate any knowledge to the crime for which he has been charged?" Out of the presence of the jury Dr. Maynard testified that defendant professed no knowledge of any crime of rape. Defendant does not disclose the relevancy of this inquiry and we do not perceive any legitimate purpose. The question called for inadmissible hearsay and the doctor's answer, stating what defendant had declared after he had been charged with this crime, was of that nature. Defendant did not take the stand and his self-serving declarations to the doctor were not admissible for any purpose. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972). The State's objection was properly sustained.

**[14]** Exceptions Nos. 17 and 18 relate to the trial court's action in sustaining the State's objections during direct examination to questions concerning Dr. Maynard's opinion as to the extent of drug use by defendant. Our perusal of the record indicates that on redirect examination defense counsel was permitted to ask Dr. Maynard if he had an opinion "whether or not the defendant was dependent on drugs?" In response thereto the witness answered: "I have no opinion. I have a copy of a report on Ernest Vinson. On page 3, number 3, under diagnosis it reads 'drug dependence, all known varieties. . . . ' This is

the current diagnosis." Even assuming error on direct examination, which we do not concede, we perceive no possible prejudice since substantially the same question was asked and answered on redirect.

**[15]** We find no merit in Exceptions Nos. 19 and 20 which deal with answers of the doctor on cross-examination to questions concerning the course of treatment of defendant. The questions and answers were pertinent to matters covered on direct examination and were obviously admissible. *State v. Stone,* 226 N.C. 97, 36 S.E. 2d 704 (1946); *State v. Perry,* 210 N.C. 796, 188 S.E. 639 (1936).

Assignments three, four and six, therefore, are overruled.

**[16]** In assignment five defendant contends the trial court erred in denying his motion as of nonsuit at the close of the State's evidence. We find no merit in this assignment. The testimony of the prosecuting witness contains plenary evidence which tends to show, when taken in the light most favorable to the State, that defendant had intercourse with her by force and against her will. Accordingly, defendant's motion as of nonsuit was properly overruled. *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973).

The seventh assignment, based on Exceptions Nos. 22 through 25, asserts error by the trial court in instructing the jury.

**[17]** Defendant's Exception No. 22 is that the trial court failed to define the term "sexual intercourse" and thus failed to charge that rape requires penetration by the male organ. The court charged: "Rape is forcible sexual intercourse with a woman, against her will. For you to find defendant guilty of rape, the State must satisfy you from the evidence and beyond a reasonable doubt of three things. First, that the defendant, Ernest John Vinson had sexual intercourse with the alleged victim, Norma Coleen Ferguson," etc.

The law defines rape as the carnal knowledge of a female person by force and against her will. G.S. 14-21 (1969); *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975). "The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ

of the female by the sexual organ of the male." *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513 (1958). In this respect the law does not require any particular phraseology in stating that the defendant had carnal knowledge of the complaining witness. *State v. Hodges,* 61 N.C. 231 (1867). Accordingly, in *State v. Bowman,* 232 N.C. 374, 61 S.E. 2d 107 (1950), this Court held that testimony of a complaining witness that defendant had "intercourse" with her was sufficient to warrant a finding by the jury that there was penetration of her private parts. *Accord, State v. Hardee,* 6 N.C. App. 147, 169 S.E. 2d 533 (1969). It necessarily follows that the term "sexual intercourse" encompasses actual penetration. *Williams v. State,* 92 Fla. 125, 109 So. 305 (1926); *Teynor v. State,* 47 Ohio App. 149, 191 N.E. 372 (1933).

We are of the opinion that the instructions sufficiently relate the law of rape to the evidence presented. Here, all the State's evidence clearly points to two completed acts of penetration. The complaining witness testified "he actually penetrated me and had intercourse with me." There was no evidence to the contrary. Although defendant's plea of not guilty required the State to prove penetration beyond a reasonable doubt, the defense was not grounded on lack of penetration. Under these circumstances, the term "sexual intercourse" conveyed the idea of completed intercourse, including actual penetration, and the jury must have so understood. Moreover, the Court asked defense counsel if the instructions were satisfactory and counsel replied "quite" and indicated no corrections or additions were necessary. If he desired further elaboration on the term "sexual intercourse" he should have so requested at that time. Of course the trial court must charge on all substantial features of a case which arise upon the evidence even absent a special request for such instruction. *State v. Deck,* 285 N.C. 209, 203 S.E. 2d 830 (1974); *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974). Conversely, when the trial court has aptly instructed on all substantial features of the case, a defendant desiring a more detailed instruction as to any subordinate matter should make an appropriate request. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Gordon,* 224 N.C. 304, 30 S.E. 2d 43 (1944); *State v. Hendricks,* 207 N.C. 873, 178 S.E. 557 (1935); *State v. O'Neal,* 187 N.C. 22, 120 S.E. 817 (1924).

**[18]** Exception No. 23, directed to the trial court's failure to instruct the jury to consider the "lack of evidence" as well as the

evidence in the case, is without merit. Defendant cites *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954), and *State v. Tyndall,* 230 N.C. 174, 52 S.E. 2d 272 (1949), in support of this exception. Both of those cases stand for the proposition that when the court undertakes to define the term "beyond a reasonable doubt," the definition must be in substantial accord with those approved by this Court. In this case the trial court's instructions on reasonable doubt were in substantial accord with the charge which we approved in *State v. Gaiten,* 277 N.C. 236, 176 S.E. 2d 778 (1970). Here, as in *Gaiten,* the evidence was not circumstantial, but was direct and amply sufficient to support the verdict. Accordingly, *Gaiten* controls and the court's instructions as to reasonable doubt were adequate under our decision in that case. *See also State v. Britt,* 270 N.C. 416, 154 S.E. 2d 519 (1967).

**[19]** In Exceptions Nos. 24 and 25 defendant argues the court did not charge "on the required mental capacity to commit a criminal offense" or "on the legal consequences if the jury found that the defendant did not know right from wrong at the time of the alleged offense." A request for the desired instructions does not appear in the record. Moreover, defendant did not make a formal plea of insanity and there is no evidence in the record tending to show that he was insane or lacked requisite mental capacity to commit the crime. Evidence of low mentality in itself is not sufficient to raise a defense to a criminal charge. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. denied* 396 U.S. 1024, 24 L.Ed. 2d 518, 90 S.Ct. 599 (1970). Under these facts there was insufficient evidence to require a charge on insanity or lack of mental capacity, and there was no error in the court's failure to do so. *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Melvin,* 219 N.C. 538, 14 S.E. 2d 528 (1941); *State v. Miller,* 219 N.C. 514, 14 S.E. 2d 522 (1941).

This assignment is overruled.

**[20]** Finally, defendant contends that imposition of the death penalty in this case constitutes cruel and unusual punishment. This contention has heretofore been considered and determined to be without merit in various cases. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975), and cases cited therein. Therefore, defendant's eighth assignment based on this contention is overruled.

After careful review of all assignments, we find no prejudicial error in the trial. The verdict and judgment must therefore be upheld.

No error.

Chief Justice SHARP dissenting as to the death sentence:

The rape for which defendant has been convicted occurred on 5 December 1973, a date during the period between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated in the dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666 *et seq.*, 200 S.E. 2d 721, 747 *et seq.* (1974), I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975).

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STATE OF NORTH CAROLINA v. ROGER LAWRENCE WETMORE

No. 47

(Filed 6 June 1975)

**1. Jury § 5— reexamination and challenge of jurors accepted by both sides**

In this homicide prosecution, the trial court did not err in permitting the district attorney to reexamine and challenge for cause a prospective juror and to reexamine and challenge peremptorily a second prospective juror after both had been passed by the State and by

defendant but before the jury was impaneled where the court was informed that the first juror had formed an opinion as to defendant's guilt and the juror stated she now believed defendant was not guilty by reason of insanity, and where the second juror had initially indicated he only knew defendant casually, the court was informed the juror was a good friend of defendant and his family, and upon reexamination the juror admitted that defendant and his son were the best of friends and that he knew defendant quite well.

2. **Witnesses § 1— competency of witness**

The competency of a witness to testify is to be determined at the time the witness is called to testify and rests mainly, if not entirely, in the sound discretion of the trial judge in the light of his examination and observation of the particular witness.

3. **Witnesses § 1— competency of State's witness — motion for new trial**

The trial court in a homicide case did not err in failing to grant defendant a new trial because of the incompetency of a State's witness after having heard the witness testify and a psychiatrist testify that the witness was suffering from a mental illness known as chronic paranoid schizophrenia where the testimony of the witness, though long and rambling at times, was clear and consistent on all material matters and was fully corroborated by defendant, the local police, and S.B.I. agents.

4. **Homicide § 24— death from intentional use of deadly weapon — presumptions**

The trial court did not err in instructing the jury that if the State proved beyond a reasonable doubt that defendant intentionally killed the deceased with a deadly weapon then "the law raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice."

5. **Criminal Law § 115; Homicide § 23— instructions — not guilty verdict — insanity — failure of State's proof**

When construed as a whole, the charge of the court in this homicide case did not limit the jury's permissible not guilty verdict to a verdict of "not guilty by reason of insanity" and foreclose the possibility of a verdict of "not guilty" by virtue of possible failings in the State's case.

6. **Criminal Law § 5; Homicide §§ 7, 28— mental disease — effect on premeditation and deliberation — failure to instruct**

The trial court in this first degree murder case did not err in failing to charge that insanity which precludes the mental process of premeditation and deliberation is a defense to a charge of first degree murder and that if as a result of mental defect of reasoning the defendant did not have the required specific intent to kill, defendant should be found not guilty of first degree murder.

7. **Criminal Law § 5— irresistible impulse doctrine**

The irresistible impulse doctrine is not recognized by the courts of this State.

8. **Constitutional Law § 36; Criminal Law § 135; Homicide § 31— death penalty for first degree murder**

Imposition of the death penalty for first degree murder did not violate defendant's guarantee against cruel and unusual punishment or deprive him of equal protection of the law.

Chief Justice SHARP concurring in part and dissenting in part.

Justices COPELAND and EXUM dissenting as to death sentence.

APPEAL by defendant from *Peel, J.*, at the July 1974 Term of ROWAN Superior Court.

On indictment proper in form, defendant was convicted of the first degree murder of his father, Edwin Hall Wetmore. Defendant appeals from judgment imposing a sentence of death.

Evidence for the State tends to show: On Friday, 8 February 1974, deceased came home from work at the Veterans Administration Hospital (V.A. Hospital) in Salisbury at about 4:45 p.m. After supper, he and his wife Dorothy read the newspaper and watched television. They went to bed about 9:00 or 9:30 p.m. About 11:30 p.m. they were awakened by defendant's knocks on their locked bedroom door. When the door was opened, defendant entered and told his father to put on his clothes because they were going to the V.A. Hospital. Defendant called his father a "queer" and they began fighting. At first, the two men fought with their fists, but defendant procured a scout knife and stabbed his father "more than once." Mrs. Wetmore saw "a good bit" of blood.

Defendant then compelled his mother to help him drag the body into the kitchen. He then cleaned his scout knife and took it to his room where Mrs. Wetmore had seen it before. He also took the rug which had blood on it out of the bedroom.

Defendant and his mother then loaded the body onto a pickup truck. She went back to the kitchen in a state of shock. While there she heard the sound of metal coming from the back yard but at no time saw an axe. As she was wiping up blood in the kitchen, defendant came in and said he wanted to take the body to the ball park at the V.A. Hospital (Kelsey Park) so it would look like a mental patient had killed his father. He drove the truck to Kelsey Park and left it, returning in a car driven by his mother, who had followed him. Upon returning home, they cleaned the house for an hour or two. Mrs. Wetmore washed defendant's bloodstained shirt, jeans and tennis shoes.

Defendant removed several bloodstained shingles from the side of the house. He said something to his mother about putting an axe in a pond near the house.

At 5:00 p.m. on Monday, 11 February 1974, defendant and his brother Jerry Wetmore went to the Salisbury Police Department and told Sergeant J. L. Hurley that their father had been missing and that they had located his body in the back of a truck at Kelsey Park. Sergeant Hurley accompanied defendant and Jerry Wetmore to Kelsey Park where he was shown the body of deceased.

At 4:45 a.m. on Tuesday, 12 February 1974, agents of the State Bureau of Investigation searched the Wetmore house with the consent of Mrs. Wetmore and found a boy scout knife with a brownish substance on it in a chest of drawers in defendant's bedroom.

At approximately 8:30 p.m. on Wednesday, 13 February 1974, Mrs. Wetmore, frightened because defendant appeared "extremely nervous," made a statement to agents of the State Bureau of Investigation which was introduced at trial to corroborate her testimony. Agents returned to the Wetmore house at about 2:00 p.m. on Thursday, 14 February 1974, and, again with Mrs. Wetmore's permission, searched the premises. The agents found an axe in a pond about one-half mile from the house and a bedroom rug on a trash pile five to six hundred yards from the house.

Analysis of the scout knife showed the brownish substance to be human blood of indeterminate blood type. Analysis of the head of the axe taken from the pond revealed numerous white and brown Caucasian head hairs. Analysis of reddish brown stains on the bedroom rug showed them to be human blood of blood group O, the blood group of deceased.

Dr. Elizabeth Mayrand performed an autopsy on deceased at 9:30 p.m. on 11 February 1974. The body had 43 stab wounds and the head was almost completely dismembered from the body. Death was caused by numerous stab wounds in the chest.

Evidence for defendant tends to show: Defendant testified that he was not in control of his mental or bodily faculties at the time he killed his father; rather, a computer at a star ship base was in control of them. Defendant felt it was his duty to

kill his father since his father was in control of a star ship base on this planet and was teaching defendant to become a dictator. Due to the computer's influence, defendant did not feel he had a choice when he killed his father. He stated that he stabbed his father many times to be sure he was dead; that he knew it was against the law to kill his father but at the time of the killing did not think it was wrong; that if he had known it was wrong he would not have done it; and that he tried to cover up the killing because he wanted to be able to proceed to a star ship. He also stated that he had planned to kill his father for about one week and decided then how he was going to do it and cover it up. He further testified: "I knew destroying my father was wrong. My mother wanted to leave the body at the house and say it was self defense but I thought it better to take it to Kelsey Park."

Warren Owen, a friend from high school, testified that defendant told him life existed on other planets; that Hickory, North Carolina, was being used as a star ship base; and that defendant and a boy from Myrtle Beach were trainees of these creatures.

David Long, jailer at the Rowan County Sheriff's Department, testified that while defendant was in jail during February 1974 he carried on conversations with imaginary people and showed signs of hallucination.

Dr. Robert L. Rollins, Director of the Forensic Unit at Dorothea Dix Hospital in Raleigh, evaluated defendant at Dorothea Dix during February and March 1974. Dr. Rollins testified that, in his opinion, defendant is of above average intelligence, but is suffering from a mental illness known as acute schizophrenic reaction; that at the time he killed his father he was not laboring under such a defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his acts; that he was aware of what he was doing and the harmfulness of his acts to his father; that he meant to kill his father; and that at the time of the killing he did not know right from wrong with respect to the decision to kill his father. Further, in his opinion defendant was not trying to simulate insanity.

Dr. Rollins further testified that in his opinion defendant attempted to cover up this crime for two reasons: First, he appreciated that there were members of the community who did not accept his beliefs about the space conspiracy, and that these

people very likely would apprehend him and put him in jail; and, second, he felt that if this happened he would not be able to carry out his mission to search for this space ship base. Defendant made this elaborate plan to cover up the killing of his father even before he killed him for the same reasons. Dr. Rollins did not believe the defendant would have killed his father if a police officer had been standing there because defendant knew the police officer would consider it wrong.

Dr. Rollins also testified:

> " . . . [I]t was my opinion that Mr. Wetmore . . . was competent to stand trial, using the criteria that he knew what he was charged with, he knew the possible consequences if he were convicted, and I felt he was able to cooperate with his attorney."

*Attorney General Rufus L. Edmisten and Assistant Attorney General George W. Boylan for the State.*

*Robert M. Davis and Larry G. Ford for defendant appellant.*

MOORE, Justice.

**[1]** Defendant first assigns as error the action of the trial judge in permitting the district attorney to reexamine and challenge for cause Mrs. Brady, a prospective juror, and to reexamine and challenge peremptorily Mr. Crisp, another prospective juror, after both had been passed by the district attorney and counsel for defendant.

Before the State passed Mrs. Brady, she stated she had not formed an opinion as to defendant's guilt or innocence. However, before the jury was finally selected and impaneled, the trial court was informed that Mrs. Brady had formed an opinion as to defendant's sanity. On further examination, Mrs. Brady stated she now believed defendant was insane at the time of the homicide and was not guilty of the crime charged by reason of insanity. Over objection, this juror was excused by the State for cause.

Before the State passed Mr. Crisp, he indicated he only knew defendant casually. Before the jury was impaneled, the court was informed that Mr. Crisp was a good friend of defendant and his family. Upon reexamination, this juror admitted

that defendant visited his son at their home two or three times each week, that defendant and his son were the best of friends, and that he knew defendant quite well. The State, over objection, then excused Mr. Crisp peremptorily.

In *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), defendant was on trial for murder. The trial judge excused a juror on the grounds of family hardship. The circumstances constituting the hardship came to the trial judge's attention after the juror had been accepted by both the State and the defendant and had been sworn but not impaneled. We held that the trial judge's action did not constitute error.

In *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796 (1973), defendant assigned as error the action of the trial judge in permitting the solicitor to reexamine and successfully challenge for cause a prospective juror who had been passed by the State and tendered to defendant. Before the State passed and tendered this juror, she indicated her willingness to vote for a verdict which would result in the death penalty. Prior to jury impanelment, however, she let it be known that she had changed her opinion about capital punishment. The trial judge thereupon allowed the solicitor to reexamine the prospective juror. The reexamination revealed that she had talked with her pastor during the overnight recess and as a result of that conversation she would not, under any circumstances, vote for a verdict which would impose the death sentence. Over objection, the trial judge allowed the solicitor to successfully challenge her for cause. We approved stating:

> "The competency of jurors is a matter to be decided by the trial judge. Decisions as to a juror's competency at the time of selection and their continued competency to serve are matters resting in the trial judge's sound discretion. G.S. 9-14; *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698. The trial judge's ruling on such questions are [sic] not subject to review on appeal unless accompanied by some imputed error of law. *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289."

*See also State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802 (1967).

The solicitor did not attempt to challenge Mr. Crisp for cause, but challenged him peremptorily. Peremptory challenges are challenges that may be made according to the judgment

of the party entitled thereto without being required to assign the reason therefor, and the reason for challenging a juror peremptorily cannot be inquired into. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969).

The court did not abuse its discretion in allowing the district attorney to reexamine these prospective jurors and in excusing one for cause and the other peremptorily. This assignment is overruled.

Defendant's second assignment of error is directed to the court's refusal to disqualify the witness Mrs. Dorothy Wetmore. Defendant contends that this witness was not mentally competent to testify in that her testimony showed that her thought process was extremely confused and that she was motivated by delusional thinking that her husband was out to get her. Dr. Robert L. Rollins, a qualified psychiatrist and head of the Forensic Unit at Dorothea Dix Hospital, testified that she was suffering from a mental illness known as chronic paranoid schizophrenia.

Defendant did not object to Mrs. Wetmore's competency as a witness or to her testimony during the trial, but after verdict and after sentence had been pronounced, he moved for a new trial for the reason that Mrs. Wetmore was mentally incompetent. Defendant contends that the trial judge abused his discretion in allowing Mrs. Wetmore's testimony to stand after he heard her and Dr. Rollins testify.

In *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970), defendant contended that the court erred in allowing one Epley to testify after a psychiatrist testified that in his opinion it was impossible for Epley to give reliable testimony. In overruling this contention, Justice Sharp, now Chief Justice, speaking for the Court said:

> " . . . The law does not say that the decision of the trial judge as to the competency of a witness shall be controlled by expert medical testimony or that the evidence of a psychiatrist, whether employed by the State or defendant, or appointed by the Court, is entitled to greater weight than that of a qualified lay witness. . . . " *Id.* at 650, 174 S.E. 2d at 799.

In *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973), the defendant contended that the court erred in failing to find that the State's witness Tinsley lacked sufficient mental capacity to be permitted to testify. We held that there was no merit in this contention, quoting with approval from *State v. Benton, supra,* as follows:

> " 'Unsoundness of mind does not per se render a witness incompetent, the general rule being that a lunatic or weak-minded person is admissible as a witness if he has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with respect to the questions at issue. The decision as to the competency of such a person to testify rests largely within the discretion of the trial court.' Accord: *State v. Squires,* 265 N.C. 388, 144 S.E. 2d 49; *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7; Stansbury, North Carolina Evidence, 2d Ed., § 55; 97 C.J.S., Witnesses, § 57(b)."

And, " . . . [i]t is the consensus that mental eccentricities or aberrations which fall short of complete mental incapacity do not render a witness incompetent, although they may affect his credibility." 3 Jones on Evidence § 20:13, pp. 614-15 (6th ed. 1972).

In *State v. Merrick,* 172 N.C. 870, 90 S.E. 257 (1916), as in the present case, defendant did not object to the testimony of a witness but at the conclusion of the testimony moved to strike. There we stated: " . . . An objection to testimony not taken in apt time is waived. [Citations omitted.] When testimony has thus been admitted without objection, the granting or denying a motion to strike out rests in the discretion of the court. [Citations omitted.] . . . . "

**[2]** We have held many times that the competency of a witness to testify is to be determined *at the time the witness is called to testify* and rests mainly, if not entirely, in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. 7 Strong, N. C. Index 2d, Witnesses § 1 (1968); *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365 (1971); *State v. Bowden,* 272 N.C. 481, 158 S.E. 2d 493 (1968); *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966); *Artesani v. Gritton,* 252 N.C. 463, 113 S.E. 2d 895 (1960); *State v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754 (1952).

**[3]** Defendant waited too late to challenge the competency of Mrs. Wetmore, but assuming that his objections to her competency were timely made, we hold that defendant's motion was properly denied. Mrs. Wetmore's trial testimony, although long and rambling at times, was clear and consistent on all material matters and was fully corroborated by defendant, the local police, and S.B.I. agents. The trial judge had a firsthand opportunity to observe her demeanor, sincerity, perception and memory. There is nothing in the record to indicate that the trial judge abused his discretion in failing to grant defendant a new trial because of Mrs. Wetmore's incompetency to testify.

**[4]** Defendant next assigns as error that portion of the charge in which the trial court instructed the jury that if the State proved beyond a reasonable doubt that the defendant intentionally killed the deceased with a deadly weapon then "the law raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice."

Defendant's counsel, with commendable candor, states in his brief:

> "Defendant is aware that the instructions complained of here are consistent with the case law of this state. Malice and unlawfulness of the killing are presumed, when a deadly weapon is intentionally used; 4 STRONG INDEX, 2d Homicide, Sec. 14, pp. 207-209. The burden is upon the defendant to disprove malice and reduce a killing to voluntary manslaughter. STATE v. ABSHER, 226 N.C. 656, 40 S.E. 2d 26 (1946). Your defendant contends these rules are no longer valid in this society . . . .
>
> * * *
>
> " . . . The defendant is aware that this Court recently rejected this same argument in the case of STATE v. SPARKS, 285 N.C. 631 (1974)."

Defendant is correct. We did reject this argument in *Sparks,* and we adhere to that decision. We need only repeat what we said in *Sparks, supra,* at 644, 207 S.E. 2d at 719:

> " . . . We have carefully considered defendant's argument that we should change our well-established rule. However, we are not persuaded to do so. See *State v. Jennings,* [276 N.C. 157, 171 S.E. 2d 447 (1970)]; *State v. Propst* [274 N.C. 62, 161 S.E. 2d 560 (1968)]."

This assignment is overruled.

**[5]** The trial court also charged:

> "The defendant has the burden of proving he was insane. However, unlike the State which must prove the defendant's guilt beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction.
>
> "Therefore, I charge that if you are satisfied from the evidence that the defendant, at the time of the alleged crime, and as the result of mental disease or defect, either did not know the nature and quality of his act, or did not know that it was wrong, he would be not guilty.
>
> "If you find the defendant not guilty for this reason, but otherwise would have found him guilty, you must find him not guilty by reason of insanity."

Defendant contends that the foregoing instructions in effect limited the jury's permissible not guilty verdict to only a verdict of "not guilty by reason of insanity" and foreclosed the possibility of a verdict of "not guilty" by virtue of possible failings in the State's case. This contention is without merit. On several occasions the trial judge instructed the jury that it might return either of five permissible verdicts and at one time told them that throughout their deliberations they would have a written list designating those verdicts. He clearly stated:

> "Under this charge and the evidence in this case, there are five possible verdicts that you can arrive at. First is guilty of First Degree Murder, second is guilty of Second Degree Murder, third is guilty of Voluntary Manslaughter, *the fourth is not guilty,* and *the fifth is not guilty by reason of insanity.*
>
> "And it has been agreed, members of the jury, by counsel for the State and for the defendant that I might submit to you, when you go to your room, a list of the possible verdicts which you can use in your deliberations and in returning your verdict in open Court. Your verdict would be a verbal or oral verdict, but you could use this list as it has been agreed." (Emphasis added.)

Again, immediately before that portion of the charge to which defendant objected, the trial judge carefully recited the substantive elements required to be found by the jury before

it could return a verdict of guilty of either first degree murder, second degree murder or manslaughter, and then said: "However, if you do not so find or have a reasonable doubt as to one or more of these things, you will return as your verdict a verdict of not guilty." Following this, the judge charged upon the effect to be given defendant's allegations of mental impairment and then stated: "If you find the defendant not guilty for this reason, but otherwise would have found him guilty, you must find him not guilty by reason of insanity."

Immediately before the jury retired to deliberate, the judge again charged that it might return verdicts of not guilty on all of the offenses charged or not guilty by reason of insanity. This instruction was repeated when the jury returned and asked for additional instructions. " . . . 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* [277 N.C. 680, 178 S.E. 2d 476 (1971)]; *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971)." *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1972). *See* 3 Strong, N. C. Index 2d, Criminal Law § 168 (1967).

Construing the charge as a whole, we hold that the trial court properly protected the rights of defendant by instructing the jury to return a verdict of "not guilty" if possessed of any reasonable doubt as to the sufficiency of the State's case, and further by instructing the jury to return a verdict of "not guilty by reason of insanity" if convinced, regardless of the sufficiency of the State's case, that the defendant at the time of the alleged crime, and as the result of a mental disease or defect, did not know the nature and quality of his act or did not know that it was wrong.

Next, defendant assigns as error the court's final mandate to the jury.

Defendant contends that this portion of the charge is conflicting on several material points. We have carefully examined the objected to portion of the charge and fail to detect any such conflict. The instruction complies with settled law in this State. *State v. Woods,* 278 N.C. 210, 179 S.E. 2d 358 (1971); *State*

*v. Propst, supra; State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955). This assignment of error is overruled.

**[6]** Defendant further contends that the court should have instructed the jury as follows regarding his mental condition at the time of the killing:

> "There is evidence which tends to show that the defendant was insane at the time of the acts alleged in this case. Insanity which precludes the mental process of premeditation and deliberation is a defense to the charge of murder in the first degree.
>
> "Generally insanity is a complete defense to these charges. In order for this to be so the disease or defect must have so impaired the defendant's mental capacity that he either did not know the nature and quality of his act or did not know that it was wrong.
>
> "However, if you find that the defendant had a defect in his mental reasoning 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 the defendant had the specific intent to kill or to premeditate or to deliberate the killing of Edwin H. Wetmore. If as a result of mental defect of reasoning the defendant did not have the required specific intent, you must find the defendant not guilty of first degree murder."

Several states have adopted a so-called theory of diminished responsibility with respect to specific intent of crimes such as first degree murder, and hold that a defendant may offer evidence of an abnormal mental condition, which, although not sufficient in degree to establish legal insanity, tends to show that he did not have the capacity to deliberate or premeditate at the time the homicide was committed—elements necessary for a conviction of murder in the first degree. Defendant's counsel in his brief admits that North Carolina has not adopted this theory. For a list of cases from other jurisdictions supporting the theory of diminished responsibility, *see State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970). *See also* Annot., 22 A.L.R. 3d 1228.

Our Court has consistently said that the test of insanity as a defense to a criminal charge is the capacity to distinguish

between right and wrong at the time of and in respect to the matter under investigation. *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516 (1973); *State v. Benton, supra; State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. den.* 396 U.S. 1024, 24 L.Ed. 2d 518, 90 S.Ct. 599 (1970). We addressed the exact question before us very recently in *State v. Cooper, supra,* a case very similar on its facts to the present case. The question was carefully examined by Justice Lake writing for the Court. Suffice to say that nothing has transpired in the short period since we decided *Cooper* to incline us to modify our view as there set out.

**[7]** We have also rejected the irresistible impulse doctrine which defendant here seeks to invoke.

As stated by Justice Branch in *State v. Humphrey, supra,* at 574, 196 S.E. 2d at 519:

> "Defendant's counsel ably presented arguments for adoption of the 'irresistible impulse doctrine.' However, neither defendant's arguments nor our research disclose reasons sufficiently persuasive to warrant modification or abrogation of the long recognized 'right and wrong' test of criminal responsibility."

This assignment is overruled.

**[8]** Finally, defendant contends that the entry of a judgment ordering the death penalty violates the constitutional guarantee against cruel and unusual punishment and that the arbitrariness of the imposition of the death penalty deprives him of equal protection of the law guaranteed by the Constitution. Defendant admits that this Court has rejected this argument in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our decision in that case. Further discussion would serve no useful purpose. *See State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973).

The record in this case discloses a vicious, brutal, senseless murder of a father by a son. The evidence is such that the jury could have found that defendant was not guilty by reason of insanity or, as it did, that defendant, because of hatred for his

father, unlawfully with malice, premeditation and deliberation, killed him. It was for the jury to decide.

Because of the imposition of the death sentence, we have carefully examined the entire record in this case and have considered every contention and argument advanced by defendant. Our examination discloses that defendant received a fair trial, free from prejudicial error.

No error.

Chief Justice SHARP concurring in part and dissenting in part:

The murder for which defendant was convicted occurred on 8 February 1974, a date between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated in the dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666 *et seq.,* 202 S.E. 2d 721, 747 *et seq.* (1974), I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment.

I concur in the decision that defendant is not entitled to a new trial upon the issue of his guilt of the crime charged, for I perceive no error which I believe affected the verdict. However, I do not concur in the statement in the majority opinion that "[w]e addressed the exact question before us very recently in *State v. Cooper, supra* [286 N.C. 549, 213 S.E. 2d 305 (1975)], a case very similar on its facts to the present case." There is a fundamental difference in the two cases:

In this case the defendant himself went upon the stand and testified (as set out in the majority opinion) "that he had planned to kill his father for about one week and decided then how he was going to do it and cover it up." By his own admission he was able to premeditate and deliberate, for he formulated and executed a plan to kill his father. He was, therefore, not entitled to a charge that the jury should consider whether he lacked the ability to formulate the specific intent to kill as a result of mental illness. The only question here was whether defendant, at the time he killed his father, was laboring under such a defect of reason in consequence of a disease of the mind

that he was incapable of knowing the nature and quality of his act, or if he did know, whether he could distinguish between right and wrong in relation to it. As to this, defendant himself testified both ways.

In *Cooper* the defendant did not testify. For proof that he killed his victims after premeditation and deliberation, the State had to rely upon circumstantial evidence. Since all the evidence tended to show that Cooper was a chronic sufferer from paranoid schizophrenia and subject to hallucinations and delusions, he contended—in my view, correctly—that the evidence of his mental disease was for the jury's consideration in determining whether the State had proved beyond a reasonable doubt the essential elements of murder in the first degree, *i.e.*, that he had actually formed a specific intent to kill his wife and children and had taken their lives after deliberating and premeditating their deaths.

The dissent in *Cooper* was not based on a doctrine of diminished or partial responsibility. Its thesis was full responsibility, but only for the crime committed. *Id.* at 594, 213 S.E. 2d at 334.

In this case, on the issue of insanity, the judge charged the jury as follows: "I charge that if you are satisfied from the evidence that the defendant, at the time of the alleged crime, and as a result of mental disease or defect, either did not know the nature and quality of his act, or did not know that it was wrong, he would be not guilty."

Obviously this charge assumes that defendant killed his father, a fact which, in the absence of a *judicial admission*, the State must prove beyond a reasonable doubt. The pitfall of such an assumption lies in wait for every trial judge who charges the jury in a case where insanity is pleaded as a complete defense unless the first issue submitted to the jury is whether the defendant killed the deceased. This is a problem to which I called attention in the dissent in *State v. Cooper, supra,* at 589-590, 213 S.E. 2d at 331. In the instant case, however, I think the error could not have prejudiced defendant.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. FERNANDO HUNT

No. 43

(Filed 6 June 1975)

1. **Criminal Law § 66— in-court identification — suggestive pretrial procedures — reliable identification — independent origin**

In a prosecution for rape, felonious assault and armed robbery, pretrial identification procedures were suggestive where defendant was exhibited singly to the victim through a one-way mirror and defendant was the only person who appeared in all of the photographic, showup and lineup identification procedures; however, the totality of circumstances discloses that the victim's identification of defendant was reliable, the court's determination that the victim's in-court identification of defendant was of independent origin was supported by the evidence, and the in-court identification was properly admitted in evidence where the *voir dire* evidence showed that the victim was with her assailant for about 20 minutes, at times in close proximity at a place where interior and exterior lights made identification possible, the victim's description of her assailant's facial characteristics permitted a police specialist to prepare an adequate composite picture of defendant, the victim was able to describe differences in the hair and beard of defendant as she viewed him at the showup, lineup and trial as compared with his appearance on the day she was attacked, and only a month passed between the day of the attack and the victim's positive identification of defendant at the lineup.

2. **Criminal Law § 85— character witness — cross-examination — specific acts of misconduct by defendant**

In this prosecution for rape, felonious assault and armed robbery wherein defendant did not testify, the court erred in permitting the solicitor to ask defendant's character witness on cross-examination whether he knew defendant had served time and was on probation for other crimes, including assault, and whether he would have testified to defendant's good character if he had had such knowledge, and such error was not cured when the court on the following day instructed the jury to disregard the solicitor's questions to the witness.

Justice COPELAND dissents.

ON *certiorari* to review the trial before *Martin (Robert M.), S.J.*, at the 10 June 1974 Session of VANCE County Superior Court.

Defendant was tried upon three separate indictments charging rape, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. The cases were consolidated for trial, and defendant entered a plea of not guilty to each charge.

The State's evidence tended to show the following facts:

Janet Wynn, a telephone operator, testified that on the morning of 29 December 1973 she received a call from a person who stated that she had been attacked and needed help. The caller was incoherent, but she managed to understand that the person was calling from the Marguerite Trailer Park.

Lonnie Luce, General Manager of Lake Marguerite Mobile Home Park, stated that on the morning of 29 December 1973 he received a call from a telephone operator telling him that assistance was needed at one of his units, which the operator thought was No. 27. He and his father proceeded to that number, arriving about 8:20 a.m., and upon finding no need for assistance at that location, proceeded to Unit No. 17, where they knocked on the door several times. They heard a moaning sound from inside the trailer, and, using a pass key to enter the trailer, they found Betty Sue Ratts. She told them that she had been attacked and raped by a black man. Miss Ratts was badly beaten about the face. The witness sent his father to call an ambulance and to notify the Sheriff.

The prosecutrix, Betty Sue Ratts (now Wright), testified that on the morning of 29 December she was awakened about 7:00 a.m. by a knock on the front door. She asked who it was, and a voice answered "Your neighbor." She asked what he wanted, and he first told her that he needed a plunger to unstop his commode. She replied that she did not have one, and he then asked for some grease, something like Crisco. She took a can of Crisco from her kitchen cabinet and returned to the door, but she was unable to get the can through the door because of the latch chain. She thereupon removed the chain, and at that time she saw a man outside pointing a gun toward her. He came into the trailer, and she begged him not to hurt her. He told her to get her money, and she went into the bedroom where she had been sleeping and turned on the light to take

the money from her pocketbook. She handed him about twenty or thirty dollars, and at that time she "got a good look at him." She said that she was able to identify the man who came into the trailer. Upon defendant's motion to suppress any evidence of identification by this witness, the trial judge conducted a *voir dire* hearing and at the conclusion of the hearing overruled defendant's motion to suppress. The evidence elicited on *voir dire* and the trial judge's ruling will be more fully set forth in the opinion.

The jury returned to the courtroom, and the prosecuting witness, continuing, testified that after she gave him the money, he inquired whether they were alone. Although she answered in the affirmative, he searched each room to ascertain whether she had answered truthfully. He told her to go to the back bedroom, where he made her lie on the bed and proceeded to rape her. He then made her turn on her stomach, removed his belt, put it around her neck, and choked her until she finally passed out. When she regained consciousness, she managed to crawl to the telephone and ask the telephone operator for help. While she was in the hospital, she described her assailant to a man who made a composite picture of her assailant according to her description. She stated that she was in the presence of defendant for at least twenty minutes, and "during that time we could see each other well." She described her assailant as being of medium build with an Afro haircut and positively identified defendant as the man who raped her on 29 December 1973.

Dr. Beverly Tucker testified that he saw Miss Ratts (now Mrs. Wright) in the emergency room in Maria Parham Hospital about 9:00 on the morning of 29 December 1973. At that time she had multiple abrasions and contusions of the face and head, a laceration from mid-forehead to the mid-part of the bridge of her nose, swelling which completely closed her right eye, and numerous abrasions on her feet and ankles. Tests revealed the presence of live sperm in the vaginal pool. Fecal matter found on her body and clothes indicated that she had become unconscious or suffered a severe fright causing loss of bodily functions. The doctor also testified, under proper limiting instructions, to statements made to him by prosecutrix which substantially corroborated her testimony.

A composite picture made by a special agent of the SBI from a description given to him by the prosecuting witness was admitted into evidence for the purpose of illustration.

Joe Momier, a special agent with the SBI, testified that, on 3 January 1974, he visited the trailer of one Sandra Reavis, which was located about 200 feet from the trailer of prosecutrix. On that occasion a male person, later identified as defendant, answered the door, and Sandra Reavis introduced him as her brother. Agent Momier also testified that defendant voluntarily came to the Vance County Sheriff's Department on 5 January 1974 and made certain statements. Upon defendant's objection to admission of these statements, Judge Martin conducted a *voir dire* hearing and admitted the statements into evidence after finding that they were voluntarily made. Mr. Momier then stated that defendant initially told him that on 28 December he was not in the Marguerite Trailer Park but that he was in the park on 29 December. He later told them that he was also in the park on 28 December and that he had spent the night at Sandra Reavis's trailer on at least one occasion.

Roger Davis, an officer of the North Carolina Department of Motor Vehicles License and Theft Division, testified that on 3 January 1974, he received a radio call from Agent Momier stating that they had some suspects in the Reavis trailer under surveillance. Momier asked him to stop a 1956 blue Chevrolet when it left the trailer park. The witness complied with this request and found four occupants, including defendant, in the car. At that time he observed defendant's hands. There were scabbed-over scratches on both hands in the general pattern of claw marks. The witness further noted that defendant was starting a mustache and goatee, which at that time were "very light. You could just tell it was starting." The individual with scratched hands identified himself as Fernando Hunt. Agent Momier, recalled, corroborated Davis's testimony with regard to the beginning of a mustache.

The State rested, and defendant offered evidence, in substance, as follows:

Wilbert Hargrove and Ronald Hargrove both stated that there was a "get together" at Sandra Reavis's trailer on the night of 28 December 1973. Defendant left them at the Beacon Light Apartments about 10:30 p.m., and they did not know where he went after that time.

Geneva Wright Fuller testified that on the night of 28 December 1973 defendant, who was engaged to marry her fifteen-year-old daughter, came to her house between 10:30 and

11:00 and accompanied her young daughter to her older daughter's house to baby-sit. She saw defendant on the next morning and did not observe any scratches on his hands or face.

Annette Fuller testified that defendant was with her at her sister's house on the night of 28-29 December 1973. They watched television until her sister and her brother-in-law came in about 1:30, and at that time she and defendant went to bed on the sofa bed in the living room, where they slept or made love all night. She further said that she braided his hair while they were baby-sitting and that defendant had always had a mustache and beard as heavy as he had at the time of the trial. She specifically stated that defendant was with her at 7:00 a.m. on the morning of 29 December 1973.

Faye Rose Crocker, Annette Fuller's older sister, gave testimony which tended to corroborate the testimony of her sister. Her husband, Tyrone Crocker, also gave corroborative testimony and in addition stated that he observed defendant and Annette in bed together about 8:35 a.m. on the morning of 29 December 1973.

Defendant presented evidence of his good character which will be more fully considered in the body of the opinion. The jury returned a verdict of guilty as to all charges.

Defendant gave notice of appeal but failed to perfect the appeal within time allowed. We allowed *certiorari* on 14 October 1974 as to the charge of rape, and on 4 February 1975, pursuant to G.S. 7A-31, we certified the charges of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury to this Court for review before determination by the Court of Appeals.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Rafford E. Jones, for the State.*

*James W. Smith for appellant.*

BRANCH, Justice.

Defendant assigns as error the trial judge's denial of his motion to suppress the in-court identification testimony of the prosecuting witness, Betty Sue Ratts Wright. Upon defendant's motion to suppress, the trial judge excused the jury and con-

ducted a *voir dire* examination which disclosed the following relevant facts:

The prosecutrix testified that she knew the defendant to be the man who assaulted her "from the identification of what I saw that morning." She further testified that she originally looked at some pictures of suspects, including defendant, but was unable to identify anyone positively. She told them that she thought defendant was the man but could not be sure until she saw him in person.

On 9 January defendant was in a room with a probation officer, and the prosecutrix observed him through a one-way mirror. At that time he was sitting down, had his hair braided, was wearing a cap, and did not speak. Apparently, at this time defendant was unaware that he was being observed. The prosecutrix told the officer that she thought that defendant was the man but could not be sure unless she heard him speak and saw him under substantially the same lighting conditions as existed on the morning of the assault.

About a month later she saw defendant in a lineup with eight other people, and she described the differing conditions at this second observation:

> " . . . The difference in the first lineup as opposed to the second lineup is that in the second lineup, he looked almost like he does now. In the first one, he had on a toboggan hat pulled down and he had his hair braided, he was sitting, and there was another man in the room in front of him and I couldn't see him all the time. Plus, I was looking through a one-way mirror and he was lot further away than he was at the second lineup.
>
> "I don't remember whether I asked the Sheriff or detective to have him stand up or have all of them stand up at the first lineup, but I told them at that time that I could not make an identification unless I heard him talk and stand. . . . "

She testified that she had a chance to observe his face at intervals of a minute several times during the twenty minutes or so he was in her trailer on the morning of the incident. She further stated that there was sufficient light from street lights shining into the trailer to make an identification, particularly since, when she observed his face, he was within one foot of her.

Testimony of law enforcement officers indicated that defendant was fully informed of his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, and that he understandingly and voluntarily waived the presence of counsel at the lineup.

Bobby Hamm of the Vance County Sheriff's Department testified that at the second encounter each of the men was required to say three phrases: "This is your neighbor."; "Do you have any grease?"; and "Would you take me to Raleigh?". He then described Mrs. Wright's reaction during the second confrontation:

> " . . . Mrs. Wright was standing right beside me in front of each man as he made the statements, approximately two feet from them. She didn't change at the moment when he made the statements; she listened to the rest of them. He was the third man who made the statements. Her face became flushed, that was all. She identified the man as being the man who attacked her. I was present when he was warned of his constitutional rights and when he was advised if he could not afford an attorney one would be provided for him. He voluntarily stood in the lineup. . . . "

Defendant testified on *voir dire* that he had no recollection of being warned of his rights and that, after his initial refusal to stand in a lineup, the police told him that he had to do so. Recalled, prosecutrix stated that she was "not sure if I could identify him today if he was dressed differently."

At the conclusion of the *voir dire* hearing, Judge Martin made the following findings of fact and conclusion of law:

> "THE COURT: The Court finds that Mrs. Wright, formerly Miss Ratts, spent a considerable period of time with her assailant up to at least twenty minutes; that she was with him under adequate artificial interior and exterior light in her trailer and, on several occasions was facing her assailant their heads being approximately a foot apart, facing him directly and intimately; that in Court Mrs. Wright pointed to the defendant Hunt as the one who raped her in her home on the twenty-ninth day of December, 1973; that Mrs. Wright was positive as to her input identification of the defendant based on what she saw at the time that she was raped and on nothing more; that sometime thereafter,

Mrs. Wright was showed photographs of a number of persons and was unable to recognize any photograph as being of the man who raped her; that thereafter, a lineup was conducted in the early part of January, at which time the defendant along with several others, was in the lineup and although she felt almost positive that the defendant was the person who raped her, she was unable to make a positive identification for the reason that she was some distance away looking through a glass and the defendant had on a hat and his hair was braided, and that on the day that she was raped, her assailant did not have on a hat, nor was his hair braided, but that it was an Afro hairdo on the twenty-ninth day of December, 1973. The Court further finds as a fact that on the twenty-eighth day of January, 1974, a lineup was conducted at the Sheriff's office, at which time some persons, all black, including the defendant, was placed in the lineup; that before the defendant was placed in the lineup, he was warned of his constitutional rights under the 'Miranda' decision and was specifically warned that he had the right to have counsel present at the lineup and, if he was unable to do so, the Court would appoint counsel for him; that the defendant knowingly, intelligently, voluntarily and understandingly waived his right to counsel in the lineup and freely consented to participate in the lineup. And the Court finds as a fact that the defendant freely, voluntarily, understandingly, and intelligently waived his right to counsel at the out-of-court confrontation for identification by the prosecutrix. The Court further finds as a fact that the defendant was represented by counsel at the preliminary hearing, and that, at the preliminary hearing, Mrs. Wright identified the defendant as the person who assaulted her at her residence on the twenty-ninth day of December, 1973. The Court finds and determines that, from clear and convincing evidence, the in-court identification of the defendant Hunt is of independent origin based solely on what she saw at the time of the assault and rape and does not result from out-of-court confrontation or from any photograph or from any lineup or any pretrial identification procedures suggestive and conducive to mistaken identification, and the defendant's motion to suppress the testimony as to identification is overruled.

EXCEPTION NO. 1"

Defendant argues that he was denied due process because of suggestive pretrial identification procedures. He points specifically to the fact that he was the only person who appeared in all the pretrial procedures and to the fact that he was exhibited to the prosecuting witness singly. In support of this contention, he relies strongly on *Foster v. California,* 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed. 2d 402 (1969).

In *Foster* defendant was charged with armed robbery, and the only eyewitness to the alleged crime failed to identify defendant at a lineup in which defendant was wearing a leather jacket similar to the one worn by the robber and in which defendant, who was six feet tall, was shown with two people who were about five feet six inches tall. Only a tentative identification resulted from a one-to-one confrontation which took place after the witness requested that he be allowed to speak to defendant. Positive identification occurred at a second lineup with five men in which defendant was the only person who had appeared at the first lineup. At trial the witness testified as to his identification of defendant at the lineup and also made an in-court identification.

In a majority opinion by Justice Fortas, Justices Black, Harlan, White, and Stewart dissenting, the Court held the admission of the identification evidence to be error. The Court, in part, stated:

> "The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, '*This* is the man.' See *Biggers v. Tennessee,* 390 U.S. 404 (dissenting opinion). This procedure so undermined the reliability of the eyewitness identification as to violate due process."

The United States Supreme Court considered a similar question in the case of *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972). There the defendant was charged with a rape which allegedly occurred on 22 January 1965. The State's evidence, in part, consisted of testimony by the prosecuting witness concerning a pretrial showup during which two detectives walked the defendant by the prosecuting witness, at which time defendant was directed to say "Shut up or I will kill you."

This confrontation occurred on 17 August 1965. At trial, the prosecuting witness testified that she had "no doubt" about her identification. Finding that the testimony was properly allowed to go to the jury, the Court, *inter alia,* stated:

> "We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include *the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. . . .*" (Emphasis supplied.)

The factors to be considered in evaluating the likelihood of misidentification as enunciated in *Neil* were applied by this Court to the facts in *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10. The facts in the case *sub judice,* in *Neil,* and in *Henderson* exhibit striking similarities. In *Henderson* there was no lineup, but there was a showup conducted within twenty-four hours after the crime, at which time the rape victim identified the defendant as her assailant. She did not testify as to the showup at trial, but made a positive in-court identification of defendant as the man who raped her. Finding no error in the admission of the evidence, we stated:

> "Since *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, the general rule has been that evidence unconstitutionally obtained is excluded in both State and Federal Courts as essential to due process—not as a rule of evidence but as a matter of Constitutional law. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127; *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; *Rochin v. California,* 342 U.S. 165, 96 L.Ed. 183,

72 S.Ct. 205; *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610; *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507; *State v. Rogers, supra.*

* * *

"The practice of showing suspects singly to persons for purposes of identification has been widely condemned. *Stovall v. Denno, supra; State v. Wright,* [274 N.C. 84, 161 S.E. 2d 581]. However, whether such a confrontation violates due process depends on the totality of the surrounding circumstances. *Stovall v. Denno, supra.*

"We recognize that there are circumtances under which the single exhibition of a suspect may be proper. The landmark case of *Stovall v. Denno, supra,* held that the showing of a single suspect in a hospital room while he was handcuffed to police officers did not violate due process because the possibility of the impending death of the witness required an immediate confrontation. Our Court has held that there was no violation of due process when there were 'unrigged' courtroom and station house confrontations which amounted to single exhibitions of the accused. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884; *State v. Bass,* [280 N.C. 435, 186 S.E. 2d 384]; *State v. Haskins, supra; State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593. Similarly we have recognized that a confrontation which takes place when a suspect is apprehended immediately after the commission of the crime may be proper. *State v. McNeil,* [277 N.C. 162, 176 S.E. 2d 732].

* * *

"It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin. *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407; *State v. Bass, supra; State v. Austin, supra; State v. Rogers, supra; State v. Wright, supra.*"

**[1]** A superficial reading of *Foster* and *Neil* gives the initial impression that the Court's holding in *Neil, sub silentio,* reversed *Foster. See* Shapiro, *Searches, Seizures and Lineups,* 20 New York Law Forum 217. However, the cases are readily distinguishable in that in *Foster* the Court did not consider whether the in-court identification was of independent origin. In *Neil,*

on the other hand, the central question was "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." We think that the last stated query is the central and decisive question in the assignment of error before us. At the threshold of this question, we concede that the one-to-one confrontation and the showing of defendant in all the pretrial identification procedures were suggestive. We must therefore decide whether the totality of the circumstances discloses reliability of identification. The prosecuting witness had ample opportunity to observe her assailant. The record shows that she was with him for about twenty minutes, at times in close and intimate proximity at a place where the exterior lights made identification possible. She testified, "I got a good look at him when I turned the lights on. . . . The street lights were shining in the room and I could see his face; how tall he was and what size man he was. At the time I observed his face, he was within a foot." Further, her description of his facial characteristics permitted a police specialist to prepare an adequate composite picture of defendant. Her attention to detail was further denoted by the fact she was able to describe differences in the hair and beard of defendant as she viewed him at the showup, lineup, and trial as compared to his appearance on the day that she was attacked.

Certainly the period which elapsed between the day of the attack and the positive identification did not constitute such passage of time as would be conducive to misidentification. Compare *Neil v. Biggers, supra,* where the crime occurred on 22 January 1965, and identification was not finally made until 17 August 1965.

The level of certainty demonstrated by the witness might be questioned because she did not positively identify defendant from photographs. She explained her failure to positively identify defendant from the photographs with these statements: "I wouldn't identify anybody from a picture in anything as serious as this. I told them I thought this was the man but I could not be sure until I saw him in person." The prosecuting witness also failed to identify defendant when she observed him through a one-way mirror as he was sitting in a room in the sheriff's office. In this connection, she said:

> " . . . I didn't hear him talk. He had his hair braided. He had a cap on. I told him I thought that was the man, but I

could not be sure unless I heard him talk, unless I saw him in the same light that I saw him that night. . . . "

The prosecuting witness's failure to make a positive identification from photographs or from the showup appears more strongly to evince a commendable resolution to avoid misidentification than to disclose uncertainty of identification.

The trial judge's findings at the conclusion of the *voir dire* as to the admissibility of the identification testimony were supported by clear, competent, and convincing evidence. These findings are, therefore, conclusive and binding on this Court. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884; *State v. McVay,* 277 N.C. 410, 177 S.E. 2d 874; *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534, *cert. denied,* 400 U.S. 946, 91 S.Ct. 253, 27 L.Ed. 2d 252. These findings, in turn, support the trial judge's conclusion of law that the "in-court identification of the defendant Hunt is of independent origin based solely on what she saw at the time of the assault and rape and does not result from any out-of-court confrontation or from any photograph or from any lineup or from any pretrial identification procedures suggestive and conducive to mistaken identification." *State v. McVay, supra.*

We hold that the trial judge correctly overruled defendant's motion to suppress the identification testimony.

**[2]** Defendant next assigns as error the denial of his motion for mistrial based upon improper cross-examination of a defense witness. During the cross-examination of Richard Vaughan, who testified to defendant's good character and reputation, the following exchange occurred between the witness and the assistant solicitor:

"MR. ALLEN: Q. Mr. Vaughan, you say you have known him for a long time?

A. Yes, sir.

Q. Do you know of his police record?

THE WITNESS: Beg your pardon?

Q. Do you know of his police record?

A. No, I don't know about that.

Q. Do you know that he has served time in the penitentiary?

MR. SMITH: Object, Your Honor.

THE COURT: Overruled.

A. No, I didn't know that.

Q. You know he is now on probation—

MR. SMITH: Object, Your Honor.

THE COURT: Overruled.

Q. —for possession of marijuana and assault?

A. I did not know that.

Q. And if you had know [*sic*] this, you wouldn't have given him the good character and reputation you did, would you?

THE WITNESS: Say that again, please.

Q. If you had known he had served time for burning property and knew that he was now on probation for possession of marijuana and assault, you would not have given him the good reputation that you just gave him, would you?

A. If I had know [*sic*] that, I couldn't have said that." The Court shortly thereafter adjourned for the day. The following morning, upon the convening of Court, defendant's counsel moved for mistrial. Judge Martin denied the motion but withdrew the challenged testimony from the consideration of the jury under the following instructions:

"THE COURT: Members of the jury, the witness, Richard Vaughan, the last witness who testified for the defendant, and testified as to the general character and reputation of the defendant, was asked a number of questions on cross examination by the Solicitor. The first question asked on cross-examination was: Mr. Vaughan, you say you have known him for a long time. Answer: Yes, sir. Members of the jury, there were a number of other questions asked by the Solicitor of the witness, Richard Vaughan, two of those questions under objection by defendant's counsel, and the Court overruled the objection. I now reverse my ruling and sustain the objection, not only to those two questions, but

I instruct you that you will not consider for any purpose the other questions propounded by the Solicitor. The Court instructs you that you will disregard each of these questions propounded by the Solicitor of the witness, Mr. Vaughan, and erase the matter from your minds. You will disabuse your minds of those questions on cross examination by the Solicitor of the witness, Richard Vaughan.

"Members of the jury, questions are not evidence. Questions by counsel or by the Solicitor are not evidence, they are simply questions. Evidence is the sworn testimony that comes from the lips of the witnesses on the stand."

It is a well-established rule in this jurisdiction that a character witness may not be asked on cross-examination whether he has heard of particular acts of misconduct by defendant. *State v. Green,* 238 N.C. 257, 77 S.E. 2d 614; *State v. Robinson,* 226 N.C. 95, 36 S.E. 2d 655; *State v. Shinn,* 209 N.C. 22, 182 S.E. 721; *State v. Canup,* 180 N.C. 739, 105 S.E. 322. Nor may such a witness be asked whether he would consider one to have good character who was guilty of such misconduct. *See Woodie v. North Wilkesboro,* 159 N.C. 353, 74 S.E. 924.

Thus, this assignment of error is resolved to the question of whether the withdrawal of this evidence from the jury under proper instructions cured the original error. Normally, where evidence is erroneously admitted but later withdrawn, under instructions by the Court that the jury should disregard such testimony, the error in admission is considered harmless. *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38; *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541; *State v. Welch,* 266 N.C. 291, 145 S.E. 2d 902. *See generally,* 1 D. Stansbury, North Carolina Evidence § 28 (Brandis Rev.). Justice Seawell, writing for this Court in *State v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469, well stated the test to be applied in such a situation:

"In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But

> in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed. [Citations omitted.]"

Whether instructions can cure the prejudicial effect of such statements must depend in large measure upon the nature of the evidence and the particular circumstances of the individual case. *State v. Aldridge,* 254 N.C. 297, 118 S.E. 2d 766.

*State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476, provides particular guidance in instant case. In *Choate,* the defendant was charged with abortion and murder. Testifying in his own behalf, he denied that he had given the deceased any abortion-inducing medication. On cross-examination the solicitor questioned the defendant in detail about alleged abortions performed on three named women. Defendant replied that he had no knowledge or recollection of having treated any of the women. Subsequently, the State called two of the named women and the mother of the deceased third woman and elicited testimony, over the defendant's objection, that defendant had indeed treated these women. No testimony was elicited as to the precise nature of the treatment. The trial judge limited the testimony to impeachment purposes only. Court was adjourned for the day. Upon the convening of Court on the following morning, the judge ordered the testimony stricken and carefully and fully instructed the jurors that they were not to consider such testimony in reaching their verdict. Defendant was convicted of criminal abortion.

On appeal, this Court reversed on the ground that the rebuttal testimony with regard to treatment of the three named women was so prejudicial to the defendant that no instruction could cure the error. The Court stated:

> " . . . It is apparent that the trial judge, when he reached the conclusion that the evidence was inadmissible, did all that he could do to remove the harmful effect of it. But it had been with the jury over night, and must have found lodgment in their minds. And evidence tending to show that defendant committed other like offenses is calculated to prejudice the defendant in the minds of the jurors, and was not subject to correction. [Citation omitted.] Conviction of a defendant under such circumstances ought not to stand."

To similar effect, *see State v. Gavin,* 232 N.C. 323, 59 S.E. 2d 823; *State v. Broom,* 222 N.C. 324, 22 S.E. 2d 926.

A more recent case reversing a conviction upon similar reasoning is *State v. Aycoth,* 270 N.C. 270, 154 S.E. 2d 59. In *Aycoth,* during the cross-examination of an officer who was a State's witness, counsel for one of the defendants asked whether the witness knew, of his own knowledge, who owned the automobile in the possession of defendants at the time of their arrest for the crime for which they were on trial. The witness replied that Aycoth had said that the car was his at an earlier time "when we arrested him on another charge in his yard. His wife asked me to go search the car and see if I could find some articles that was [*sic*] left in the car setting [*sic*] in the yard, when he was indicted for murder." The Court allowed the motion to strike this unresponsive answer and instructed the jury to disregard such statements relating to the earlier arrest and indictment. Aycoth's motion for mistrial was, however, denied.

On appeal, this Court, quoting and relying upon the above-quoted statement from *State v. Strickland, supra,* held that the prejudicial effect of defendant's statements could not have been erased by the Court's instruction to disregard such testimony.

Both counsel and defendant in a criminal case are always faced with a difficult task in deciding whether the accused should testify and be subjected to cross-examination. Here defendant did not testify. If defendant had a previous criminal record, that fact, in all probability, strongly influenced his decision to forego his right to testify. The effect of the prosecutor's questions was to inform the jury that defendant had previously been convicted of other separate and distinct criminal offenses, including assault. The motion for mistrial was not made until the next day, and after denying the motion, the able trial judge, who had presided with learning and fairness throughout the trial, immediately sought to remove from the minds of the jurors the harmful effect of the incompetent evidence. However, it must be noted that the instructions then given were not specific as to the content of the challenged questions, and by this time the evidence must have found secure lodgment in the minds of the jurors. The questions posed by the prosecutor were loaded with prejudice, and we are of the opinion that under the circumstances of this capital case, the

harmful effect of the evidence could not have been removed by the Court's instruction. For this reason defendant is entitled to a new trial.

We do not deem it necessary to consider the remaining assignments of error since in all probability they will not recur at the next trial.

New trial.

Justice COPELAND dissents.

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STATE OF NORTH CAROLINA v. RONNIE YOUNG

No. 46

(Filed 6 June 1975)

1. **Jury § 6— sequestration of jurors — individual examination — discretionary matter**

A motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process; the trial court in a first degree murder prosecution did not abuse its discretion in denying defendant's motion to sequester all prospective jurors so he could examine the veniremen one at a time in the absence of all other prospective and selected jurors.

2. **Jury § 6— regulation of voir dire inquiry — discretion of trial court**

Regulation of the manner and extent of the inquiry on *voir dire* rests largely in the trial judge's discretion and a defendant seeking to establish on appeal that the exercise of such discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion.

3. **Jury § 6— voir dire examination — purpose**

The *voir dire* examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exists for challenge for cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law.

4. **Criminal Law § 101; Jury § 5— sequestration of prospective jurors — denial proper**

Defendant failed to show prejudicial error in the trial court's denial of his motion to sequester the prospective jurors and for the right to examine them regarding what they had read or heard about the case where the record failed to show the jury *voir dire* in context and any alleged abuse of discretion or prejudice resulting from the court's denial of defendant's motion.

**5. Jury § 7— challenges — disallowance — preservation of exception**

In order to preserve an exception to the court's rulings on challenges to the polls, the appellant must exhaust his peremptory challenges *and* thereafter undertake to challenge an additional juror.

**6. Criminal Law § 43— photographs of murder victims — admissibility**

The trial court in a first degree murder prosecution did not err in allowing into evidence two color photographs of the victims' bodies, since such photographs were admissible to illustrate and explain the testimony of witnesses.

**7. Criminal Law § 75— confession — admissibility**

Evidence was sufficient to support the trial court's admission of defendant's confession made to the police.

**8. Homicide § 21— first degree murder — confession — sufficiency of evidence**

Evidence which clearly established the brutal and heartless murders of the two victims as they were leaving their place of employment and which linked defendant to weapons used in the killings and placed him at the scene of the crime at the time it was committed, when considered with the confession of defendant, was amply sufficient to repel motions for judgment of nonsuit in a first degree murder prosecution.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

DEFENDANT appeals from judgments of *Ervin, J.*, 29 July 1974 Schedule "C" Criminal Session, MECKLENBURG Superior Court.

Defendant was tried upon separate bills of indictment, proper in form, charging him with the first degree murders of Sharon Williams and Steve Charles Helton on 18 August 1973 in Mecklenburg County.

The State's evidence tends to show that on 17 August 1973 Steve Helton and Sharon Williams were employed at the Burger Chef Restaurant in Charlotte, North Carolina. At approximately 11:30 p.m., upon the close of business, they and two other employees left the building and picked up trash for a few minutes. Steve and Sharon then walked to the rear of the establishment to enter Steve's car which was parked there. Stephenie Strawser and Donna Faye Bartlett, the other two employees, went to their automobiles at the front of the parking lot. Stephenie and Donna saw flashes and heard popping noises and a sound "like a cannon," coming from the area around Steve's car. Donna Bartlett saw a lot of smoke and saw three

figures running from behind a dumpster situated near Steve's vehicle. She then saw Steve Helton lying on the ground "trying to get up and brushing his hair back from his head." He was on his back near the left rear wheel of his car. Sharon Williams was on the right front seat slumped over toward the steering wheel.

Dr. Hobart R. Wood, Medical Examiner for Mecklenburg County, examined the bodies at the scene about 12:45 a.m. on 18 August 1973, and pronounced them both dead. He thereafter performed autopsies and testified that Sharon Williams had a large destructive shotgun wound in the right side of the neck and, in addition, a smaller entry type wound made by a large fragment of thin copper jacketing from a bullet. The large wound severed the right common carotid artery running up the side of the neck and practically severed the cervical spine and the spinal cord. Steve Helton had a gunshot wound which entered the base of the left neck toward the shoulder. It severed the cervical spine and spinal cord. The remains of a mutilated jacket and lead core of the bullet were recovered in the upper right back. In the opinion of Dr. Wood, each victim died as a result of gunshot wounds in the neck.

Brenda Agurs and Ellen Barber Gilmore are sisters and live together in Apartment 3 at 2725 Craddock Avenue. They were together on 18 August 1973 at about 10 a.m. when defendant told them he and Richard Gordon had gone to hold up a place "but when they got there there was more people there than was supposed to be, so he had killed some people. He said that he hid behind a green trash can dumpster and when a young man walked out to empty some trash he said [he] hid on behind the trash can so he couldn't see him and said when he went to turn to walk back inside he shot the guy and said there was a girl in a car and when he shot the guy the girl screamed and he said he blasted her, too. He said that there was another guy with him but he was just shooting up in the air. He didn't hit anything. He said he had a high powered rifle. Just me and my sister were present when Ronnie Young made those statements. Her name is Ellen Gilmore."

Brenda Agurs further testified that she had known Ronnie Young about two and one-half months prior to 17 August 1973. Richard Gordon lived next door in Apartment 2 for about a year prior to August 1973 and left some guns in her apartment

closet about two weeks prior to August 17. She then stated: "I saw Ronnie Young with the gun case about two or three days before the Burger Chef case and saw him the Friday night that he brought it back and put it in the closet about 12:00 or 12:30 Friday, August 17."

Ellen Barber Gilmore gave evidence corroborative of the testimony of her sister, and, in addition, testified that: "We asked him why did he kill them and he said that he had been going in and out of the store and they could identify him. He said that white people had been taking from us all our lives and he would kill any of them."

Officer Dale M. Travis testified that on 21 August 1973 at 2 a.m. approximately twenty-five police officers went to 2725 Craddock Avenue and surrounded Apartments 2 and 3. The officers were admitted to Apartment 3 by a black female and a search warrant was read to her. In a closet in the front room they found a 30-30 Marlin rifle (State's Exhibit 22), a sawed-off shotgun, a .22 single barrel rifle and ammunition. Contemporaneously, the defendant was arrested in Apartment 2 by Officer Crump for the murders of Sharon Williams and Steve Helton. Fingerprints and palm prints (State's Exhibit 47) were lifted from the 30-30 Marlin rifle seized in the search. Defendant's fingerprints and palm prints were thereafter taken (State's Exhibit 49) and compared with State's Exhibit 47. Steven Randolph Jones of the SBI, an expert in the identification of fingerprints, testified that he picked out sixteen points of similarity between State's Exhibit 47 and State's Exhibit 49 and that in his opinion the inked impression of defendant's right palm shown on State's Exhibit 49 is identical with the latent palm print, State's Exhibit 47, lifted from the 30-30 Marlin rifle.

Frederick Mark Hurst, Jr. of the SBI, an expert in the field of firearms identification and comparison, testified that in his opinion State's Exhibit 13, a 30-30 Winchester fired cartridge case found approximately five feet from Steve Helton's car on the night of the murders, was fired from State's Exhibit 22. He also testified that State's Exhibit 33, a bullet fragment removed from the body of Sharon Williams, was fired from the same rifle.

After hearing testimony of Officers Dale Travis, H. R. Thompson, Larry Wayne Shank, J. D. Bumgardner and the

defendant, the court made full findings of fact and concluded (1) that defendant was properly advised of his constitutional rights in accordance with *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966); (2) that defendant knowingly waived his right to counsel both orally and in writing; and (3) that defendant freely, understandingly, knowingly and voluntarily, without compulsion, duress, physical abuse or promise of leniency, made a full confession which the State is entitled to offer in evidence against him. The State then offered defendant's confession which, in pertinent part, reads as follows:

"Me and Richard Gordon were up on the block at Seymour and Steel Creek where a bunch of people were shooting dice. Some of them started talking about going up to the Burger Chef and robbing it. They asked me about pulling the job. I told them 'no.' Me and Richard left and Richard asked me 'do you think we ought to do it?' I said 'no,' and he said 'O.K., forget it'. We went on down to Richard's house at 2725 Craddock Avenue and I started playing cards with Ann, who is Richard's girlfriend. I left and went home about 10:30 and left and went by a girl's house named Pat. Pat told me where the shotgun was hidden in the grass. I got the shotgun and ran and caught up with Richard and Zack. Zack had the rifle; the big rifle that I had ~~stolen~~ gotten (R.Y.) from ~~Roy~~ Ray (R.Y.) Thompson. Richard had the pistol.

We walked on up behind the Burger Chef. We all three stood behind the big dumpster. The light in the place went out. I saw the boy come up to the garbage dumpster and I stepped around to the other side and left Zack and Richard. I started hearing six shots. I ran back around by the other side of the dumpster and Zack was standing in front of the car. I saw Zack shoot at the man by the trunk of his car. I stepped out from behind the dumpster and shot my shotgun at the car. Richard was standing beside the dumpster when I came around. I turned and ran and Richard was right behind me. I heard approximately two more shots. Zack caught up with us on the railroad tracks. The boys up on the block told us the Manager would be parked in the back and if he did not come out with a money bag that they would have made a drop before they closed. The closest one to the car was supposed to get

the money. That would have been Zack. When we got down on the track, Zack hollered and said that there was not any money. I emptied the shell from the shotgun on the railroad track by the junk yard. We went on down to Richard's house and I got some water. We gave the guns to Zack on the front porch at Richard's and he took them next door. I then went home."

Defendant testified as a witness in his own behalf. He said he and Richard Gordon were good friends and often smoked grass and dropped acid. On the night in question defendant had been drinking beer and smoking grass at Gordon's apartment. Gordon asked defendant to accompany him and Zachery McCain to the Burger Chef to get a money bag. Gordon got three guns from a closet, a rifle, a pistol and a shotgun. The three left the apartment together. Defendant had the sawed-off shotgun, McCain had the .32 pistol and Richard Gordon had the 30-30 rifle. They started walking toward the Burger Chef and on arrival stood behind a big green dumpster, each with a weapon in his hand. At that point defendant said:

"I had finally came to myself and I told Richard that I wanted out of it, that I didn't want no part of this that was going to happen. I told him that we were going to get ourselves in trouble. So we started arguing. So I threw the gun down and I told him I was going to run and he told me no, you can't run. . . . He said, 'You run and I am going to kill you.' So about that time a guy came out of the place and he put the girl in the car, I was standing beside Richard and Richard ran around the front of the car and shot him. And the door on the driver's side was open. That is when he shot the girl and ran back over there where I was.

At the time Zachery McCain was on the other side of the garbage can. I can't recall what he was doing. I heard a lot of shots. About that time he ran back around where I was and he had the shotgun in his belt and he said, 'You get up there. You done messed up everything.' Said, 'No, I am going to make you a part of it.' That is when he took the shotgun from his belt and shot. He threw me the shotgun and said, 'Come on and let's run,' and we started running."

Defendant further testified that while they were running he emptied the shell from the shotgun on the railroad track.

They continued on to Richard Gordon's apartment where defendant left the gun and went home. He stated he was arrested on Tuesday morning between 2 and 3 a.m. in Richard Gordon's apartment; that he was upstairs in bed with one Lori Ann Alexander and "my girl friend, Amy Carelock." He said the officers called him "Nigger," kicked him while his arms were handcuffed behind his back, pushed his head and face into the wall, struck him with a flashlight and billy stick and pushed him out of the house. He further stated that an officer later snatched him out of the car and threw him in the mud and again struck him in the head.

Defendant was convicted of the first degree murder of both Steve Helton and Sharon Williams. The death sentence was pronounced in each case, and defendant appealed to the Supreme Court assigning errors discussed in the opinion.

*Rufus L. Edmisten, Attorney General; George W. Boylan, Assistant Attorney General, for the State of North Carolina.*

*George C. Collie, Attorney for defendant appellant.*

HUSKINS, Justice.

Before pleading, defendant moved to quash the bills of indictment on grounds that the death penalty as applied in this State violates the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. After verdict he moved to arrest judgment on similar grounds. Denial of both motions constitutes defendant's first assignment of error.

Under this assignment defendant argues (1) that he was denied due process because the death penalty was applied to him in an arbitrary, capricious, subjective and selective manner due to freakish exercise of prosecutorial discretion and (2) that the death penalty as applied in North Carolina is unconstitutional *per se*. These contentions have heretofore been considered by this Court and rejected in numerous cases. *See, e.g., State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Armstrong*, 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Avery*, 286 N.C. 459, 212 S.E.

2d 142 (1975); *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). Assignment one is overruled.

Prior to the commencement of jury selection defendant moved to sequester all prospective jurors so he could examine the veniremen one at a time in the absence of all other prospective and selected jurors. The trial judge denied the motion and then directed that the jury be selected in the following manner:

> " . . . The entire number of jurors who are available will be brought into this courtroom tomorrow morning at 9:30 and the Clerk will read over the names of the entire jury panel at that time in the presence and hearing of the defendant and his counsel.
>
> Immediately the first twelve persons whose names are called will be directed at that time to take seats in the jury box. In other words, we will call the entire panel of jurors one at a time by name with the first twelve being seated in the jury box to my left. As soon as we do that, I will direct that the State will call in the presence and hearing of all the prospective jurors a list of the names of witnesses that the State proposes to call or list of names of witnesses that the State will call. As soon as we complete that process, then I will remove from the courtroom all of the prospective jurors except the twelve who are sitting in the jury box to my left.
>
> The other prospective jurors will be taken to the District Court customarily used, but vacant this week, and will be sequestered in that courtroom under supervision of the Sheriff's office during the process of the jury selection.
>
> With regard to the twelve in the jury box, the State shall then conduct their Voir Dire examination of those twelve and shall make any and all challenges for cause against any of the twelve and it shall then make its peremptory challenge. If the Court shall allow a challenge for cause or if the State shall excuse a juror peremptorily, the Clerk shall call a replacement in the box before the Solicitor completes his examination or challenge of any other of the twelve.

When the State is satisfied with the twelve in the box, the Clerk shall then tender the twelve in the box to the defendant. The defendant shall then conduct his Voir Dire examination of those twelve. The defendant shall then make any challenges for cause against any of the twelve and shall then make any peremptory challenges against any of the twelve. If by reason of cause or peremptorily, a juror shall leave the box during the course of the defense counsel's examination of the jurors, the Clerk shall not immediately call a replacement to the box but shall wait until the defendant shall state to the Court that he is satisfied with the remainder of the twelve which remain.

After they have been tendered him by the State, if there have been no members of the twelve removed, the Clerk shall proceed to empanel the jury. If anyone for cause or peremptorily have been removed by the defendant, then after the remaining ones have been stated by the defendant to be satisfactory with him, he shall have replacements called for the vacant seats by the Clerk from the panel at large. Then the State must by virtue of G.S. 9-21(b) be allowed to first examine any and all replacement jurors in the box and make challenges both for cause and peremptorily before the defendant shall be allowed to question any replacement. At all times the State is the party to be first satisfied with any given juror before he shall be ever tendered to the defendant. Those jurors who shall have been tendered to a defendant by the State and not challenged for cause or peremptorily by the defendant, may not thereafter be challenged by the defendant. The defendant may not stand any at the foot of the list or make any reservation of any challenge to await and see who the replacement shall be. Once the defendant has passed, he has passed for all purposes."

In accordance with this procedure, the clerk called twelve prospective jurors who took their seats in the jury box and the State proceeded with its voir dire examination. In questioning the jurors the district attorney asked the entire panel whether any of them had read anything in the paper about the case "back in the summer of 1973." Ten of the jurors indicated in the affirmative. "At this point," defendant again moved to sequester the prospective jurors and for the right to examine them regarding what they had read or heard about the case.

The court overruled the motion and instructed the jurors that he would permit examination as to whether any of them, or any of the other prospective jurors, had formed or expressed an opinion about the case. The record then recites:

> " . . . The Court further instructed the prospective jurors not, under any circumstances, give up [sic] the benefit of your opinion concerning what you have read or heard if you have one. In other words, don't tell us anything about what your opinion might or might not be. The sole purpose of this is simply to ascertain whether you have any opinion or not. We don't want to know what that opinion is and do not express in any way any opinion about this matter if you have an opinion. Simply indicate that you have formed such an opinion and stop at that point."

The record recites at this point that defendant thereafter exercised all of his peremptory challenges before the panel of twelve jurors was selected, but it is completely silent in regard to the actual examination of the jurors, the number and identity of those excused for cause, and the identity of those excused peremptorily.

Defendant objected and excepted to the foregoing proceedings in apt time and bases his second assignment of error thereon. He argues the trial court erred in denying his motion to sequester prospective jurors and his motion to examine the jurors concerning what they had read and heard about this case.

**[1]** Matters relating to the actual conduct of a criminal trial are left largely to the sound discretion of the trial judge so long as the defendant's rights are scrupulously afforded him. *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970). Therefore, a motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); 47 Am. Jur. 2d, Jury § 197 (1969); Annot., Voir Dire—Personal Examination, 73 A.L.R. 2d 1187, 1203 (1960). *Compare State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970), *rev'd as to death penalty,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289 (1971), *with State v. Perry, supra.*

Here, the jury was selected in the manner previously approved by this Court in various cases, including *State v. Dawson,* 281 N.C. 645, 190 S.E. 2d 196 (1972); *State v. Cutshall,* 281

N.C. 588, 189 S.E. 2d 176 (1972); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410, *rev'd as to death penalty,* 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971); *State v. Perry, supra; State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970), *cert. denied* 401 U.S. 962, 28 L.Ed. 2d 245, 91 S.Ct. 967 (1971). Accordingly, there was no abuse of discretion in denying defendant's motion to sequester prospective jurors.

Defendant's second contention under this assignment is that the court's ruling on his motion to examine jurors concerning what they had read or heard about the case denied him the opportunity to ascertain whether grounds existed for challenge for cause and the opportunity to exercise his peremptory challenges intelligently.

The right to make inquiry on voir dire examination as to the fitness and competency of a prospective juror is secured by G.S. 9-15(a). In regard to this phase of the trial, the presiding judge has the duty to supervise the examination of prospective jurors and to decide all questions relating to their competency. G.S. 9-14 (1969); *State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796, *cert. denied* 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143 (1973).

**[2]** Regulation of the manner and the extent of the inquiry on voir dire rests largely in the trial judge's discretion. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied* 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973). A defendant seeking to establish on appeal that the exercise of such discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion. *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617 (1968); *see State v. Higgs,* 143 Conn. 138, 120 A. 2d 152 (1956); *State v. Rasor,* 168 S.C. 221, 167 S.E. 396 (1933); 47 Am. Jur. 2d, Jury § 212 (1969).

**[3]** The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969). "Obviously, prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges." *State v. Jarrette, supra.*

**[4]** When the foregoing principles are applied to this case, the proposed question, taken alone, seemingly would be within legitimate bounds of inquiry. However, the record before us fails to show the jury voir dire in context and any alleged abuse of discretion or prejudice resulting from the court's denial of defendant's motion. We perceive no prejudicial error in the trial court's action.

It is elementary that an appellate court must have in the record before it a complete account of the action by the trial court of which the appellant complains. An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968); *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53 (1967).

The court's outlined procedure for the selection of the jury provided that defendant could conduct the voir dire examination of the twelve jurors remaining in the box after the State had examined them to its satisfaction and after the clerk had tendered them to defendant. That is the usual sequence in jury selection. Here, however, defendant's motion was made during the State's examination and defendant sought the *immediate* right to examine the jurors before the State had concluded its examination. The question which defendant proposed to ask—"What it was that they had read or heard about this case?"—could not reasonably be expected to elicit information bearing on a challenge for cause since the court allowed questioning as to any ultimate opinion the jurors had formed as a result of what they had read or heard. *See State v. Jarrette, supra* at 640-41, 202 S.E. 2d at 732. Under these circumstances, there was no necessity for the court to allow interruption of the State's examination for such questioning by defense counsel. Even so, in an abundance of caution and fairness, the court allowed defense counsel *at that time* to question the jurors as to whether they had formed an opinion about the case.

The State contends that the trial court allowed every prospective juror who, for whatever reason, had formed any opinion about the case to be challenged for cause on that ground without further inquiry concerning the nature of the opinion or how strongly it was held. The contention seems logical in light of the procedure adopted by the trial court, but the record fails to support it. Nor will the record support defendant's argument that the court unduly limited his right to examine the jurors as

to their fitness and competency. In fact, the record fails to show (1) what transpired *at that time* during defendant's questioning of the jurors concerning their opinions, if they had one, (2) what transpired *later, i.e.,* during defendant's questioning of the jurors on voir dire after they had been passed by the State and tendered to him, (3) whether defense counsel posed any questions to the jurors which were disallowed by the court, or (4) whether any prospective juror who had read or heard anything about the case ultimately served as one of the twelve. The record gives us nothing tangible to support a finding that defendant was prejudiced by the jury selection process. Nothing else appearing, the selection process imports regularity. "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." *State v. Sanders,* 280 N.C. 67, 185 S.E. 2d 137 (1971); *accord, State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833 (1967).

**[5]** We further note that in order to preserve an exception to the court's rulings on challenges to the polls the appellant must exhaust his peremptory challenges *and* thereafter undertake to challenge an additional juror. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969). Justice Stacy (later Chief Justice) explained this rule in *State v. Levy,* 187 N.C. 581, 122 S.E. 386 (1924), as follows:

> "It should be observed that no ruling relating to the qualification of jurors and growing out of challenges to the polls will be reviewed on appeal, unless the appellant has exhausted his peremptory challenges and then undertakes to challenge another juror. [Citation omitted.] His right is not to select but to reject jurors; and if the jury as drawn be fair and impartial, the complaining party would be entitled to no more upon a new trial, and this he has already had on the first trial. [Citations omitted.] Hence the ruling, even if erroneous, would be harmless."

In a criminal appeal the burden is on the appellant to show both error and prejudice. *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386, *cert. denied* 377 U.S. 1003, 12 L.Ed. 2d 1052, 84 S.Ct. 1939 (1964). Here, he has shown neither. Defendant's second assignment is overruled.

**[6]** Defendant's third assignment asserts error in allowing into evidence two color photographs of the victims' bodies. We find no merit in this assignment. The photographs were admissible to illustrate and explain the testimony of witnesses Kirkpatrick, Catlett, Booth, and Bartlett. They were properly authenticated and the jury was properly instructed that they were admitted for the sole purpose of illustrating and explaining the testimony of the witnesses. They were competent for that purpose. *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652, *rev'd as to death penalty* 401 U.S. 1004, 34 L.Ed. 2d 295, 93 S.Ct. 453 (1972); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971), *rev'd as to death penalty* 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410, *rev'd as to death penalty* 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd as to death penalty* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971).

**[7]** Defendant next assigns as error the admission, over objection, of the confession which he made to the police. He contends the confession should have been excluded because it is "very reasonable and plausible" to conclude from the evidence received on voir dire (1) that the defendant did not understand the waiver of rights which he signed, (2) that he was promised leniency, (3) that he was too scared or frightened to understand the consequences of his act, and (4) that he lacked the intelligence or mental capacity to comprehend the documents which he signed. We find no merit in this contention.

The trial judge properly excused the jury and heard evidence bearing upon the admissibility of the confession. *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511 (1968). Based on the evidence thus received, he made extensive findings of fact and conclusions of law supporting admission of the confession. His findings were amply supported by competent evidence and are conclusive on appeal. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Pruitt, supra; State v. Thompson,* 285 N.C. 181, 203 S.E. 2d 781, *cert. denied* 419 U.S. 867, 42 L.Ed. 2d 104, 95 S.Ct. 123 (1974); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). Only defendant's own testimony supports his conten-

tions under this assignment. The trial court was not required to accept that testimony and disbelieve other competent evidence. This assignment is overruled.

**[8]** Defendant finally contends the court should have allowed his motion for judgment of nonsuit made at the close of the State's evidence. He argues that the evidence *aliunde* the confession was insufficient to establish that the crime charged was committed by him. This constitutes defendant's fifth assignment of error.

When the State offers evidence of the *corpus delicti* in addition to defendant's extrajudicial confessions, defendant's motion to nonsuit is correctly denied. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Elam,* 263 N.C. 273, 139 S.E. 2d 601 (1965). "A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof *aliunde* of the *corpus delicti.* Full, direct, and positive evidence, however, of the *corpus delicti* is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, *when taken in connection with the confession,* establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396 (1961); *accord, State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972).

Here, the State's evidence, *aliunde* the confession, clearly establishes the brutal and heartless murders of the two victims as they were leaving their place of employment. The evidence further links defendant to weapons used in the killings and places him at the scene of the crime at the time it was committed. This evidence, when considered with the confession of defendant, is amply sufficient to repel the motions for judgment of nonsuit. *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868 (1968); *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511 (1968). Assignment five is therefore overruled.

We have carefully examined the entire record and find no prejudicial error in the trial. The verdict and judgment in each case must therefore be upheld.

No error.

Chief Justice SHARP dissenting as to the death sentence:

The murders for which defendant was convicted occurred on 18 August 1973, a date between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated in the dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666 *et seq.,* 202 S.E. 2d 721, 747 *et seq.* (1974), I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

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STATE OF NORTH CAROLINA v. HOWARD BROOKS

No. 76

(Filed 6 June 1975)

1. **Riot and Inciting to Riot § 1— elements of the crime of riot**

The elements of the crime of riot are public disturbance, assemblage, three or more persons, disorderly and violent conduct or the imminent threat of such conduct, and results in injury or damage to persons or property or creates a clear and present danger or injury or damage to persons or property. G.S. 14-288.2(a).

2. **Constitutional Law § 18; Riot and Inciting to Riot § 2— constitutionality of riot statute**

G.S. 14-288.2 prohibiting engaging in and inciting a riot is not so complex and imprecise as to be unconstitutional; furthermore, the reach of G.S. 14-288.2 is not so pervasive as to include activity protected by the First Amendment, since the advocacy of imminent lawless

action is the only type of speech which can come within the purview of G.S. 14-288.2, and such speech is not protected by the First Amendment.

3. **Riot and Inciting to Riot § 2— insufficiency of warrant to charge crime**

Warrant charging that defendant "did unlawfully, wilfully incite a riot by urging three or more persons to congregate at Prospect School, Robeson County, North Carolina, thereby creating a clear and present danger of a riot" failed to state the commission of any criminal offense, much less the offense of inciting a riot.

4. **Constitutional Law § 30; Criminal Law § 40— district court proceedings — no requirement of transcript**

There are no constitutional infirmities in the denial of a free transcript of the district court proceedings to an indigent defendant since the appeal from district court to superior court is a *de novo* procedure, there is no requirement that a defendant purchase and provide the superior court with a transcript of the district court poceedings in order to secure full appellate review, there is no statutory requirement that a transcript of district court proceedings be maintained, and a transcript of the district court proceedings is not needed for an effective appeal for trial *de novo* in superior court.

5. **Riot and Inciting to Riot § 2— items found at scene of riot — admissibility**

In a prosecution for engaging in and inciting a riot, the trial court did not err in allowing into evidence a piece of iron pipe, a revolver, two shotguns, a machete, and two jugs of amber liquid, all of which were found at the scene of the disorder shortly after defendant was arrested.

6. **Criminal Law § 128— mistrial — motion properly denied**

The trial court did not err in failing to grant defendant's motions for a mistrial and by failing properly to instruct the jury upon certain alleged acts of prosecutorial misconduct.

APPEAL pursuant to G.S. 7A-30(1) to review decision of the Court of Appeals reported in 24 N.C. App. 338, 210 S.E. 2d 535 (1975) (opinion by *Parker, J., Britt* and *Vaughn, J.J.* concurring), which found no error in defendant's convictions for inciting a riot and for engaging in a riot, but ordered a new trial on the charge of failure to comply with a lawful order to disperse.

Defendant was charged by warrants with the above three offenses, violations respectively of G.S. 14-288.2(d), 14-288.2(b), and 14-288.5(b). All three offenses being misdemeanor violations, defendant was first tried before McLean, D.J., at the 14 May 1973 term of Robeson County District Court. Upon being convicted of all charges, defendant exercised his absolute right

to appeal to Superior Court for trial *de novo*. *See* G.S. 7A-290. Defendant's cases thereafter were tried before Bailey, J. at the 9 July 1973 Session of Robeson County Superior Court.

The State's evidence, summarized except where quoted, tended to show the following:

C. E. "Buddy" McLaurin, a local newsman, testified that on 23 March 1973 at approximately 2:00 p.m. he went to a building called the "Stable" in Pembroke, North Carolina, in order to attend a press conference called by the Tuscarora Indians. When he arrived, there were approximately fifty to sixty people in attendance, most of whom were Indians. The following individuals were seated at tables near the front of the meeting room: Vernon Bellacord, National Head Director of the American Indian Movement; Bill Sargent, Eastern Director of the American Indian Movement; Bob Garvey, an official of the Eastern Division of the American Indian Movement; and defendant, who was known in Robeson County as Chief Brooks of the Tuscarora Tribe. Defendant spoke to the group for approximately five minutes and reminded them of an organizational meeting scheduled for 6:45 p.m. at the Prospect School. Defendant told the group that he had been in contact with Young Allen, Superintendent of the Robeson County Public School System, and that Allen had informed him that the Prospect School property would not be available for the meeting because of on-site construction work. Defendant stated that he had been to the school and had observed some exterior construction work and did not think it constituted a reasonable or a prudent excuse for denying them permission to use the facility. Defendant also stated, as he had done at other meetings, that he wanted the people of Robeson County to know that he was willing to die on the school steps and that if there were any "riot clad armed law enforcement" officers on the school grounds, they would be trespassing on Indian property and he hoped they knew what that meant. Defendant's demeanor while speaking at the Stable was described by McLaurin as "more or less matter of fact." McLaurin also added defendant made no request that anybody bring arms to the Prospect School.

McLaurin further testified that he and Bill Price, another newsman, went to the Prospect School that evening at approximately 7:00 p.m. When they arrived, defendant, in a group of approximately one hundred people, was standing on the grounds of the Prospect United Methodist Church, located di-

rectly across a State paved road from the Prospect School. McLaurin saw some forty law enforcement officers standing on the other side of the road (school grounds).

During the course of the evening, McLaurin heard defendant tell certain members of the crowd on three or four different occasions not to go on the road "until he made his decision." He also heard defendant tell his "security force" to "rid the area of alcoholic beverages or anything else."

McLaurin observed one segment of the crowd harass law enforcement officers on several occasions. One individual, in particular, was shining a flashlight in the eyes of the State Highway Patrolmen and telling them that they would be smiling before the night was over.

At approximately 8:00 p.m. McLaurin saw a .38 caliber pistol and a machete being carried by members of the crowd. He later heard the .38 caliber pistol discharge and also saw one shotgun and heard it discharge. The shotgun was fired from a truck as it drove by the church yard.

McLaurin stated that by 8:00 p.m. the crowd had grown from one hundred to approximately one hundred and fifty and that it was at its largest (two hundred) around 9:00 p.m. He left the area about 11:00 p.m.

The State also offered the testimony of twelve law enforcement officers: four from the State Highway Patrol, seven from the Robeson County Sheriff's Department, and one from the State Bureau of Investigation. With the exception of insignificant facts, all of the officers' testimony was basically the same. Their combined testimony, summarized except where quoted, tended to show the following:

The officers arrived at Prospect School on the evening of 23 March 1973 between 6:15 p.m. and 6:45 p.m. During the course of the evening, their force was composed of approximately eighteen members of the Robeson County Sheriff's Department; approximately thirty-five members of the State Highway Patrol; and approximately eight agents of the State Bureau of Investigation. All the State Troopers and Deputy Sheriffs were clad in full riot gear, i.e., a hard helmet with a face shield, a gas mask, riot stick, and pump shotgun.

Approximately seventy-five to one hundred people had assembled on the church property by 6:30 p.m. The crowd con-

tinued to grow throughout the night, reaching a maximum size of approximately two hundred sometime between 11:00 p.m. and midnight. Defendant was present throughout the evening. From time to time he was seen addressing the crowd from the church steps. Due to the verbal abuses directed towards them, as well as other noises, the officers could not hear what defendant was telling the crowd. However, when he spoke, officers could see members of the crowd "stick their arms up in the air" and could hear them yell out "Red Power." Also, during the speeches, various groups in the crowd would sing such songs as "We Shall Overcome."

As the evening progressed the crowd became increasingly noisy and boisterous. A bonfire was built on the church grounds and there was considerable shouting, cursing, dancing, and singing. The officers observed several members of the crowd drinking alcoholic beverages. From time to time, a group would start across the road and call the officers "white and black m ..... f ....."; "pigs"; "white sons of bitches"; "white-eyed m..... f....." and other profane and indecent names. These groups also told the officers that if they ever got across the road, they were going to take the officers' riot sticks and guns and use them to "beat the officers to death." Meanwhile, traffic on the paved State road was heavy and some passing motorists were stopped and dragged from their cars while members of the crowd beat on the hoods, sides, and trunks of their vehicles.

Eventually, members of the crowd started throwing beer and coca-cola bottles at the officers. The profanity and verbal insults became increasingly belligerent and violent in tone. Members of the crowd would form a large group and start to come across the road toward the officers. When this happened, defendant would call them back, telling them not to cross the road until he made his decision and that when he made his decision, they were going across to the school grounds. Defendant also announced to the officers that if any of "his people" were injured, then he would "declare war on Robeson County." Many officers, veterans of previous crowd control situations, testified they had never before been as frightened.

Officers continuously observed members of the crowd armed with knives, sticks, pistols and other weapons. At approximately 8:00 p.m. a shot was fired over by the church steps. Shortly thereafter, a member of the crowd emerged onto the paved road and fired several pistol shots into the air.

Sometime after midnight a bottle was thrown out of the crowd. It struck the pavement and splattered glass on some of the officers. Just then, three shotgun blasts rang out. They were fired in quick succession. The pellets fell on the officers' parked vehicles. When this occurred, sometime around 12:20 a.m., Deputy Sheriff Hubert Stone, upon the advice of other officers, issued a command to disperse. Using a "bullhorn," Deputy Stone told the crowd that it had five minutes in which to leave. This directive was greeted by an increased flurry of bottle throwing. Nevertheless, approximately twenty-five people did obey the command to disperse and left. Others, including defendant, remained. After waiting some five to six minutes, Deputy Stone ordered his officers to cross the road and to arrest those who had refused to comply with his command to disperse. The officers carried out this order and arrested forty-eight men, including defendant, six women, and one boy. Others in the crowd evaded arrest by fleeing into the darkness.

A subsequent search of the area on the church side of the road led to the discovery of the following items: (1) a .22 caliber pistol; (2) a beer bottle containing amber liquid with paper stuck in its mouth; (3) a cider jug containing amber fluid; (4) a two-section iron pipe; (5) a single barrel shotgun; (6) a sawed-off shotgun; and (7) a machete.

Defendant did not offer any evidence. He was thereafter found guilty on all charges and from judgments imposing concurrent jail sentences he appealed.

*Attorney General Rufus L. Edmisten by Associate Attorney Thomas L. Ringer, Jr. for the State.*

*Paul, Keenan, Rowan & Galloway by James V. Rowan for defendant appellant.*

COPELAND, Justice.

Defendant brings forward four questions based on five of the fourteen assignments of error properly noted in the record.

In Question #1 (Assignments #1 and #3) defendant contends that the trial court erred in failing to quash the warrants charging him with inciting a riot and engaging in a riot on the grounds that the statutes underlying these charges are unconstitutional on their face and as applied.

We begin our evaluation of defendant's argument by examining the common law offense of riot. In *State v. Cole,* 249 N.C. 733, 107 S.E. 2d 732, *cert. denied,* 361 U.S. 867 (1959), this Court, in an opinion by Justice Denny (later Chief Justice), defined this common law offense as follows:

> "[A] tumultuous disturbance of the peace by three persons or more assembled together of their own authority, with intent mutually to assist one another against all who shall oppose them, and afterwards putting the design into execution, in terrific and violent manner, whether the object in question be lawful or otherwise. Indictment for riot always must charge the defendants with unlawful assembly, mutual intent to assist one another, and execution of the intent by overt acts, before they can be convicted." *Id.* at 744, 107 S.E. 2d at 741. *See also State v. Hoffman,* 199 N.C. 328, 154 S.E. 314 (1930); *State v. Stalcup,* 23 N.C. 30 (1840).

The common law crime of unlawful assembly, which is a component element of common law riot, contains the following elements: (1) the participation of three or more persons; (2) a common intent to attain a purpose which will interfere with the rights of others by committing disorderly acts; and (3) a purpose to commit acts in such manner as would cause firm persons to apprehend a breach of peace. *See* Proposed Legislation Relating to Riots and Civil Disorders, Report and Commentary of the North Carolina Governor's Committee on Law and Order, 6 (1969) (hereinafter cited as *N. C. Riot Report).*

Following certain civil disorders that occurred in this State during April of 1968 former Governor Dan K. Moore (now an Associate Justice of this Court) requested the Governor's Committee on Law and Order (hereinafter referred to as Advisory Committee) to consider appropriate legislation for dealing with riots and other disturbances. *See N. C. Riot Report, supra,* at vi.

The legislation eventually proposed by the Advisory Committee was subsequently enacted by the North Carolina General Assembly as Section 1, Chapter 869, 1969 Session Laws, entitled "An Act to Revise and Clarify the Law Relating to Riots and Civil Disorders." This Act was codified as Article 36A of Chapter 14 of the General Statutes. G.S. 14-288.2, the provision applicable in the instant cases wherein defendant was charged with inciting and engaging in a riot, was enacted as a part of

Chapter 869, 1969 Session Laws. G.S. 14-288.2 provides as follows:

"(a) A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

"(b) Any person who wilfully engages in a riot is guilty of a misdemeanor punishable as provided in § 14-3(a).

"(c) Any person who wilfully engages in a riot is guilty of a felony punishable by a fine not to exceed ten thousand dollars ($10,000.00) or imprisonment for not more than five years, or both such fine and imprisonment, if:

(1) In the course and as a result of the riot there is property damage in excess of fifteen hundred dollars ($1,500.00) or serious bodily injury; or

(2) Such participant in the riot has in his possession any dangerous weapon or substance.

"(d) Any person who wilfully incites or urges another to engage in a riot, so that as a result of such inciting or urging a riot occurs or a clear and present danger of a riot is created, is guilty of a misdemeanor punishable as provided in § 14-3(a).

"(e) Any person who wilfully incites or urges another to engage in a riot, and such inciting or urging is a contributing cause of a riot in which there is property damage in excess of fifteen hundred dollars ($1,500.00) or serious bodily injury, is guilty of a felony punishable as provided in § 14-2."

**[1]** G.S. 14-288.2(a) lists the component elements that constitute the crime of riot. These elements are as follows: (1) Public disturbance; (2) Assemblage; (3) Three or more persons; (4) Disorderly and violent conduct, or the imminent threat of such conduct; and (5) Results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property. The definitional section of Arti-

cle 36A, G.S. 14-288.1, in sub-section (8), defines a "public disturbance" as follows:

> "Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."

"Disorderly conduct," as it applies to our fact situation, is defined by G.S. 14-288.4(a) as follows:

> "Disorderly conduct is a public disturbance intentionally caused by any person who:
>
> "(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence; or
>
> "(2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace; . . ."

**[2]** Defendant contends that "[t]he very fact that correct application of 14-288.2 requires a cross-reference through this interlocking maze of statutory descriptions makes § 14-288.2 so complex and imprecise as to be unconstitutional." We fail to discern the statutory complexity alleged to exist by defendant. One purpose for codifying this offense was to *simplify* the common law by setting out in concrete form the essential elements that constitute this crime. *See N. C. Riot Report, supra,* at 6-7. This purpose has been accomplished. The key words of the statutory definition of riot are "three persons," "violent conduct," and "clear and present danger of injury or damage." *See Fuller v. Scott,* 328 F. Supp. 842 (M.D.N.C. 1971). We believe that our citizens who desire to obey this statute will have no difficulty in understanding it. These are not words so vague and imprecise that men of common intelligence and understanding must guess at their meanings. *See Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971). "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed

to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky,* 407 U.S. 104, 110 (1972). *See also Cox v. Louisiana,* 379 U.S. 536 (1965).

Furthermore, we do not find the reach of G.S. 14-288.2 to be so pervasive as to include activity protected by the First Amendment. A public disturbance involving three or more people, no matter how noisy or boisterous, cannot, under the statutory definition, be a riot unless *violence* or the threat of *immediate violence* which poses a clear and present danger to persons or property is present. The advocacy of imminent lawless action is not protected by the First Amendment. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444 (1969) (per curiam). The latter is the only type of speech that can come within the purview of G.S. 14-288.2.

The right of freedom of speech is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. *See, e.g., Stromberg v. California,* 283 U.S. 359, 368 (1931). The State has a paramount duty to maintain order not only in the streets but in schools, hospitals, and other public places. The United States Supreme Court has recognized this obligation. *See, e.g., Grayned v. Rockford,* 408 U.S. 104 (1972); *Colten v. Kentucky, supra; Feiner v. New York,* 340 U.S. 315 (1951); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). Accordingly, we find nothing constitutionally impermissible in our statutory definition of the offense of riot. Defendant's assignments relating to the constitutionality of G.S 14-288.2 are therefore overruled.

Defendant's motion to quash the warrants charging him with inciting a riot and with engaging in a riot also raised the question of the sufficiency of the warrants to charge the commission of criminal offenses. *See, e.g., State v. Vestal,* 281 N.C. 517, 520, 189 S.E. 2d 152, 155 (1972), and numerous cases there cited. It is essential to the jurisdiction of the court that a criminal offense be charged in the warrant upon which the State brings the defendant to trial. *See, e.g., State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14 (1965).

**[3]** Defendant was charged in the second count of Warrant #73CR3893 with the offense of inciting a riot in violation of G.S. 14-288.2(d). This count contained the following language:

> "And Howard Alexander Brooks at and in the county named above on or about the 24th day of March, 1973, did *unlawfully, wilfully incite a riot by urging three or more persons to congregate at Prospect School, Robeson County, North Carolina, thereby creating a clear and present danger of a riot.*" (Emphasis supplied.)

The import of the above italicized language is that the crime of inciting a riot took place when defendant urged three or more people to go to Prospect School and that the presence of three or more people at the school created the "clear and present danger of a riot." As far as we know, these allegations fail to state the commission of any criminal offense, much less the offense of inciting a riot. Any statute that would permit the State to convict an individual for urging three or more people to assemble in a public place would be constitutionally impermissible. Our riot act clearly does not encompass such activity. In fact, the scope of the act in no way infringes upon the freedom of non-violent assemblage. Hence, we hold that the trial court erred in failing to quash the second count of Warrant #73CR3893, charging defendant with inciting a riot, and that the judgment of conviction in this case is hereby arrested for the reasons set forth above. It is obvious that Warrant #73CR4822 charging "engaging in a riot" states a proper cause of action.

When these cases were called for trial in the District Court defendant's counsel filed a motion that the court provide, at the expense of the State, a stenographic reporter to take down the proceedings at the trial for use by defendant at any future trial. On 14 May 1973 District Judge McLean denied defendant's motion for a free transcript and entered the following notation for the minutes:

> "(a) That this is a Court of original jurisdiction with trial de novo on appeal from this Court to the Superior Court;
>
> "(b) That it is not customary to have a stenographic record of this Court, since trial on appeal is de novo;

"(c) That the motion of the defendant comes after the case was called by the Solicitor for trial;

"(d) That this Court has no statutory authority to provide at the State's expense a stenographic reporter in this Court;

"(e) That while Counsel for the defendant offers to have the defendant make affidavit of indigency at this time, no such affidavit has been heretofore filed, and *the defendant appears represented by privately employed counsel;*

"(f) That there is a scarcity of Court Reporters and the Court is satisfied that to provide a reporter would delay this trial which is now scheduled for its third (3rd) trial date; . . ." (Emphasis supplied.)

At the call of these cases for trial *de novo* in Superior Court, and prior to pleading in that court, defendant, still represented by the same privately employed counsel (who continues to represent defendant in this Court), moved in the alternative (1) for a remand of the cases to the District Court for a proper trial with a free transcript to be provided; or (2) for the arrest of the judgments entered by the District Court; or (3) for a dismissal of all charges because of the failure to provide him with a free transcript of the District Court proceedings. The denial of these motions by the Superior Court forms the basis for defendant's next contention. (Question #2, Assignment #2.)

Defendant argues that he has been denied his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 1, Sections 19 and 22, of the North Carolina Constitution due to the failure of the District Court to provide him with a free transcript. Assuming, *arguendo,* that defendant was in fact an indigent, we fail to see how the denial of his request for a free transcript violated any of his constitutional rights. Defendant strongly urges, however, that his constitutional right to the equal protection of the law has been violated in that he has been denied access to the Superior Court equal to that of an appellant who could have purchased a transcribed record of the District Court proceedings. Since this is a question of first impression before this Court, we will closely examine defendant's arguments.

The first case relied on by defendant is *Griffin v. Illinois,* 351 U.S. 12 (1956). In that case the United States Supreme

Court invalidated a state procedure that required a criminal appellant to purchase and make available a transcript of his trial to secure full appellate review. There was, however, no majority agreement of the exact constitutional basis for the decision. Four justices felt that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19. Justice Frankfurter cast the deciding vote but objected on the following language: "Of course a State need not equalize economic conditions." *Id.* at 23. A number of subsequent Supreme Court cases relied on *Griffin* to strike down state practices imposing similar contingencies between the indigent and a statutory appellate right. *See, e.g., Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958) (per curiam); *Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961); *Lane v. Brown*, 372 U.S. 477 (1963).

Defendant next cites *Roberts v. LaVallee*, 389 U.S. 40 (1967) (per curiam). In that case the trial court denied defendant's [an indigent] request for a free transcript of his preliminary hearing on the basis of a New York statute requiring the payment of certain fees for such a transcript. On *certiorari* from the denial of defendant's petition for habeas corpus, the United States Supreme Court reversed the judgment dismissing the habeas petition and stated that it had "no doubt that the New York statute . . . could not meet the test of our prior decisions" which "for more than a decade now have made clear that differences in access to instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Id.* at 42.

Defendant also relies on *Britt v. North Carolina*, 404 U.S. 226 (1971). In *Britt* defendant's three-day murder trial ended in a mistrial when the jury reported a hopeless deadlock. A retrial was scheduled for the following month. During the interim, defendant filed a motion alleging that he was indigent, and asking for a free transcript of the first trial. The trial court denied this motion and the North Carolina Court of Appeals affirmed. 8 N.C. App. 262, 174 S.E. 2d 69 (1970). We denied defendant's petition for *certiorari*. Thereafter, the United States Supreme Court granted defendant's petition for writ of *certiorari* and determined that the rule announced in *Griffin* applied to the *Britt* facts, but found that no violation of the rule had

been shown and affirmed the decision of the North Carolina Court of Appeals.

**[4]** All three of the above decisions are readily distinguishable from the facts in the case before us. First, our *de novo* procedure has no requirement that a defendant purchase and provide the Superior Court with a transcript of the District Court proceedings in order to secure *full* appellate review. In fact, the trial *de novo* is not really an appeal on the record. It is a new trial as a matter of absolute right from the beginning to the end. It totally disregards the plea, trial, verdict, and judgment of the District Court. *See, e.g., State v. Spencer,* 276 N.C. 535, 543, 173 S.E. 2d 765, 771 (1970). It represents a completely fresh determination of guilt or of innocence. *See, e.g., State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied,* 403 U.S. 940 (1971).

Second, there is no statutory requirement in this State that a transcript of the District Court proceedings be maintained. Generally, such transcripts are not available, even for a fee.

Finally, we find no merit in the argument that a transcript of the District Court proceedings is needed for an effective appeal for trial *de novo* in Superior Court. In *Colten v. Kentucky, supra,* the United States Supreme Court found no constitutional infirmity in a Kentucky statutory scheme (almost identical to the *de novo* procedures under G.S. 7A-290) in which the judge in the *de novo* court was empowered to sentence anew and was not bound to stay within the limits of the sentence imposed by the inferior court. The following language from Mr. Justice White's majority opinion is relevant:

> "The trial de novo represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. . . . [T]he record from the lower court is not before the superior court and is irrelevant to its proceedings. . . .
>
> * * * * *
>
> "Proceedings in the inferior courts are simple and speedy, and, if the results . . . are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction.

> He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior court. The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of the judge or jury in the superior court, with sentence to be determined by the full record made in that court . . . . " 407 U.S. at 117-18, 118-19.

We agree with the United States Supreme Court in *Colten* that the judgment of the District Court in this type of case is, in essence, no more than an offer to defendant in settlement of his case. Defendant is free to accept this offer or to appeal to the Superior Court and seek the judgment of a jury with their verdict to be determined *solely* upon the evidence adduced in the Superior Court. In this factual situation, we fail to see any equal protection problems.

The purpose of our *de novo* procedure is to provide all criminal defendants charged with misdemeanor violations the right to a "speedy trial" in the District Court and to offer them an opportunity to learn about the State's case without revealing their own. In the latter sense, this procedure can be viewed as a method of "free" criminal discovery. It would necessarily destroy the underlying purposes of the *de novo* system to hold that every indigent defendant is entitled to a free transcript of the District Court proceedings. We do not think that either the Federal or the State Constitution requires such a result. Therefore, for the reasons above stated, we hold that there are no constitutional infirmities in the denial of a free transcript of the District Court proceedings to an indigent defendant. Hence, this assignment is overruled.

**[5]** Defendant next contends (Question #4, Assignment #5) that certain real evidence was improperly admitted over his objection. Specifically, defendant complains about the State's introduction of a piece of iron pipe, a revolver, two shotguns, a machete, and two jugs containing an amber fluid, all of which

were found at the scene of the disorder shortly after defendant was arrested. Defendant argues that this evidence was irrelevant and immaterial and therefore should have been excluded. We disagree. Under G.S. 14-288.2(a), *supra,* the *capacity* of members of the assemblage to inflict injury or damage to persons or property or to create the clear and present danger of such injury or damage is material to the crime of riot and is relevant to establish the proposition defendant was engaged in a riot. Certainly, the probability of violence or the severity of possible injuries was significantly enhanced by the presence of the weapons above described. Furthermore, several of the State's witnesses testified that they heard gunshots and saw several of the admitted items before the arrests took place. "Whatever the jury may learn through the ear from descriptions given by witnesses, they may learn directly through the eye from the objects described." 1 Stansbury's N. C. Evidence § 117 (Brandis Rev. 1973) (hereinafter cited as 1 Stansbury).

Defendant also asserts that the above evidence should have been excluded because its only effect was to confuse the issues and to excite prejudice against him. We agree that this evidence prejudiced defendant's case. However, "when a relevant object is brought into the courtroom and produced for exhibition in the regular course of the trial, its exclusion from evidence is not required simply because it may have undue weight with the jury. This is true of a living person as well as of an inanimate object." 1 Stansbury, *supra,* at § 117. *Accord, State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972); *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971); *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99 (1967). "It is not a valid ground of objection to evidence that it tends to prove the fact in question more conclusively when the article to which it refers is exhibited, instead of being left to the description of witnesses." 1 Stansbury, *supra,* at § 118. For the above stated reasons, this assignment is overruled.

**[6]** Finally, defendant contends (Question #3, Assignment #4) that the trial court committed error by failing to grant his motions for a mistrial and by failing to properly instruct the jury upon certain alleged acts of prosecutorial misconduct. We have carefully reviewed the record and, although we disapprove of some of the actions of the district attorney, we fail to see how they resulted in denying defendant his right to a

fair trial. *See, e.g., State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. McCall,* 286 N.C. 472, 212 S.E. 2d 132 (1975), and numerous cases cited in these opinions. Also, we do not believe that the trial court abused its discretion in denying defendant's motions for mistrial. In fact, the record reveals that on one occasion the trial court asked defendant's counsel if he really wanted a mistrial on the basis of the district attorney's statements to the jury and defendant's counsel said that he was "just making the motion." Accordingly, this assignment is overruled.

Except for the restraint exercised by the police officers on the occasion in question, the crimes for which defendant was tried may well have been of a more serious nature. We believe defendant has had a fair trial, free from prejudicial error, and therefore the judgment of the Court of Appeals as it pertains to defendant's conviction for "engaging in a riot" is affirmed. However, that portion of the decision below finding no error in defendant's conviction for "inciting a riot" is reversed in that we have deemed it appropriate to arrest the judgment in this case for the reasons previously stated.

Therefore, the result of our decision is as follows:

AS TO "ENGAGING IN A RIOT"—AFFIRMED.

AS TO "INCITING A RIOT"—REVERSED AND JUDGMENT ARRESTED.

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STATE OF NORTH CAROLINA v. CLAUDE BUCHANAN

No. 57

(Filed 6 June 1975)

**1. Homicide § 21— motion for nonsuit — sufficiency of evidence at issue**

When an indictment charges a defendant with first degree murder, a motion for judgment as in case of nonsuit requires the trial court to determine whether the evidence, when taken in the light most favorable to the State, is sufficient to raise a legitimate inference and to permit the jury to find that a defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished this purpose.

2. **Homicide § 4— premeditation defined**

Premeditation means thought beforehand for some length of time, however short.

3. **Homicide § 21— first degree murder — sufficiency of evidence**

Evidence in a first degree murder case was sufficient to permit the jury to find that defendant acted after sufficient premeditation and deliberation where such evidence tended to show that defendant knew deceased had stolen wood on previous occasions, defendant secreted himself in a nearby field with his shotgun on the day before the killing hoping to catch deceased stealing more wood, on the day of the killing defendant saw deceased's truck pass by his home and back into a driveway where cut wood was located, defendant drove his truck to the driveway and blocked it, defendant ordered one man to drop wood which he held, the man did so, defendant then shot deceased, deceased did not advance on defendant, and defendant saw no weapon or anything else in the possession of deceased at or before the fatal shot.

4. **Constitutional Law § 36; Homicide § 31— first degree murder — death penalty proper**

Upon defendant's conviction of first degree murder, the trial court did not err in signing the judgment committing him to death by asphyxiation.

5. **Homicide § 18— premeditation and deliberation — proof by circumstantial evidence**

Ordinarily, it is not possible to prove premeditation and deliberation by direct evidence, but such elements must be established by proof of circumstances from which they may be inferred; among the circumstances to be considered by the jury in determining whether a killing was with premeditation and deliberation are want of provocation on the part of the deceased, the conduct of defendant before and after the killing, the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled.

6. **Homicide § 25— first degree murder — instructions unsupported by evidence**

Defendant in a first degree murder prosecution is entitled to a new trial where the court instructed the jury that they could "infer" premeditation and deliberation from "the dealing of lethal blows after the deceased has been felled and rendered helpless" and from the "vicious and brutal slaying of a human being" where there was no evidence that defendant assaulted deceased or otherwise dealt lethal blows after he was felled and where the facts failed to disclose a vicious and brutal killing.

DIRECT appeal pursuant to G.S. 7A-27(a) to review defendant's trial before *Friday, J.*, at the two-week September-October 1974 Regular Criminal Session of JACKSON County Superior Court.

The two-week regular criminal session commenced on 30 September 1974 and defendant's case (No. 74CR861) was called for trial on 3 October. Defendant was charged in a bill of indictment, returned at the May, 1974 Session, with the first-degree murder of Everett Manuel Mills on 15 April 1974. Upon arraignment, defendant entered a plea of not guilty. Thereafter, at the trial, both the State and the defendant presented evidence. The jury returned a verdict finding defendant guilty as charged and Judge Friday entered judgment on this verdict imposing the death penalty.

The State's evidence, summarized except where quoted, tended to show the following:

On 15 April 1974 Everett Manuel Mills (hereinafter deceased), his brother, Roy Mills, and his brother-in-law, Robert Shook, were working on Russell Beutell's Christmas tree farm near Balsam Gap. At approximately 4:30 p.m. they stopped work for the day and drove over to Waynesville where Roy Mills purchased two cases of beer. Afterwards, they drove back by way of the Moses Creek Road in Jackson County. At approximately 6:00 p.m. they passed by the Tom Hooper property (hereinafter Hooper place), stopped the 1966 Jeep truck in which they were riding, and backed it into the Hooper driveway. Robert Shook got out, walked over to a nearby woodpile, and began loading wood into the truck. At this time, the Hooper place was under the control of defendant as caretaker.

Roy Mills described the subsequent events as follows:

While Robert Shook was loading wood defendant drove up to the Hooper place. He parked his truck directly in front of the driveway entrance and emerged with a shotgun. Defendant told Robert Shook to "throw the wood down" and added, "God damn you, I'll kill you all." After Shook had dropped the wood, defendant shot deceased, who was standing on the left side of the Jeep truck. This occurred at approximately 6:00 p.m. They said nothing to defendant prior to the firing of the fatal shot.

After the shooting, he and Robert went to the assistance of deceased, who was lying beside the Jeep truck, covered with blood. When they got deceased in the truck, they asked defendant to move his vehicle and went for help.

Robert Shook described these events as follows:

As he was picking up a couple of pieces of wood, defendant drove up, jumped out of his truck, shotgun in hand, and told him to throw the wood to the ground if he did not want his "God damn brains" blown out. As he was dropping the wood, defendant shot deceased, who was standing beside the Jeep truck. Thereafter, defendant reloaded his shotgun and told them to "move" if they all did not want to be killed. Deceased was quickly placed in the truck; defendant was asked to move his vehicle; and they went for help.

As to the prior relationship between defendant and deceased, Roy Mills and Robert Shook testified as follows:

*Roy Mills:* "They were good friends right on up to that minute. We never had any arouble right up until the very hour of 6:00 o'clock, or about 6:00, and none of us had ever had any trouble but good friends right up to the minute."

*Robert Shook:* "As far as I know, they had been good friends all this time and I have been a good friend of Mr. Buchanan. Me and him has been huntin' together."

Fred Holcombe, who was Sheriff of Jackson County on 15 April 1974, testified that later that evening he went to defendant's home. When he arrived, defendant was seated on the front porch. Defendant greeted him as follows: "Come in. I know what you're here for. I shot Manuel Mills." Sheriff Holcombe immediately advised defendant of his constitutional rights. Thereafter, defendant stated that he had seen the Mills' truck pass by his house earlier in the afternoon; that the truck had stopped in front of the Hooper place and had backed into the driveway; that on previous occasions certain personal property, including chopped wood, had been stolen from the Hooper place; that he suspected deceased was responsible for these prior thefts; that he got in his truck and drove up to the Hooper place; that upon his arrival, he picked up his shotgun and got out of his truck; that deceased said "I'll kill you"; and that he shot deceased. Defendant further stated that "[I]f a man tells me he is going to kill me, I'm not going to give him a chance."

While defendant was making the above statements, Sheriff Holcombe asked him: "Did Mr. Mills have any weapon, a knife or gun, or anything?" Defendant replied: "I didn't see any." Sheriff Holcombe also testified that defendant failed to tell him

that deceased had advanced on him or that deceased had his hands in his pocket at any time prior to the discharge of the fatal shot.

Sheriff Holcombe added that after defendant had made all of the above statements, he asked him to go over to the Mills' residence. He refused to go with defendant. Defendant then stated: "I watched this place, yesterday . . . I brought my shotgun and got in this grass field over there to see if anybody come down to this house to steal anything." The grass field defendant referred to was directly across from the Hooper place on the other side of Moses Creek and Moses Creek Road.

Sheriff Holcombe further testified that he had examined the clothing deceased was wearing at the time of the killing and had found a closed pocket knife in the righthand pants pocket.

At the conclusion of the State's case, defendant moved for a directed verdict on the charge of first-degree murder. This motion was denied and thereafter defendant offered evidence, summarized except where quoted, that tended to show the following:

Tommy Hooper testified that he and his brother owned the Hooper place and that they had appointed defendant caretaker of this property. Hooper further stated that he had never given anyone permission to remove wood, furniture, or other items from the property. However, he stated that the Hooper place had been leased to Robert Shook "up to about a month or six weeks prior to" 15 April 1974.

Defendant then took the stand and testified as follows:

He was a cousin of the Hoopers and had been in charge of the Hooper place for approximately eighteen years. Prior to the date of the killing, he had seen deceasesd and his brother "hauling wood" away from the property, but he had not previously confronted them about this.

On the afternoon of 15 April 1974 he saw deceased, his brother and his brother-in-law pass by his house in their Jeep truck. The truck thereafter proceeded up Moses Creek Road to the Hooper place and was subsequently backed into the driveway. After observing these events, he got in his truck and drove up to the Hooper place, a distance of approximately one hundred yards. He stopped in front of the driveway entrance

and saw deceased and Roy Mills seated inside of their Jeep truck drinking beer. Robert Shook was approximately forty feet from the Jeep truck, near the woodpile.

He got out of his truck and stated: "Boys, I don't want no trouble. I've done everything I could do to keep you 'uns out of here." Deceased responded: "Oh, Claude, this is the first time we've been up here stealing any wood." He then told deceased: "Wait a minute, Manuel, you was out here Saturday—I don't know if you was here Friday or not, but the door was kicked open Friday. I know you was here Saturday; I know you was here Sunday, and here it is Monday, and it's getting a everday business."

Following the above verbal exchange, deceased got out of the Jeep truck and said: "God damn you, I'll kill you." Thereupon, deceased proceeded to advance on him with "his right hand in his right pocket." He knew that deceased usually carried a pistol in this pocket. He repeatedly warned deceased not to come any closer. When deceased failed to heed a final warning, he "wheeled and grabbed" his shotgun, which was in the front seat of his truck, and "shot from [his ] hip." Thereafter, deceased, under his own power, got back in the Jeep truck. He [defendant] moved his own vehicle, which was blocking the drive, and the others drove off.

After a short time, he drove back down to his house and immediately called the sheriff's department. When Sheriff Holcombe subsequently arrived, he told him what had happened, i.e., that he had shot deceased in self-defense.

Defendant further testified that his shotgun was always loaded, 365 days a year, and that he was carrying it in his truck on the day of the killing because he had told a neighbor that he would shoot a crow for him. He denied ever telling Sheriff Holcombe that he had taken his shotgun and hidden himself in a field near the Hooper place.

As to his prior relationship with deceased, defendant testified as follows:

"I was acquainted with Mr. Manuel Mills and we were good friends. . . . I was acquainted with all of them and good friends with all of them. I and the Mills family have been good friends all our lives, visit back and forth once in a while, and Mr. Manuel Mills, especially, has been in my home from

time to time. . . . Not two weeks before [the day of the killing] he run out of gas right there in front of my house, and he asked me if I would let him have some gas, and I told him yes sir, all you have to do is siphon it out of my truck. Up until the moment this gun was fired, I had no ill will or bad feelings toward Mr. Manuel Mills. . . . "

*Attorney General Rufus L. Edmisten by Assistant Attorneys General William B. Ray and William W. Melvin for the State.*

*W. R. Francis for defendant appellant.*

COPELAND, Justice.

Defendant brings forward three assignments of error based on a total of three exceptions duly noted in the record.

Defendant first assigns error (Nos. 1 & 2) to the action of the trial court in denying his motion for "a directed verdict of not guilty" at the close of the State's evidence and in denying his motion for "nonsuit" at the close of all the evidence. The question presented by these assignments is whether the evidence was sufficient to warrant its submission to the jury and to support a verdict of guilty of the offense charged in the first-degree murder indictment. *See, e.g., State v. McCall,* 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974). Both of these motions have the same legal effect as a motion for judgment as in case of nonsuit. *See, e.g., State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Britt, supra; State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305 (1967).

**[1]** When an indictment charges a defendant with first-degree murder, a motion for judgment as in case of nonsuit requires the trial court to determine whether the evidence, when taken in the light most favorable to the State, is sufficient to raise a legitimate inference, and to permit the jury to find that a defendant, after *premeditation* and *deliberation,* formed a fixed purpose to kill and thereafter accomplished this purpose. *State v. Britt, supra,* at 262, 204 S.E. 2d at 822. *Accord, State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Cooper, supra; State v. Sparks, supra; State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Johnson,* 278 N.C. 252, 179 S.E. 2d 429 (1971); *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970).

All the evidence in the instant case discloses that defendant intentionally shot the deceased with a .12 gauge shotgun and that his death was proximately caused by a shotgun wound to the chest and the chest cavity. Hence, the only remaining question is whether the evidence was sufficient to permit a jury to find that defendant acted after due premeditation and deliberation.

G.S. 14-17, as presently written, provides in pertinent part as follows:

> "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* . . . shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison." (Emphasis supplied.)

In *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970), an opinion by Justice Sharp (now Chief Justice), this Court documented the history of G.S. 14-17 as follows:

> "Prior to 1893 there were no degrees of murder in North Carolina. Any unlawful killing of a human being with malice aforethought, express or implied, was murder and punishable by death. *State v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649; *State v. Dalton,* 178 N.C. 779, 101 S.E. 548; *State v. Rhyne,* 124 N.C. 847, 33 S.E. 128; *State v. Boon,* 1 N.C. 191. '*Malice aforethought* was a term used in defining murder prior to the time of the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or *preconceived* disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. *S. v. Crawford,* 13 N.C. 425. As used in C.S., 4200, now G.S. 14-17, the term *premeditation* and *deliberation* is more comprehensive and embraces all that is meant by *aforethought,* and more.' *State v. Hightower,* 226 N.C. 62, 64, 36 S.E. 2d 649, 650 (emphasis added); *accord, State v. Smith,* 221 N.C. 278, 20 S.E. 2d 313; *State v. Pike,* 49 N.H. 399; 6 Am. Rep. 533." *Id.* at 657, 174 S.E. 2d at 803-04.

The Act of 1893 was based on what has frequently been referred to as the "Pennsylvania pattern." *See, e.g.*, R. Perkins, Criminal Law 89 (2d ed. 1969) (hereinafter Perkins); Keedy, History of the Pennsylvania Statute Creating Degrees of Murder, 97 U. Pa. L. Rev. 759 (1949). "The Pennsylvania statute [was] substantially the same as ours, and by that statute the first classification of criminal homicides into two degrees of murder and manslaughter was made in this country." *State v. Fuller*, 114 N.C. 885, 899, 19 S.E. 797, 801 (1894). The Pennsylvania Act was first adopted in 1794 and at the time of the ratification of Chapter 85, 1893 Public Laws, every other State had previously divided the common law crime of murder into two degrees. *State v. Fuller, supra*, at 902, 19 S.E. at 802. *See also* Perkins, *supra*, at 88. *See generally* W. LaFave & A. Scott, Criminal Law 562-68 (West 1972) (hereinafter cited as LaFave & Scott).

The Act of 1893 was first construed by this Court in *State v. Fuller, supra.* However, the term "premeditation and deliberation" was not construed until *State v. Thomas*, 118 N.C. 1113, 24 S.E. 431 (1896), the fourth decision of this Court interpreting the 1893 Act. In that case, this Court made the following pertinent observations:

> " . . . In *S. v. Norwood*, 115 N.C., 789 . . . it was settled that if the prisoner once formed 'the fixed design to take life' it was immaterial how soon after deliberately determining to do so the purpose was carried into execution. . . .
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> " . . . But this Court has never as yet ventured to give a more specific definition of the mental process which the Legislature intended to describe by the use of these words [premeditation and deliberation] than the general one given in *Fuller's case. It is inaccurate to say that, whenever there is an intent to kill, the homicide belongs to the class of murders in the first degree;* . . .
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> ". . . The word which marks distinctly the two degrees is 'premeditated' . . . . *'To say that murder was of the first degree, simply because it was intended at the moment . . . would be to construe the words "deliberate and premeditated" out of the statute.'* . . . 'An intent to kill may exist in other degrees of unjustifiable homicide, but in no other

degree is that intent formed into a *fixed purpose* by deliberation and premeditation.' [Citation omitted.] *This intent is defined by others as a steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences.* [Citations omitted.]

* * * * *

" . . . In order to constitute deliberation and premeditation, something more must appear than the prior existence of actual malice or the presumption of malice which arises from the use of a deadly weapon. *Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt, that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill in furtherance of such purpose or motive.* [Citations omitted.]" (Emphasis supplied.) *See also State v. Rhyne,* 124 N.C. 847, 33 S.E. 128 (1899).

**[2]** In analyzing the Act of 1893 (now G.S. 14-17) it is clear that neither the statute nor the early court decisions interpreting it undertook to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would naturally vary with different individuals and under differing circumstances. Therefore, as this Court has stated on countless occasions, "premeditation means thought beforehand for some length of time, however short." *See, e.g., State v. Britt, supra; State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674 (1972); *State v. Johnson,* 278 N.C. 252, 179 S.E. 2d 429 (1971); *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961); *State v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188 (1950); *State v. Wise,* 225 N.C. 746, 36 S.E. 2d 230 (1946); *State v. Hammonds,* 216 N.C. 67, 3 S.E. 2d 439 (1939); *State v. Lewis,* 209 N.C. 191, 183 S.E. 357 (1936); *State v. Steele,* 190 N.C. 506, 130 S.E. 308 (1925); *State v. Walker,* 173 N.C. 780, 92 S.E. 327 (1917); *State v. Roberson,* 150 N.C. 837, 64 S.E. 182 (1909); *State v. Daniel,* 139 N.C. 549, 51 S.E. 858 (1905); *State v. Hunt,* 134 N.C. 684, 47 S.E. 49 (1904); *State v. Cole,* 132 N.C. 1069, 44 S.E. 391 (1903); *State v. Caldwell,* 129 N.C. 682, 40 S.E. 85 (1901); *State v. Norwood,* 115 N.C. 789, 20 S.E. 712 (1894). However,

since the proscribed intent to kill must be turned over in the mind in order for the mental process of premeditation and deliberation to transpire, it is clear that some period of time must necessarily elapse. The true test is not the duration of time as much as it is the extent of the reflection. *See, e.g., People v. Thomas,* 25 Cal. 2d 880, 156 P. 2d 7 (1945). One commentator has suggested that for the premeditation the killer asks himself the question, "Shall I kill him?". The intent to kill aspect of the crime is found in the answer, "Yes, I shall." The deliberation part of the crime requires a thought like, "Wait, what about the consequences? Well, I'll do it anyway." LaFave & Scott, *supra,* at 563 fn. 5. We believe this analogy is in accord with the sound interpretation placed upon the Act of 1893 (now G.S. 14-17) in *State v. Thomas, supra.*

**[3]** Applying these rules to the case *sub judice,* we must determine if there was sufficient evidence of premeditation and deliberation to carry the first-degree murder charge to the jury. "In passing upon the sufficiency of the State's evidence to carry the case to the jury, the trial court in the present case was not required to consider defendant's testimony concerning self-defense." *State v. Everette,* 284 N.C. 81, 85, 199 S.E. 2d 462, 466 (1973). Therefore, viewing the State's evidence in the light most favorable to the State, as we are bound to do, we hold it was sufficient to permit the jury to find that defendant acted after sufficient premeditation and deliberation. Specifically, the State introduced evidence that tended to show defendant knew the deceased had stolen wood on previous occasions; that on the day prior to the killing, defendant had secreted himself, with his shotgun, in a nearby field hoping to catch deceased stealing more wood; that on the day of the killing he saw deceased's truck pass by his home and back in the driveway of the Hooper place; that he thereafter got in his own truck and drove up to the Hooper place; that he parked his truck in front of the Hooper place in a manner so that the driveway was blocked; that he thereafter got out of his truck with a shotgun in his hands; that he told Robert Shook that he would blow his God damn brains out if he did not drop the wood he was carrying; that after Shook had thrown the wood down, he said: "God damn you, I'll kill you all"; that he then shot deceased, who was standing beside his Jeep truck; that he then reloaded his shotgun and told everyone to "move"; that he subsequently told Sheriff Holcombe that he did not see a weapon or anything else in the possession of deceased at or before the

fatal shot; that he failed to tell Sheriff Holcombe deceased had advanced on him at any time during the incident; and that he told Sheriff Holcombe: "I didn't look for any weapon, if a man tells me he is going to kill me, I'm not going to give him a chance." We believe that the jury could properly determine from this evidence that the killing resulted from suffiicent premeditation and deliberation to constitute first-degree murder. *See, e.g., State v. Sparks, supra; State v. Britt, supra, State v. Van Landingham, supra.* These first two assignments are therefore overruled.

**[4]** In his final assignment (No. 3) defendant contends that the trial court erred in signing the judgment committing him to death by asphyxiation. Defendant makes no specific contention with respect to the validity of the death penalty. However, all possible contentions that defendant could present under this assignment have been considered and rejected by this Court in numerous recent decisions. *See, e.g., State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975): *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). Furthermore, we note that the killing occurred on 15 April 1974, subsequent to the effective date of Chapter 1201, 1973 Session Laws. Hence, the punishment was that prescribed by the Legislature. *See State v. Williams, supra.*

If this was not a capital case, then defendant's conviction would stand since we can find no error in the assignments brought forward. However, since this is a capital case, and in accord with the well-settled practice of this Court, we have elected to consider *ex mero motu* certain portions of the trial court's charge. In particular, we are concerned with the following quoted portions:

> "Now, among the circumstances which you may consider in determining whether a killing was with premeditation and deliberation are, as the Court previously instructed you: One, lack of provocation on the part of the deceased;

Secondly, the conduct of the defendant, before and after the killing; Thirdly, the use of grossly excessive force; Four, any threats or declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased, and Five, *the dealing of lethal blows after the deceased has been felled and rendered helpless.*

"Now, the Court instructs you that *premeditation and deliberation may be inferred from a vicious and brutal slaying of a human being. . . .*"

After receiving the court's instructions the jury took a dinner recess, at the conclusion of which they retired to the jury room. Thereafter, at approximately 8:00 p.m., the entire jury panel returned to the courtroom, and with the defendant and his attorneys present in open court, the following proceedings took place:

"COURT: Mr. Foreman, the Court understands that the jury had a question—is that correct?

"JURY FOREMAN (GUY JONES): Yes, sir.

"COURT: What would that be, sir? If you would stand?

"JURY FOREMAN: Sir, the jury was in question on the five issues that were supposed to be proved without a reasonable doubt.

"COURT: The five elements of first degree murder?

"FOREMAN: Yes, sir.

"COURT: Do you want those reviewed, now?

"FOREMAN: Yes, sir.

"COURT: And just that, is that correct?

"FOREMAN: Yes, sir."

Following the above exchange, the court repeated in full its prior instructions pertaining to the elements the State must prove beyond a reasonable doubt in order to sustain a conviction of first-degree murder. Included in these subsequent instructions was the portion of the charge previously set out in full.

**[5]** Of course, ordinarily, it is not possible to prove premeditation and deliberation by direct evidence. Therefore these elements of first-degree murder must be established by proof of

circumstances from which they may be inferred. *See, e.g., State v. DeGregory,* 285 N.C. 122, 203, S.E. 2d 794 (1974); *State v. Britt, supra; State v. Van Landingham, supra, State v. Fountain, supra, State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484 (1969). Among the circumstances to be considered by the jury in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force; or the dealing of lethal blows after the deceased has been felled. *See, e.g., State v. Walters, Id.* at 623-24, 170 S.E. 2d at 490; and the cases previously cited above.

However, we have held that "[a] trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. When such instructions are prejudicial to the accused he would be entitled to a new trial. [Citations omitted.]" *State v. Lampkins,* 283 N.C. 520, 523-24, 196 S.E. 2d 697, 699 (1973). *Accord, State v. McClain,* 282 N.C. 396, 193 S.E. 2d 113 (1972); *State v. Jennings,* 276 N.C. 157, 161, 171 S.E. 2d 447, 449 (1970); *State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452 (1958); *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921 (1952); *State v. Wilson,* 104 N.C. 868, 10 S.E. 315 (1889). This rule is consistent with the following statement by this Court in *State v. Gaskins,* 252 N.C. 46, 48-49, 112 S.E. 2d 745, 747 (1960):

> "'. . . [E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury.' *State v. Vinson,* 63 N.C. 335, 338. '. . . [S]uch facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters . . .' *Pettiford v. Mayo,* 117 N.C. 27, 28, 23 S.E. 252, 253."

In *State v. Cameron,* 284 N.C. 165, 171, 200 S.E. 2d 186, 191 (1973), this Court, in an opinion by Justice Branch, stated the rule as follows:

> "G.S. 1-180 requires the trial judge to clarify and explain the law arising on the evidence and a trial judge should not give instructions to the jury which are not sup-

ported by the evidence produced at the trial. *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447; *State v. Wilson*, 104 N.C. 868, 10 S.E. 315. *The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.*" [Citations omitted.]" (Emphasis supplied.)

**[6]** In the instant case the court instructed the jury that they could "infer" premeditation and deliberation from "the dealing of lethal blows after the deceased has been felled and rendered helpless" and from the "vicious and brutal slaying of a human being." This instruction was not given once, but twice, the last being some forty minutes prior to the time the jury rendered a verdict of guilty of first-degree murder. The record is totally devoid of any evidence or reasonable inference that defendant assaulted deceased or otherwise "dealt lethal blows" upon his person after he had been "felled and rendered helpless." In fact, all the evidence shows that defendant, subsequent to the firing of the fatal shot, moved his truck, which was blocking the drive, so that the deceased and his companions could leave. Furthermore, the facts of this case fail to disclose a "vicious and brutal" killing in the sense those terms are usually employed. Considering all the evidence, there is no doubt but that the issues of "premeditation and deliberation" constituted the primary focus of the jury's inquiry. Therefore, we hold that the trial court's charge that the jury could infer these elements from matters not supported by the evidence constituted prejudicial error entitling defendant to a new trial.

Accordingly, for the reasons above stated, this case is remanded to the Jackson County Superior Court for a

New trial.

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BARBARA H. HINSON v. WILLIAM W. JEFFERSON AND WIFE, ANNE C. JEFFERSON, AND MAE W. JEFFERSON

No. 75

(Filed 6 June 1975)

**1. Appeal and Error § 26— exception to judgment — review**

An exception to a judgment rendered by the trial court, without an exception to the evidence or to the court's findings of fact, presents

for appellate review the sole question of whether the facts found support the judgment.

2. **Rules of Civil Procedure § 52— nonjury trial — separate statement of conclusions of law — bare legal conclusion**

Statement in the judgment that "plaintiff is not entitled to the relief prayed for by her" without a statement of the grounds for such conclusion does not comply with the requirement of G.S. 1A-1, Rule 52(a)(1) that the court state separately its conclusions of law.

3. **Cancellation and Rescission of Instruments § 4— lot sold for residential purposes — inability to support on-site sewage disposal system — mutual mistake**

A sale of realty was not subject to rescission on the ground of mutual mistake of fact where the grantors conveyed land subject to a restrictive covenant limiting its use to a single-family dwelling, the land could not be used for such purpose because it would not support a septic tank or on-site sewage disposal system, and such fact was unknown to the grantors and grantee at the time of the conveyance.

4. **Sales § 6; Vendor and Purchaser § 6— sale of land — restrictive covenant as to use — land not subject to such use — implied warranty**

Where a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling and, due to subsequent disclosures, both unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee or by any subsequent grantees through mesne conveyances for the specific purpose to which its use is limited by the restrictive covenants, the grantor breaches an implied warranty arising out of said restrictive covenants.

5. **Sales § 6; Vendor and Purchaser § 6— sale of land — single-family dwelling restrictive covenant — inability to support on-site sewage disposal — breach of implied warranty**

Where grantors conveyed land subject to a restrictive covenant limiting its use to a single-family dwelling, the land could not be used for such purpose because it would not support a septic tank or on-site sewage disposal system, and reasonable inspection by the grantee before or at the time of conveyance would not have disclosed that the property could not support a septic tank or on-site sewage disposal system, the grantors breached an implied warranty arising out of the restrictive covenant and the grantee, by giving timely notice of the defect once it was discovered, is entitled to full restitution of the purchase price upon her execution and delivery of a deed reconveying the land to the original grantors.

Chief Justice SHARP and Justices LAKE and MOORE concur in the result.

APPEAL as of right by defendants pursuant to G.S. 7A-30(2) to review decision of Court of Appeals reported in 24 N.C. App. 231, 210 S.E. 2d 498 (1974) (opinion by Britt, J., Vaughn, J.,

concurring, Campbell, J., dissenting), which vacated the judgment entered by *Phillips, D.J.*, at the 11 July 1974 Session of PITT County District Court and remanded the cause for entry of judgment consistent with its opinion. This action was previously before the Court of Appeals on an appeal by plaintiff. *See* 20 N.C. App. 204, 200 S.E. 2d 812 (1973). On remand from this first appeal the cause was submitted to District Judge Phillips on the following stipulations contained in a pretrial order filed with the court on 3 April 1974:

"(a) This is an action by the plaintiff against the defendants for the recovery of the purchase price of $3,500 paid by the plaintiff to the defendants for a parcel or lot of land described in the complaint and for the cancellation of that certain deed whereby the defendants conveyed said lot or parcel of land to the plaintiff. The unverified answer of the defendants was duly filed.

(b) That by deed dated October 19, 1971, the defendants conveyed to the plaintiff a certain lot or parcel of land lying in Farmville Township, Pitt County, North Carolina, as particularly described in Deed Book J-40, page 365, of the Pitt County Public Registry and as described in the complaint of the plaintiff, said parcel of land fronting 200 feet on State Road #1200 by 300 feet deep.

(c) That the conveyance by the defendants to the plaintiff contained the following restrictive covenants which run with the lot or parcel of land conveyed as follows:

1. The above described lot or parcel of land shall be used for residential purposes only and no residence constructed thereon shall cost less than $25,000.00 based on cost prevailing in the County of Pitt, State of North Carolina, as of October 1, 1971; further, no residence shall be built upon the above described lot or parcel of land unless and until the plans and specifications therefor are approved in writing by William W. Jefferson and wife, Anne C. Jefferson, or the survivor, provided, however, that said plans and specifications need be approved only for the first residence built upon the above described lot or parcel of land.

2. No trailer, mobile home, basement, tent, shack, garage, barn or other outbuilding erected on the above described lot or parcel of land shall at any time be used as a residence, either temporarily or permanently.

3. No building shall be located on the above described lot or parcel of land nearer than 50 feet to the front lot line nor nearer than 20 feet from any side lot line.

4. No noxious or offensive trade or activity shall be carried on upon the above described lot or parcel of land nor shall anything be done thereon which may be or become an annoyance or nuisance. No signs or billbord shall be erected or maintained on the premises. No trade materials or inventories may be stored upon the premises and no trucks or tractors may be stored thereon. Further, said lot or parcel of land shall at all times be neat and clean in appearance and not allowed to be and become unsightly.

5. The lot or parcel of land hereinabove described shall not be subdivided into smaller building lots or parcels of land.

(d) That prior to and at the time of the conveyance by the defendants to the plaintiff of the subject parcel or lot of land, the defendants and the plaintiff contemplated that the plaintiff would construct a home or residence on said lot or parcel of land and that the plaintiff actually prepared to build a home or residence on said lot or parcel of land of the type the plaintiff discussed with the defendants prior to the conveyance of the subject lot and according to the plans approved by the defendants subsequent to the purchase of the subject lot.

(e) That the lot or parcel of land conveyed by the defendants to the plaintiff is located about one mile west of Joyner's Crossroads on State Road #1200, a rural community, to which a municipal sewage disposal system is not now available. That any sewage disposal system for a residence constructed on the subject lot would require the use of a septic tank or an on-site sewage disposal system.

(f) That when plaintiff was ready to commence construction of a proposed residence on the subject lot and before construction commenced, the Environmental Health Division of the Pitt County Health Department on December 27, 1972, pursuant to an examination of said lot performed by Mr. W. C. Haislip under the supervision of its Chief of Sanitation, Mr. W. M. Pate, in March 1972, certified that said lot would not support a septic tank or on-site sewage disposal system for that it was noted that the area has a drainage problem and is subject to flooding and would not support a septic tank or on-site sewage disposal system which would comply with the regulations govern-

ing sewage disposal systems in Pitt County, adopted by the Pitt County Board of Health on March 1, 1972, with the regulations adopted by the Pitt County Board of Health on the 1st day of February, 1953, as amended, the latter being in effect on October 19, 1971, and the ordinances of the County of Pitt. That on the 16th day of February, 1972, Charles R. Vandiford, an employee of the United States Department of Agriculture, Soil Conservation Service, Greenville, Pitt County, North Carolina, under the supervision of District Conservationist, Roy R. Beck, conducted an evaluation of the subject lot, the result of which disclosed that the subject lot is only 2.6 feet above the water level of Black Swamp, and subject to overflow, and has a very severe drainage problem which said condition can be corrected by extensive drainage procedures including as a necessary part thereof channel improvements to Black Swamp and Little Contentnea Creek at a prospective cost of several hundred thousand dollars. That these facts so determined and the conditions of the subject lot were true and the same on October 19, 1971, the date of the sale and transfer of the subject lot to the plaintiff by the defendants.

(g) That due to the determination of the Environmental Health Division of the Pitt County Health Department the subject lot would not support a septic tank or on-site sewage disposal system in its present condition, a permit to install a septic tank or on-site sewage disposal system was denied pursuant to the regulations governing sewage disposal in Pitt County adopted by the Pitt County Board of Health, March 1, 1972, the ordinances of Pitt County, and to the regulations of the Pitt County Board of Health, adopted February 1, 1953, as amended, if applied.

(h) That by reason of the denial by the Environmental Division of the Pitt County Health Department to the plaintiff of a permit to construct a septic tank or on-site sewage disposal system on said lot, the plaintiff did not construct a residence on said lot and since the correction of the condition inhibiting the construction of a septic tank and on-site sewage disposal system on the subject lot could not be achieved except through an expenditure of funds of several hundred thousand dollars, the plaintiff demanded the refund of the purchase price paid by the plaintiff to the defendants for said lot in exchange for a reconveyance by the plaintiff to the defendants of said lot.

(i) Defendants declined the plaintiff's offer and refused plaintiff's demand.

(j) That the purchase price of said lot paid by the plaintiff to the defendants was $3,500.00.

(k) That prior to and at the time of the conveyance of said lot by the defendants to the plaintiff, neither the defendants nor the plaintiff knew that said lot would not support a septic tank or on-site sewage disposal system and did not know such fact until the evaluation of said lot was made by the United States Soil Conservation Service of the Department of Agriculture and the Environmental Health Division of the Pitt County Health Department determined such to be true.

(l) That there was no allegation by the plaintiff in her complaint of fraud or misrepresentation on the part of the defendants and the plaintiff does not contend that the defendants were guilty of any fraud or misrepresentation with respect to the condition of the aforesaid lot prior to or at the time of the conveyance of said lot by the defendants to the plaintiff, but on the contrary the defendants in conveying said lot to the plaintiff were totally unaware of any drainage or other soil condition respecting said lot which would or might prohibit the use of a septic tank or other on-site sewage system thereon.

(m) That the Environmental Health Division of the Pitt County Health Department determined, "That this lot is not suitable for residential building purposes and does not meet County Health requirements."

(n) That the deed of conveyance contained no covenant of warranty that the lot or parcel of land conveyed was suitable for the on-site construction of a residence.

(o) That plaintiff through counsel abandons her claim for special damages of $453.00.

5. It is stipulated that this cause may be heard out of term by District Judge Herbert O. Phillips and that the date of the entry of judgment shall be that date on which the judgment is actually signed."

In its judgment, after adopting verbatim the preceding stipulation of facts as its findings of fact, the District Court stated:

"And based upon said stipulations entered into between the parties hereto, the Court is of the opinion and concludes as

a matter of law that plaintiff is not entitled to the relief prayed for by her, or any part thereof;

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

"*First:* That this action be dismissed and plaintiff have and recover nothing of the defendants, either individually or jointly.

"*Second:* That the costs of this action be taxed against the plaintiff."

*Gaylord and Singleton, by L. W. Gaylord, Jr., for defendant appellants.*

*Everett & Cheatham, by C. W. Everett, Sr., for plaintiff appellee.*

COPELAND, Justice.

**[1]** Plaintiff excepted to the signing and entry of the foregoing judgment and this constitutes her only assignment of error on appeal. An exception to a judgment rendered by the trial court, without an exception to the evidence or to the court's findings of fact, presents for appellate review the sole question of whether the facts found support the judgment. *See, e.g., St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885 (1954); *Best v. Garris,* 211 N.C. 305, 190 S.E. 221 (1937). *See also Parker v. Insurance Co.,* 259 N.C. 115, 130 S.E. 2d 36 (1963); *Putnam v. Triangle Publications, Inc.,* 245 N.C. 432, 96 S.E. 2d 445 (1957).

G.S. 1A-1, Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and *state separately its conclusions of law thereon* and direct the entry of the appropriate judgment." (Emphasis supplied.) This rule has been interpreted by this Court to require the trial judge to do the following three things in writing: "(1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly." *Coggins v. City of Asheville,* 278 N.C. 428, 434, 180 S.E. 2d 149, 153 (1971). This was also the rule under former G.S. 1-185. *See, e.g., Morehead v. Harris,* 255 N.C. 130, 120 S.E. 2d 425 (1961); *City of Goldsboro v. Atlantic Coast Line Ry. Co.,* 246 N.C. 101, 97 S.E. 2d 486 (1957).

**[2]** In the instant case the court found the facts to be as stipulated and thereafter directed entry of judgment in favor of defendants. However, the court failed to state separately its conclusions of law. The mere assertion that "plaintiff is not entitled to the relief prayed for by her," without stating the grounds for such a bare legal conclusion, does not comply with the requirements of Rule 52(a)(1). The purpose for requiring the conclusions of law to be stated separately is to enable appellate courts to determine what law the trial court applied in directing the entry of judgment in favor of one of the parties. *See, e.g., Morehead v. Harris, supra; Jamison v. City of Charlotte,* 239 N.C. 423, 79 S.E. 2d 797 (1954).

The problems engendered by non-compliance with Rule 52(a)(1) are readily apparent in the instant case. We do not know what law or legal theory the trial court applied to the facts in denying plaintiff the relief prayed for. We can only assume that the trial court found none of plaintiff's legal theories to be persuasive. Plaintiff states in her sole assignment of error that she relies on the following legal points in support of her exception to the judgment:

"1. That the stipulated facts show that there was a mutual mistake of an existing material fact, common to both parties, and by reason thereof each has done what neither intended, coupled with a failure of consideration.

"2. That in a conveyance of land by deed containing restrictions therein which restrict the use of the property for a certain purpose, the grantor thereby warrants that the property so conveyed and restricted can be used for the specific purpose to which its use is restricted by the deed of conveyance."

In general, we are bound by the findings of fact unless such facts are not supported by any competent evidence. *See, e.g., Blackwell v. Butts,* 278 N.C. 615, 180 S.E. 2d 835 (1971); *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968). Here the facts are conclusive since no exception was taken by either party to the court's findings. On the other hand, we are not precluded from reviewing the trial court's view of the applicable law arising on the facts. *See generally* 1 McIntosh N. C. Practice and Procedure §§ 1372-74 (1956) (Phillips' 1970 Supp.); 5A Moore's Federal Practice § 52.03(2) (1974); Wright & Miller, Federal Practice and Procedure: Civil § 2588 (1971). Hence, in the interest of justice, we deem it appropriate to pro-

ceed to determine the proper legal conclusions to be drawn from the trial court's findings.

Based on these uncontroverted facts, the Court of Appeals held that plaintiff was entitled to rescind the contract on the grounds of "mutual mistake of material fact" coupled with a "total failure of consideration." 24 N.C. App. at 238-39, 210 S.E. 2d at 502-03. Assuming, *arguendo,* that the Court of Appeals was correct, and that this is a true mistake case, then it is one that must necessarily involve a mistaken *assumption* of the parties in the formation of the contract of purchase. In these mistaken assumption cases, unlike other kinds of mistake cases, the parties communicate their desires to each other perfectly; they intend to complete a sale, or a contract of sale, and their objective acts are in accord with their intent. Difficulties subsequently arise because at least one of the parties has, either consciously or unconsciously, mistaken beliefs concerning facts that make the sale appear more attractive to him than it actually is. For many cases *see, e.g.,* J. Wade, Cases on Restitution (1966); J. Dawson & J. Palmer, Cases on Restitution (1958). *See generally* 3 A. Corbin, Contracts §§ 579-to-621 (2d ed. 1960); Restatement of Contracts § 502 (1962); Restatement of Restitution (1937); 6 S. Williston, Contracts (rev. ed. 1937); Annot., Vendor and Purchaser: Mutual Mistake as to Physical Condition of Realty as Ground for Rescission, 50 A.L.R. 3d 1188 (1973); Atiyah & Bennion, Mistake in the Construction of Contracts, 24 Modern L. Rev. 421 (1961); Foulke, Mistake in the Formation and Performance of a Contract, 11 Colum. L. Rev. 197 (1911).

In attempting to determine whether the aggrieved party is entitled to some kind of relief in these mistaken assumption cases, courts and commentators have suggested a number of factors as relevant. *E.g.,* was the mistake bilateral or unilateral; was it palpable or impalpable; was one of the parties unjustly enriched; was the other party unjustly impoverished; was the risk assumed by one of the parties (i.e., subjective ignorance); was the mistake fundamental or collateral; was the mistake related to present facts or to future expectations; etc. *See* Rabin, A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions, 45 Tex. L. Rev. 1273 (1967) (hereinafter cited as Rabin). *See also* D. Dobbs, Remedies 716-84 (West 1973).

Our research has failed to disclose a prior North Carolina case applying the doctrine of mutual mistake pertaining to a physical condition of real property as a ground for rescission. *But see MacKay v. McIntosh,* 270 N.C. 69, 153 S.E. 2d 800 (1967). However, we have found a few cases from other jurisdictions.

In *Blythe v. Coney,* 228 Ark. 824, 310 S.W. 2d 485 (1958), the court allowed rescission where the vendor and purchaser of a residence were mistaken as to the adequacy of water pressure. The court declared that a contract may be rescinded for a mutual mistake regarding a material fact and that the mistaken assumption of the parties could be characterized as such a mistake in view of the evidence that the water meter in the home was unconnected at the time it was shown to the purchasers so that neither party was aware of the water shortage until after the sale.

Likewise, in *Davey v. Brownson,* 3 Wash. App. 820, 478 P. 2d 258 (1970), *cert. denied,* 78 Wash. 2d 997 (1971), the court relied on the doctrine of mutual mistake of a material fact in rescinding the sale of, inter alia, a 26-unit motel that, unknown to either party at the time of signing the contract, was infested with termites, a condition that could only be corrected by substantial structural repair. The court, quoting from *Lindeberg v. Murray,* 117 Wash. 483, 495, 201 P. 759, 763 (1921), stated: "We think it is elementary that, where there is a clear *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining, the contract may be avoided, and equity will decree a rescission. We take it that the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake. . . ." *Id.* at 824, 478 P. 2d at 260.

One court has held that there were sufficient grounds for rescission of a sale of realty where both the vendor and the vendee were mistaken as to the suitability of the soil or the terrain for agricultural purposes. *See, e.g., Binkholder v. Carpenter,* 260 Iowa 1297, 152 N.W. 2d 593 (1967); *McDonald v. Benge,* 138 Iowa 591, 116 N.W. 602 (1908); *Smith v. Bricker,* 86 Iowa 285, 53 N.W. 250 (1892); *Hood v. Smith,* 79 Iowa 621, 44 N.W. 903 (1890). Suffice it to say, all four decisions appear to be contra to the traditional doctrine of *caveat emptor.*

The closest mistaken assumption case we have found to our fact situation is *A & M Land Development Co. v. Miller,* 354

Mich. 681, 94 N.W. 2d 197 (1959). In that case, the court held that the trial judge was correct in refusing to rescind the sale of 42 building lots slated for subdivision and development, because of mutual mistake regarding the poor absorptive qualities of the soil that resulted in a *tentative* refusal of septic tank permits to the subdivider. The court concluded that, assuming there was a mutual mistake, to grant rescission would be improper since the purchaser received the property for which he contracted, notwithstanding that it was less attractive and less valuable to him than he had anticipated.

There are, however, several important distinguishing factors between the *Miller* case and our case. First, the purchaser in *Miller* was a developer-speculator; in our case the purchaser is a consumer-widow. Second, the property in *Miller* was not rendered valueless for its intended use, but only rendered less valuable because it could not be developed as densely as originally anticipated; in our case the property was rendered totally valueless for the intended use.

**[3]** In our view, the difficulty with the above listed factors and with the decisions we have examined is that in any given case several factors are likely to be present, and each may point toward a different result. For example, in *A & M Land Development Co. v. Miller, supra,* the mistake appears to have been mutual and it also appears to have been induced by misrepresentations of the vendor (i.e., vendor furnished reports of privately engaged engineers and local public sanitation officials indicating that the character of the soil was suitable for the use of individual septic tank systems). Yet, the court held that rescission would be improper since the purchaser received the property for which he had contracted. Perhaps the court felt that since the vendee was a developer-speculator he assumed the risk of soil defects. In short, the relation of one factor to another is not clear. *Compare Vickerson v. Frey,* 100 Cal. App. 2d 621, 224 P. 2d 126 (1950) (mistake regarding effect of building code held no grounds for rescission) *with McKay v. McIntosh, supra* (mistake regarding zoning ordinance held grounds for rescission). *But see* Rabin, *supra.* In any event, because of the uncertainty surrounding the law of mistake we are extremely hesitant to apply this theory to a case involving the completed sale and transfer of real property. Its application to this type of factual situation might well create an unwarranted instability with respect to North Carolina real estate trans-

actions and lead to the filing of many non-meritorious actions. Hence, we expressly reject this theory as a basis for plaintiff's rescission.

Is plaintiff therefore without a remedy? Did plaintiff buy this property "at the end of the halter" (an expression of horse traders)? At this moment, plaintiff has naked legal title to a tract of real estate whose use to her is limited by the restrictive covenants and by the facts as stipulated to what she calls "the dubious pleasure of viewing the same." On the other hand, defendants have $3,500 of plaintiff's money. There can be no question but that the parties to this transaction never contemplated this particular use of the subject property. In fact, the deed, by its very terms, makes it clear that the intended use was for the construction of a single-family residence, strictly limited as to costs and as to design. The stipulation further indicates that both prior to and at the time of the conveyance neither defendants nor plaintiff knew that the property would not support a septic tank or on-site sewage disposal system.

In the face of these uncontroverted facts, defendants rely upon the doctrine of *caveat emptor* as a legal defense to plaintiff's action for rescission.

The common law doctrine of *caveat emptor* historically applied to sales of both real and personal property. Its application to personal property sales, however, has been restricted by the Uniform Commercial Code. *See* G.S. 25-2-314, et. seq. Over the years, as to real property, the number of cases that strictly apply the rule of *caveat emptor* appears to be diminishing, while there is a distinct tendency to depart therefrom, either by way of interpretation, or exception, or by simply refusing to adhere to the rule where it would work injustice. *See, e.g.*, 7 Williston, Contracts §§ 926 and 926A (3d ed. 1963); 77 Am. Jur. 2d Vendor and Purchaser §§ 329-37 (1975); 67 Am. Jur. 2d Sales § 462 (1973); Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, 53 Geo. L.J. 633 (1965) (hereinafter cited as *Haskell*); Seavey, Caveat Emptor as of 1960, 38 Texas L. Rev. 439 (1960). *See generally,* Annot., 50 A.L.R. 3d 1188, *supra;* Annot., Liability of Builder-Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof, 25 A.L.R. 3d 383 (1969).

In recent years the rule of *caveat emptor* has suffered severe inroads in sales of houses to be built or in the course of con-

struction. *See generally* Bearman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule, 14 Vand. L. Rev. 541 (1961); Bixby, Let the Seller Beware: Remedies for the Purchase of a Defective Home, 49 J. Urban Law 533 (1971); Haskell, *supra;* Jaeger, The Warranty of Habitability, 46 Chi-Kent L. Rev. 123 (1969) (Part I); 47 Chi-Kent L. Rev. I (1970) (Part II); Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It, 52 Cornell L. Q. 835 (1967); Comment, Buyer's Remedies in the Sale of Real Property in California, 53 Calif. L. Rev. 1062 (1965); Note, Implied Warranties in the Sale of New Houses, 27 Md. L. Rev. 299 (1967). Today, it appears that a majority of the states imply some form of warranty in the purchase of a new home by a first purchaser from a builder-vendor. *See, e.g.,* Annot., 25 A.L.R. 3d 383, *supra,* for a collection of the cases. *See also* M. Friedman, Contracts and Conveyances of Real Property 30-35 (3d ed. 1975) (hereinafter cited as *Friedman).*

During the course of this litigation, and subsequent to the oral arguments of this case in the Court of Appeals, this Court decided the case of *Hartley v. Ballou,* 286 N.C. 51, 209 S.E. 2d 776 (1974). In that case, this Court, in an opinion by Chief Justice Bobbitt, approved the "relaxation of the rule of *caveat emptor*" in respect of defects of which the purchaser of a recently completed or partially completed dwelling was unaware and could not discover by a reasonable inspection, and substituted therefore, for the first time in this State, an implied warranty defined as follows:

"[I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee." *Id.* at 62, 209 S.E. 2d at 783. At the same time, *Hartley* made it clear that such implied warranty falls short of "an absolute guarantee." "An implied warranty cannot

be held to extend to defects which are visible or should be visible to a reasonable man . . . . " *Id.* at 61, 209 S.E. 2d at 782. As to what constitutes a "reasonable inspection" under diverse factual situations, *see, e.g., Performance Motors, Inc. v. Allen,* 280 N.C. 385, 186 S.E. 2d 161 (1972) ; *Douglas v. W. C. Mallison & Son,* 265 N.C. 362, 144 S.E. 2d 138 (1965) ; *Insurance Co. v. Don Allen Chevrolet Co.,* 253 N.C. 243, 116 S.E. 2d 780 (1960) ; *Driver v. Snow,* 245 N.C. 223, 95 S.E. 2d 519 (1956). *Cf.* G.S. 25-2-316(3) (b).

We believe that many of the mutual mistake cases discussed supra were in fact embryo implied warranty cases. For example, in *Davey v. Brownson, supra,* the purchaser obtained rescission because of termities on the ground of mutual mistake. Although the court denied its decision was based on implied warranty, it is difficult to understand the application of the mutual mistake doctrine. *See also Blythe v. Coney, supra. See generally* Freidman, *supra,* at 30-37. In this context, *Hartley* could easily be classified as a mutual mistake case, i.e., both parties assumed that the basement wall was sufficiently free from structural defects so as to prevent any water leakage. But, in *Hartley* we recognized the implied warranty as a limited exception to the general rule of *caveat emptor;* if we had elected to totally abolish the doctrine, then perhaps application of the mutual mistake theory would have been appropriate. *Hartley* is not an abrogation of the doctrine of *caveat emptor;* on the contrary it is only a well-reasoned exception.

**[4]** Concededly, this is not the *Hartley* fact situation. *Hartley* involved a builder-vendor of new homes and a consumer-vendee. Nonetheless, we believe that *Hartley* provides the legal precedent for deciding this case. The basic and underlying principle of *Hartley* is a recognition that in some situations the rigid common law maxim of *caveat emptor* is inequitable. We believe this is one of those situations. As a result, we hold that where a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee, or by any subsequent grantees through mesne conveyances, for the specific purpose to which its use is limited by the restrictive covenants, the grantor breaches an implied warranty arising out of said restrictive covenants.

Defendant contends that if plaintiff is permitted to rescind, then any contract or conveyance can be set aside under a set of circumstances rendering the land no longer attractive to a purchaser. If we applied the mutual mistake doctrine, then there might be some merit to this argument. But, under the rule we have announced, a purchaser is bound by patent defects or by facts a reasonable investigation would normally disclose. In the instant case, it is clear that a reasonable inspection by the grantee either before or at the time of conveyance would not have disclosed that the property could not support a septic tank or on-site sewage disposal system.

**[5]** Therefore, under the facts of this case, we hold that defendant grantors have breached the implied warranty, as set out above, and that plaintiff, by timely notice of the defect, once it was discovered, is entitled to full restitution of the purchase price; provided that she execute and deliver a deed reconveying the subject lot to defendants. The judgment of the Court of Appeals, as modified herein, is thus affirmed.

Modified and affirmed.

Chief Justice SHARP and Justices LAKE and MOORE concur in the result.

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STATE OF NORTH CAROLINA v. JAMES ERNEST BRUNSON

No. 71

(Filed 6 June 1975)

1. **Criminal Law § 87— leading question**

The trial court in this first degree murder case did not abuse its discretion in allowing the district attorney to ask the State's principal witness a leading question as to whether the witness could have left his house at 7:30 a.m. rather than at 7:15 a.m.

2. **Criminal Law § 62— polygraph test results**

The trial court in a first degree murder case properly excluded testimony as to the results of a polygraph test administered to defendant.

3. **Homicide § 25— answer to jury foreman's question — meaning of cool blood — cold blooded killing**

In this first degree murder prosecution, answer of the trial judge to a question of the jury foreman that a "cold blooded" killing

means about the same thing as killing in cool blood, while disapproved, did not constitute prejudicial error where the court properly instructed the jury on premeditation and deliberation on at least three occasions; furthermore, the trial judge's answer could not have affected the result in view of the viciousness of the assault which resulted in the death of the child in this case.

4. **Homicide § 31— first degree murder — life imprisonment**

The trial court properly imposed a sentence of life imprisonment upon defendant's conviction of first degree murder committed prior to 18 January 1973, the date of the decision in *State v. Waddell*, 282 N.C. 431.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Hobgood, J.*, at the September 9, 1974 Criminal Session of CUMBERLAND Superior Court.

Defendant is charged in a bill of indictment, proper in form, with the first degree murder of Vanessa Dale Lewis on 22 February 1972. He was first tried at the 22 October 1973 Session, Cumberland Superior Court, convicted by a jury and sentenced to life imprisonment. He appealed to this Court and was awarded a new trial for the reasons stated in that opinion. 285 N.C. 295, 204 S.E. 2d 661 (1974).

At his retrial, upon a plea of not guilty, he was again convicted of first degree murder and again sentenced to life imprisonment.

The State's evidence may be summarized as follows:

On 22 February 1972, Mrs. Annie Lorene Houston lived on VanStory Street in Fayetteville. At approximately 8:20 a.m., Vanessa Dale Lewis, age nine, came by Mrs. Houston's house in order to walk to school with Mrs. Houston's grandchildren. Mrs. Houston told Vanessa that her grandchildren had left about five minutes earlier and Vanessa ran to catch them.

Between 8:00 and 9:00 a.m. on the morning of 22 February, Mr. Marvin McGathy was searching for his dog in the vicinity of a burned house on Buxton Boulevard where he had once lived. He entered the house and discovered Vanessa Dale Lewis lying on a table in the kitchen. Vanessa's face was very bloody, and her clothes and books were lying in another part of the kitchen. Vanessa made a slight noise. Mr. McGathy then went to his daughter's house nearby and called the police.

Mr. W. A. Newsom, a detective with the Fayetteville Police Department at the time of the crime, received a call at 9:30

a.m. on 22 February 1972, and he and another officer went with Mr. McGathy to the burned house. When they arrived Vanessa was still alive but unconscious. Vanessa's skull was crushed on both sides and her brain was exposed. Her nose was broken, both eyes were swollen shut, her upper front teeth were missing, and her vaginal area was exposed and bleeding. There were blood spots on a nearby cabinet and stove. Vanessa was wearing only a coat, sweater-type blouse, skirt and slip. The slip and skirt had been pushed up so that Vanessa was exposed from her waist down. Her back and head were on top of the coat. An ambulance arrived at the scene of the crime within five minutes after the arrival of Detective Newsom and took Vanessa to Cape Fear Valley Hospital.

Detective Newsom found some tracks in front of the house which appeared to have been made by the boots worn by Vanessa on the day of the crime. In close proximity to these tracks were others made by tennis shoes which followed Vanessa's tracks across the yard to the house. A bloodhound led officers to some very thick undergrowth about forty yards from the house where a hammer with fresh blood on it was found suspended in a bush. The bloodhound then led officers through the underbrush to the rear of a nearby church.

Dr. Richard Dean Snipes was on duty at about 10:30 a.m. on 22 February when Vanessa was received at Cape Fear Valley Hospital. She never regained consciousness and died about thirty minutes after her arrival from massive injuries to the head resulting from blows with a blunt instrument.

Due to the extremely dirty condition of the scene of the crime no fingerprints were found; neither were any fingerprints found on the hammer.

Mr. Glen Glesne, employee of the State Bureau of Investigation Crime Laboratory, found blood, group "O," on some of the items of clothing worn by Vanessa and on the hammer. Vanessa's blood was group "O."

On 22 February 1972, Robert Carmichael awoke about 7:00 a.m., had breakfast, and went to defendant's home. Defendant's sister, Melissa Brunson, answered the door. Carmichael and defendant discussed how they were going to get money to go to a basketball game, and decided they would get copper wire from deserted houses in the area and sell it as they

had in the past. They returned to Carmichael's house and procured a hammer and screwdriver. Carmichael identified the hammer in evidence as being the hammer they took from his house on 22 February. Defendant was wearing tennis shoes that morning.

They were unsuccessful in their search for copper at the first three houses they examined. They then went toward the old burned house on Buxton Boulevard with hopes of finding copper there. On the way, they encountered Vanessa Dale Lewis walking in the direction of her school. Defendant walked beside her and began talking to her and Carmichael followed about six feet behind. The three of them went to the burned house and Carmichael proceeded to look for copper under the house. When Carmichael looked up, defendant and Vanessa, who were inside the house, were talking and then defendant began hugging her. Defendant helped Vanessa take off some of her clothes and attempted unsuccessfully to have intercourse with her. Vanessa tried for about thirty seconds to push defendant off of her. Defendant then picked up the hammer and hit her in the head. When Vanessa began screaming, defendant hit her hard about the head four or five times. Blood "began going a little bit everywhere," and some splattered on defendant and Carmichael. Defendant and Carmichael then ran out the door and through the woods, and emerged at the back of a church located nearby. Carmichael did not notice what happened to the hammer.

Defendant and Carmichael went to defendant's home nearby and tried to remove the blood. Defendant's brother, Lee Junior Brunson, was there. When he asked them how they got blood on them, defendant answered they had been killing hogs. After changing clothes, defendant and Carmichael went to Spivey Junior High School where they were students. They arrived about fifteen minutes late.

At this point, the State introduced the statement in open court that Robert Carmichael was granted full immunity in this case.

According to Lee Junior Brunson, defendant and Robert Carmichael entered the house about 8:30 to 8:45 a.m. on 22 February 1972 and both had blood on them. He saw them go into the bathroom and heard water running, and noticed that when they returned downstairs they had changed clothes and had the clothes with blood on them in a bag. Defendant and

Carmichael were there ten or fifteen minutes at the most. Lee Junior admitted on direct examination that the first time he was interviewed about this case he told officers his brother *Leon* was the one who entered the house with blood on his clothes on the morning of 22 February. He misled the officers because he did not think they would be able to locate Leon.

Mr. W. A. Newsom was recalled and testified that he first learned there may have been two persons involved in the murder when he interviewed Lee Junior Brunson on 7 May 1973. Detective Newsom then interviewed defendant on 9 May 1973 at Stonewall Jackson Training School, Concord, North Carolina, where defendant was being held on other charges. When Detective Newsom handed defendant the hammer, defendant "appeared to be in a state of shock," but did not say anything. Detective Newsom interviewed Robert Carmichael for the first time on 10 May 1973.

On 11 June 1973, Detective Newsom again interviewed Robert Carmichael and procured a statement which was introduced to corroborate Carmichael's testimony at trial. Later the same evening, Detective Newsom and Agent Ray Davis again interviewed defendant. Immediately after defendant was informed of his rights, he said he knew exactly what happened, but would say no more. The officers placed defendant in an automobile and returned to Fayetteville. At one point during the trip, defendant said, "I did it, but you will have to prove it."

Mr. Ray Davis, Assistant Supervisor of the Southeastern District of the State Bureau of Investigation, corroborated this testimony of Detective Newsom.

Defendant's evidence was, in summary:

Robert Carmichael was recalled, and testified that subsequent to his testimony the preceding day he visited his brother James at the county jail. Thereafter, he informed the District Attorney that Lee Junior Brunson and not defendant killed Vanessa Dale Lewis. However, Carmichael then testified as follows:

> "Q. All right, Robert Carmichael, tell this Court now, before the people of this State, who killed Vanessa Dale Lewis on the 22nd day of February, 1972?
>
> * * *
>
> "A. James Ernest Brunson."

Of the next four witnesses for defendant, two were police officers and two were investigators for the Public Defender's Office, and their testimony served to corroborate Carmichael's testimony that at one point on the preceding day he told the District Attorney that Lee Junior Brunson, and not defendant, killed Vanessa Dale Lewis.

On 22 February 1972, Lee Junior Brunson was supposed to be Miss Catherine Johnson's boyfriend. At about 7:10 a.m. on that day, she went to his house and lay down in his bed. Lee Junior left to get a soda about 8:00 a.m. He came back about 9:00 to 9:15 a.m., took off his tennis shoes and threw his shirt, which was balled up, under the dresser. He then went into the bathroom for five or ten minutes. At no time did she see James Brunson leave or return to the house. She left about 1:30 p.m. She testified that she has had telephone conversations with Lee Junior since he joined the Marines, and on two or three occasions when she asked him if he killed Vanessa Dale Lewis he would hang up.

A statement made by Miss Johnson to the investigator at the Public Defender's Office on 29 November 1973 was introduced in corroboration of her testimony.

On 22 February 1972, Lee Junior Brunson was also supposed to be Miss Jacqueline Armstrong's boyfriend. She received letters from him after he entered the Marines and on the envelopes of two of them he had drawn small "doodles." The jurors were allowed to inspect these envelopes so they could compare the doodles on the envelopes to a "doodle" found drawn on the body of the victim, Vanessa Dale Lewis.

Defendant next introduced the stipulation that the records of the central office of the Fayetteville City Schools show that neither defendant nor Robert Carmichael was marked "absent" or "tardy" at school on 22 February 1972.

James Brunson, the defendant, testified that he went to school with "one of the Carmichaels" about 7:45 a.m. on the morning of 22 February 1972, but he was uncertain which one. He and "Carmichael" separated before they got to school; "Carmichael" went "on down the tracks" and defendant went to school. He had breakfast at school, smoked a cigarette with James Carmichael, and played basketball with James Carmichael and Charles Davis until the first bell rang at 8:25 a.m. He did not own a pair of basketball or tennis shoes on that date. He

testified that he was manager of the junior high basketball team and could go to the games free. He was working part-time six days a week at a gas station nearby. He was not at the burned house on Buxton Boulevard on 22 February 1972 and at no time struck Vanessa Dale Lewis with a hammer. He did not at any time tell police officers: "I know what happened. I did it. Prove it."

James Carmichael testified that he ate breakfast, smoked a cigarette and played basketball with defendant and Charles Davis on 22 February 1972, and that his brother, Robert Carmichael, told him earlier that defendant did not kill Vanessa Dale Lewis.

Charles Davis ate breakfast, smoked a cigarette and played basketball with defendant and James Carmichael on 22 February 1972. He loaned defendant his sneakers for gym class because defendant had none. He heard Robert Carmichael tell James Carmichael that defendant did not kill Vanessa Dale Lewis.

Mrs. Carmichael, mother of Robert and James Carmichael, did not see Robert or defendant come back to the house after Robert left on the morning of 22 February 1972. She did not recall having seen a hammer like the one in evidence around the house at any time.

The State's rebuttal evidence was, in summary:

Minnie Pearl Brunson, sister of defendant, testified that she let "a Carmichael boy" in the house before 8:00 a.m. on 22 February 1972.

On 9 May 1973, defendant told Mr. Ray Davis that *Robert* Carmichael came to his house on the morning of 22 February. Defendant also told Davis that he did not see James Carmichael on that day.

Mr. W. A. Newsom was recalled and stated that at the former trial James Carmichael testified that he went to school with defendant on the morning of 22 February 1972.

Additional facts necessary for decision are set forth in the opinion.

*Attorney General Rufus L. Edmisten and Assistant Attorney General Thomas B. Wood for the State.*

*Sol G. Cherry for defendant appellant.*

MOORE, Justice.

**[1]** Defendant's first assignment of error is based on his Exception No. 2. By this assignment defendant contends that the court erred in allowing the assistant district attorney to repeatedly ask Robert Carmichael leading questions, particularly with reference to the time he left home on the morning of the murder.

Robert Carmichael testified on cross-examination that he awoke at approximately 7:00 a.m. and arrived at defendant's at approximately 7:15 a.m.; that he based that on the fact that his brothers left about five minutes earlier than he every day; that he did not have a watch; and that he "really didn't know" what time he left. He was then asked by the assistant district attorney on redirect examination:

"Q. All right, did you in fact then base your time estimate to start with—

"MR. CHERRY: Object to leading, your Honor.

"COURT: SUSTAINED.

"Q. Is that the only basis on which you estimate that you left your house about seven fifteen?

"A. Yes.

"Q. Could it have been seven-thirty that you left your house?

"MR. CHERRY: Objection. Move to strike.

"A. Yes.

"COURT: OVERRULED. DEFENDANT'S EXCEPTION NO. 2."

Only three questions were asked. The trial court sustained the objection to one of these. No objection was made to the second, so only the third question forms the basis for this assignment.

The record discloses that the witness was not sure of the time he left the house, and the assistant district attorney was

simply trying to clarify this. Defendant himself testified that he got up about 7:30 a.m. and that a Carmichael boy came by while he was dressing. In view of this testimony by defendant, we do not see how he could have been prejudiced by Robert Carmichael's answer that he could have left his home at 7:30 a.m. rather than 7:15 a.m.

Furthermore, this Court has wisely and almost invariably held that the presiding judge has wide discretion in permitting or restricting leading questions. When the testimony so elicited is competent and there is no abuse of discretion, defendant's exception thereto will not be sustained. 2 Wharton's Criminal Evidence § 412 (13th ed. 1972); *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Clanton,* 278 N.C. 502, 180 S.E. 2d 5 (1971); *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). We hold that, in allowing the single leading question here presented, the trial court did not abuse its discretion.

**[2]** During the course of the trial defendant offered as a witness Mr. Charles Whitman, a Special Agent with the North Carolina State Bureau of Investigation. His testimony was taken out of the presence of the jury. Mr. Whitman testified that he is a polygraph examiner with the State Bureau of Investigation and recited in detail his qualifications for such position. He further testified that he saw defendant on 2 April 1974 in Morganton, North Carolina, and at the request of Captain Studer of the Fayetteville Police Department administered a polygraph examination to defendant. He testified regarding the procedures he followed and the results of the examination. The trial court ruled this testimony inadmissible.

Defendant's counsel in his brief states: "It is readily conceded that the present rule in North Carolina and the majority of jurisdictions is that the results of a polygraph examination may not be used in Court to show either innocence or guilt. . . ." Defendant, however, contends that in this case a proper foundation was laid for the admission of this testimony in that defendant voluntarily submitted to the polygraph test, the test was administered by a competent qualified examiner, and the results of the test would have been beneficial to defendant's case, and that the exclusion of this evidence was therefore prejudicial error.

In *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961), we held such evidence inadmissible. Chief Justice Winborne there reviewed the authorities from other jurisdictions stating various reasons why results of such tests were not admissible and then concluded:

> " . . . [W]e are of opinion that the foregoing enumerated difficulties alone [lack of general scientific recognition, tendency to distract the jury, inability to cross-examine machine, no corresponding necessity for submission to tests by the prosecution] in conjunction with the lie detector use presents obstacles to its acceptability as an instrument of evidence in the trial of criminal cases, notwithstanding its recognized utility in the field of discovery and investigation, for uncovering clues and obtaining confessions. This conclusion is in line with the weight of authority repudiating the lie detector as an instrument of evidence in the trial of criminal cases."

Defendant urges us to reconsider our decision in *Foye* in light of technological and judicial advances since *Foye* was decided in 1961. The weight of authority still supports that decision. *See* Annot., 23 A.L.R. 2d 1306 (Later Case Service 1970 and Later Case Service 1975) ; 29 Am. Jur. 2d, Evidence § 831 (1967). We see no compelling reason to change our ruling and we adhere to our decision in *Foye* for the reasons stated therein.

The jury, after having deliberated for some time, returned into court and asked the trial judge to again explain the difference between first degree and second degree murder. The trial judge did so, and defendant's counsel concedes that the trial judge's initial and supplemental charges with reference to the various elements of first and second degree murder were correct.

**[3]** After the supplemental charge, the jury again returned and asked the trial judge for a "couple" of definitions:

> "One is what is the meaning of cool blood or cold blood, and the other one you have already stated two or three times, but we need it one more time, I guess, and that is the time limit in premeditated and deliberate deliberation, whatever it may be."

The trial judge then repeated that portion of his charge which correctly defined premeditation and deliberation.

The foreman of the jury then asked for a definition of cool blood. The court gave an acceptable definition of cool blood, to which defendant did not object. The foreman then said:

"Sir, could I ask one more question?

"COURT: All right.

"FOREMAN: Would this be what in my time and in my years past we have heard as a cold blooded killing, is that what it would mean, about the same thing?

"EXCEPTION DEFENDANT'S EXCEPTION NO. 17.

"COURT: Yes, sir.

"FOREMAN: Thank you, sir."

Defendant assigns this answer as error. While we do not approve this answer, and the trial judge would have been well advised to have reminded the jury that he had explained the meaning of cool blood, and to have referred to and if necessary repeated that explanation, we do not believe this answer is so prejudicial as to require a new trial. The charge of the court must be construed contextually and segregated portions will not be held prejudicial error when the charge as a whole is free from objection. *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1972); *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969). *See* 3 Strong, N. C. Index 2d, Criminal Law § 168 (1967).

In *State v. Sanders,* 276 N.C. 598, 615-16, 174 S.E. 2d 487, 499-500 (1970), we said:

" . . . Premeditation means 'thought beforehand' for some length of time, however short. [Citation omitted.] This Court said in *State v. Benson,* 183 N.C. 795, 111 S.E. 869: 'Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' [Citations omitted.] No fixed amount of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, it being sufficient if these mental processes

occur prior to, and not simultaneously with, the killing. [Citations omitted.]"

The instructions given by the trial judge to the jury on the question of premeditation and deliberation on at least three occasions were in substantial accord with these well settled principles of law. *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Sanders, supra.* The answer of the trial judge to the question of the foreman of the jury that "cold blooded" means *about* the same thing as killing in *cool* blood is manifestly not repugnant to the prior instructions. Hence, we are not presented with a situation where the judge gave conflicting instructions on a material point. *Compare State v. Starnes,* 220 N.C. 384, 17 S.E. 2d 346 (1941); *State v. Bush,* 184 N.C. 778, 114 S.E. 831 (1922).

To warrant a new trial it should be made to appear that the ruling complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued. *State v. Sanders, supra; State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364 (1963); *State v. Beal,* 199 N.C. 278, 154 S.E. 604 (1930). In view of the viciousness of the assault, which resulted in the death of the child in this case, we do not think that the trial court's answer to the question posed by the foreman affected the result. This assignment is overruled.

**[4]** In *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), we held that due to the decision of the Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), the " . . . mandatory death penalty for . . . murder in the first degree . . . may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any such offense committed after such date." *Waddell* was decided 18 January 1973. The murder in the present case was committed on 22 February 1972. Hence, on the jury's verdict of guilty of murder in the first degree, the trial court correctly imposed judgment that defendant be imprisoned for the term of his natural life.

There were many discrepancies and contradictions in the testimony. For example, Robert Carmichael, principal witness for the State, at one time said that defendant did not kill Vanessa Dale Lewis, and that Lee Junior Brunson did. Lee Junior Brunson at one time told the officers that it was his brother

Leon rather than James who came to the house with blood on his clothes. Such discrepancies and contradictions go to the credibility of the witness and not necessarily to the competency of the testimony. We are mindful of the fact that the jury observed the witnesses as they gave their testimony and that the probative value of their testimony was solely for determination by the jury. Such discrepancies and contradictions in the State's evidence are matters for the jury and not the court. *Sneed v. Lions Club,* 273 N.C. 98, 159 S.E. 2d 770 (1968); *State v. Burell,* 252 N.C. 115, 113 S.E. 2d 16 (1960); *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128 (1959); *State v. Humphrey,* 236 N.C. 608, 73 S.E. 2d 479 (1952). The jury has resolved any doubts against defendant.

After a full and careful review, we conclude that defendant has had a trial free from error, and that the judgment imposed should be affirmed. In the record we find no error.

No error.

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FRED J. STANBACK, JR. v. VANITA B. STANBACK

No. 18

(Filed 6 June 1975)

1. **Appeal and Error § 6— appeal from interlocutory orders — discretionary review**

Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment; however, the appellate courts of this State in their discretion may review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose.

2. **Appeal and Error § 9— appeal to Court of Appeals from interlocutory orders — premature appeal issue moot**

Where the Court of Appeals pursuant to its supervisory authority contained in G.S. 7A-32(c) determined that a trial on the merits of this protracted controversy would be facilitated by allowing immediate appeal from pretrial orders, the issue of premature appeal thereupon became moot and arguments on the point were rendered feckless.

3. **Appeal and Error § 36— case on appeal — service in apt time**

Plaintiff filed his statement of the case on appeal within 15 days from the entry of the appeal taken as required by G.S. 1-282 where

he gave notice of appeal in open court on 27 March 1974 from the trial court's order, there was disagreement as to the substance of the court's ruling, the form and substance of the order to be drafted by defendant's counsel and mailed to the trial judge for signing at some later date were unsettled, the order was actually signed after the adjournment of that session of court but was antedated 27 March 1974 and filed on 10 April 1974, the date from which plaintiff's 15 days began to run, and plaintiff served his case on appeal on 23 April 1974.

4. **Divorce and Alimony § 22— child custody and support — jurisdiction**

A judicial decree in a child custody and support matter is subject to alteration upon a change of circumstances affecting the welfare of the child and is not final in nature; consequently, the jurisdiction of the court entering such a decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction.

5. **Courts § 5; Divorce and Alimony § 22— child custody and support — jurisdiction in superior court**

Since statutory allocations of case loads between trial divisions are administrative and not jurisdictional, the Rowan Superior Court, in which this child custody and support proceeding was properly instituted prior to the establishment of the district court, was not divested of jurisdiction to hear a motion in the cause filed by defendant after establishment of the district court.

6. **Divorce and Alimony § 22— child custody and support — jurisdiction in superior court — no transfer to district court as a matter of right**

The General Assembly did not intend that cases called for trial or cases already tried and reduced to judgment be transferred under G.S. 7A-258 as a matter of right; therefore, the Court of Appeals erred in reversing the order of the trial court denying plaintiff's motion to transfer a child custody proceeding from the superior court to the district court, since the proceeding arose upon defendant's motion in the cause, and the original case had been called for trial and in fact tried.

7. **Rules of Civil Procedure § 34— inspection of writings — order discretionary**

Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in its sound discretion; however, if an order requiring inspection is based upon an insufficient affidavit, the order is invalid and will be set aside on appeal.

8. **Rules of Civil Procedure § 34— discovery — requirement that material be necessary and relevant**

The provision of G.S. 1A-1, Rule 34 (1969) that the court may order the discovery and production of documents and things for inspection upon the motion of any party *showing good cause therefor* requires that material sought be necessary as well as relevant.

**9. Rules of Civil Procedure § 34— inspection of checks and stubs — failure to meet good cause requirement**

In a proceeding to increase child support payments, the defendant wife's showing of need to inspect plaintiff husband's checks, check stubs and bank statements for a period of over six years was minimal and fell short of fulfilling the good cause requirement of G.S. 1A-1, Rule 34.

**10. Divorce and Alimony § 22; Attorney and Client § 7— child support and custody action — award of attorney's fee proper**

The requirement of G.S. 50-13.6 that before ordering payment of an attorney's fee in a *support* action, the court must find as fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding was inapplicable in this *custody and support* case; and defendant's uncontested affidavit, stating that due to a number of enumerated factors she was then without funds to meet the costs of preparing for the hearing, sufficiently supported the trial court's finding that defendant did not have sufficient means to defray the expense of the litigation.

Justice EXUM did not participate in the hearing or decision of this case.

ON *certiorari* to the Court of Appeals to review its decision reported in 23 N.C. App. 167, 208 S.E. 2d 390 (1974).

This divorce action was commenced on 29 March 1965 by the filing of a complaint in which plaintiff husband sought a divorce from bed and board and exclusive custody of the two minor children then born of the marriage. The defendant wife by cross-action sought alimony without divorce and custody of the children with visitation rights granted to the father. A third child was born approximately five months after the separation occurred.

After trial in the Superior Court of Rowan County and two appeals to the Supreme Court, reported in 266 N.C. 72, 145 S.E. 2d 332 (1965) and 270 N.C. 497, 155 S.E. 2d 221 (1967), the parties entered into a separation agreement in 1968 settling all matters in controversy between them relating to the issue of alimony; and following a hearing before Judge Exum, a judgment was entered on 29 March 1968 providing that the children "shall be and remain always in the physical custody of the defendant Vanita B. Stanback, except as may be hereinafter provided," and the judgment then made provision for the children to visit with their father at various times. The judgment further ordered Fred J. Stanback, Jr., to provide for the

maintenance and support of said children. The cause was retained for other and further orders as from time to time the court might deem appropriate.

The action thereafter remained quiescent until 5 September 1973 when defendant wife, by motion in the cause, moved to modify the judgment previously entered relating to custody and support of the children. She alleged changed conditions and sought a redetermination of the custody order and an increase in the amount to be paid by the father for the support of the children. Plaintiff husband resisted the motion to increase the payments for support and maintenance of the children, alleged that conditions had changed in that, among other things, he had remarried, and prayed that he be awarded custody of the children. Pending a hearing on the primary motion of defendant wife and the counterclaim of plaintiff husband, various interlocutory matters came before the court and rulings were made thereon as follows:

1. On 21 September 1973 plaintiff husband filed a motion to transfer the cause to the District Court Division of the General Court of Justice. Judge Exum denied the motion and plaintiff gave notice of appeal to the Court of Appeals.

2. On 12 December 1973 plaintiff husband served certain interrogatories, including an interrogatory inquiring into defendant's medical history and state of health, particularly with respect to treatment by physicians. Defendant wife objected to this interrogatory, and plaintiff moved that she be compelled to answer it. On 13 January 1974 Judge Crissman sustained defendant's objection and held she was not required to answer that interrogatory. Plaintiff gave notice of appeal to the Court of Appeals.

3. On 21 March 1974 defendant wife moved that plaintiff husband be required to produce his check stubs and bank statements for the period 1 March 1968 to the date of said motion. On 25 March 1974 Judge Exum allowed this motion, and plaintiff gave notice of appeal to the Court of Appeals.

4. On 21 March 1974 defendant wife moved that plaintiff husband be required to advance to her the sum of $2,000.00 to defray the costs of preparing for the hearing on her primary motion and the counterclaim of plaintiff concerning increased child support and custody. She supported this motion by an affidavit that she was without adequate funds to defray the

costs of the litigation. On 27 March 1974, following hearing, Judge Exum orally announced that the motion was allowed. Plaintiff, through his counsel, took exception and in open court gave notice of appeal to the Court of Appeals. Judge Exum's formal order allowing the motion was signed out of term and filed on 10 April 1974.

5. Plaintiff then perfected, or attempted to perfect, an appeal to the Court of Appeals with respect to the matters enumerated in the four numbered paragraphs above and served a "statement of case on appeal" on 23 April 1974. Defendant wife, contending the purported statement of case on appeal was fragmentary, filed exceptions and at the same time reserved the right to move to dismiss the appeal under G.S. 1-287.1. Such motion to dismiss was filed by her on 30 April 1974 alleging failure of plaintiff to comply with the provisions of G.S. 1-282. A hearing was held before Judge Crissman, after which he entered an order dismissing the appeal on 10 May 1974. To this dismissal order plaintiff excepted and gave notice of appeal to the Court of Appeals. Thereafter, plaintiff served upon defendant a "statement of case on appeal" on 17 May 1974 which defendant contends does not comply with Rule 19 with respect to either the composition or the arrangement of the contents.

Without deciding whether any of the various orders and judgments listed in the first four numbered paragraphs were appealable, and without deciding whether plaintiff was required to serve a statement of case on appeal or, if so, had perfected an appeal by proper preparation and service of statement of case on appeal as mentioned in the fifth numbered paragraph above, the Court of Appeals stated it would entertain the appeal "under the supervisory authority of this Court." Then, by opinion filed 2 October 1974, the Court of Appeals held:

1. Plaintiff had a right to have the case transferred to the District Court Division of the General Court of Justice pursuant to G.S. 7A-258, and Judge Exum erred in denying the motion to transfer.

2. Defendant was not required to answer the interrogatory concerning her medical history, general health, consultation with physicians or psychiatrists, etc., and Judge Crissman correctly so held.

3. Judge Exum erred in requiring plaintiff husband to produce all of his check stubs and bank statements and all of his

cancelled checks during the period 1 March 1968 to date of defendant's motion so that defense counsel might examine said items and make copies as desired.

4. Judge Exum erred in ordering plaintiff to pay $2,000.00 for the use of defendant wife in preparing for the hearing of her primary motion and plaintiff's counter motion concerning increased child support and custody.

We allowed defendant wife's petition for certiorari to review the decision of the Court of Appeals as above narrated.

*Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, attorneys for defendant appellant.*

*Norwood Robinson and George L. Little, Jr., of the firm Hudson, Petree, Stockton, Stockton & Robinson; Clarence Kluttz, attorneys for plaintiff appellee.*

HUSKINS, Justice.

In her first assignment defendant wife alleges the Court of Appeals erred in allowing an immediate appeal from the four interlocutory orders of the trial court.

**[1]** Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. *Currin v. Smith,* 270 N.C. 108, 153 S.E. 2d 821 (1967); *Steele v. Hauling Co.,* 260 N.C. 486, 133 S.E. 2d 197 (1963); *see* 2 McIntosh, North Carolina Practice and Procedure § 1782 (1956); Annotation, Appealability of Order Pertaining to Pretrial Examination, Discovery, Interrogatories, Production of Books and Papers, or the Like, 37 A.L.R. 2d 586 (1954). However, the appellate courts of this State in their discretion may review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose. *See Howland v. Stitzer,* 240 N.C. 689, 84 S.E. 2d 167 (1954); *Ward v. Martin,* 175 N.C. 287, 95 S.E. 621 (1918); *Trust Co. v. Morgan, Attorney General,* 9 N.C. App. 460, 176 S.E. 2d 860 (1970); 2 McIntosh, North Carolina Practice and Procedure § 1782(7) (Phillips Supp. 1970), and cases cited therein. Such discretion is not intended to displace the normal procedures of appeal, but inheres to appellate courts under

our supervisory power to be used only in those rare cases in which normal rules fail to administer to the exigencies of the situation. When discretionary review is allowed, the question of appealability becomes moot. *Furr v. Simpson,* 271 N.C. 221, 155 S.E. 2d 746 (1967).

**[2]** Such is the case here. The Court of Appeals determined that a trial on the merits of this protracted controversy would be facilitated by allowing immediate appeal from the pretrial orders. Accordingly, it reviewed the merits of the orders pursuant to its supervisory authority contained in G.S. 7A-32(c). The issue of premature appeal thereupon became moot and arguments on the point were rendered feckless. Hence, we consider the opinion of the Court of Appeals on the merits of this controversy, expressing no opinion on the appealability of the interlocutory orders.

**[3]** Assignment five, raising a second procedural point, alleges that Judge Crissman correctly dismissed plaintiff's appeal for failure to serve the statement of case on appeal within the time provided by law. Therefore, it is contended by defendant wife that the Court of Appeals should not have reached the merits of this cause.

The facts found by Judge Crissman in his order of dismissal show the following: Judge Exum held a hearing on 27 March 1974 to consider defendant's motion for the allowance of $2,000.00 to defray the expenses of preparing for the hearing on the motions pending at that time. In open court he announced that defendant's motion would be allowed and the parties agreed that the order allowing said motion could be signed at a subsequent time. The order was actually signed after the adjournment of that session of court, but was antedated 27 March 1974 and filed on 10 April 1974. Plaintiff gave notice of appeal in open court, and appearing upon Judge Exum's written order is a recital of that fact, to wit: "The plaintiff excepts to the foregoing order and gives notice of appeal from the entry of said order in open court at the time of the announcement of the decision of the court." Judge Exum's signature follows that recital.

Plaintiff's notice of appeal, given in open court following the announcement of the order, was sufficient to comply with the "taking of appeal" and "notice of appeal" requirements of G.S. 1-279 and 1-280. While this record is silent regarding the formal entry of this appeal on the judgment docket, such defi-

ciency is not fatal under G.S. 1-280 since the taking of the appeal is not denied and notice has, in fact, been served in time. *Simmons v. Allison,* 119 N.C. 556, 26 S.E. 171 (1896); *Atkinson v. R. R.,* 113 N.C. 582, 18 S.E. 254 (1893). "The requirement that the appeal should be entered on the record is to furnish indisputable proof of the fact, and is immaterial when the fact of the appeal having been taken is not denied, and notice of appeal has, in fact, been served on time, or waived." *Barden v. Stickney,* 130 N.C. 62, 40 S.E. 842 (1902).

Although the date of entry of the appeal on the judgment docket, if in fact so entered, does not appear on the face of this record, we are asked to determine whether plaintiff's statement of case on appeal was served within fifteen days *from the entry of the appeal taken* as required by G.S. 1-282. Defendant wife contends the fifteen days began to run on 27 March 1974 when plaintiff gave notice of appeal in open court and that plaintiff's service of case on appeal on 23 April 1974 was not timely. We find this contention unsound.

There was an agreement "that counsel for the parties would prepare and submit to the Court orders carrying out the rulings which were made by the Court." In a letter to the trial judge dated 4 April 1974 counsel for defendant admitted that he had been instructed to prepare the orders. The record further reveals several other letters (written to the trial judge after the 27 March 1974 hearing) which point to disagreement over the substance of the court's ruling. This disagreement is substantiated by Judge Exum's letter of 12 April 1974 to the parties in which he scheduled a hearing to settle the controversy "with regard to the form and perhaps the substance of the various recent orders." Clearly, at the time the judgment was "announced" on 27 March 1974 both the form and substance of the order to be drafted by counsel and mailed to Judge Exum for signing at some later date were unsettled.

On these facts this case is readily distinguishable from *Land Co. v. Chester,* 170 N.C. 399, 87 S.E. 111 (1915), cited by defendant wife. In that case judgment was rendered upon a jury verdict before adjournment of the court and the trial judge signed the judgment after adjournment. By agreement appellants were allowed ninety days to serve their case on appeal. Under the facts of that case the time for serving a statement of case on appeal was said to run from the adjournment of the term of court during which the judgment was rendered.

Here, there was no agreement for serving the case on appeal and more than the perfunctory signing of the order was required after the hearing was adjourned. The form and substance of the order, which was being prepared by the attorney for defendant wife, were in no sense final as of the 27 March 1974 hearing. Under these circumstances, "the careful and experienced lawyer cannot decide what to do until he has seen and read the judgment." *Fisher v. Fisher,* 164 N.C. 105, 80 S.E. 395 (1913). Therefore, we hold that under the facts of this case the time for serving a statement of case on appeal pursuant to G.S. 1-282 began to run when the order, and the notice of appeal endorsed thereon, were filed on 10 April 1974. Plaintiff's service was thus within the period contemplated by that statute.

We next consider whether the Court of Appeals erred, as defendant contends, in holding plaintiff had a right to have this case transferred to the district court division.

This action was properly instituted in superior court prior to the establishment of the district court in the Nineteenth Judicial District which embraces Rowan County. After numerous proceedings in superior court a custody and support judgment, filed 10 May, 1968, was entered following a hearing during the 11 March 1968 Civil Session of Rowan Superior Court. The present proceeding arises from defendant's motion in the cause to modify that judgment pursuant to G.S. 50-13.7.

**[4]** A judicial decree in a child custody and support matter is subject to alteration upon a change of circumstances affecting the welfare of the child and, therefore, is not final in nature. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967); *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967). Consequently, the jurisdiction of the court entering such a decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction. *Spence v. Durham,* 283 N.C. 671, 198 S.E. 2d 537 (1973), *cert. denied* 415 U.S. 918, 39 L.Ed. 2d 473, 94 S.Ct. 1417 (1974); *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332 (1965). The Superior Court of Rowan County rendered the original support and custody judgment in this action and under the above principles maintained continuing jurisdiction over further proceedings. Unless that court was somehow divested of its continuing jurisdiction, it was the only court which could modify the earlier judgment upon a motion in the cause and a showing of a change of circumstances.

*Tate v. Tate,* 9 N.C. App. 681, 177 S.E. 2d 455 (1970); 3 Lee, North Carolina Family Law § 222 (Supp. 1974).

**[5]** Plaintiff contends that under the Judicial Department Act of 1965, codified in Chapter 7A of the General Statutes, the district court is now the *only* proper division for hearing child custody and support matters. While G.S. 7A-244 unquestionably allocates such matters to the District Court Division of the General Court of Justice, we are not persuaded that statute requires the district court to hear the motion in the cause filed in this case.

Under the Judicial Department Act of 1965 both trial divisions *concurrently* possess the aggregate of original civil trial jurisdiction reposed in the General Court of Justice excepting only matters involving claims against the State and probate and administration of decedents' estates as to which exclusive original jurisdiction is vested in the Supreme Court and the superior court division respectively. G.S. 7A-240 to -242 (1969). The Act further provides for the *administrative* allocations of case loads between the divisions. G.S. 7A-242 *et seq.* (1969). It is plain these allocations are *not jurisdictional* since a judgment is not void or voidable for reason that it was rendered by a court of the trial division which by the statutory allocation was the improper division for hearing and determining the matter. G.S. 7A-242 (1969); *see* Report of the Courts Commission to the North Carolina General Assembly at 23 (1965). Hence, G.S. 7A-244 is merely an administrative allocation of annulment, divorce, alimony, child support and child custody actions to the district court division, and does not divest the Rowan Superior Court of jurisdiction to hear the motion in the cause filed by defendant in this action.

Although the case allocations of Chapter 7A are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. G.S. 7A-257, 258 (1969). However, this right may be waived by consent or by failure to move for transfer within the prescribed time limits. An order erroneously transferring or refusing to transfer is ordinarily not immediately appealable, even for abuse of discretion, and will not result in a new trial unless prejudice is shown. G.S. 7A-260 (1969).

Plaintiff's motion to transfer this action to district court was made pursuant to G.S. 7A-258 and the Court of Appeals

held he had the *right* under that section to make the motion. We find that holding erroneous.

**[6]** G.S. 7A-258(a) provides that a party may move to transfer a civil action or special proceeding to the proper division when the case is pending in an improper division or when the parties consent to the transfer and the judge deems the transfer will facilitate the efficient administration of justice. Here, consent is absent. G.S. 7A-258(c) requires a plaintiff to file a motion for transfer within twenty days after the filing of a pleading which justifies the transfer. That subsection contains the following statement: "In no event is a motion to transfer made or determined after the case has been called for trial." Thus, it appears the General Assembly did not intend that cases called for trial or cases already tried and reduced to judgment, as here, be transferred under G.S. 7A-258 as a matter of right. That section clearly applies only to cases in the pleading stage.

This point is further illustrated by G.S. 7A-259(b) which is the only section of Chapter 7A speaking directly to the point of transfer due to the establishment of the district court division. It reads: "When a district court is established in a district, any superior court judge authorized to hear and determine motions to transfer may, on his own motion, *subject to the requirements of subsection (a)*, transfer to the district court cases pending in the superior court." (Emphasis added.) Subsection (a) allows any such superior court judge to order a transfer upon his own motion for the efficient administration of the trial divisions "at any time *before the case is calendared for trial.*" (Emphasis added.) Therefore, even a judge on his own motion is not authorized to order a transfer once the case has reached the trial stage and has been calendared.

Defendant's motion in the cause was not a new and independent proceeding. Instead, the motion was a continuation of the original action for child custody and support. *See* 3 Lee, North Carolina Family Law § 226 (1963). The original case had been called for trial, and had in fact been tried in the superior court. Under these circumstances G.S. 7A-258 does not warrant a transfer of the action to district court as a matter of right. Accordingly, we hold the Court of Appeals erred in reversing the order of the trial court denying plaintiff's motion to transfer.

Defendant wife next contends the Court of Appeals erred in reversing the trial court's order requiring plaintiff husband

to produce for defendant's examination all of his check stubs, bank statements and cancelled checks during the period 1 March 1968 to date of defendant's motion.

[7] Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in its sound discreton. *Tillis v. Cotton Mills,* 244 N.C. 587, 94 S.E. 2d 600 (1956); *Dunlap v. Guaranty Co.,* 202 N.C. 651, 163 S.E. 750 (1932). However, if an order requiring inspection is based upon an insufficent affidavit, the order is invalid and will be set aside on appeal. *Patterson v. R. R.,* 219 N.C. 23, 12 S.E. 2d 652 (1941). "If the requirements are not complied with, or if the order of the court goes beyond the powers contemplated and conferred by law, the order will be set aside." *Dunlap v. Guaranty Co., supra; Ross v. Robinson,* 185 N.C. 548, 118 S.E. 4 (1923).

The discovery order contested in this assignment is governed by the requirements of Rule 34 of the North Carolina Rules of Civil Procedure, as it read prior to the 1973 amendment which became effective 1 January 1975. G.S. 1A-1, Rule 34 (1969). Under Rule 34 as then written a trial court may order the discovery and production of documents and things for inspection, copying or photographing upon the motion of any party *showing good cause therefor.* Unlike Rules 26 and 33, Rule 34 requires a party invoking the rule to show "good cause" for the production of the items sought. We note that Rule 34 of the Federal Rules of Civil Procedure was amended in 1970 so as to delete the good cause requirement because of the confusion created by vagueness of the term. The fact that good cause remains a requirement under our Rule 34 after its 1973 amendment demonstrates that, in this jurisdiction, the requirement is not a mere formality which may be overlooked.

The basis of defendant's Rule 34 motion is the relevance of the check stubs, bank statements and cancelled checks in determining the amount of child support which plaintiff must pay under G.S. 50-13.4(c). In her motion she states: "One of the relevant facts which is material in determining this motion is the amount which the plaintiff has customarily expended to provide for his personal living expenses and for the living expenses of said three minor children while they have visited with him as well as the personal living expenses of his present wife and her children. . . . The best evidence of the amount expended by plaintiff for these purposes is found in the cancelled checks and

bank statements of plaintiff." It seems defendant is equating good cause with relevance.

**[8]** While relevance is one of the factors to be considered under Rule 34, the provision for that factor is found in subsection (1) of Rule 34 and not in the good cause provision. Subsection (1) provides for the determination of relevance in accordance with Rule 26(b) which allows the examination of any matter, not privileged, relevant to the subject matter of the pending action. Consequently, a demonstration that the desired materials are relevant to the subject matter of the litigation does not by itself satisfy the good cause requirement. *Guilford National Bank of Greensboro v. Southern Ry. Co.*, 297 F. 2d 921 (4th Cir. 1962), *cert. denied* 375 U.S. 985, 11 L.Ed. 2d 473, 84 S.Ct. 518 (1964). "The difficulty with the relevance-is-good-cause approach is that it interprets a portion of Rule 34 as redundant and thereby violates elementary canons of construction." *Crowe v. Chesapeake and Ohio Railway Company*, 29 F.R.D. 148, 150 (E.D. Mich. 1961); *see Schlagenhauf v. Holder*, 379 U.S. 104, 13 L.Ed. 2d 152, 85 S.Ct. 234 (1964). Therefore, good cause is something more than mere relevance.

As illustrated by the federal courts' experience with the term, good cause often depends upon the facts of the individual case and upon considerations of practical convenience and, therefore, is not susceptible to a universal definition. However, Professor Moore does advance the following general test for good cause:

> "Generally speaking, however, it was held that the moving party must demonstrate that inspection of documents to be produced is in some way necessary to the adequate preparation of its case. . . . In short, any showing that failure to order production would unduly prejudice the preparation of the party's case, or cause him hardship or injustice, would support the order." 4A Moore's Federal Practice § 34.08 (1974).

By the better view, necessity, as well as relevance, is an element of good cause under Rule 34. *United States v. R. J. Reynolds Tobacco Co.*, 268 F. Supp. 769 (D.N.J. 1966).

**[9]** When these principles are applied to the facts of this case, it becomes apparent that defendant wife did not make a sufficient showing of need to fulfill the good cause requirement of Rule 34. The only showing in her motion is the statement that

the materials were the "best evidence" of plaintiff's expenditures. It is well established that a mere statement that an examination is material and necessary is not sufficient to support a production order. *Patterson v. R. R.*, 219 N.C. 23, 12 S.E. 2d 652 (1941); *see Bentz v. Cities Service Tankers Corp.*, 41 F.R.D. 294 (S.D.N.Y. 1966); *Archer v. Cornillaud*, 41 F. Supp. 435 (W.D. Ky. 1941). Here, the showing of need to inspect plaintiff's checks, check stubs and bank statements for a period of over six years is minimal and falls short of good cause.

Furthermore, defendant admits the trial court required plaintiff to answer an interrogatory setting forth his income and his net worth. Nothing else appearing, this financial information should be sufficient for the purpose of determining plaintiff's estate, earnings, conditions and accustomed standard of living in accordance with G.S. 50-13.4(c). There is nothing in defendant's motion or in the trial court's order suggesting that plaintiff husband has been evasive or has otherwise sought to avoid his support obligation under North Carolina law. When the need for production of materials is not shown, as here, the law will not sanction the use of Rule 34. This is so in order to prevent litigants from engaging in mere fishing expeditions to discover evidence or using the rule for harassment purposes.

Defendant wife having failed to carry her burden of showing good cause, we hold the Court of Appeals correctly reversed the trial court's order granting her Rule 34 motion.

Finally, defendant wife contends the Court of Appeals erred in reversing the trial court's order requiring plaintiff to pay $2,000.00 for her use in preparing for the hearing on the various motions pending before the court.

The trial court's order required plaintiff to pay $2,000.00 to defendant's attorneys to defray the "reasonable and necessary expenses incurred by the defendant or her counsel in making preparations for the hearing on the motions pending in this action." Defendant's attorneys were required to account for expenditures and refund any excess. Such an order is proper when authorized by statute. *Winfield v. Winfield*, 228 N.C. 256, 45 S.E. 2d 259 (1947); *Green v. Green*, 210 N.C. 147, 185 S.E. 651 (1936).

We find appropriate authority for the order in G.S. 50-13.6. That statute provides that in a proceeding for custody or support, or both, including a motion in the cause for the modifica-

tion of an existing order, the trial court may order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

**[10]** Apparently conceding this grant of authority in G.S. 50-13.6, plaintiff argues the trial court failed to make appropriate findings in accordance with the second sentence of that statute which reads, in pertinent part: "Before ordering payment of a fee *in a support action,* the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . . " (Emphasis added.) While it is true that such a finding does not appear in the trial court's order, we hold such a finding unnecessary in this case.

The general grant of authority to award attorney's fees under G.S. 50-13.6 applies to actions or proceedings *"for the custody or support, or both,* of a minor child, including a motion in the cause for modification or revocation of an existing order *for custody or support, or both."* (Emphasis added.) On the other hand, the duty to make the required finding under the second part of that statute is imposed only in a *support action.* Consequently, these provisions fall within the purview of the maxim *expressio unius est exclusio alterius,* meaning the expression of one thing is the exclusion of another. *In re Taxi Co.,* 237 N.C. 373, 75 S.E. 2d 156 (1953). The General Assembly, having limited the second provision to support actions, apparently did not intend the requirement to apply to custody or custody and support actions. It follows, therefore, that the second provision of G.S. 50-13.6 is inapplicable to this order since defendant's motion in the cause prays for modification of both the custody and support aspects of the previous judgment.

Under G.S. 50-13.6 the grant of attorney's fees is within the sound discretion of the trial judge. When that discretion has been properly exercised in accordance with statutory requirements, the order must stand on appeal. *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1972). Suffice it to say that defendant's uncontested affidavit, stating that due to a number of enumerated factors she was then without funds to meet the costs of preparing for the hearing, sufficiently supports the trial court's finding that defendant did not have sufficient means to defray the expense of this litigation.

For the reasons stated we conclude the Court of Appeals erred in reversing the trial court's order requiring plaintiff to pay this $2,000.00 item.

The case is remanded to the Court of Appeals for further remand to the Superior Court of Rowan County for further proceedings in conformity with this opinion.

Affirmed in part;

Reversed in part;

Remanded.

Justice EXUM did not participate in the hearing or decision of this case.

ASHE v. MOTOR LINES

No. 125 PC.

Case below: 25 N.C. App. 657.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

AYERS v. BROWN

No. 124 PC.

Case below: 25 N.C. App. 476.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 June 1975.

BLAIR v. FAIRCHILDS

No. 118 PC.

Case below: 25 N.C. App. 416.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

BLUE CROSS AND BLUE SHIELD v. INSURANCE CO.

No. 128 PC.

Case below: 25 N.C. App. 578.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

CARDWELL v. WELCH

No. 112 PC.

Case below: 25 N.C. App. 390.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

CARPENTER v. CARPENTER

No. 100 PC.

Case below: 25 N.C. App. 235.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

FREIGHT CARRIERS v. ALLEN CO.

No. 104 PC.

Cases below: 22 N.C. App. 442.
25 N.C. App. 315.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

GRAHAM AND SON, INC. v. BOARD OF EDUCATION

No. 86 PC.

Case below: 25 N.C. App. 163.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

GRIBBLE v. GRIBBLE

No. 119 PC.

Case below: 25 N.C. App. 366.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

INSURANCE CO. v. CHANTOS

No. 126 PC.

Case below: 25 N.C. App. 482.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

INSURANCE CO. v. INGRAM, COMR. OF INSURANCE

No. 110 PC.

Case below: 25 N.C. App. 478.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 June 1975.

LARUE v. AUSTIN-BERRYHILL, INC.

No. 114 PC.

Case below: 25 N.C. App. 408.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

LITTLE v. BOARD OF ELECTIONS

No. 105 PC.

Case below: 25 N.C. App. 304.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

McKNIGHT v. McKNIGHT

No. 93 PC.

Case below: 25 N.C. App. 246.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

SMITH v. McCLURE

No. 102 PC.

Case below: 25 N.C. App. 280.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

SOLESBEE v. BROWN

No. 123 PC.

Case below: 25 N.C. App. 476.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

STATE v. BINDYKE

No. 103 PC.

Case below: 25 N.C. App. 273.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 June 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 6 June 1975.

STATE v. DEAS

No. 97 PC.

Case below: 25 N.C. App. 294.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

STATE v. HOLMES

No. 127 PC.

Case below: 25 N.C. App. 581.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

STATE v. LANGLEY

No. 91 PC.

Case below: 25 N.C. App. 298.

Petition by State for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 6 June 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. LINDSEY

No. 113 PC.

Case below: 25 N.C. App. 343.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 June 1975.

STATE v. OLSEN

No. 117 PC.

Case below: 25 N.C. App. 451.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

STATE v. WALLACE

No. 99 PC.

Case below: 25 N.C. App. 360.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

STATE v. WHITE

No. 107 PC.

Case below: 25 N.C. App. 398.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

WILLIAMS v. ADAMS

No. 116 PC.

Case below: 25 N.C. App. 475.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 6 June 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

WOOD v. BROWN

No. 101 PC.

Case below: 25 N.C. App. 241.

Petition for writ of certiorari to North Carolina Court of Appeals denied 6 June 1975.

STATE OF NORTH CAROLINA v. RONALD F. JACKSON

No. 80

(Filed 6 June 1975)

1. **Constitutional Law § 30; Criminal Law § 177— speedy retrial after appeal**

In enacting G.S. 15-186 providing that "In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing criminal session of court after the receipt of" the certificate of the appellate division, the General Assembly did not intend to give defendants on retrial a right to a more speedy trial than that guaranteed to all by the U. S. Constitution and the N. C. Constitution; whether a defendant has been denied his right to a speedy retrial must be determined in light of the facts of a particular case by the application of the same principles applied by the courts in determining whether a defendant has been denied his right to a speedy trial.

2. **Constitutional Law § 30; Criminal Law § 177— delay between appellate decision and retrial**

A delay of seven months from the time the decision of the Court of Appeals was filed on defendant's first appeal to the date of his second trial did not violate his statutory right to a speedy trial under G.S. 15-186 where the delay largely resulted from a congested docket and from an attempt to give priority to jail cases, and defendant made no motion for a speedy retrial until two months before the retrial.

3. **Criminal Law § 15— pretrial publicity — local prejudice — motion for change of venue**

The trial court in an armed robbery case did not abuse its discretion in the denial of defendant's motion for a change of venue from Union County or for a special venire on the ground of newspaper publicity where articles in a Monroe newspaper were factual and not inflammatory, and articles in two Charlotte newspapers were largely favorable to defendant; nor did the court err in the denial of such motion on the ground that defendant could not receive a fair trial in Union County because newspaper articles about the case were critical of the district attorney, sheriff, and a local attorney. G.S. 1-84; G.S. 9-12.

4. **Criminal Law § 66— in-court identifications — suggestive pretrial photographic lineup — courtroom showing of defendant**

In this armed robbery case, the in-court identifications of defendant by the two victims were not tainted and rendered incompetent by a suggestive pretrial photographic lineup wherein defendant's photograph appeared two times while the photographs of others appeared but once, or by a showing of defendant to one witness in a courtroom where defendant was on trial on another charge, where both witnesses carefully observed defendant's uncovered face during the robbery for five minutes from a distance of a few feet in a well-lighted room during midday, both witnesses selected defendant from

the photographic lineup, and the trial judge found upon the *voir dire* testimony that their in-court identifications were based on what they saw on the day of the crime.

5. **Criminal Law § 62— polygraph test results**

The trial court properly refused to allow the results of a polygraph test into evidence.

6. **Constitutional Law § 31; Criminal Law § 73; Indictment and Warrant § 6— complaint for arrest — hearsay**

The trial court in a prosecution for first degree murder committed prejudicial error in the admission of the complaint for arrest executed by a police officer who did not testify at trial since the State was thereby permitted to strengthen its case with clearly incompetent hearsay evidence by a person who was not subject to cross-examination.

Justice COPELAND did not participate in the hearing or decision of this case.

APPEAL pursuant to G.S. 7A-30(2) to review the decision of the North Carolina Court of Appeals, reported in 24 N.C. App. 394, 210 S.E. 2d 876 (1975), which found no error in proceedings before *Copeland, S.J.*, at the 15 April 1974 Session of UNION Superior Court, and Seay, J., at the 6 May 1974 Session of Union Superior Court.

On indictment proper in form, defendant was charged with armed robbery in violation of G.S. 14-87. He was first convicted of the present offense before Chess, J., at the 12 March 1973 Special Criminal Session of Union Superior Court. Upon appeal to the Court of Appeals, that court awarded a new trial for the reasons stated in the opinion reported in 19 N.C. App. 370, 199 S.E. 2d 32 (1973).

At retrial, upon a plea of not guilty, defendant was again convicted of armed robbery and was sentenced to ten to fifteen years' imprisonment.

The State's evidence tends to show that at about 3:20 p.m. on 30 January 1973, Bill Squires was operating his grocery store-service station business in Union County when defendant and another man entered. Defendant aimed a handgun at Squires and said, "Give me your money." The man accompanying defendant then took approximately three hundred to four hundred dollars from the cash register. Defendant also took at gun point approximately thirty dollars from the person of Larry Catledge, a salesman who was making a visit to Squires's business at the time. Defendant and his accomplice then left in a green

Chevrolet truck with South Carolina license plates. Both Squires and Catledge identified defendant at trial as one of the robbers.

Defendant testified that in January 1973 he owned a green Chevrolet truck with South Carolina license tags. He further testified that he was repairing another truck in Bennettsville, South Carolina, on the date and at the time in question. He denied being in North Carolina on that date or participating in the robbery. Three acquaintances, defendant's mother, and his brother also testified that defendant was in Bennettsville—approximately ninety miles from the scene of the crime—at pertinent times during the afternoon of 30 January 1973.

Other facts necessary for decision are set out in the opinion.

*Attorney General Rufus L. Edmisten and Assistant Attorney General James E. Magner, Jr. for the State.*

*David R. Badger for defendant appellant.*

MOORE, Justice.

By his first assignment of error defendant contends that his statutory and constitutional rights to a speedy trial were violated.

Defendant was first tried and convicted before Chess, J., and a jury, at the 12 March 1973 Special Criminal Session of Union Superior Court, and from sentence imposed appealed to the Court of Appeals. That court, in an opinion certified 24 September 1973, awarded defendant a new trial. 19 N.C. App. 370, 199 S.E. 2d 32 (1973). Thereafter, pretrial motions were heard before Copeland, J., at the 15 April 1974 Special Criminal Session of Union Superior Court and defendant was again tried before Seay, J., at the 6 May 1974 Criminal Session of Union Superior Court.

**[2]** Defendant contends that a delay of some seven months from the time the decision of the Court of Appeals was filed on his first appeal to the date of the second trial violated his statutory right to a speedy trial under G.S. 15-186 which, in pertinent part, provides:

> *"Procedure upon receipt of certificate of appellate division.*— . . . In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for

trial at the first ensuing criminal session of the court after the receipt of such certificate."

**[1]** The Court of Appeals held that this statute was not mandatory but was a directive to the clerk of the superior court regarding steps to be taken when the appellate division orders a new trial.

Defendant's counsel in his brief states:

> "The defendant is in accord with the holding of the North Carolina Court of Appeals that literal compliance with North Carolina General Statutes Section 15-186 is not necessary where extraordinary circumstances exist and that whether there is good cause in delay of scheduling a case for retrial must be answered in light of the facts in a particular case. . . . Although many of the same principles applied by appellate courts in deciding whether a defendant has been denied his right to a speedy trial should be applied in determining whether there is good cause for delay in the scheduling of a case for retrial pursuant to North Carolina General Statutes Section 15-186, the defendant respectfully contends that the cited statute reflects the legislative intent to substitute an objective standard in lieu of the somewhat subjective standard utilized by appellate courts in their discussions of speedy trial questions based solely upon constitutional consideration. . . . "

The Court of Appeals, after a good examination of authorities from other states, concluded:

> "Whether there is good cause for delay in the scheduling of a case for retrial and whether the defendant has been denied his constitutional right to a speedy retrial must be answered in light of the facts in a particular case. In answering these questions the same principles applied by our courts in deciding whether a defendant has been denied his right to a speedy trial should be applied."

We agree. We do not believe that the General Assembly by G.S. 15-186 intended to give defendants on retrial right to a more speedy trial than that guaranteed to all by the Constitution of the United States and the Constitution of North Carolina.

In *State v. Brown,* 282 N.C. 117, 123, 191 S.E. 2d 659, 663 (1972), with reference to the constitutional right to a speedy trial, we said:

> "The word 'speedy' cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971); *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Cavallaro,* 274 N.C. 480, 164 S.E. 2d 168 (1968); *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965). See *Pollard v. United States,* 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957): *Beavers v. Haubert,* 198 U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573 (1905)."

*Accord, State v. Hill,* 287 N.C. 207, 214 S.E. 2d 67 (1975); *State v. Gordon,* 287 N.C. 118, 213 S.E. 2d 708 (1975).

In the present case Judge Copeland heard evidence from both the State and defendant on a motion to dismiss for failure to give defendant a speedy trial and made findings of fact substantially as follows:

1. The decision of the Court of Appeals was certified to the Union County Superior Court 24 September 1973.

2. The defendant has been out on bond since August 1973.

3. Neither defendant nor his counsel made any motion for a speedy trial orally until about two months prior to this hearing. A written motion for a speedy trial was filed on 8 March 1974.

4. A large number of criminal cases were pending, many including defendants in jail, and as many of these cases as possible had been disposed of since 24 September 1973, a substantial number of which involved defendants in jail awaiting trial.

Judge Copeland then concluded:

> "AS A MATTER OF LAW . . . under the circumstances, the District Attorney has proceeded as rapidly as he could with these cases, considering the other cases that he had to try in this county and in this district.
>
> "THE COURT ALSO CONCLUDES AS A MATTER OF LAW that no prejudice resulted to the defendant in this connection."

**[2]** As found by the trial court, the delay in this case largely resulted from the congested docket and from an attempt to give priority to jail cases. The congestion of criminal court dockets has consistently been recognized as a valid justification for delay. *Dickey v. Florida,* 398 U.S. 30, 26 L.Ed. 2d 26, 90 S.Ct. 1564 (1970); *State v. Gordon, supra; State v. Brown, supra; State v. George,* 271 N.C. 438, 156 S.E. 2d 845 (1967); *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965). The burden is clearly on the accused who asserts the denial of his right to a speedy trial to show that the delay is due to the neglect or willfulness of the prosecution. *State v. Brown, supra; State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971); *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Hollars, supra.* Defendant has failed to carry that burden.

In the present case no motion for a speedy trial was made prior to 8 March 1974, and on 18 April 1974, when Judge Copeland heard the motion, counsel for defendant stated that he was not prepared to try the case at that time for the reason that there were witnesses from out of state. "A defendant who has himself caused the delay, or *acquiesced* in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. [Citations omitted.]" (Emphasis added.) *State v. Johnson, supra.* Defendant's contention that he has been denied his right to a speedy trial is without merit.

**[3]** Pursuant to the provisions of G.S. 1-84 and G.S. 9-12, defendant filed a pretrial motion for a change of venue from Union County or, in the alternative, for a special venire for the retrial of his case. Defendant contends that the trial court abused its discretion in denying this motion for the reason that newspaper articles published prior to the trial made it impossible for him to obtain a fair trial in Union County. In

support of this motion, defendant offered petition verified by his attorney, and various newspaper clippings.

The newspaper articles in the Monroe Enquirer-Journal were factual and not inflammatory. The articles in the Charlotte papers were largely favorable to defendant. For instance, headlines in large print in an article in the October 2, 1973, edition of The Charlotte Observer boldly proclaimed, "Convicted Man Telling Truth, N. C. Tests Show." This statement referred to a polygraph test given defendant during the investigation of this case, the results of which are not admissible in evidence.

The Charlotte News in bold headlines in its March 14, 1973, edition stated, "I'll Prove My Innocence, Robber Tells Union Judge." Another article in the June 22, 1973, edition of The Charlotte Observer was headlined as follows: "Agent Says N. C. Inmate Not Guilty." This article referred to a statement made by an unnamed undercover agent for South Carolina's State Law Enforcement Division and quoted Chief J. P. Strom of that Division as saying that the evidence "looks good and strongly indicates that Jackson may be innocent." It is noted that neither of these South Carolina officers testified at trial. Still another headline in the June 28, 1973, edition of The Charlotte Observer stated, "New Probe May Free Man Convicted in N. C. Robbery," and then related statements made by various witnesses regarding defendant's innocence.

The Charlotte Observer and The Charlotte News are newspapers with wide circulation in that area. Defendant offered no evidence to show that such publicity was more widespread in Union County than in any other county to which the case might have been removed under G.S. 1-84 or from which jurors could have been drawn under G.S. 9-12.

Defendant contends, however, that the primary reason for the motion was not to move the trial outside the territory served by the Charlotte newspapers but to move it out of the area within which Mr. Lowery, the District Attorney; Mr. Fowler, the Sheriff; and Mr. Funderburk, an attorney, were well known. In his motion for a change of venue or a special venire, defendant alleges that some of the published articles were critical of these three men, all of whom were well known in that area; that they were published without the fault of the defendant; and constituted probable cause to believe that a fair and impartial trial could not be obtained in Union County. No evidence was

offered to support these allegations and no evidence was offered that any prospective juror or other citizen of Union County had read or in any manner had been influenced by such articles.

A motion for a change of venue or for a special venire on the grounds of local prejudice against defendant is addressed to the sole discretion of the trial judge and an abuse of discretion must be shown before there is any error. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971); *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). There is no indication of abuse of discretion in the present case. This assignment is overruled.

**[4]** Defendant next contends that the trial court erred in admitting the in-court identification testimony of State's witnesses Bill Squires and Larry Catledge. Defendant argues that the pretrial identification procedures were so unnecessarily suggestive and conducive to mistaken identification that the defendant was denied due process of law and that the in-court identification was therefore tainted by the pretrial identification procedures.

In *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974), we stated the test applicable to pretrial identification procedures as follows:

> " . . . The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127; *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; *Rochin v. California,* 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205; *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610; *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507; *State v. Rogers* [275 N.C. 411, 168 S.E. 2d 345]."

*Accord, State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682 (1974). And the United States Supreme Court has said that "each case must be considered on its own facts, and . . . 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." *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968). *Accord, State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Shore, supra; State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971).

In the present case, the trial court, on motion of defendant, held a *voir dire* hearing on defendant's motion to suppress the identification testimony. At the *voir dire*, Bill Squires and Larry Catledge testified that they viewed defendant from the distance of a few feet for about five minutes during the robbery. They did not observe the other man very carefully because defendant was the one with the handgun. Both witnesses testified that defendant was the man who held the gun on them on 30 January 1973 and that they were basing their in-court identification on their observations at the time of the crime.

Other evidence on *voir dire* discloses that the day after the robbery Sheriff Fowler of Union County brought about six photographs for Squires to examine. There were two pictures of defendant but each of the other suspects appeared only once. Defendant and one other suspect had a mustache. Squires selected defendant's picture and said, "Sheriff, I am just about positive that this is the man." Sheriff Fowler then told Squires that defendant was scheduled to be tried that day in Wadesboro on a different charge and took Squires there. In the courtroom there were twelve to fifteen people. Squires observed defendant, who was awaiting trial, both inside the courtroom and during a recess in the concessions area. After viewing defendant, Squires said, "There's no doubt, Sheriff, that's him. I'm positive." There was conflicting evidence whether Sheriff Fowler pointed out defendant for Squires while in the courtroom.

Larry Catledge stated on *voir dire* that when he was shown an undisclosed number of photographs the evening of the day after the crime, he pointed to defendant's picture and said, "This looks like the man now, and looks like the man that did, you know, the robbery." Later, while walking by the fingerprinting room on the way from the concessions area, he looked through the open door and recognized the person being finger-

printed inside (defendant) as the man who robbed him on 30 January 1973.

After considering the evidence on *voir dire,* the trial court found, in part, that both witnesses' in-court identifications were based on their observations of defendant from the distance of several feet at the time of the crime, and that there was no impermissible suggestiveness in the photographic identifications or in the personal observations of defendant by the witnesses.

We do not approve two of the procedures utilized in this case. We refer particularly to the photographic lineup wherein defendant's photograph appeared two times while the photographs of others appeared but once and to the showing of defendant to Squires in a courtroom instead of a lineup. We are aware, however, that unnecessary suggestiveness alone does not require the exclusion of evidence. As the United States Supreme Court has said:

> " . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as [*Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967)] makes clear, the admission of evidence of a showup without more does not violate due process.
>
> * * *
>
> "We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. . . . " *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972).

*Accord, State v. Burns,* 287 N.C. 102, 214 S.E. 2d 56 (1975); *State v. Shore, supra; State v. Henderson, supra.*

Here, both witnesses carefully observed defendant's uncovered face for five minutes from a distance of only a few feet. This occurred during midday in a well-lighted room. Both witnesses selected defendant from the photographic lineup. The trial judge, after hearing both witnesses on *voir dire,* found that their in-court identifications were based on what they saw on the day of the crime. We think that, considering the totality of the circumstances, the identification testimony was properly admitted in evidence. *Compare Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969). The trial judge's finding, based on competent evidence, is binding on appeal. *State v. Burns, supra; State v. Shore, supra; State v. Tuggle, supra.*

Defendant contends, however, that Squires's initial description to the police that defendant was "about six foot tall . . . approximately my height" should render his in-court identification tainted, since defendant was in fact only about five feet seven inches tall. We note, however, that the record shows that Squires himself is only five feet eight inches tall.

**[5]** By his next assignment of error defendant contends the trial court erred in refusing to allow the results of a polygraph examination into evidence.

Defendant recognizes the contrary holding of this Court in *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961). However, defendant maintains that *Foye* left open the door for future acceptance of such testimony when the reliability of lie detector test results was more clearly demonstrated. We recently rejected this argument in *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94 (1975), stating:

> "Defendant urges us to reconsider our decision in *Foye* in light of technological and judicial advances since *Foye* was decided in 1961. The weight of authority still supports that decision. See Annot., 23 A.L.R. 2d 1306 (Later Case Service 1970 and Later Case Service 1975); 29 Am. Jur. 2d, Evidence § 831 (1967). We see no compelling reason to change our ruling and we adhere to our decision in *Foye* for the reasons stated therein."

This assignment is overruled.

**[6]** By his next assignment of error defendant contends the trial court erred in admitting into evidence the complaint for arrest and warrant for arrest.

After defendant rested his case, the State offered and the court received in evidence Exhibit No. 1, which contains the complaint for arrest and warrant for arrest. Defendant contends that these documents are hearsay and constitute a derogation of his constitutional right to confront the witnesses against him.

The affidavit of Officer Frank McGuirt, which constitutes the complaint for arrest and which is most strenuously objected to by defendant, reads as follows:

> "The undersigned, Frank McGuirt, on information & belief, being duly sworn, complains and says that at and in the County named above and on or about the 30th day of Jan., 1973, the defendant named above did unlawfully, wilfully, and feloniously steal, and carry away personal property, to wit: approx. $300.00 in money, from the person and possession Bill Squires with the use of a firearm, to wit a pistol, whereby the life of Bill Squires endangered. The taking was accomplished by the commission of an assault upon Bill Squires through putting him in fear of bodily harm by threat of violence.
>
> "The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-87.
>
> Sworn to and subscribed before me this
>
> 31 day of Jan. 1973.
>
> Frank McGuirt
> Complainant
>
> Kenneth Helms
> Magistrate
>
> Deputy Sheriff Union County"

We think the introduction of the complaint for arrest was error. We need only to determine if the error was prejudicial. In *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972), we held that it was error to allow a search warrant together with the affidavit to obtain the search warrant to be introduced into evidence because the statements and allegations contained in the affidavit were hearsay statements which deprived the accused of his right to confrontation and cross-examination. *See also State v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206 (1958).

*See generally* 1 Stansbury's N. C. Evidence § 139 (Brandis Rev. 1973).

In *Spillars,* the affidavit contained hearsay statements indicating defendant's complicity in another crime without showing defendant had been convicted of that crime. For that reason we said:

> "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. . . . "

We further said, however:

> " . . . [T]he 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."

In the present case, defendant's defense was an alibi. Two witnesses for the State positively identified defendant as the robber. Several witnesses for defendant testified that at the time of the robbery defendant was in Bennettsville, South Carolina—some ninety miles from the scene of the crime. The entire case for the prosecution rested upon testimony of the two eyewitnesses. It was important for the State, if possible, to corroborate the testimony of these witnesses. This the district attorney attempted to do by introducing the incompetent affidavit of Officer Frank McGuirt who did not testify and who could not therefore be cross-examined. This affidavit was not limited to the purpose of corroborating the testimony of these witnesses but was admitted into evidence without restriction. It is presumed that this affidavit, entered into evidence without restriction, was exhibited to the jury or its contents made known to them. *State v. Spillars, supra.*

We agree with the dissenting opinion of Chief Judge Brock in the Court of Appeals that "allowing the 'complaint for arrest' to be placed in evidence permitted the State to strengthen its case with clearly incompetent hearsay evidence." The admission of this affidavit was prejudicial error and entitles defendant to a new trial.

The case is remanded to the North Carolina Court of Appeals with direction that it remand it to the Superior Court

of Union County for a new trial in accordance with the principles herein stated.

New trial.

Justice COPELAND did not participate in the hearing or decision of this case.

STATE OF NORTH CAROLINA v. TIMOTHY WESLEY ROBBINS

No. 42

(Filed 6 June 1975)

1. **Criminal Law § 34— reference to non-testifying defendant's arrest record — no prejudice**

Testimony of a police officer concerning an arrest record, though incompetent, did not prejudice defendant where the court sustained defendant's objection and promptly instructed the jury to disregard the statement.

2. **Criminal Law § 42— portion of check found on defendant — deceased's name on check — admissibility**

The trial court in a prosecution for kidnapping and first degree murder did not err in allowing into evidence a portion of a check found in defendant's pocket at his arrest which bore the name "Osborne," the name of deceased, on the payee line, since the check tended to show some contact between the defendant and the deceased, to identify defendant as the perpetrator of the crime charged, and to corroborate the testimony of police officers, and it was not necessary that the paper writing be authenticated or that its genuineness and execution be proven.

3. **Criminal Law § 114— jury instruction — no expression of opinion**

Trial court's instruction following the recapitulation of the testimony of each State's witness, "That is what the evidence of this witness tends to show for the State and for the defendant. What it does show is for you, the jury, to say and to determine," did not amount to an expression of opinion in violation of G.S. 1-180 and was not prejudicial to defendant.

4. **Constitutional Law § 36; Homicide § 31— first degree murder — death sentence proper**

Imposition of the death penalty in a first degree murder prosecution was not cruel and unusual punishment.

Justice COPELAND did not participate in the hearing or decision of this case.

Chief Justice SHARP and Justice EXUM dissenting as to the death sentence.

ON *certiorari* to the Superior Court of GUILFORD County to review judgments of *Copeland, J.*, 28 May 1974 Criminal Session, GUILFORD Superior Court (Greensboro Division).

Defendant was tried on separate bills of indictment, proper in form, charging him with the kidnapping and first degree murder of Bradley Douglas Osborne on 19 January 1974 in Guilford County.

Hugh Douglas Osborne, father of Bradley Douglas Osborne, the deceased, testified that his son Bradley was a student at Wingate College and was on a weekend visit home on Saturday, 19 January 1974. Bradley operated a blue 1973 Gremlin with a black stripe down the side and a stripe across the rear deck. A Wingate College decal was affixed to the rear window of the car. When Bradley came home on this particular Saturday his father put a new 1974 license tag, No. ABF-918, on the Gremlin.

Bradley left his home about 12:50 p.m. to purchase gasoline. At the time, he was wearing a gold Timex watch (State's Exhibit 4). He never returned home, and at 10 o'clock that evening Mr. Osborne reported his son's absence to the police.

Alex Gimpaya testified that he was working at an Exxon filling station between West Market Street and Friendly Road and sold gasoline to the owner of a blue Gremlin about noon on January 19. The customer used a credit card to pay for the gas and signed his name to the receipt. Mr. Gimpaya stated that he wrote the license number ABF-918 on the receipt.

Mr. Gimpaya further testified that the driver of the Gremlin was a young white male; that while he was pumping the gas, a black man approached the driver and talked to him and then circled the car and took a seat beside the driver in the front seat while the witness was placing the credit card in the machine to record the sale. This witness identified defendant as the black man he observed on that occasion and as the man who entered the Gremlin while he was working the credit card machine. When the car left the defendant and the owner were in the car together.

Patrolman T. P. Dolinger testified that as a result of a radio communication he went to the home of Hugh Osborne about 10 p.m. on January 19 and was informed that the son Bradley Osborne had been missing since 1 p.m. that day. Patrol-

man Dolinger put out an alert for the missing person, including information as to the type of vehicle he was driving.

Teresa Louise Martin testified that defendant came to her home on 19 January 1974 between 1:30 and 2:00 p.m. driving a blue 1973 Gremlin and accompanied by his cousin Ronald Stimpson. Defendant invited her to a party that night and she accepted. She got in the Gremlin with defendant and Ronald Stimpson and went to Liberty to see about the party. While riding in the car she observed a tape player and some tapes under the front dash. Upon reaching Liberty she heard one of the boys there ask defendant to let him shoot a gun. She later saw the gun while parked outside Ronald Stimpson's house that night when defendant handed her the gun to hold. She stated that defendant had the gun at the time she left with him and Ronald Stimpson to go to Liberty about 1:30 that afternoon. She also testified that defendant had two watches that day, one of which was gold with an outdated calendar on the watchband which defendant allowed her to wear. She identified this watch as State's Exhibit No. 4. She recalled that on the way back from Liberty that night she, the defendant and Ronald Stimpson stopped on Bothwell Street where defendant went into the woods and later emerged from them running. During the afternoon while defendant and Stimpson were in the Bi-Rite Store and she was alone in the Gremlin, she went through the glove compartment and found a gasoline credit card with the name "Osborne" on it.

Nadine McCain testified that on 19 January 1974 at about 9 p.m. she accompanied Ronald Stimpson to a party in Liberty and they drove to the party in a blue Gremlin with defendant Timothy Robbins and Teresa Martin. After returning from the party to Greensboro, they stopped at a supper club parking lot where Stimpson and defendant went inside. While they were gone, she and Teresa Martin looked in the glove compartment and found an Exxon card with the name "H. D. Osborne" printed on it. Upon leaving the parking lot, defendant drove to Bothwell Street where he entered the woods and later returned. Defendant was carrying a gun at that time.

Grady Stimpson, a cousin of defendant, testified that on the evening of 19 January he went for a ride with defendant in a blue Gremlin car which defendant was driving. During the drive this witness observed tapes in the car, all of which were made by white singers. He also observed that defendant had a

pistol and a shoulder holster with him. Later, back at the Stimpson home, defendant "asked me if I had a body, what would I do with it." The next morning, which was Sunday, defendant came by the home of this witness around 8 a.m. and "asked me again if I had a body, what would I do with it." As the two of them rode around, defendant turned his car on Bothwell Street, which was a dirt road, and said: "I have got something I am going to show you. . . . I done messed up. I done killed a man." The witness then testified that defendant told him he had taken a pair of pants from a store uptown and in trying to get away had asked the man to give him a lift and they became embroiled in an argument and he subsequently killed him. The witness then testified that defendant showed him the body in the ditch off Bothwell Street.

Allen Junior Stimpson, cousin of the defendant, testified that on Saturday morning, 19 January 1974, the defendant showed him a Smith and Wesson .32 caliber pistol and that he rode in the Gremlin which defendant was driving that Saturday night. During the ride he noticed all the tapes in the Gremlin were by white singers and observed on the back window of the car a "Wingate" sticker. This witness further testified that on Sunday morning, January 20, he and defendant took a trip to Charlotte in the Gremlin, and defendant told him that he had shoplifted a pair of pants while some white boy was watching him; that he offered to pay the white boy to drive him away but the white boy drove him to the police station; that he pulled a pistol on the white boy, moved him over to the passenger side, and drove away; that he later shot the white boy and dragged the body into the woods and later put it in a ditch and covered it with leaves and tires. He said, "That is one less whitey when the revolution come."

On 21 January 1974 at 6 p.m. an unidentified caller whose voice sounded like a black male telephoned the Greensboro Police Department and stated that a body was to be found in the ditch under three tires on the right-hand side of Bothwell Street. This information was put on the air; and Detective Larry Bishop, who heard the radio message, went to Bothwell Street and found the body of a white male under four tires stacked on some bushes. He observed the body and saw there was no wristwatch on it. What appeared to be a gunshot wound was in the left chest. The body was removed by ambulance to Moses Cone Hospital.

Dr. Donald D. Leonard testified that on 22 January 1974 he performed a postmortem examination on the body of Bradley Douglas Osborne; that a bullet entered the left breast and that the muzzle of the gun was less than six inches from the body when the gun was fired; that in his opinion the cause of death was a gunshot wound in the chest with secondary loss of blood.

Captain W. H. Jackson, Greensboro police, testified that he arrested Timothy Robbins, with the aid of Charlotte police officers, at Piedmont Community College on 23 January 1974. At the time of his arrest, defendant had a loaded revolver in his belt, a gold colored Timex watch with an outdated calendar on his arm, and in his pocket a portion of a check (State's Exhibit 16) with the word "Osborne" written on it. On 26 January 1974 the Gremlin automobile was found at 2641 Mayfair Avenue in Charlotte, three and one-half blocks from where the defendant resided. The Greensboro police examined the car and, among other things, found an Exxon credit card receipt for three dollars' worth of gasoline with the name "Bradley Osborne" on it. Hugh B. Osborne testified that the signature on the credit card receipt was the signature of his son, Bradley Osborne.

The defendant offered no evidence.

The jury convicted defendant of kidnapping and murder in the first degree. He was sentenced to life imprisonment for kidnapping and to death for the murder. He appealed to the Supreme Court assigning errors discussed in the opinion.

*Rufus L. Edmisten, Attorney General; William W. Melvin and William B. Ray, Assistant Attorneys General, for the State of North Carolina.*

*Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, for defendant appellant.*

HUSKINS, Justice.

**[1]** Captain W. H. Jackson, one of the investigating police officers, testified that upon his arrival in Charlotte he went to the Charlotte police to obtain, if possible, the address of Timothy Wesley Robbins. He then stated that the address was obtained "from an arrest record of Timothy Robbins." At this point defendant objected and the court, sustaining the objection, in-

structed the jury "to disregard anything about an arrest record." Denial of defendant's motion for a mistrial is assigned as error, defendant contending that the officer's statement impeached his character prejudicially in violation of the rule proscribing such evidence when a defendant has not taken the stand.

We said in *State v. Jarrette,* 284 N.C. 625, 646, 202 S.E. 2d 721, 735 (1974):

> "It is, of course, the general rule that upon the trial of a criminal charge, the defendant not having taken the stand as a witness, evidence of his bad character is not competent and, for this reason, the State may not introduce evidence showing that he committed an unrelated criminal offense. [Citations omitted.] However, Agent Phelps' statement inferring that the defendant had escaped from prison was not responsive to the question propounded to him by the Solicitor. Immediately, upon motion of the defendant's counsel, the court properly instructed the jury not to consider this statement. We find in this circumstance no ground for mistrial."

In *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967), defendant was on trial for rape and kidnapping. Defense counsel asked a State's witness if he knew the defendant prior to this incident. The witness replied, "Yes, sir. I have had David for other sex offenses." Upon defendant's objection and motion to strike, the court instructed the jurors not to consider the statement, to erase it from their minds and not to let it influence their verdict in any way. We held the occurrence afforded no grounds for a mistrial.

Captain Jackson's inadvertent reference to defendant's arrest record was incompetent. We hold, however, that the action of the court in sustaining defendant's objection and prompt instruction to the jury to disregard the statement sufficed to remove any possibility of prejudice to defendant. "[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." *State v. Ray,* 212 N.C. 725, 194 S.E. 482 (1938); *accord, State v. Self,* 280 N.C. 665, 187 S.E. 2d 93 (1972); *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453 (1970). "Ordinarily where the evidence is withdrawn no error is committed." *State v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469 (1948).

A look at the record reveals that defendant's guilt of kidnapping and murder is overwhelmingly shown by competent, untainted evidence. All the evidence and every surrounding circumstance points unerringly to his guilt; and there is no reason to believe that another trial would produce a different result. In some cases, and this is one of them, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of an erroneous statement is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper evidence is harmless error. *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974). Substantial factual differences distinguish *State v. Aycoth,* 270 N.C. 270, 154 S.E. 2d 59 (1967), relied on by defendant. In our view, the minds of the jurors in this case would not have found the State's case significantly less persuasive had Officer Jackson never referred to an arrest record. Hence, no prejudice resulted. This accords with consistent decisions of this Court that technically incompetent evidence is 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. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. denied* 404 U.S. 1023, 30 L.Ed. 2d 673, 92 S.Ct. 699 (1972); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). "Verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial." *State v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323 (1951). This assignment of error is overruled.

**[2]** Defendant's second assignment of error relates to the introduction, over objection, of a portion of a check (State's Exhibit 16). Captain Jackson of the Greensboro Police Department testified without objection that State's Exhibit 16 was removed from the pocket of defendant Timothy Robbins in the police department in Charlotte on the night of January 24. This check, or portion of a check, is dated January 18, 1974, has the word "Osborne" showing on the payee line followed by the sum "$35.00." Only the word "five" shows on the line below followed by the printed word "Dollars." The check apparently was drawn on The Stage Door Set and bears the purported signatures of Thomas M. Vance and Donald Martin. No first name or initial of the payee is visible on this portion of the check, and there is no indication that the check was endorsed by the deceased or anyone else. Defendant contends that this

paper writing was never authenticated and its genuineness and its execution were never proven prior to its introduction. He asserts the check was therefore erroneously received into evidence and that its reception was highly prejudicial.

Every circumstance calculated to throw any light upon the crime charged is admissible in criminal cases. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied* 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966); *State v. Payne,* 213 N.C. 719, 197 S.E. 573 (1938). Articles shown by the evidence to have been used in the commission of a crime are competent and properly admitted into evidence. *State v. Stroud,* 254 N.C. 765, 119 S.E. 2d 907 (1961). "So far as the North Carolina decisions go, any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials." 1 Stansbury, North Carolina Evidence § 118 (Brandis rev. 1973). *Accord, State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645 (1958); *State v. Harris,* 222 N.C. 157, 22 S.E. 2d 229 (1942).

Here, there is evidence tending to show that the last name of the deceased is "Osborne"; that this partially mutilated check with the name "Osborne" on the payee line was found in defendant's pocket when he was arrested; that defendant was also wearing a gold Timex watch (State's Exhibit 4) which he showed to Allen Junior Stimpson and stated that he took it "off the boy" together with a billfold containing $30.00 in money. Thus there is evidence tending to show that State's Exhibit 16 has a relevant connection with the case and is competent evidence. It tends to show some contact between the defendant and the deceased and to identify the defendant as the perpetrator of the crime charged. Moreover, it corroborates the testimony of the police officers. Rules of law relating to authentication, genuineness and execution of paper writings have no pertinence in this context. This assignment of error is overruled.

**[3]** Defendant's next assignment of error is based on Exceptions Nos. 15 through 29. One of these exceptions appears in each instance where the court in its charge, following recapitulation of the testimony of each State's witness, stated: "That is what the evidence of this witness tends to show for the State *and for the defendant.* What it does show is for you, the jury, to say and to determine." (Emphasis added.) Defendant argues that since he offered no evidence the charge "in effect held the

defendant out to the jury as ratifying and confirming almost the entire evidence put on by the State." Moreover, he contends that repetition of the phrase fifteen times "unavoidably and unalterably invaded the province of the jury, and in effect amounted to an expression of opinion on the part of the judge, for which a new trial must be ordered." We now examine the validity of this assignment.

The main purpose of the court's charge to the jury is to clarify the issues, eliminate extraneous matters, and apply the law to the different factual aspects arising upon the evidence. *State v. Jackson,* 228 N.C. 656, 46 S.E. 2d 858 (1948). So long as the judge charges correctly on the applicable principles of law and states the evidence plainly and fairly without expressing an opinion thereon, he has wide discretion in presenting the issues to the jury and is not bound by any stereotyped forms of instruction in doing so. *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965); *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352 (1944); *State v. Howard,* 222 N.C. 291, 22 S.E. 2d 917 (1942).

Here, defendant offered no evidence but relied upon the legal presumption of innocence and the weakness of the State's case. The presumption of innocence goes with him throughout the trial and is not overcome by his failure to testify in his own behalf. "He is not required to show his innocence. The burden is on the State to prove his guilt beyond a reasonable doubt." *State v. Spivey,* 198 N.C. 655, 153 S.E. 255 (1930). And a reasonable doubt may arise from the evidence offered against him, or from a lack of evidence, or from its deficiency. *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954); *State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895 (1949); *State v. Tyndall,* 230 N.C. 174, 52 S.E. 2d 272 (1949).

When the foregoing legal principles are applied to the words in the charge assigned as error, it is apparent that the language complained of is not prejudicial and did not amount to an expression of an opinion in violation of G.S. 1-180. "The charge of the court must be read as a whole . . ., in the same connected way that the judge is supposed to have intended it and the jury to have considered it. . . ." *State v. Wilson,* 176 N.C. 751, 97 S.E. 496 (1918). Although the instruction in question here is not a model to be followed, we perceive nothing in it which would prejudice a mind of ordinary firmness and intelligence. When construed contextually, the charge as a

whole is correct. It presents the law fairly and clearly to the jury and applies it correctly to the different factual aspects of the evidence. Furthermore, "it is a 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. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973). This assignment lacks merit and is overruled.

**[4]** Finally, defendant contends that imposition of the death penalty is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

This assignment has been the subject of final judicial determination in this State unless further review is required by legislative enactment or by the Supreme Court of the United States. *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973).

Assignments relating to nonsuit and to the signing of the judgments are formal, requiring no discussion, and are overruled.

Examination of the entire record discloses a senseless killing without provocation and a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

Justice COPELAND did not participate in the hearing or decision of this case.

Chief Justice SHARP dissenting as to the death penalty:

The murder for which defendant was convicted occurred on 19 January 1974, a date between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Ses-

sion Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974)—an opinion in which Justice Higgins and I joined—, I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in *State v. Waddell, supra* at 453 and 476, 194 S.E. 2d at 30 and 47.

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

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IN THE MATTER OF THE APPLICATION OF CAMPSITES UNLIMITED INC.

No. 50

(Filed 6 June 1975)

1. **Municipal Corporations § 31— zoning — review of decision by board of adjustments**

When a proceeding is before the superior court upon certiorari for review of the order of a county board of adjustments, the findings of fact made by the board, if supported by evidence introduced at the hearing before the board, are conclusive.

2. **Municipal Corporations § 31— zoning — review of decision of board of adjustments**

Upon review by certiorari in the superior court of an order of a county board of adjustments, the matter is before the court to determine whether an error of law has been committed and to give relief from an order of the board which is found to be arbitrary, oppressive or attended with manifest abuse of authority; it is not the function of the reviewing court to find the facts but to determine whether the findings of fact made by the board are supported by the evidence before the board.

3. **Municipal Corporations § 30— zoning — nonconforming use — building or other development — expenditure of money or contractual obligation**

In order for a landowner to acquire a vested right to continue development of land as a nonconforming use after the enactment of a

zoning ordinance, it is not material whether the proposed development and use of the land be the construction of a building or some other development, such as construction of recreational facilities, roads, water and sewer lines and the grading, clearing and development of the sites for the proposed use of the property; furthermore, there is no basis for distinction between the actual expenditure of money and the incurring of binding contractual obligations for such expenditure, or between expenditures for the acquisition of the land, for the acquisition of building materials or services and for the making of visible, physical changes in the condition of the land.

4. **Counties § 5; Municipal Corporations § 30— zoning ordinance — good faith expenditures before passage — knowledge zoning under consideration**

The developer of a lakeside campsite project did not act in bad faith in making and incurring substantial expenditures and obligations in the development of the project prior to the adoption of a county zoning ordinance which would prohibit the use of the land for such purpose where the evidence in the record shows that at the time the developer acquired and began work on the property it knew no more concerning the county's plans for zoning than that a general consideration of zoning of the entire rural portion of the county was in progress by the Planning Board, that the Planning Board, itself, had not determined what zoning restrictions it would recommend to the county for the area including the land in question, and that the reason the developer proceeded speedily with its development was not to win a race with the proponents of zoning but to get its property in condition to take advantage of the spring and summer market for the sale of campsites; therefore, the developer has a right to continue development of its property as a nonconforming use to which the zoning ordinance does not apply.

5. **Counties § 5; Municipal Corporations § 30— zoning ordinance — good faith expenditures — attempt to "beat" ordinance**

Statement by a developer's president at a public hearing several months after development of land had begun that he was aware that zoning "had been in the planning stage for a year or so" and that he was "trying to beat it" does not show bad faith by the developer in proceeding with its proposed development.

6. **Counties § 5; Municipal Corporations § 30— study of zoning — right of landowner to develop property**

The right of landowners to develop their properties in ways then lawful cannot be frozen by a county's or a municipality's announcement of its undertaking of a general study of zoning which, at some future date, may or may not lead to the adoption of an ordinance restricting the landowner's proposed use of his land.

7. **Counties § 5; Municipal Corporations § 30— zoning ordinance — nonconforming use — entire campsite project**

Although roads had been cut in only five of eight sections of a campsite development project and lots had been staked off in only one area at the time a county zoning ordinance was passed, the entire development constituted a nonconforming use where the evi-

dence shows that the detailed map of the project was prepared in eight sections solely in order to permit the use of a scale sufficient to make the map readable, not because of any plan to develop the tract in sections, and that, from the outset, the developer intended to develop the entire property as promptly as possible without interruption and without regard for section boundaries.

APPEAL by Stanly County from the North Carolina Court of Appeals which reversed the judgment entered by *Seay, J.*, at the 4 February 1974 Session of STANLY, approving and confirming the order of the Board of Adjustments for Stanly County, *Vaughn, J.*, dissenting. The decision of the Court of Appeals is reported in 23 N.C. App. 250, 208 S.E. 2d 717.

Campsites Unlimited Inc., hereinafter called Campsites, is the owner of a 155-acre tract of land which borders on Lake Tillery in Stanly County. It purchased this tract for the purpose of developing it as recreational property and subdividing it into lots for sale as camp sites, the average size of the lots to be 40 feet by 80 feet. From the beginning its development plan has contemplated the construction of a system of private roads, a swimming pool, a marina, a restaurant, a pavilion and a central sewage disposal system, and the sale of the lots to individuals for the use thereon of camper vehicles, no buildings to be permitted on such lots. At the time Campsites acquired the property, Stanly County had no zoning ordinance applicable to its rural areas.

In July 1971, Stanly County established a planning board, which immediately took under consideration plans for zoning the county's rural areas. A preliminary zoning plan was presented to the county officials in June 1972. The Board of Commissioners took the proposal under consideration and tentatively set 1 July 1973 as the date by which it hoped to put a zoning ordinance into effect.

Campsites acquired its land by deed dated 25 January 1973. Its president, organizer and, apparently, its sole stockholder, is C. L. Darnley. According to his testimony, he conceived the idea of a camp site development in the Lake Tillery area in the latter part of 1971 or early in 1972, procured an option on the land, retained counsel and employed an engineer to make the necessary surveys, lay out streets and prepare maps. The purchase price of the property was $156,000, of which $5,000 was paid in cash at the time the deed was delivered. Rights for the construction of the contemplated restaurant and marina upon the

property were sold to another party in February 1973. At about the same time, an oral agreement was reached with Carolina Power and Light Company for a lease to be executed permitting certain uses of its lake front property by occupants of the proposed development and the drafting of engineering plans for sewer and water services was begun.

Mr. Darnley's plan was to develop the entire 155 acres as rapidly as possible, using the proceeds of early lot sales for the financing of the remainder of the total development. He pressed its engineers to move rapidly in order to open the development by early spring, 1973, in order to take advantage of the seasonal market for sale of lots for camp site purposes. A wet spring delayed the clearing, grading and construction of the streets. Workers cutting and clearing trees closely followed engineers staking streets and were, in turn, followed immediately by other workers grading the streets. The actual grading of the streets began about 10 March 1973. On or about 28 March 1973, Mr. Darnley first learned that some neighboring landowners objected to his proposed development and that, as a result, the county might adopt zoning regulations for the area. The work on the project continued.

On 16 April 1973, the County Board of Commissioners adopted a zoning ordinance, effective immediately, whereby the area which includes the property of Campsites was designated "R-20." The ordinance provides that land in an "R-20" district may not be used for camp site development and the minimum size of a lot is 20,000 square feet. The average size of the lots, according to Campsites' plan, is 3,200 square feet.

The total cost of the entire contemplated development would be not less than $2,700,000. At the time the zoning ordinance was passed, Campsites had paid out, or become obligated to pay, approximately $275,000 for the purchase of the land, engineering and surveying fees, road construction, and other expenses. Its engineers had prepared a perimeter map of the entire development area and detail maps of the entire 155 acres, in eight sections, showing streets and lot boundaries, a total of 1,200 camp site lots being so shown. The roads so laid out were not designed for and would not be suitable for single-family residential lots 20,000 square feet in area. They were designed for slow speed traffic in a camp site development. They were not intended to become part of the public road system. The maps showing streets and lot boundaries were prepared in sections

in order to permit use of a scale sufficiently large to make the map usable, not because of any plan to develop the tract in sections. At all times the plan of Campsites was to proceed with the entire development as promptly as possible.

At the time the zoning ordinance was adopted, roads had been actually cut in the areas shown on map sections #1 through #5 and lots had been staked off in the area shown on map section #1. Nothing had been done in the actual development of the areas shown on map sections #6, 7 and 8.

Campsites applied to the County Board of Adjustments for recognition of its development as a preexisting, nonconforming use. Following a hearing, the Board issued its order denying permission to continue the development as a nonconforming use. It found:

> "Applicant has failed to sustain its claim that the expenditures of money made by it and for which it became obligated to make [sic] on its 155-acre tract were made in good faith without knowledge that the Board of Commissioners of Stanly County was contemplating adopting a Zoning Ordinance encompassing the area in which the 155-acre tract lies, and prohibiting the use of its property in the manner and for the purposes proposed by Applicant."

This finding by the Board was predicated upon its findings that with knowledge that "zoning was in progress" with a target effective date of 1 July 1973, Mr. Darnley told his engineer on 12 January 1973 that he "wanted to expedite things as fast as possible" and wanted to open (i.e., begin selling lots) by early spring, and that at the hearing on 16 April 1973, following which the zoning ordinance was adopted, Mr. Darnley stated that he was aware that zoning had been in the planning stage for approximately a year and "he was trying to beat it."

Upon review in the Superior Court upon certiorari, the court considered the evidence presented at the hearing before the Board of Adjustments, and entered its order making findings of fact substantially identical to those found by the Board of Adjustments and approving and confirming the order of that Board.

On appeal to the Court of Appeals, that court reversed and remanded the matter to the Superior Court "with the direction that the court enter judgment in this matter declaring the

entire development in question to be a nonconforming use and further declaring the property free of the effect of the zoning ordinance of 16 April 1973."

*Brown, Brown & Brown by Richard L. Brown, Jr., for Stanly County.*

*Henry C. Doby, Jr., for James A. Henson et al.*

*Russell J. Hollers and John V. Hunter III for Campsites Unlimited, Inc.*

LAKE, Justice.

**[1, 2]** This proceeding came before the Superior Court upon certiorari for review of the order of the Board of Adjustments for Stanly County. Upon such review, the findings of fact made by the Board, if supported by evidence introduced at the hearing before the Board, are conclusive. *In re Application of Hasting,* 252 N.C. 327, 113 S.E. 2d 433; *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1. The matter is before the Court to determine whether an error of law has been committed and to give relief from an order of the Board which is found to be arbitrary, oppressive or attended with manifest abuse of authority. *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600; *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128. It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board. It may vacate an order based upon a finding of fact not supported by evidence.

In the present case, the Superior Court set forth in its judgment what purport to be findings of fact by it. The material portions of these are identical with the material findings of fact made by the Board of Adjustments. For the purposes of this appeal we treat these portions of the judgment of the Superior Court as merely the determination by the Superior Court that the findings of fact made by the Board of Adjustments are supported by the evidence contained in the record of the hearing before the Board. Such a determination by the Superior Court is its conclusion upon a question of law and is reviewable, as such, by the appellate courts.

The statement of facts above set forth is a summary of uncontradicted evidence set forth in the record of the hearing

before the Board of Adjustments. The key finding of fact by the Board was:

> "8. Applicant has failed to sustain its claim that the expenditures of money made by it and for which it became obligated to make on its 155-acre tract were made in good faith without knowledge that the Board of Commissioners of Stanly County was contemplating adopting a Zoning Ordinance encompassing the area in which the 155-acre tract lies, and prohibiting the use of its property in the manner and for the purposes proposed by Applicant. This finding of fact is based on the following evidence:"

We summarize the Board's statement of the basis for its said finding of fact as follows:

> Mr. Darnley testified that in the fall of 1972 he had knowledge of the proposed zoning in Stanly County, but believed that his project would be almost finished prior to 1 July 1973, the tentative target date for the adoption of some zoning ordinance by the Board of County Commissioners. He had been advised by the real estate agent, through whom he purchased the land in question, that "they were in the process of trying to get zoning in Stanly County."
>
> Mr. Darnley made no inquiry of the Planning Administrator and Zoning Administrator prior to the adoption of the zoning ordinance on 16 April 1973. He made no personal inquiry of anyone between November 1972 and the passage of the ordinance on 16 April 1973 as to whether there was any zoning in effect or in contemplation in Stanly County. The Stanly News and Press, a newspaper published in Albemarle, carried various news stories relative to zoning in the county, which stories began as early as October 1971. Mr. Darnley read this newspaper "on occasions" and read a story in the paper about the appointment of the County Planning Board (July 1971). With knowledge that zoning was "in progress in Stanly County with a target effective date of July 1, 1973," Mr. Darnley told his engineer on 12 January 1973 that he "wanted to expedite things as fast as possible" and "wanted to open by the first of March, if possible, or by early spring." At the hearing on 16 April 1973, following which the zoning ordinance was adopted by the Board of County Commissioners, Mr. Darn-

ley, in response to a question by "someone," stated that he was aware that zoning "had been in the planning stage for a year or so" and that he "was trying to beat it."

It is indisputable that prior to 16 April 1973 there was no zoning ordinance or other law in effect which prohibited the development and use of the property of Campsites as proposed by it. It is equally indisputable that at least three months prior to the enactment of the county zoning ordinance, Campsites purchased the property for the purpose of developing it as now proposed and immediately began its contemplated development with the intent to develop the entire tract as rapidly as possible, so as to take advantage of the spring and summer market for the sale of the contemplated camp sites. It is likewise indisputable that extensive work on the property itself, including the engineering and staking of roads and lots, the cutting and clearing of trees and the grading and opening of roads, occurred throughout several weeks prior to the enactment of the ordinance and was still in progress when the ordinance was enacted and that, for the purchase of the land, engineering, legal work, and the above mentioned construction work on the property itself, Campsites expended, or obligated itself to expend, in excess of $250,000. Nothing in the record of the hearing before the Board of Adjustments suggests that, at the time Campsites embarked upon this project, made these expenditures and undertook these contractual obligations, any specific proposal for a zoning ordinance had been reported to the County Board of Commissioners by the Planning Board, had been publicized by the county or had otherwise been brought to the attention of Campsites or of its president, Mr. Darnley.

Campsites does not contend that the Stanly County Zoning Ordinance was not duly adopted or that it is, in any respect, invalid. It contends that this valid ordinance has no application to its proposed development of its land, for the reason that such development was in progress when the ordinance was adopted and, consequently, it has a vested right to continue its development as a nonconforming use of its property.

In a number of recent decisions, this Court has dealt with the right of one, to whom a municipality has issued a building permit and who, in reliance thereon, has commenced construction or has incurred substantial expenditures or contractual obligations preparatory to such construction, to proceed with the construction, notwithstanding revocation of such permit by a

valid, subsequently enacted zoning ordinance. See: *Keiger v. Board of Adjustment,* 281 N.C. 715, 190 S.E. 2d 175; *Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E. 2d 904; *Warner v. W & O, Inc.,* 263 N.C. 37, 138 S.E. 2d 782; *Stowe v. Burke,* 255 N.C. 527, 122 S.E. 2d 374. The only significance of the building permit in those cases was that such permit was required, under the ordinance in effect at the time of its issuance, in order to make the proposed use of the property lawful. In the present instance, there was no county ordinance or other law in effect at the time Campsites began its development of its property which required Campsites to obtain a permit therefor. It was then lawful for Campsites to proceed as it did. Consequently, those decisions declare the law applicable to the present case.

In *Warner v. W & O, Inc., supra,* Justice Rodman, speaking for this Court, said, "The law accords protection to nonconforming users who, relying on the authorization given them, have made substantial expenditures in an *honest belief* that the project would not violate *declared* public policy." (Emphasis added.) In *Town of Hillsborough v. Smith, supra,* we said:

> "In order to acquire a vested right to carry on such nonconforming use of his land, it is not essential that the permit holder complete the construction of the building and actually commence such use of it before the revocation of the permit, whether such revocation be by the enactment of a zoning ordinance or otherwise. To acquire such vested property right it is sufficient that, prior to the revocation of the permit or enactment of the zoning ordinance and with the requisite good faith, he make a substantial beginning of construction and incur therein substantial expense."

**[3]** In this respect, it is not material whether the proposed development and use of the land be the construction of a building or some other type of development, such as construction of recreational facilities, roads, water and sewer lines and the grading, clearing and development of sites for the proposed use of the property. In this respect, there is no basis for distinction between the actual expenditure of money and the incurring of binding contractual obligations for such expenditure, or between expenditures for the acquisition of the land, for the acquisition of building materials or services and for the making

of visible, physical changes in the condition of the land. *Town of Hillsborough v. Smith, supra.* In that case we said:

> "It is not the giving of notice to the town, through a change in the appearance of the land, which creates the vested property right in the holder of the permit. The basis of his right to build and use his land, in accordance with the permit issued to him, is his change of his own position in bona fide reliance upon the permit. * * *
>
> "We, therefore, hold that one who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land."

In the present case, there was a clearly visible change in the condition of the land as a result of the activities of Campsites in the clearing and construction of roadways and in the staking out of lots. Substantial expenditures and obligations were made and incurred. If these were made and incurred in good faith, the adoption of the county zoning ordinance on 16 April 1973 did not deprive Campsites of its preexisting right to so develop and use its land.

In *Warner v. W & O, Inc., supra,* we said:

> "The law * * * does not protect one who makes expenditures with knowledge that the expenditures are made for a purpose declared unlawful by duly enacted ordinance. * * * Nor does it protect one who waits until after an ordinance has been enacted forbidding the proposed use and, after the enactment, hastens to thwart the legislative act by making expenditures a few hours prior to the effective date of the ordinance."

In *Keiger v. Board of Adjustment, supra,* we said:

> "When, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the

authorized construction a nonconforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit."

In *Stowe v. Burke, supra,* at the time the landowner's expenditures were made, the city's planning board had already proposed to the city council the ordinance which was, in fact, adopted and notice had been published of the meeting of the city council to consider its adoption, it was held that the landowner, having made his expenditures with knowledge of these circumstances, had not acted in good faith and, therefore, was properly enjoined from proceeding with the proposed construction.

In *Town of Hillsborough v. Smith, supra,* we said:

"The 'good faith' which is requisite under the rule of *Warner v. W & O, Inc., supra,* is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him."

**[4]** In the present case, the evidence in the record of the hearing before the Board of Adjustments does not show that Campsites, or its president, had any knowledge of any specific zoning ordinance under consideration by the Board of County Commissioners at the time it acquired and began the development of its property. Indeed, it does not appear from the record of that hearing that the County Planning Board, itself, had determined what zoning restrictions it would recommend to the county for the area including the land now owned by Campsites.

It is clearly shown in the record that the development of the property by Campsites was well under way before it was made aware of any opposition to its project and was begun when Campsites knew no more concerning the county's plans for zoning than that a general consideration of zoning of the entire rural portion of the county was in progress by the Planning Board. It clearly appears from the record of the hearing before the Board of Adjustments that the reason for Campsites' proceeding speedily with its development was not to win a race with

the proponents of zoning but to get its property in condition to take advantage of the spring and summer market for the sale of camp sites. We find nothing whatever in the record of the hearing before the Board of Adjustments to indicate that, in this development of its property, Campsites proceeded, in manner or in time, differently from the way in which it would have proceeded had there been no consideration whatsoever of zoning by the county authorities.

**[5, 6]** The statement by Mr. Darnley, at the hearing on 16 April 1973, several months after the development was begun, that he was aware that zoning, "had been in the planning stage for a year or so" and that he was "trying to beat it," does not show bad faith by Campsites in proceeding with its proposed development. The right of landowners to develop their properties in ways then lawful cannot be frozen by a county's or a municipality's announcement of its undertaking of a general study of zoning which, at some future date, may or may not lead to the adoption of an ordinance restricting the landowner's proposed use of his land. The statement that Mr. Darnley was trying to "beat" the proposed zoning is ambiguous at best. It was made several months after his development of the property began and was made at a hearing which he was attending for the purpose of seeking to defeat the adoption of a proposed zoning ordinance. It falls far short of evidence of bad faith such as was contemplated by the decisions of this Court above mentioned.

The finding of the Board of Adjustments, above quoted, that the applicant has failed to sustain its claim that the substantial expenditures and obligations made and incurred by it were made in good faith is not supported by the evidence in the record.

**[7]** The evidence at the hearing before the Board of Adjustments shows clearly that the detailed map of the project was prepared in eight sections solely in order to permit the use of a scale sufficient to make the map readable. All of the evidence shows it was, from the outset, the intent of Campsites to develop the entire property as promptly as possible without interruption and without regard for section boundaries. Clearly, the plan was to proceed with the cutting of trees, the grading, the laying out of roads and lots across the entire tract as one project. Obviously, such work must have some starting point and cannot feasibly be carried on throughout the entire 155 acres simul-

taneously. Nothing in the present record indicates a plan by Campsites to develop its property in separate stages. Consequently, *In re Tadlock,* 261 N.C. 120, 134 S.E. 2d 177, has no application to the present case.

We affirm the judgment of the Court of Appeals which reversed the judgment of the Superior Court and remanded the matter to the Superior Court with the direction that it enter judgment declaring the entire development in question to be a nonconforming use to which the county zoning ordinance of 16 April 1973 does not apply.

Affirmed.

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STATE OF NORTH CAROLINA v. ELVIN CLAUDE POPE

No. 117

(Filed 6 June 1975)

1. **Criminal Law § 90— impeachment of own witness — prior inconsistent statements**

It remains the general rule in this jurisdiction that the solicitor (or district attorney) may not impeach a State's witness by evidence that the character of the witness is bad or that he has made prior statements inconsistent with or contradictory of his testimony.

2. **Criminal Law § 88— State's witness — testimony for defendant on cross-examination**

Although a State's witness was testifying on cross-examination as a defense witness, bent upon exonerating defendant of the charge for which he was being tried, he remained the witness of the State, which had called him.

3. **Criminal Law § 90— State's witness — prior inconsistent statements — evidence incompetent**

A sheriff's testimony as to prior inconsistent statements made by the State's witness was incompetent, but the trial court's refusal to strike his entire testimony was sustainable on two grounds: (1) when no objection is interposed to an incompetent question at the time it is asked, a motion to strike the answer is addressed to the trial judge's discretion and his ruling is not subject to review in the absence of abuse; (2) where only a portion of a witness's testimony is incompetent, the party moving to strike should specify the objectionable part and move to strike it alone.

4. **Criminal Law § 90— no impeachment of own witness — exception**

There is a generally recognized exception or corollary to the anti-impeachment rule which allows impeachment where the party calling

the witness has been misled and surprised or entrapped to his prejudice, but the allowance of a motion to impeach one's own witness by proof of his prior inconsistent statements rests in the discretion of the trial court.

5. **Criminal Law § 90— impeachment of own witness — proof of prior inconsistent statements — limitation**

Under the exception to the anti-impeachment rule the right to prove prior oral inconsistent statements is limited to statements made by the witness to the State's attorney or to some person whom he specifically instructed to communicate the statement to the attorney; however, where investigating officers, whose duty it is to seek, find, preserve and analyze evidence of criminal offenses and turn it over to the prosecuting attorney for ultimate legal action, have furnished him with formally prepared, signed or acknowledged statements of witnesses, he may rely on these statements unless he possesses other information which reasonably apprises him that they were false or that the witness making them intends to repudiate them.

APPEAL by defendant pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals finding no error in the trial before *Winner, S.J.*, at the 31 May 1974 Session of MOORE.

Defendant was tried upon an indictment which charged that on or about 3 January 1974 he "did feloniously steal, take and carry away" a Lennox heat pump, the property of O. J. Garrison having a value of more than two hundred dollars. Evidence for the State tended to show:

On 3 January 1974 Mr. and Mrs. O. J. Garrison were engaged in building a new home between Highway 15-501 and Morganton Road in Southern Pines. As part of an air-conditioning system, they had purchased a Lennox heat pump from Charles Pressley, a dealer in Lennox heating and air-conditioning units. This unit, worth $650.00, was on the premises awaiting installation. On the morning of 3 January 1974, Mr. and Mrs. Garrison discovered that the pump was missing. Tracks and indentations in the wet ground indicated that the persons who had taken the unit had carried it through the woods and loaded it on a motor vehicle.

In its investigation of the theft, the Moore County Sheriff's Department engaged the assistance of an undercover agent, Don Tripp, of the Town of Chapel Hill. On 18 January 1974 Tripp, who had never met defendant, telephoned him at his home. He told defendant he wanted to buy an air-conditioning unit and would pay $450.00 for it. In accordance with defendant's instructions Tripp arrived at defendant's home about 8:30 p.m., and defendant met him in the yard. Tripp identified himself as

"the one that was supposed to see him that night to buy the air-conditioning unit" and inquired if the price was still $450.00. When defendant said it was, Tripp asked if there was any chance of the unit being traced. Defendant said No; that the plates had been removed. Defendant helped Tripp load the heavy unit on the truck in which he had come. Tripp forthwith delivered the unit to the Moore County Sheriff's Department, where Charles Pressley examined it. Although the serial number plates had been removed Pressley was able to identify it as the unit he had sold the Garrisons by the "unusual manner of work" which he had done on it. He had used wire nuts, three times the normal size for such a unit, because he did not have the correct size. In order to keep the large nuts from falling off he had had to "skin the wires back about two inches and fold them down."

Richie Nelson Pope (Richie), the 19-year-old son of defendant, was called as a State's witness. After stating his name, age, address, and employment as a carpenter, Richie testified: "I did not go with my father anywhere on Morganton Road on January 3, 1974. I did go with him that night to his brother's house. I have never been to a dwelling owned by O. J. Garrison on Morganton Road."

The next statement in the record is, "Jury out." In the absence of the jury Richie testified that he had "pled guilty to this offense," but he "was never on the premises"; that he and his father had acquired the unit as a gift from "two Indian fellows." He said, "I realize that I told Sheriff Wimberly that my father and I went to the premises and removed the property in question, loaded it and gave complete details of what occurred there at the time."

Upon the jury's return to the courtroom Richie testified that after he was arrested on 18 January 1974 he told Sheriff Wimberly that he was driving and that his father and Larry Martin [defendant's son-in-law] were with him. He said, "I told him that we went out 15-501 and stopped on the shoulder of the road there."

In answer to the solicitor's question, "And did you tell him [Sheriff Wimberly] you stayed in the car and that your father and Larry Martin went through the woods up to—," Richie answered, "I told him Larry Martin did."

On cross-examination by defense counsel, Richie said: "I never denied to the Sheriff or any of the officers that I did not steal it. In fact, I pled guilty. My father did not have any part in it; he did not go with me and steal any of the air-conditioning units. I don't deny that I did it myself."

At the conclusion of Richie's testimony the State immediately called C. G. Wimberly, Sheriff of Moore County, as a witness. After giving his name, position, tenure in office, and stating that he had "read" Richie his constitutional rights and obtained a written waiver from him, the Sheriff testified that on the night of 18 January 1974 Richie "made some statements about the theft of a Lennox heat pump." He detailed these statements as follows: "He told me that he and his daddy, Elvin [defendant], and Larry Martin left his daddy's house and went out on 15-501, said he was driving, . . . [H]e told me they went out there and he parked there on the shoulder of the road, that would be 15-501, some distance from this house. He said that he stayed in the vehicle, and that his daddy and Larry Martin went to the house, brought this unit back through the woods and come back and—"

At this point, defendant objected; the court said, "Sustained as to that," and the Sheriff did not finish the statement. Immediately, thereafter, in answer to four questions from the solicitor, Sheriff Wimberly testified without objection that Richie told him that "the unit was put in the trunk of the car"; that "they took it to Southern Pines and left it"; that "it was later moved to his father's house"; and that "he was nervous when they were moving it because he was involved."

The foregoing statements concluded the Sheriff's direct examination and counsel for defendant then said: "For the record, I want to make an objection and motion to strike his entire testimony." The court's ruling was, "The motion to strike his entire testimony is denied." Thereafter defendant cross-examined the Sheriff, who said, *inter alia,* that defendant was not present at the time he questioned Richie.

Defendant, as a witness in his own behalf, testified substantially as follows:

He has never been upon the property of O. J. Garrison, and he did not steal the Lennox heat pump. He did not talk with Don Tripp on the telephone with reference to the sale of any air-conditioning unit. He was, however, at home when Tripp

came into his yard and said he had come to see an air conditioner. He showed him a unit which Larry Martin had left there three or four days earlier. "No money was involved, or no money was discussed whatsoever. Nelson Pope (Richie) was also on the premises at that time" and the three of them loaded the unit into Tripp's truck. He had no knowledge as to where Larry Martin got the unit, and he had made no statement whatever to Sheriff Wimberly or any of his deputies.

At the conclusion of defendant's testimony Sheriff Wimberly was recalled. He then testified that defendant was arrested on the night of January 18, 1974; that after he had explained his constitutional rights to him defendant had signed "the waiver," and answered questions about the theft of this Lennox air-conditioning unit heat pump. Defendant denied that he knew the unit had been stolen. He told the Sheriff he had found the unit in a field some distance from the road while he was rabbit hunting; that it was covered with pine straw.

The jury found defendant guilty as charged. The judgment of the court was that he be imprisoned for ten years, and defendant appealed. The Court of Appeals, one member of the panel dissenting, found no error in the trial, and defendant appealed as a matter of right to this Court.

*Rufus L. Edmisten, Attorney General; George W. Boylan, Assistant Attorney General, for the State.*

*Seawell, Pollock, Fullenwider, Van Camp and Robbins by Bruce T. Cunningham, Jr., for defendant appellant.*

SHARP, Chief Justice.

On his appeal to the Court of Appeals and to this Court defendant has presented only the question whether the trial court erred in permitting the State to impeach its witness Richie Nelson Pope by introducing evidence that he had made prior statements which contradicted his testimony.

Disregarding the prior inconsistent statements Richie himself admitted having made (which were not substantive evidence), his testimony as to the theft of the heat pump is as follows. On direct examination he said, "I did not go with my father anywhere on Morganton Road on January 3, 1974. . . . I have never been to a dwelling owned by O. J. Garrison on Morganton Road." On cross-examination he said, "I never denied

to the Sheriff or any of the officers that I did not steal it. In fact, I pled guilty. My father did not have any part in it; he did not go with me and steal any of the air-conditioning units. I don't deny that I did it myself."

**[1]** It remains the general rule in this jurisdiction that the solicitor (or district attorney) may not impeach a State's witness by evidence that the character of the witness is bad or that he has made prior statements inconsistent with or contradictory of his testimony. *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973); *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954): *see* 1 Stansbury's North Carolina Evidence (Brandis Rev., 1973) § 40.

**[2]** Although it is quite clear that on cross-examination Richie was testifying as a defense witness, bent upon exonerating defendant of the charge for which he was being tried, he remained the witness of the State, which had called him. *See State v. Tilley, supra;* 1 Stansbury's North Carolina Evidence § 41 (Brandis Rev. 1973); McCormick on Evidence § 38 (1972); 98 C.J.S., *Witnesses* § 578 i. (1957). Therefore under the anti-impeachment rule Sheriff Wimberly's testimony that on the night Richie was arrested he told him "he staved in the vehicle, and that his daddy and Larry Martin went to the house, brought this unit back through the woods and come back . . . . " was incompetent. This testimony, however, was given before any objection to it was interposed. When the objection interrupted the statement quoted above (as shown by the dots) it was at once "sustained as to that." Defendant made no motion to strike "that," and the judge gave the jury no instruction to disregard "that." Immediately thereafter, in answer to specific questions to which no objection was made, the Sheriff testified that Richie also told him that the unit was put in the trunk of the car; that "they" took it into Southern Pines and left it; that it was later moved to his father's house; and that "he was nervous when they were moving it because he was involved." This evidence was likewise incompetent.

**[3]** Notwithstanding the incompetency of that portion of Sheriff Wimberly's testimony set out in the preceding paragraph the court's refusal "to strike his entire testimony," is sustainable on two grounds:

First, when no objection is interposed to an incompetent question at the time it is asked, a motion to strike the answer

is addressed to the trial judge's discretion and his ruling is not subject to review in the absence of abuse. *State v. Hunt,* 223 N.C. 173, 176, 25 S.E. 2d 598, 600 (1943); *State v. Merrick,* 172 N.C. 870, 90 S.E. 257 (1916); *State v. Lewis,* 281 N.C. 564, 189 S.E. 2d 216 (1972); 7 N.C. Index 2d, *Trial* § 15 (1968).

As noted in *Bryant v. Construction Company,* 197 N.C. 639, 641-642, 150 S.E. 122, 123-124 (1929), motions to strike the answer elicited by a question to which no objection was made "are often allowed when the answer is not responsive to the question and contains prejudicial testimony of fact concerning which the objecting party was not put on notice. But when the answer is directly responsive it will usually be permitted to stand unless in apt time objection was made to the question propounded." In *Dobson v. R. R.,* 132 N.C. 900, 901, 44 S.E. 593, 594 (1903), it is said: "Objection should be interposed when the incompetent questions are asked. It will not do to object after the question has been asked and answered. This would give the objector two chances, one to exclude the testimony if unfavorable to him and the other to make use of it if favorable; and for this reason the law requires that parties should act promptly or else the right to have testimony excluded, or the examination conducted within proper limits, will be waived."

Second, as pointed out in the opinion of the Court of Appeals, where only a portion of a witness's testimony is incompetent, the party moving to strike should specify the objectionable part and move to strike it alone. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968); *State v. Tyson,* 242 N.C. 574, 89 S.E. 2d 138 (1955). In the preliminary statement of facts the objectionable portions of Sheriff Wimberly's testimony is quoted; all other portions were competent. When defendant moved to strike the Sheriff's entire testimony, the court, in its discretion, could have stricken the incompetent evidence. It was, however, under no duty to separate the good from the bad. *Nance v. Telegraph Co.,* 177 N.C. 313, 98 S.E. 838 (1919). Under these circumstances the court will ordinarily deny the motion. *See* 88 C.J.S., *Trial* § 143 (1955).

Our decisions dictate the conclusion that defendant has shown no reversible error in the trial below.

**[4]** Although the State made no attempt to invoke its application in this case, and it is not pertinent to decision here, the

evidence merits examination of a generally recognized exception or corollary to the anti-impeachment rule which does not seem to have been the subject of discussion in our decisions. This corollary allows impeachment "where the party calling the witness has been misled and surprised or entrapped to his prejudice." *Green v. State,* 243 Md. 154, 157, 220 A. 2d 544, 546 (1966); *State v. Green,* 71 Wash. 2d 372, 428 P. 2d 540 (1967); 98 C.J.S., *Witnesses* § 578 c (1) (1957); 58 Am. Jur., *Witnesses* § 799 (1948).

Our decisions, in holding that the State cannot impeach its own witness, also hold that the State is not bound by what the witness says. The State's attorney, therefore, may show by other witnesses or other competent evidence that the facts are different from those to which the witness has testified. The trial judge also has the discretionary power to permit a prosecuting attorney who has been surprised by the testimony of an evasive or hostile witness to call his attention to his prior inconsistent statements for the purpose of "refreshing his memory" or "awakening his conscience." McCormick on Evidence § 38 (1972); *State v. Tilley,* 239 N.C. at 251, 79 S.E. 2d at 477. (Clearly, this is what the solicitor attemped to do in this case.)

In a situation where the witness has treacherously induced the State to call him by representing that he will give testimony favorable to its contentions and then surprises the solicitor with testimony contra, cross-examination is not likely either to "refresh his memory" or "awaken his conscience." In such instances the reason for the corollary to the anti-impeachment rule is demonstrated: "It would be grossly unfair to permit a witness to entrap a party into calling him by making a statement favorable to that party's contention, and then, when he is called and accredited by that party and gives testimony at variance with his previous statement and against that party's interest, to deny the party calling him the right to show that he was induced to do so by a previous statement of the witness made under such circumstances as to warrant a reasonable belief that the witness would repeat the statement when called to testify." 58 Am. Jur., *Witnesses* § 799 (1948); *see Murphy v. State,* 120 Md. 229, 233, 87 A. 811, 812 (1913).

Surprise or entrapment, however, will not automatically invoke the anti-impeachment corollary. The State's motion to be allowed to impeach its own witness by proof of his prior inconsistent statements is addressed to the sound discretion of

the trial court. The motion should be made as soon as the prosecuting attorney is surprised. He may not wait until subsequent "surprises" follow. Further, surprise does not mean mere disappointment; it means "taken (captured) unawares." *Selden v. Metropolitan Life Ins. Co.*, 157 Pa. Super. 500, 43 A. 2d 571 (1945).

Before granting the motion the court must be satisfied that the State's attorney has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the State had a *right* to expect. These preliminary questions are determined by the court upon a *voir dire* hearing in the absence of the jury in the manner in which the admissibility of a confession is ascertained after objection. If the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered. *Green v. State, supra; Sellman v. State,* 232 Md. 344, 192 A. 2d 788 (1963); 58 Am. Jur. *Witnesses* § 800 (1948).

**[5]** The right to prove prior oral inconsistent statements is limited to statements made by the witness to the State's attorney or to some person whom he specifically instructed to communicate the statement to the attorney. *Sellman v. State, supra; State v. Baltimore Contracting Co.*, 177 Md. 1, 6 A. 2d 625 (1939); *Riggins v. State,* 67 Ga. App. 309, 20 S.E. 2d 95 (1942); *Allen v. State,* 71 Ga. App. 517, 31 S.E. 2d 107 (1944). However, where investigating officers, whose duty it is to seek, find, preserve and analyze evidence of criminal offenses and turn it over to the prosecuting attorney for ultimate legal action, have furnished him with formally prepared, signed or acknowledged statements of witnesses, he may rely on these statements unless he possesses other information which reasonably apprises him that they were false or that the witness making them intends to repudiate them. *State v. Green,* 71 Wash. 2d 372, 379, 428 P. 2d 540, 545 (1967); *Commonwealth v. Smith,* 178 Pa. Super. 251, 115 A. 2d 782 (1955).

While the cases cited in the preceding paragraph hold that the State's attorney can legitimately claim surprise in the instances above specified albeit he himself does not interview the witness before calling him to the stand, in our view the better practice, and the only safe rule, is "never to call a witness to whom you have not talked."

Where the prosecuting attorney knows at the time the witness is called that he has retracted or disavowed his statement, or has reason to believe that he will do so if called upon to testify, he will not be permitted to impeach the witness. He must first show that he has been genuinely "surprised or taken unawares" by testimony which differed in material respects from the witness's prior statements, which he had no reason to assume the witness would repudiate. *Commonwealth v. Smith, supra; State v. Green, supra; State v. Baltimore Contracting Co., supra; Perrotti v. Sampson,* 163 C.A. 2d 280, 329 P. 2d 310 (1958); 98 C.J.S., *Witnesses* § 578 c. (2) (1957); *see State v. Anderson, supra.*

Testimony tending to show a witness's prior inconsistent statements is admitted only to show that the State was surprised by his testimony and to explain why the witness was called. Such statements "are not probative evidence on the merits and are not to be treated as having any substantive or independent testimonial value." *Green v. State,* 243 Md. 154, 158, 220 A. 2d 544, 546. Their only effect is to impeach the credibility of the witness. *State v. Green, supra; see* 58 Am. Jur., *Witnesses* § 804 (1948).

In this case, although the evidence of Richie's prior contradictory statements came in without objection and were not admissible under the corollary or exception to the anti-impeachment rule, the trial judge carefully instructed the jury that Sheriff Wimberly's testimony as to those statements was not substantive evidence; that it was not evidence defendant had committed the offense with which he was charged; that the jury could consider the statements only as bearing upon the credibility of the witness Richie Pope, "in determining whether to believe his testimony or not."

Our consideration of the record in this case convinces us that, aside from the non-substantive evidence of Richie's prior inconsistent statements, substantive evidence supports defendant's conviction of the crime with which he was charged and that his trial contains no reversible error. The decision of the Court of Appeals is

Affirmed.

GRAHAM W. DEAN v. CAROLINA COACH COMPANY, INC.

No. 59

(Filed 6 June 1975)

1. **Evidence § 50— hypothetical question — facts which must be included**

As a general rule, a hypothetical question which omits any reference to a fact which goes to the essence of the case and therefore presents a state of facts so incomplete that an opinion based on it would be obviously unreliable is improper, and the expert witness's answer will be excluded; however, there is substantial authority to the effect that the interrogator may form his hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove.

2. **Evidence § 50— hypothetical question as to possible cause of injury — sufficiency of facts included in question**

In a personal injury action growing out of a collision between plaintiff's car and defendant's bus, a hypothetical question asked by plaintiff of an expert medical witness as to whether the accident could or might have aggravated plaintiff's preexisting hernia condition, though not presenting a complete factual background, did contain sufficient facts to allow the witness to express an intelligent and safe opinion.

3. **Evidence § 50— expert opinion — basis**

An expert witness may base his opinion upon facts within his own knowledge or upon the hypothesis of the finding of certain facts recited in the question; however, an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.

4. **Evidence § 50— hypothetical question — nonresponsive answer — improper basis for answer**

The trial court in a personal injury action erred in denying defense counsel's motion to strike an expert witness's answer to a hypothetical question as to whether an accident could or might have aggravated plaintiff's preexisting hernia condition where the witness's unresponsive, unequivocal statement that an aggravated assault caused plaintiff's difficulty and that plaintiff's symptoms were brought about by an automobile accident was not within the plaintiff's personal knowledge, that information was not contained in the patient's medical history, nor did the answer rest upon the hypothesized facts recited in the hypothetical question.

ON *certiorari* to review the decision of the Court of Appeals, 23 N.C. App. 470, 209 S.E. 2d 413, finding error in the trial before *McKinnon, J.*, 18 February 1974 Session of WAKE County Superior Court.

By this civil action, plaintiff seeks damages for personal injuries growing out of a collision on 13 May 1971 between plaintiff's automobile and defendant's bus.

Plaintiff's evidence, pertinent to decision, may be summarized as follows:

Dr. D. N. Whitaker testified that he saw plaintiff on 14 May 1971, and at that time plaintiff was complaining of pain in his neck, his right shoulder, and his clavicle area as a result of an automobile accident on the preceding day. X-rays revealed no fractures. He saw Mr. Dean on 18 May, and the patient continued to complain of pain in his neck, ankle, and shoulder. The patient returned for treatment on 22 and 29 May; on 5, 12, and 26 June; 20 September; and 15 October. Dr. Whitaker testified that prior to 14 May plaintiff had undergone a kidney stone operation and a hernia repair. The first time plaintiff complained of pain in the hernia area after the accident was on 26 June 1971. However, on 15 April, prior to the wreck, plaintiff had complained of pain in that area. Dr. Whitaker stated: "Yes, he was complaining of pain in the hernia area some 30 days before the accident and I found that his hernia had returned."

Plaintiff testified that Dr. Whitaker treated him after the accident, and on 18 May 1971 Dr. Whitaker prescribed a corset or support as a result of his complaint relative to pains in his side. He averred that he did not have sufficient pain in the side to require a support prior to the accident.

Although the record does not so disclose, the parties in their respective briefs indicate that the testimony of Dr. Alexander Webb, stipulated to be an expert in the field of general surgery, was taken by deposition. Dr. Webb testified that on 9 July 1971 he did a combined repair of a right flank hernia and a repair of an inguinal hernia on plaintiff. During Dr. Webb's direct examination plaintiff's counsel asked him the following hypothetical question:

> . . . If the jury should find from the evidence that is the competent evidence, and by its greater weight that on May 13th, 1971, plaintiff Graham W. Dean was employed as a bus operator for defendant Carolina Coach Company and that at said time was able to operate the bus without any pain or difficulty; that prior to May 13th, 1971, he on June 18, 1970, underwent surgery for removal of kidney stones and thereafter in February, 1971, another surgical proce-

dure for the repair of a hernia; that he was certified as being able to return to work by Dr. Donald Whitaker on March 31st, 1971, and that he was involved in this accident on May 13th, 1971, and at that time was complaining of no pain and immediately after the accident he had pain in his right ankle, right clavicle area, cervical neck strain and pain in the abdomen in the area of the post-operative area, if the jury should find these facts to be true, do you have an opinion based upon reasonable medical certainty as to whether or not the accident of May 13, 1971, could or might have aggravated the pre-existing condition, that is the pre-existing surgical procedures, could or might have aggravated that condition and resulted in the necessary treatment that you gave him?

After stating that he did have an opinion, Dr. Webb, over defendant's objection, testified: *"I think that a man can go along for years with an inguinal hernia and even a right muscle splitting hernia without difficulty until he has some aggravated assault to it, and that is what happened here.* [Emphasis added.] Now the one thing we don't have on Jack is we don't have any X-rays of his cervical spine." He further stated that defendant was disabled and out of work for three months after the operation. Defendant's motion to strike Dr. Webb's answer was denied.

Plaintiff's wife testified that after the accident plaintiff complained of pain in his side and that he did not wear a support until after the accident.

Plaintiff offered other evidence tending to show that the negligence of defendant's agent was the proximate cause of his injuries and the resulting damages.

The jury answered the issue of negligence in favor of plaintiff and awarded him damages in the amount of $19,046.95. Defendant appealed, and the Court of Appeals ordered a new trial on the issue of damages. We allowed *certiorari* on 30 December 1974, pursuant to G.S. 7A-31(c).

*Teague, Johnson, Patterson, Dilthey and Clay, by I. Edward Johnson and Grady S. Patterson, Jr., for plaintiff appellant.*

*Smith, Anderson, Blount and Mitchell, by James D. Blount, Jr.; Samuel G. Thompson; and Michael E. Weddington, for defendant appellee.*

BRANCH, Justice.

Defendant assigns as error the ruling of Judge McKinnon in allowing Dr. Alexander Webb to express his expert opinion in answer to a hypothetical question, which defendant contends was defective by reason of being factually incomplete. By this assignment of error and its Exception No. 7, defendant also argued in the Court of Appeals that the Court's failure to strike the unresponsive answer was error.

The Court of Appeals quoted and based its decision on the following rule found in 1 D. Stansbury, North Carolina Evidence § 137 at 452 (Brandis Rev.):

> . . . In framing a hypothetical question the following cautions should be observed:
>
> * * *
>
> 2. Include all of the material facts which will be necessary to enable the witness to form a satisfactory opinion. Although it is not necessary to incorporate *all* [original emphasis] of the facts, the trial judge may properly exclude the witness's answer if the question *presents a picture so incomplete that an opinion based upon it would obviously be unreliable.* [Emphasis supplied, footnotes omitted.]

**[1]** As a general rule, a hypothetical question which omits any reference to a fact which goes to the essence of the case and therefore presents a state of facts so incomplete that an opinion based on it would be obviously unreliable is improper, and the expert witness's answer will be excluded. *Todd v. Watts,* 269 N.C. 417, 152 S.E. 2d 448; *Schafer v. Railroad,* 266 N.C. 285, 145 S.E. 2d 887; *State v. Thompson,* 153 N.C. 618, 69 S.E. 254; *Steiger v. Massachusetts Cas. Ins. Co.,* 273 So. 2d 4 (Fla. App.); *Smith v. Twin City Motor Bus Co.,* 228 Minn. 14, 36 N.W. 2d 22. However, there is substantial authority to the effect that the interrogator may form his hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove. 31 Am. Jur. 2d *Expert and Opinion Evidence* § 56 at 562; *Pigford v. R. R.,* 160 N.C. 93, 75 S.E. 860.

In *Pigford,* the plaintiff, an employee of the defendant, stated that he was instructed by his supervisor to load a gondola car with iron rails. He told the supervisor that he had only three men and a boy working with him, and he did not think

that he had enough help to load the rails. The supervisor told him to do the best he could. In the process of loading, he felt something "tear loose" when a rail turned over on him. The evidence further tended to show that the plaintiff suffered a serious hernia as a result of the injury.

The record discloses that during the presentation of the plaintiff's case, an expert medical witness was asked the following hypothetical question:

> If the jury should find it a fact that he was engaged in loading a car 7½ feet from the ground with 660 pound rails, with a force of three men and a boy, and in pushing the rail up on the car, or in assisting to push it he felt pain in the region of the stomach from which a hernia was subsequently observed by you, state in your opinion what would have caused the appearance of the hernia. I am asking for your professional opinion as to whether the hernia could have been the result of such an act on his part?

The defendant contended that the above-quoted question was erroneous because the evidence tended to show that the plaintiff was using slides which he had prepared himself and that five men were engaged in the work instead of three, as set forth in the question. This Court rejected this contention, and, although conceding that the question was "not as full as it might have been," held that it combined "substantially all the facts" so that the question was "substantially explicit for [the expert] to give an intelligent and safe opinion." *See also State v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85.

The rule relied upon by the Court of Appeals has been considered and somewhat modified by a line of cases represented by *State v. Stewart,* 156 N.C. 636, 72 S.E. 193. There the defendant, who was charged with murder, objected to a hypothetical question posed as to the cause of death of the victim of the homicide because one fact as to which there was evidence was not incorporated into the question. In rejecting defendant's contention, the Court, *inter alia,* quoted *State v. Holly,* 155 N.C. 485, 71 S.E. 450:

> "It is not necessary in the statement of a hypothetical question that all the facts should be stated. Opinions may be asked for upon different combinations of facts on the examination in chief and on the cross-examination . . . . "

> If the defendant thought the fact, which was omitted, would have elicited a different opinion from the witness, it was his right and duty to incorporate it in a question on cross-examination.

The statement in *Stewart* was amplified in *Godfrey v. Power Co.*, 190 N.C. 24, 128 S.E. 485, by the following language: "It was not incumbent on the plaintiff to include in his [hypothetical] questions all the evidence bearing upon the fact to be proved; the defendants had the right to present other phases of the evidence in counter-hypothetical questions. . . . " *Accord: Canney v. Travelers Ins. Co.*, 110 N.H. 304, 266 A. 2d 831.

A leading authority on evidence adopts a view consistent with decisions of this Court:

> . . . Some courts have required that all facts material to the question should be embraced in the hypothesis, but this viewpoint seems undesirable because it is likely to multiply disputes as to the sufficiency of the hypothesis, and may tend to cause counsel, out of abundance of caution, to propound questions so lengthy as to be wearisome and almost meaningless to the jury. The more expedient and more widely prevailing view is that there is no rule requiring that all material facts be included. The safeguards are that the adversary may on cross-examination supply omitted facts and ask the expert if his opinion would be modified by them, and further that the trial judge if he deems the original question unfair may in his discretion require that the hypothesis be reframed to supply an adequate basis for a helpful answer. [Footnotes omitted.]

E. Cleary (Gen. Ed.), McCormick's Handbook of the Law of Evidence § 14 at 33-34 (2d ed.). *See also* 31 Am. Jur. 2d *Expert and Opinion Evidence* § 57; Annotation, 56 A.L.R. 3d 300 § 7.

**[2]** Here, all the evidence disclosed that, prior to the accident, plaintiff had undergone surgery for correction of a hernia. The hypothetical question posed by plaintiff's counsel did not seek Dr. Webb's opinion as to whether the accident *caused* the hernia but rather sought his opinion as to whether the accident "could or might have aggravated the preexisting condition, that is the preexisting surgical procedures, could or might have aggravated that condition and resulted in the necessary treatment that you gave him?" The testimony of Dr. Whitaker and plaintiff at trial

disclosed that the hernia returned and that plaintiff suffered some pain prior to the accident. In this connection plaintiff testified that the hernia "was bulging out a month before the accident, but there was no pain. I said there was not enough pain that I thought I should wear a support." He testified that he had never worn a support until after the accident. This testimony was entirely consistent with a theory that the accident could or might have aggravated the plaintiff's preexisting condition.

Defendant argues that it did not have the opportunity to cross-examine Dr. Webb concerning the omitted fact since the doctor's testimony was taken and offered by deposition. Be that as it may, at trial defense counsel had the opportunity to present other phases of the evidence through counter-hypothetical questions. Defense counsel had the opportunity to cross-examine plaintiff and Dr. Whitaker concerning plaintiff's preexisting condition. In fact, defense counsel did searchingly cross-examine these witnesses so as to make the jury fully cognizant of the reoccurrence of the hernia prior to the accident. Under these circumstances we cannot agree with the holding of the Court of Appeals that the hypothetical question presented a "picture so incomplete that an opinion based on it was misleading to the jury and obviously unreliable." Although the hypothetical question did not present a complete factual background, it did contain sufficient facts to allow Dr. Webb to express an intelligent and safe opinion as to whether the accident on 13 May 1971 aggravated plaintiff's preexisting condition.

We are thus brought to the answer elicited by the hypothetical question. Under this same assignment of error defendant argued in the Court of Appeals that Dr. Webb's answer to the hypothetical question was unresponsive and that he seriously prejudiced defendant's case by improperly answering the ultimate issue before the jury, *i.e.*, what happened to plaintiff in the automobile accident on 13 May 1971. The Court of Appeals did not consider this contention, and defendant, the prevailing party in that Court, did not discuss it in his Supplemental Brief. Defendant did, however, specifically note that the Court of Appeals addressed itself to only one of its assignments of error and urged this Court to consider all assignments of error argued before the Court of Appeals. The hypothetical question and the answer to it are inextricably tied, and we consider it fair and proper to consider this portion of defendant's argument.

**[3]** An expert witness may base his opinion upon facts within his own knowledge or upon the hypothesis of the finding of certain facts recited in the question. *Summerlin v. Railroad,* 133 N.C. 550, 45 S.E. 898; however, an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility. *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541.

**[4]** Here the answer given by the expert was unresponsive, and defense counsel properly preserved his objection by objecting to the hypothetical question and immediately moving to strike the unresponsive answer. *See Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778; *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494. Initially, we note that the hypothetical question asked for an opinion as to whether a condition could or might have been aggravated by the accident of 13 May 1971. The answer " . . . that a man can go along for years with an inguinal hernia . . . without difficulty until he has some aggravated assault to it, and that is what happened here," in effect, stated that an aggravated assault *caused* plaintiff's difficulty. The prejudicial effect of this answer was compounded when Dr. Webb on cross-examination again unresponsively stated, "We do know his acute symptoms were brought about by an automobile accident by his history." Again defendant's motion to strike the answer was denied. Immediately thereafter Dr. Webb on cross-examination admitted that there was no reference in his records as to when plaintiff's groin pains started and that there was no reference at all to an automobile accident in his notes. Examination of the hypothetical question discloses that there was no mention of an *automobile* accident.

The record reveals that Dr. Webb was well qualified to state that plaintiff had a hernia when he examined and treated him. However, his unresponsive, unequivocal statement as to causation was not within his personal knowledge; neither was it contained in the patient's medical history; nor did the answer rest upon the hypothesized facts recited in the hypothetical question. It is obvious that Dr. Webb had no factual basis for his statement to the effect that plaintiff's injury resulted from an aggravated assault. Clearly, the answer to the hypothetical question invaded the province of the jury and was, at best, based on conjecture and speculation. We therefore hold that the failure of the trial judge to allow defense counsel's motion to strike Dr.

Webb's answer to the hypothetical question was error prejudicial to defendant.

Modified and affirmed.

STATE OF NORTH CAROLINA v. SIDNEY RICHARD BROWN

No. 126

(Filed 6 June 1975)

1. **Criminal Law § 146— appeal from Court of Appeals to Supreme Court — substantial constitutional question**

An appellant seeking to appeal to the Supreme Court from a decision of the Court of Appeals as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination, the mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" being insufficient to avoid a dismissal. G.S. 7A-30.

2. **Constitutional Law § 30— speedy trial — 3½ month delay between arrest and trial**

Defendant was not denied his right to a speedy trial by the delay between the defendant's arrest on 25 March 1974 and defendant's trial on 8 July 1974 where counsel was appointed to represent defendant and moved that a court reporter be provided to record the preliminary hearing, three days after defendant's arrest the court denied this request but stated that a recording system would be available to record the preliminary hearing, another attorney was appointed to represent defendant, and defendant waived a preliminary hearing through his second court-appointed counsel on 13 May 1974.

3. **Indictment and Warrant § 14— motion to quash — denial without hearing**

The trial court did not err in the denial of defendant's motion to quash the indictments without a hearing where the trial court denied the motion after having reviewed the motion to quash and the lengthy brief filed in support thereof.

4. **Constitutional Law § 31— refusal to put defendant and witness in same cell**

Defendant was not denied the right to communicate with his witness by the denial of his request that they be put in the same jail cell so that they could confer about their "joint defense" where defendant's testimony at trial was upon the theory that he and the witness had no joint defense, the defendant contending he did not know the witness and had nothing to do with the witness's activities

at the time of the crimes, and there is nothing to indicate that defendant's counsel was limited in his opportunity to confer with defendant and the witness.

5. **Constitutional Law § 31— denial of court reporter at preliminary hearing — recording facilities available — waiver of hearing — witness now deceased**

There is no merit in defendant's contention that his constitutional rights were violated through the State's delay of the preliminary hearing and the denial of his request for a court reporter to record the testimony at such hearing so that defendant lost the opportunity to record the intended testimony of a witness, now deceased, absolving defendant of complicity in the crimes for which he was tried where the record shows that facilities were available for recording the testimony at a preliminary hearing, the record shows no effort by defendant or his counsel to expedite a preliminary hearing after the court, three days after defendant's arrest, ordered such hearing at "the earliest practicable time," no such hearing was held because defendant waived it, and nothing in the record shows that the State had any indication that the witness would have testified as defendant now says he would have done or that the State had any indication that the witness's early death was a probability.

APPEAL by defendant from the judgment of the Court of Appeals, reported in 25 N.C. App. 10, 212 S.E. 2d 187, finding no error on the defendant's appeal to it from *Thornburg, J.*, at the 8 July 1974 Session of CALDWELL.

Upon indictments, proper in form, consolidated for trial, the defendant was found guilty of felonious breaking or entering and of possession without lawful excuse of implements of housebreaking. The two charges were consolidated for judgment and the defendant was sentenced to 10 years in the State Prison.

The evidence for the State was to the following effect:

At 3 a.m. on 25 March 1974, the burglar alarm at the Sav-Mor Drugstore in Lenoir signalled the police station that the store had been entered. Within two minutes, two officers arrived at the store, the first going to the front door and second to the back door. The main portion of the store was lighted but a storage room at the back of the building which led to the back door was dark. There was a light outside the building over the back door.

The first officer, who went to the front door, found it had been pried open and observed the defendant and two other men inside the store. When these three men saw this officer, they all ducked down behind a counter and went into the dark,

back room. The officer followed them into that room and heard them removing a bar which was across the back door. When the door was thus opened, this officer could see by the light from the outside that the defendant and one of the other men were at the back door. The second officer, on the outside of the building, was only six or seven feet from the back door when it opened. The defendant stuck his head out, looked right into the face of the officer, pulled back into the building and closed the door, following which the door again opened and the other man ran out and, though wounded by shots fired by that officer, escaped. The defendant ran back into a corner of the dark storage room where the officer, who had entered the store by the front door, located him with the officer's flashlight and placed him under arrest.

The locked cabinet in which the store's stock of narcotic drugs was kept had been pried open and a quantity of various types of such drugs, together with a number of containers of jewelry, was piled on the counter within arm's reach of the defendant. Also, on the counter at that place, the officer found two crowbars which, without objection, he testified were used to gain entrance into the store. The crowbars were introduced in evidence. The man who fled from the store, when shot, dropped a bag containing a drill, bit, screwdriver and hammer, all of which were introduced in evidence.

After the defendant was arrested, the officers continued to search the store for the third man, Gibson, and found him hiding under the counter on which the drugs and crowbars had been found. Gibson, when found and arrested, had a pair of gloves in the pocket of his jacket. These were introduced in evidence. When found under the counter, Gibson also had a bottle of demerol pills, some of which he had taken. Demerol is a stimulant which drug addicts use. Some time after his arrest, while in custody awaiting trial, Gibson died.

The officer, who entered the building through the front door and who arrested the defendant, knew and recognized the defendant when he saw him. When this officer entered the store, the three intruders were two or three feet apart and were behind the drug counter. No drugs or tools were found on the defendant's person.

The president of the corporate owner of the store testified that he closed the store at 6:15 p.m. on the evening preceding

the arrest of the defendant in the store. When he left the store, both the front and back doors were locked, the back door having a bar across it. The narcotic drugs were then in a locked compartment. There were no such drugs and no crowbars then on the counter. When he returned to the store, in response to a call from the officers, at approximately 4 a.m., the narcotics cabinet had been broken open and there were eight or ten bottles of narcotic drugs piled on the counter, in addition to the one which Gibson had beneath the counter and from which Gibson was taking pills.

The defendant testified in his own behalf to the following effect:

His home is in Bessemer City. On the night in question, he was returning home from California, hitchhiking. His last ride ended at Lenoir. He then walked along the highway and came to the Sav-Mor Drugstore which was lighted and in which he saw a man. Thinking the store was open, he went into it to buy a pack of cigarettes. Just as he entered the front door, the officer came in behind him with his pistol drawn, ordered him to get up against the wall and placed him under arrest, saying that the charge was "public drunkenness right now." He knew nothing about the narcotics piled on the counter in the back room and had nothing to do with opening the narcotics cabinet or taking the drugs therefrom. He did not force open the front door to the store and, prior to his arrest, knew nothing about the burglary tools. He has never used narcotic drugs. He did not try to hide when the officer came into the store.

Later, when Gibson was arrested, the two were placed briefly in the same holding cell. Gibson then told the defendant that he, Gibson, had been arrested for breaking and entering and possession of burglary tools and the officers would probably charge the defendant with those offenses. Gibson told the defendant he would testify that the defendant had nothing to do with the breaking and entering or with the possession of the burglary tools.

A few minutes later, the officers placed the defendant and Gibson in different parts of the jail and the defendant had no further conversation with Gibson. The officers took them to court together and they asked for a hearing. No date for a hearing was set and Gibson "killed himself or something in the jail." (The police officers who were witnesses for the State testi-

fied that Gibson died in jail but they had no information that he committed suicide.)

On cross-examination, the defendant testified that he did not know Gibson prior to that night, that he had been drinking and that he had previously served three prison sentences and had been convicted several times for assault with a deadly weapon, escape, larceny and traffic violations.

The arresing officer testified in rebuttal that he did not arrest the defendant for public drunkenness, that he found the defendant hiding in the storage room and that the defendant, when arrested, did not tell him that he just happened to be in the store for the purpose of getting a pack of cigarettes.

*Rufus L. Edmisten, Attorney General, and T. Buie Costen, Assistant Attorney General, for the State.*

*L. H. Wall for defendant.*

LAKE, Justice.

The conflict between the testimony of the police officers and that of the defendant raised a question of fact for the jury. The jury simply did not believe the defendant's unlikely explanation of his presence in the store along with two drug thieves.

**[1]** The decision of the Court of Appeals being unanimous, the defendant's only right to appeal to this Court, as distinguished from a petition for certiorari, is upon the basis of a substantial constitutional question. G.S. 7A-30. He asserts his constitutional rights have been denied, but his assignments of error raise no substantial constitutional question. "[A]n appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must *allege and show* the involvement of such question or suffer dismissal. The question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. Mere mouthing of constitutional phrases like 'due process of law' and 'equal protection of the law' will not avoid dismissal." *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. (Emphasis added.)

The defendant contends that he was denied his constitutional rights in the following respects: (1) He was denied his right to a speedy trial; (2) in denying his pretrial motions to quash the indictments, the trial court denied him the right "to present a defense"; and (3) the prosecution procedures employed were "so fundamentally unfair and basically unjust that they operated to forever deprive the defendant of his Sixth and Fourteenth Amendments Rights to a fair and impartial speedy trial."

**[2]** The offenses are alleged to have been committed on 25 March 1974. The defendant was brought to trial at the 8 July 1974 Session of the Superior Court. In the meantime, counsel was appointed to represent him. His counsel so appointed moved in the District Court that a court reporter be appointed at the State's expense to record proceedings at the preliminary hearing. This request was denied, but the court stated that the recording system which was used in the Juvenile Domestic & Relations Court would be available to record the preliminary hearing and ordered such hearing to be set at the earliest practicable time. This order was entered 28 March 1974, three days after the defendant's arrest. The defendant becoming dissatisfied with his court-appointed counsel and requesting appointment of another attorney, this was done, the second attorney representing him from that time to the present. Through his second court-appointed counsel, the defendant waived a preliminary hearing on 13 May 1974. There is no showing whatever of a denial of the defendant's right to a speedy trial.

**[3]** Prior to trial the defendant filed, pro se, a motion to quash the indictments. His court-appointed counsel filed a lengthy brief in support thereof. When the cases were called for trial in the Superior Court, the trial judge announced that he had previously considered and "thoroughly reviewed" the motion to quash and the supporting brief and the motion was denied. The defendant now asserts that it was a denial of his constitutional right to so rule upon his motion to quash "without hearing." There is no substance to this contention.

**[4]** The defendant contends he was denied the right to communicate with his witness Gibson by the denial of his request that they be put in the same jail cell so that they could confer about their "joint defense." Defendant's testimony at his trial was upon the theory that he and Gibson had no joint defense,

the defendant contending that he did not know Gibson and had nothing to do with Gibson's activities in the store. Furthermore, there is nothing whatever to indicate that either of defendant's court-appointed attorneys was limited in any respect in his opportunity to confer with the defendant and with Gibson.

**[5]** Finally, the defendant asserts that, through the State's delay of the preliminary hearing and the denial of his request for a court reporter to take such testimony at such hearing, the defendant lost the opportunity to record Gibson's intended testimony absolving the defendant from complicity in the breaking and entering of the store and possession of the burglary tools. He contends that Gibson committed suicide and the State, through its negligence, failed to prevent this. The record shows that had a preliminary hearing been held, facilities were available for the recording of the testimony. The record shows no effort by the defendant or his counsel to expedite a preliminary hearing after the District Court, three days after the defendant's arrest, ordered such hearing to be held at the "earliest practicable time." No such hearing was held because the defendant waived it.

Nothing in the record indicates any effort by the defendant or his counsel to take the deposition of Gibson for the purpose of preserving his testimony. Furthermore, nothing in the record shows that the State had any indication that Gibson would testify as the defendant now says he would have done, nor does the record show that the State had any indication that Gibson's early death was a probability. The record does not show when Gibson died nor does it show anything about the cause of his death except the defendant's own testimony at his trial that Gibson "killed himself or something in the jail."

Nothing whatever in this record indicates that the defendant has not had a fair trial or that any of his rights under the State or Federal Constitution has been denied him. In addition to the above contentions of the defendant on this appeal, we have examined the rulings of the trial court concerning the admission of evidence and the charge of the court to the jury. We find therein no substantial error.

Appeal dismissed.

STATE OF NORTH CAROLINA v. TEDDY LEE CARRIKER

No. 103

(Filed 6 June 1975)

**Criminal Law § 99— comments of trial judge — effect on prospective jurors**

In a prosecution for felonious distribution of marijuana to a minor, defendant was entitled to a continuance where prospective jurors who were sitting in the courtroom heard the judge, before passing sentence in another case in which another defendant entered a plea of guilty of possession of marijuana, state that marijuana was a habit-forming drug, once the habit was formed "anything goes," it led to robbery or anything else to get money, and all or many of those charged with such offenses "get religion" when they come into court.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 24 N.C. App. 91, 210 S.E. 2d 98 (1974), which found no error in the trial before *Gambill, E.J.*, at the 25 March 1974 Special Criminal Session of DAVIDSON Superior Court.

On indictment proper in form, defendant was charged with the willful and felonious distribution of a controlled substance, marijuana, to a minor, in violation of G.S. 90-95(a)(1) and G.S. 90-95(i). (1971 Session Laws, c. 919, s. 1.)

Martha King testified that she was fourteen years of age when, on 25 September 1973, she stopped at defendant's trailer on the way home from school and purchased from him a "nickel bag" of marijuana, ordinarily priced $5.00, for $4.95. School authorities discovered Martha smoking some of this marijuana the following day. Martha's mother and the police were notified, and Martha told the officers she obtained the marijuana from defendant.

A police officer who was present at Martha's school the day after the alleged sale corroborated Martha's testimony. A chemist with the State Bureau of Investigation testified that in his opinion the green vegetable material taken from Martha at school was marijuana.

Witnesses for the defendant testified that they saw defendant refuse to sell Martha any marijuana on 25 September 1973, but that someone else at the trailer did sell marijuana to her. Defendant, who was twenty-three years of age on the date in

question, testified denying ever having sold marijuana to Martha King.

From a jury verdict of guilty and from a judgment sentencing the defendant to fifteen to thirty years' imprisonment, defendant appealed to the Court of Appeals, which affirmed. We allowed *certiorari* on 4 February 1975.

*Attorney General Rufus L. Edmisten and Assistant Attorney General James E. Magner, Jr. for the State.*

*Clarence C. Boyan for defendant appellant.*

MOORE, Justice.

When court opened on the day of the trial of this case, the jurors for the term were called and sworn and thereafter remained in the courtroom. The district attorney then called the first case on the calendar, *State v. Bell.* That defendant entered a plea of guilty of possession of marijuana. Before passing sentence in that case, the presiding judge made certain remarks as hereinafter partially summarized. Shortly after judgment was imposed in the *Bell* case, the district attorney called defendant's case. Before pleading to the indictment charging him with distribution of marijuana, defendant moved for a continuance for the term due to the remarks made by the judge before sentencing Bell. Prior to ruling on this motion, defendant's attorney, Mr. Lea, accompanied by the court reporter, conferred with the presiding judge in chambers. There the following exchange took place:

"MR. LEA: We make a Motion to continue on the basis of certain remarks made by the Presiding Judge in the sentencing of Roger Paul Bell, these remarks which I think—

"THE COURT: —What remarks? I don't care about your opinion.

"MR. LEA: The first one was that marijuana was a habit-forming drug. The second remark—

"THE COURT: —I didn't say that.

"MR. LEA: That is what I understood you to say.

"THE COURT: I said when they got hooked on marijuana that my experience was that anything went, and I

have tried them for robbery; they get desperate for money and anything goes, robbery or anything else.

"MR. LEA: I think that is close to what you said; and further, as the defendant in a previous case left the Courtroom, the Presiding Judge looked at the Jury and stated substantially as follows: That they all get religion when they come in the Courtroom. Is this a fair statement, Your Honor?

"THE COURT: I don't know that I said they all do. I said a lot of them get religion when they come in the Courtroom.

"MR. LEA: Is it necessary for me to give the reasons for this?

"THE COURT: I don't care anything about the reasons. You can take it up if you want to and tell the Court up there why you took it up. All I said in front of the Jury is what you get from the papers everyday, on the radio or on the television anytime you want to turn it on, and those people sitting on the Jury are grown men and women. The Motion is DENIED."

Defendant's attorney contends that the comments made by the presiding judge before the jury panel were actually much more extensive and prejudicial than those preserved for the record and set out above.

By his first assignment of error defendant alleges that the trial court erred in denying his motion for a continuance due to the fact that the remarks made by the court before the jury panel prejudiced his right to a fair trial. Neither the State nor defendant has cited a North Carolina case nor has our research discovered one which deals directly with the question here involved. The general rule is stated in Annot., 89 A.L.R. 2d 197, 234, as follows:

" . . . [T]he rule appears to be that the practice of addressing the prospective jurors does not of itself constitute reversible error, although suggestions or statements which are likely to influence the decision of the jurors when called upon later to sit in a given case may constitute error and should be avoided, as should misstatements of the law or remarks disparaging legitimate defenses that may be made in cases to be tried, as well as references made directly

> or by innuendo to particular cases which might come before the jurors."

*See* 75 Am. Jur. 2d, Trial §§ 91, 92, pp. 194-95 (1974).

Many decisions have warned that remarks made before prospective jurors must be engaged in with the greatest of care and that the judge must be careful not to make any statement or suggestion likely to influence the decision of the jurors when called upon later to sit in a given case. In *Gross v. Commonwealth,* 256 S.W. 2d 366 (Ky. 1953), Commonwealth insisted that the remarks of the presiding judge made on the first day of the term to the prospective jurors could not have prejudiced them as this case was not tried until the 17th day thereof. The trial judge there had stated from the bench to the members of the prospective jury, in substance, that they would never convict anyone for violating the liquor laws if they accepted the testimony of defendants charged with such offenses. This statement was not directed to the defendants in that case or any other particular defendant charged with such violations. Holding that these remarks were error, the Kentucky Court of Appeals stated:

> "We do not believe the poison had evaporated from the minds of the jurors because of the fact seventeen days elapsed between the time these unfortunate words were spoken to the jury and the time of the trial. A trial judge occupies a high position, and the jury should, and usually does, have great respect for him and is easily influenced by the slightest suggestion coming from him. *Burnam v. Com.,* 283 Ky. 361, 141 S.W. 2d 282, and authorities therein cited. Practically the same statement made here was made by the trial judge in *Shaw v. Com.,* 206 Ky. 781, 268 S.W. 550, and it was there held to be reversible error."

*Accord, Mele v. Becker,* 1 Mich. App. 172, 134 N.W. 2d 846 (1965).

G.S. 1-180, which requires a judge to explain the law but to give no opinion on the facts, refers by its terms to the charge of the judge to the jury. Nonetheless, it has long been construed to forbid the judge to convey to the trial jury in any way *at any stage* of the trial his opinion on the facts involved in the case. *State v. Holden,* 280 N.C. 426, 185 S.E. 2d 889 (1972); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410 (1971); *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833 (1966); *State v. Wil-*

*liamson,* 250 N.C. 204, 108 S.E. 2d 443 (1959); *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263 (1954); *State v. Cook,* 162 N.C. 586, 77 S.E. 759 (1913). There is language in our cases to the effect that G.S. 1-180 is not applicable until the case is called to trial. *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594 (1943); *State v. Jacobs,* 106 N.C. 695, 10 S.E. 1031 (1890).

In *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173 (1954), we held that G.S. 1-180 was violated when the trial judge inadvertently communicated his opinion of the facts in the case by his remarks or questions to *prospective* jurors during the selection of the jury. And as we said in the oft-quoted case of *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855 (1907):

> " . . . The judge should be the embodiment of even and exact justice. He should *at all times* be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." (Emphasis added.)

*Accord, State v. Greene,* 285 N.C. 482, 489, 206 S.E. 2d 229, 233 (1974).

In addition to G.S. 1-180, and apparently to supplement it, the General Assembly enacted G.S. 1-180.1 to further prevent the trial judge from invading the province of the jury. This statute in part provides:

> *"Judge not to comment on verdict.*—In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticize any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge *shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be*

*tried during that week at such session of court, upon motion of a defendant or upon motion of the State. . . .* " (Emphasis added.)

This statute by its express terms applies to comments made by the presiding judge concerning *verdicts* rendered during the session. However, we fail to see how comments made by the judge in the presence of the jury panel concerning a verdict of guilty could be more prejudicial than the same remarks made concerning a plea of guilty. Such comments violate the spirit if not the letter of G.S. 1-180.1.

The central question is whether or not the language complained of might have so affected the prospective jury panel that it was likely defendant would be deprived of a fair and impartial trial. In the present case the prospective jurors were put on notice by the trial judge that marijuana was a habit-forming drug; that once the habit was formed "anything goes"; that it led to robbery or anything else to get money; and that all or many of those charged with such offenses "get religion" when they come into court. Surely the prospective jurors could logically infer from these remarks that defendants charged with similar offenses should be convicted, and that when apprehended and brought into court many such defendants would attempt to deceive the court by "getting religion." The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. *State v. Canipe, supra; State v. Smith, supra.* That the remarks were an inadvertence on the part of the able and experienced judge renders the comments nonetheless harmful. *Burkey v. Kornegay,* 261 N.C. 513, 135 S.E. 2d 204 (1964); *Miller v. R. R.,* 240 N.C. 617, 83 S.E. 2d 533 (1954).

G.S. 1-180.1 also expressly provides that "[t]he provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment." Hence, in order to obtain the benefit of the statute a defendant must, as defendant did in this case, move for a continuance.

The comments made by the trial judge concerning cases involving marijuana, coming shortly before defendant's case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion.

We see no merit in defendant's other assignment of error, but for the reasons stated defendant is entitled to a new trial.

The case is remanded to the North Carolina Court of Appeals with direction that it remand it to the Superior Court of Davidson County for a new trial in accordance with the principles herein stated.

New trial.

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STATE OF NORTH CAROLINA v. FREDDIE LEE

No. 125

(Filed 6 June 1975)

1. **Criminal Law § 46— flight of defendant — nature of search by law officer**

While generally testimony of a law enforcement officer to the effect that he searched for the accused without success after the commission of the crime is competent to show flight of the accused, whether such testimony does give rise to an inference that flight occurred depends, of course, on the nature and extent of the search.

2. **Criminal Law § 46— flight of defendant — insufficiency of evidence**

Evidence which tended to show that the sheriff merely looked for defendant while riding around on the street where defendant lived, that the sheriff never went to defendant's residence, that he made no inquiry as to defendant's whereabouts, that defendant customarily frequented other cities and the sheriff knew this fact, and that the sheriff was unable to locate defendant within six days was insufficient to support a jury instruction concerning flight of defendant.

3. **Criminal Law §§ 46, 113— instruction on defendant's flight — insufficient evidence — new trial**

Where the trial court in a criminal case permits the jury to return a verdict of guilty upon a legal theory or a state of facts not supported by the evidence, it is prejudicial error entitling the defendant to a new trial; therefore, defendant in this common law robbery prosecution is entitled to a new trial where the trial court gave instruction on flight of defendant which was unsupported by the evidence.

ON *certiorari* to review a decision of the Court of Appeals, 24 N.C. App. 666 (1975) which found no error in the trial and conviction of defendant on a charge of common law robbery

before *James, J.*, at the May 27, 1974 Session of PERQUIMANS Superior Court.

Based upon an affidavit of the victim in this case, Aubrey Jordan, a warrant for the arrest of the defendant was issued on August 25, 1973. Jordan's affidavit duly charged defendant with common law robbery whereby some $140.00 was taken from Jordan's person. The warrant was executed on August 31, 1973, by Sheriff Julian H. Broughton. Defendant, having been properly indicted on October 29, 1973, was first tried and convicted at the October 29, 1973 Session of Perquimans Superior Court, but the Court of Appeals awarded him a new trial for the reason that he was not provided counsel. 21 N.C. App. 337, 204 S.E. 2d 192 (1974).

At his second trial defendant, upon being found guilty by the jury as charged, was sentenced to a term of imprisonment of not less than eight nor more than ten years. We allowed defendant's petition for writ of certiorari on April 2, 1975, and the case was argued in this Court on May 13, 1975.

The State's case in chief consisted entirely of the testimony of Aubrey Jordan, which was that in the early morning hours of August 25, 1973, on King Street in Hertford he was robbed by defendant and another person whom he could not identify. Jordan positively identified defendant as one of his assailants on direct examination, stating that he had known defendant since 1941 and had had occasion since then to see him two or three times each year. On cross-examination, however, he conceded that when immediately after the robbery he reported it to Robert Harvey, a Hertford policeman, and several hours later to Chief of Police B. L. Gibbs, he described his assailants to both Harvey and Gibbs but did not identify defendant by name to Harvey and wasn't sure whether he made such an identification to Gibbs.

Gibbs and Harvey testified for defendant that Jordan never identified defendant by name to either of them.

*Attorney General Rufus L. Edmisten and Associate Attorney Noel Lee Allen, for the State.*

*W. T. Culpepper III, for defendant appellant.*

EXUM, Justice.

The sole question raised in defendant's petition for certiorari is whether the Court of Appeals erred in deciding that there was sufficient evidence of defendant's flight after the robbery to support the following instructions of Judge James to the jury:

> "Now it is contended by the State, whether the evidence shows it is for you and you alone to say, that the defendant disappeared, and was not seen for five or six days, the officer's testimony being that he had a warrant for him and drove around through the area which he knew the defendant would normally be in, but did not see him, but made no inquiries as to where the defendant was, did not ask any person where he might be found, made no oral inquiry whatsoever and did not see him for five or six days, the State saying and contending that that was evidence of flight, or secluding himself.
>
> "I instruct you that evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show perhaps a consciousness of guilt. However, I instruct you that proof of circumstances, that is proof of flight, in and of itself is not sufficient to establish the defendant's guilt."

The only evidence which could have conceivably supported these instructions was testimony of one of defendant's witnesses that defendant lived on King Street in Hertford and the following testimony for the State in rebuttal of the Sheriff of Perquimans County, Julian H. Broughton:

> "I recall a warrant coming into my hands in connection with this case now on trial. It was on a Saturday afternoon when I got the warrant from the Magistrate's office. I attempted to serve that warrant on the Defendant, Freddie Lee, that Saturday. I attempted to locate the Defendant for the purpose of serving the warrant on him by riding—just by riding and looking for him, didn't ask any questions if anybody had seen him, or anything. I was not able to locate the Defendant on this Saturday to serve the warrant. I looked for him again Sunday, but I did not find him on Sunday for the purpose of serving the warrant.

"I looked for Freddie Lee from the time the warrant came into my hands on Saturday the 25th of August until the 31st of August when I was able to locate him and serve the warrant. This was a period of six days; I looked for him everyday, mostly on King Street.

"I rode around and did not ask any questions each day. In looking for him I asked no questions of anybody. I had a particular reason for not making any verbal inquiry as to where Freddie Lee might be."

On cross-examination, however, Sheriff Broughton admitted that defendant sometimes divided his time between Hertford, Norfolk and New York. He said, "Freddie Lee has been going back and forth to Norfolk and New York. I have previously called and gotten in touch with him to bring him back from Norfolk before. At that time he was living in Norfolk. He was staying here and Norfolk."

**[1]** While generally "testimony of a law enforcement officer to the effect that he searched for the accused without success after the commission of the crime is competent" to show flight of the accused, *State v. Lampkins,* 283 N.C. 520, 196 S.E. 2d 697 (1973), whether such testimony does give rise to an inference that flight occurred depends, of course, on the nature and extent of the search. Where the search is likely to be unproductive because of the manner in which it was conducted or where the State's evidence affords a reason for failure to locate the accused which is as probable as that the accused was trying to avoid apprehension, the fruitless search is not evidence of flight. See, e.g., *State v. Jones,* 93 N.C. 611 (1885). On the other hand if the nature and extent of the search makes it reasonably likely that the accused will thereby be located, failure to find him is some evidence that has fled, or is otherwise trying to avoid apprehension. See, e.g., *State v. Lampkins, supra,* and authorities cited therein.

**[2]** Sheriff Broughton's search falls in the former category. He merely looked for defendant while riding around on the street where defendant lived. He never went to defendant's residence, nor for reasons known only to the sheriff did he make any inquiry as to defendant's whereabouts. This, together with the sheriff's own testimony that defendant customarily frequented other cities, leaves the question of whether defendant did indeed flee or otherwise try to avoid apprehension to utter

conjecture, speculation and surmise. He may well have been inside his residence when Sheriff Broughton rode by, or for six days, in Norfolk or New York where, to the sheriff's knowledge, it was not unusual for him to go.

"[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so . . . should not be left to the jury." *State v. Vinson,* 63 N.C. 335 (1869). Jury instructions based upon a state of facts not supported by the evidence and which are prejudicial to the defendant entitle the defendant to a new trial. *State v. Lampkins, supra; State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921 (1952); *State v. Wilson,* 104 N.C. 868, 10 S.E. 315 (1889).

Flight of defendant was, as we have indicated, not supported by the evidence. *State v. Lampkins, supra,* and *State v. Davis,* 237 Mo. 237, 140 S.W. 902 (1911), relied on by the State, are distinguishable on this point. In *Lampkins* the evidence was that the arresting officer checked at various "locations" throughout a particular area of town for some *four months* before he was able to locate the defendant. In *Davis* there was evidence that after an unsuccessful search for the defendant he was ultimately "captured" in another county.

The State argues and the Court of Appeals reasoned that even if there was no evidence of flight, since the testimony of Sheriff Broughton was before the jury without objection or motion to strike, the instructions of Judge James were not prejudicial and may even have been beneficial to defendant in that they clarified for the jury the weight to be accorded the sheriff's testimony.

We disagree with this reasoning. First, Sheriff Broughton's testimony, since it does not support an inference of flight, was incompetent and on proper motion should have been stricken. *State v. Jones, supra.* The question of its competency is not before us nor was it before the Court of Appeals only because defendant did not object to or move to strike it at trial.

**[3]** Second, the prejudice in the challenged instructions is clear. They permit the jury to consider Sheriff Broughton's testimony as evidence of flight—a circumstance, the jury was told, which it could find tended to show an admission or consciousness of guilt on the part of the defendant. In effect the instructions added a circumstance to the State's case against defendant not supported by either the State's or defendant's evi-

dence. We have uniformly held that where the trial court in a criminal case permits the jury to return a verdict of guilty upon a legal theory or a state of facts not supported by the evidence it is prejudicial error entitling the defendant to a new trial. *State v. Duncan,* 264 N.C. 123, 141 S.E. 2d 23 (1965); *State v. Gurley,* 257 N.C. 270, 125 S.E. 2d 445 (1962); *State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452 (1958); *State v. Vinson, supra. See also State v. McCoy, supra.* The prejudice here is heightened because Aubrey Jordan's testimony, when considered in its entirety, and the testimony of Gibbs and Harvey make room for a good jury argument that Jordan had not consistently identified defendant as one of his assailants. Evidence of flight is not only competent but "often considered *material* . . . where there is a dispute or doubt as to the identity as to the perpetrator of the crime." *State v. Foster,* 130 N.C. 666, 675, 41 S.E. 284, 287 (1902). (Emphasis supplied.)

For the reasons stated the decision of the Court of Appeals is reversed and the cause remanded to that Court with direction to award a new trial to defendant.

Error and remanded.

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STATE OF NORTH CAROLINA v. COLONEL LEE WORTHAM

No. 101

(Filed 6 June 1975)

1. **Constitutional Law § 31; Criminal Law §§ 95, 169— extrajudicial statement of nontestifying codefendant — admission harmless error**

Defendant did not waive his objection to testimony by a law enforcement officer concerning a statement made by a nontestifying codefendant to the officer outside defendant's presence, and evidence as to the statement should have been excluded; however, the competent evidence against defendant so positively established his guilt in the participation of the armed robbery that the incompetent evidence admitted was harmless beyond a reasonable doubt.

2. **Criminal Law § 102— jury argument — remark by District Attorney not improper**

In an armed robbery case the District Attorney's remarks in his jury argument, "they are thieves, they are rogues, they are scoundrels," were not improper and did not entitle defendant to a new trial where the District Attorney did not travel outside the record in making the remarks and his characterization of defendant, if directed to him, did not require that the trial court exercise his discretion and limit the argument.

ON *certiorari* to review the decision of the Court of Appeals, 23 N.C. App. 262, 208 S.E. 2d 863, which found no error in the judgment of *Bailey, J.*, 25 March 1974 Criminal Session of GRANVILLE County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with armed robbery. He entered a plea of not guilty.

The State's evidence tends to show that on the 16th day of January 1974 defendant in company with Dan Moss, James Royster and Lewis Royster drove his automobile around Oxford for the purpose of "getting some money." After finding that several places were not "right," they stopped at the Buy-Quick Food Mart operated by Jim Hobgood. Lewis Royster, armed with a pistol and accompanied by his brother James, entered the store and by the use of the pistol took over $320 from the cash register. At that time defendant was also in the store purchasing a "soft drink and some cigarettes." While the robbery was in progress, defendant departed and pulled his automobile around on a side street, where he waited with the motor running until he was joined by his other companions. The four occupants of the car later divided the money.

The State's evidence included the testimony of Lewis Royster and James Royster.

Defendant's evidence tended to show that on the night of 16 January 1974 he was at the home of Otis Royster playing cards. He there encountered James Royster, Lewis Royster, and a third man whom he did not yet know, and they asked him to take them to the Buy-Quick Food Mart to buy wine. He had not previously known any of these persons, but on the next day he learned the Roysters' names. Dan Moss was at Otis Royster's home, but he did not accompany them to the food mart. On the way to the store the other men talked about robbing the store, but he paid no attention to this "talk." When they arrived, the Roysters entered the store, and after talking to some girls whom he saw on the street, he entered the store and purchased a "soda" and some cigarettes. At that point Lewis Royster stuck a gun in the store owner's face, and his brother James took money from the cash register. He slowly backed out of the store and told the third unidentified man that those "fools" were robbing the place. Thereupon the third man pulled a gun and forced him to pull his automobile around to a side street, where they waited until the Roysters joined them. He then drove out into

the country, where his passengers got out. He reported these occurrences to the police on the next day after he had finished work.

The jury returned a verdict of guilty as charged. Defendant appealed from judgment entered on the verdict, and the Court of Appeals found no prejudicial error in the trial. We allowed *certiorari,* pursuant to G.S. 7A-31, on 4 February 1975.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.*

*C. W. Wilkinson, Jr., for defendant.*

BRANCH, Justice.

**[1]** Defendant contends that the trial judge erred in allowing the State's witness, S.B.I. Agent Momier, to testify on rebuttal as to a statement made to him by a codefendant, Dan Moss, which statement was not made in defendant's presence. We quote the portion of the record pertinent to this assignment of error:

> Mr. Momier said he was present when they arrested Dan Moss. He stated that Mr. Moss was warned of his constitutional rights. He stated that Dan Moss made the statement that he was on the car with Colonel Wortham and the two Roysters on the night before the robbery and that he did not commit the robbery.
>
> At this point, the solicitor asked the following question:
>
> "Mr. Momier, this was on the night before the robbery, or on the night of the robbery?"
>
> Both the defendant Wortham and the defendant Moss objected.
>
> The objection was overruled by the Court.
>
> The defendant Wortham excepted.
>
> EXCEPTION No. 7.
>
> Answer to this question, "It was on the night of the robbery."
>
> Momier stated that Dan Moss admitted that he was on the car with them.

In finding no error in the admission of this evidence, the Court of Appeals stated that the record indicated that the witness Momier was allowed to answer several questions concerning the Moss statement before objection was made and that defense counsel's failure to make timely objection waived the objection. The Court of Appeals further held that the admission of the evidence, if error, was harmless error beyond any reasonable doubt.

Without hearing the inflection of the witness's voice, it is impossible for us to decide from the cold record whether the witness Momier meant to state that Moss said he was with defendant and the Roysters on the preceding night or at an earlier time on the night of the robbery. Under these circumstances we think that it would be unfair for us to interpret this ambiguous statement so as to presume error on the part of defense counsel in not properly lodging his objection. We, therefore, do not agree with the conclusion of the Court of Appeals that defendant waived his objection.

Since the codefendant Moss did not testify, the evidence as to his extrajudicial statement should have been excluded. *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476; *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492. Thus, there only remains the question of whether the improperly admitted evidence was sufficiently prejudicial to warrant a new trial. The challenged evidence contributed nothing toward proving defendant's guilt of any element of the crime of armed robbery. It did tend to impeach his credibility by contradicting his statement that codefendant Moss was not in the car during the night of the robbery. All of the evidence in this case places defendant at the store at the time of the armed robbery. The uncontradicted evidence also reveals that he transported two of the confessed robbers to the scene of the robbery and afterwards carried them away from the scene. The Roysters, the one who actually used the pistol in the armed robbery and the other who took the money from the cash register, each testified that in addition to being the driver of the automobile, defendant took part in the plan to rob and received a part of the proceeds of the robbery.

The test of harmless error is "whether there is a reasonable possibility that the evidence complained of might have contributed to conviction." *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398. Here the competent evidence against defendant Colonel

Lee Wortham so positively established his guilt in the participation of the armed robbery that the incompetent evidence admitted was harmless beyond a reasonable doubt. *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284; *State v. Davis* and *State v. Fish,* 284 N.C. 701, 202 S.E. 2d 770, *cert. denied,* 419 U.S. 857, 95 S.Ct. 104, 42 L.Ed. 2d 91; *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405.

**[2]** Defendant next argues that he is entitled to a new trial because of improper remarks by the District Attorney during his argument to the jury.

The record contained only this fragmentary excerpt concerning the District Attorney's argument: "During the course of Mr. Allen's argument to the jury, Mr. Allen stated 'they are thieves, they are rogues, they are scoundrels.' " The record does not show the context in which these remarks were made; neither do we know for a certainty that the word "they" included defendant. Nor do we know whether the remarks of the District Attorney were in answer to an argument made by defense counsel.

We find language very similar to that here objected to in *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, *vacated and remanded as to death penalty only,* 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761. There the District Attorney characterized the defendants as "two robbers, two thieves, two gunmen and 'killers.' " The Court found no prejudicial error in the remarks of the District Attorney and, *inter alia,* stated:

> This Court has said that the argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432; *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542. He may not, however, by argument, insinuating questions, or other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not "travel outside of the record" or inject into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762; *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *State v. Little, supra.* On the other hand, when the prosecuting

attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. *State v. Bowen, supra.*

The prosecuting attorney may use "appropriate epithets which are warranted by the evidence," . . . . In *State v. Bowen, supra,* the epithet, "these two thieves," was not approved by this Court but was held not to be ground for a new trial because it was "a conclusion drawn from the evidence." . . .

. . . The defendant being charged on this trial with murder in the first degree, it was not improper for the prosecuting attorney to characterize him and his companion as "killers." . . .

In instant case defendant was charged with armed robbery, and there was ample evidence to support the charge. An armed robber is a thief, a robber, and certainly a thief and a robber may be aptly characterized as a scoundrel. Thus, it appears that the District Attorney did not travel outside the record and that his characterization of defendant, if directed to him, did not demand that the trial judge exercise his discretion and limit the argument.

We think it only proper to observe that the District Attorney was perilously near crossing the line from allowable denunciation into the forbidden territory of abuse which would have required reversal. In any event, we agree with the Court of Appeals that, in light of the stated circumstances, reversible error does not appear.

Our further consideration of this case convinces us that *certiorari* was improvidently allowed and that the action of the Court of Appeals in finding no prejudicial error was correct.

The decision of the Court of Appeals is

Affirmed.

IN THE MATTER OF THE APPEAL OF AMP INCORPORATED FROM THE DECISION OF THE STATE BOARD OF ASSESSMENT, SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW, AFFIRMING THE ACTION OF THE GUILFORD COUNTY BOARD OF COMMISSIONERS ASSESSING ADDITIONAL TAXES, PENALTIES AND INTEREST FOR THE YEARS 1964 THROUGH 1968, INCLUSIVE

No. 99

(Filed 26 June 1975)

**1. Taxation § 25— ad valorem taxes— review of order of State Board of Assessment**

Upon review of an order of the State Board of Assessment (now the Property Tax Commission), the superior court is without authority to make findings at variance with the findings of the Board when the findings of the Board are supported by competent, material and substantial evidence. G.S. 145-315 (now G.S. 150A-51.)

**2. Taxation § 38— ad valorem tax assessment — presumption of correctness — burden of proof**

Ad valorem tax assessments are presumed to be correct, and when such assessments are challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous.

**3. Taxation § 38— ad valorem taxes — attack on valuation — showing required of taxpayer**

In order for a taxpayer to rebut the presumption of correctness of an ad valorem tax assessment, he must produce competent, material and substantial evidence that the county tax supervisor used an arbitrary or illegal method of valuation and that the assessment substantially exceeded the true value in money of the property.

**4. Taxation § 25— ad valorem taxes — book value — illegal method of valuation**

There is no statutory authority that permits a county tax supervisor, as a per se rule, to equate "book value" with true value in money as a uniform measure of assessment for purposes of ad valorem tax valuation; therefore, a county tax supervisor used an "illegal" method of valuation in requiring the taxpayers of the county to list inventories at book value as reported on State tax returns.

**5. Taxation § 25— ad valorem taxes — listed values of inventories — insufficient evidence**

Taxpayer failed to offer competent, material and substantial evidence to support ad valorem valuations listed by it for its inventories for the years 1964-1968.

**6. Taxation § 25— ad valorem taxes — scrap metals — value**

The "true value in money" for ad valorem taxation purposes of brass and copper scraps accumulated by a manufacturer of electronic

terminals is the prices offered by the supplying mills to whom such scrap is "usually" and "freely" sold by the manufacturer.

7. **Taxation § 25— ad valorem taxes — goods in process — value**

The value for ad valorem taxation of the non-defective in-process inventory of a manufacturer of electronic terminals is not the scrap value but is the cost of replacing the inventory plus labor and overhead.

8. **Taxation § 25— ad valorem taxes — raw material inventory — value**

The value for ad valorem taxation of the raw material inventory of a manufacturer of electronic terminals is not the scrap value but is the cost of replacing the inventory.

9. **Taxation § 25— ad valorem taxes — raw materials and in-process inventories — value — use of book value**

Finding by the State Board of Assessment that "book value" constituted the "true value in money" for ad valorem taxation of the raw material and in-process inventories of a manufacturer of electronic terminals was supported by competent, material and substantial evidence where the evidence showed that such "book values" were based on the manufacturer's own figures furnished to the State of North Carolina for income and franchise tax purposes, and that the manufacturer's accounting procedures are structured so as to define and compute "book value" as replacement cost plus labor and overhead, which is the proper standard for valuing the manufacturer's raw material and in-process inventories.

10. **Taxation § 25— ad valorem taxes — understatement of inventories — discoverable property**

The differences between the total values of inventories listed by a taxpayer on ad valorem taxation abstracts and the values found by the State Board of Assessment to be the true value in money of the inventories constituted discoverable property under G.S. 105-331.

Justice EXUM did not participate in the consideration or decision of this case.

Justice LAKE dissents.

ON *certiorari* to review decision of the North Carolina Court of Appeals reported in 23 N.C. App. 562, 210 S.E. 2d 61 (1974) (opinion by *Brock, C.J., Morris and Martin, J.J.*, concurring), which reversed the judgment filed by Exum, J., on 25 January 1974 (said judgment having reversed a final decision entered by the State Board of Assessment, sitting as the State Board of Equalization and Review), and remanded the cause to the Guilford County Superior Court with directions that an order be issued reinstating and affirming the decision of the State Board.

All references herein to statutes contained in Chapter 105 of the General Statutes refer to the applicable provisions prior to their revision or recodification pursuant to Chapter 806, 1971 Session Laws, effective 1 July 1971. Also, for convenience, the petitioner appellant is hereinafter referred to as "AMP"; the respondent appellee is hereinafter referred to as either "Guilford County" or "the County"; and the State Board of Assessment (now the Property Tax Commission—*see* G.S. 105-288) is hereinafter referred to as the "State Board."

AMP is a corporation engaged in the business of manufacturing various electronic parts and components and owns and operates a manufacturing plant at 1126 Church Street in Greensboro, North Carolina, and at other locations both within and outside of the State of North Carolina.

AMP duly and timely filed "Business Property Abstracts" (hereinafter referred to as abstracts) in accordance with G.S. 105-306 through 105-309 for the taxable years 1964-1968, inclusive, and made the following tax payments for which it was billed as a result of filing said abstracts:

Table I*

| *Year* | *Tax* |
|---|---|
| 1964 | $ 11,555.73 |
| 1965 | 11,724.06 |
| 1966 | 12,026.60 |
| 1967 | 13,534.23 |
| 1968 | 13,044.07 |
| Total | $ 61,884.69 |

*All computations, listings, valuations, etc., have been listed in chronological tabular form for the purposes of this opinion.

Included in these abstracts were the following valuations for current inventories:

Table II

| *Year* | *Inventory Valuation* |
|---|---|
| 1964 | $ 399,278.00 |
| 1965 | 448,101.00 |
| 1966 | 460,734.00 |

Table II — continued

| *Year* | *Inventory Valuation* |
|---|---|
| 1967 | 454,801.00 |
| 1968 | 238,651.00 |
| Total | $ 2,001,565.00 |

By letter dated 21 August 1969 the Tax Supervisor of Guilford County (hereinafter referred to as Tax Supervisor), purporting and claiming to act under the authority of G.S. 105-331 (now G.S. 105-312), notified AMP that he intended to increase the valuation of inventories of AMP for the years 1964-1968, inclusive, to the following amounts:

Table III

| *Year* | *Inventory Value* |
|---|---|
| 1964 | $ 477,769.00 |
| 1965 | 843,327.00 |
| 1966 | 1,205,369.00 |
| 1967 | 1,565,711.00 |
| 1968 | 1,402,489.00 |
| Total | $ 5,494,665.00 |

Based upon this adjustment to inventories for the years 1964-1968, inclusive, the Tax Supervisor proposed to assess against AMP the following additional taxes, penalties and interest beginning with the year 1964:

Table IV

| *Year* | *Tax* | *Penalty* | *Total* |
|---|---|---|---|
| 1964 | $ 653.83 | $ 392.30 | $ 1,046.13 |
| 1965 | 3,472.06 | 1,736.03 | 5,208.09 |
| 1966 | 6,619.81 | 2,647.92 | 9,267.73 |
| 1967 | 9,992.64 | 2,997.79 | 12,990.43 |
| 1968 | 11,039.00 | 2,207.80 | 13,246.80 |
| GRAND TOTAL | | | $41,759.18 |

AMP, through its local counsel, duly and timely gave the Tax Supervisor notice of protest against the proposed assess-

ments and denied any liability therefor. The matter was thereafter set for hearing before the County Board pursuant to the provisions of G.S. 105-331(b) and the hearing was held on 2 September 1969. On 15 September 1969 the County Board approved and confirmed the proposed assessment (Table IV) on the basis that AMP had failed to report all of its inventories for the years 1964 through 1968, inclusive, and that the underreporting of these inventories was subject to being discovered under G.S. 105-331 (now G.S. 105-312). Both the Tax Supervisor and the County Board arrived at the valuation of inventories in the assessment appealed from by referring to inventories shown on North Carolina income tax returns filed by AMP with the State of North Carolina and by deducting therefrom inventories reported to Forsyth, Mecklenburg and Wake Counties, attributing the remaining balance to Guilford (AMP's only other location within the State).

AMP duly and timely noted its exception to the ruling of the County Board and gave notice of appeal to the State Board. At the 19 February 1970 hearing before the State Board, AMP presented the following evidence, summarized except where quoted.

Herbert M. Cole, the local AMP plant manager, testified that at its Greensboro facility AMP manufactured various types of solderness connectors for the electronics industry. These connectors are used to terminate wires contained in various types of electronic equipment.

Cole described the manufacturing process as follows:

The process begins with the receipt of brass, copper and other metals. These metals are received in strips approximately five to eight inches wide that are coiled in large rolls. These coils are first run through a machine called a "slitter" that slices the coiled material into narrow strips depending on the length of the terminal to be produced in the forming dies. After the material is slit, it is reeled into rolls called "pancakes." These "pancakes" are then carried to a storage area where they remain until such time as AMP is in a position to run them through the forming dies to manufacture a specific type of electrical terminal. When the time comes, material handlers carry the "pancakes" to stamping machines located in the press room and run the forming dies to produce the terminals. The terminals then undergo various types of metal plating.

The handling, slitting, forming and plating processes all generate substantial amounts of scrap material. For example, as "pancakes" are run through the forming die certain tools in the die eventually wear out, which results in the manufacture of terminals with dimensions out of specification. Such faulty terminals must be scrapped since AMP's customers cannot use them. Also, materials in raw form are sometimes scrapped. As stated earlier, these materials arrive in coil form. Sometimes a truck driver, or AMP's own personnel, will drop these coils. If this happens, or if the edges of these coils are dented or fouled in any other manner, then the coil must be scrapped because AMP cannot use anything that has rough edges. Such damaged metal will not go through the forming dies.

Scrap generated by all of the above listed causes is gathered two or three times daily. The scrap is then held until such time as approximately 40,000 pounds of either brass or copper or a combination of both has been accumulated. Such accumulation usually occurs once every week. At this time, Mr. George R. Beck, Director of Purchases for AMP, is contacted at the home office in Harrisburg, Pennsylvania, and he arranges to sell it to one or more of the mills from whom AMP purchases its raw materials.

Mr. Beck, previously identified, testified that as Director of Purchases he supervised the procurement of all production materials, expense items and capital equipment at all of AMP's plants and that he also supervised the sale of scrap. Beck stated that he was familiar with AMP's Greensboro operation and that during the 1964-68 period the operation of that plant remained essentially the same. As to the sale of scrap materials, Beck testified as follows:

> ". . . Among my duties are the handling of sales of scrap materials resulting from Greensboro Plant operations. Scrap that results from the Greensboro operations is always sold to the suppliers from whom we procure our raw materials. It is sold at published prices. The selling of scrap is a customary and regular activity of the company in the course of its business. During the years 1964 through 1968, approximately 50% of the raw material used by the company in its Greensboro Plant went into scrap. Raw materials that have been damaged in some manner prior to being put into process are sold at published scrap prices. The Company also has occasion to sell items of in-process

inventory and, when it does, scrap prices are received for such sales. Items of in-process inventories which are sold could not be completed into finished products by another manufacturer. As to whether or not any special equipment is required for the customer to further process Amp's products after Amp ships them to the customer, the whole business is predicated on the premise that Amp furnishes its customers with devices which cannot be used for the most part until the customer uses application equipment designed and manufactured by Amp, Inc."

On cross-examination by Guilford County, Mr. Beck testified that generally AMP had been manufacturing the same line of products since 1964. *He also stated that one-half of the raw metal received by the Greensboro plant was reduced to scrap during the manufacturing process* and that mills supplying AMP with the raw material (brass and copper coils) repurchased this scrap at published prices supplied to the Harrisburg office. Beck added that, "Roughly 40% of raw material costs are recouped from the sale of scrap although the precise percentage varies with market conditions." Thus, according to Beck, for every pound of raw material AMP purchased it recouped approximately 40% of the original purchase price in scrap sales.

Ernest L. Price, Tax Manager for AMP, testified that his duties included responsibility for the entire tax liability of the corporation and its affiliates to ALL taxing authorities. Specifically, as to the Greensboro operation, Mr. Price testified as follows:

". . . During the years 1964 through 1968, Amp, Inc. was on a calendar year basis for income tax purposes. I have made a computation of percentage of scrap generated from the processing of raw materials at the Greensboro Plant for each of the years 1964 through 1968, based upon the raw materials that are issued into production during the year as compared with the scrap generated during that year. These figures are based on the books and records of the Company."

Following the above quoted testimony, Mr. Price testified as to certain relevant statistical data. We have summarized this testimony in tabular form.

Table V

| *Year* | *Percentage of Scrap Generated To Raw Materials Issued* |
|---|---|
| 1964 | 50.4% |
| 1965 | 50.5% |
| 1966 | 51.3% |
| 1967 | 54.2% |
| 1968 | 49.8% |

Table VI

| *Date* | *Book Value of Finished Goods At Greensboro Plant* |
|---|---|
| 1 January 1964 | $177,585.00 |
| 1 January 1965 | 223,360.00 |
| 1 January 1966 | — 0 — |
| 1 January 1967 | — 0 — |
| 1 January 1968 | — 0 — |

Mr. Price then testified that under the accounting used by AMP *book value was defined as the lower of cost or of market.* At this point, the witness testified as follows as to the "true cash value" of AMP's Greensboro inventories on the relevant valuation dates. For the purposes of comparison, we have listed these figures with those originally included in AMP's abstracts. *See* Table II, *supra.*

Table VII

| *Year* | *Book Value of Inventories on 1 January* | *True cash Value of Inventories on 1 January as Computed by Mr. Price* | *Value Originally Reported by AMP On Business Property Abstracts* |
|---|---|---|---|
| 1964 | $ 464,758.00 | $ 287,622.00 | $ 399,278.00 |
| 1965 | 1,034,066.00 | 549,726.00 | 448,101.00 |
| 1966 | 1,012,055.00 | 412,968.00 | 460,734.00 |
| 1967 | 614,604.00 | 218,250.00 | 454,801.00 |
| 1968 | 400,725.00 | 78,281.00 | 238,651.00 |
| Totals | $ 3,526,208.00 | $ 1,546,847.00 | $ 2,001,565.00 |

Mr. Price then described how he had computed the "true cash values" of inventories as listed in Column 3 of Table VII, *supra.* He stated that all of his computations were based on the theory that AMP could only sell "in-process" inventory back to

the supplier since a customer would not use them. Price's computations are best explained by use of the following mathematical equation (Price's own example taken from his 1 January 1968 figures):

Table VIII

| | |
|---|---|
| $ 304,115.00 | Book Value of In-Process Inventory on 1-1-68 |
| —193,600.00 | (Less) Direct Overhead as of 1-1-68 |
| $ 110,515.00 | |
| — 36,801.00 | (Less) Full Cost of In-Process Materials Scrapped as of 1-1-68 |
| $ 73,714.00 | |
| + 96,610.00 | (Add) Book Value of Raw Material Inventory on 1-1-68 |
| $ 170,324.00 | |
| × .4596 | (Multiply) Relation of Scrap Price to Book Value |
| $ 78,280.91 | TRUE CASH VALUE OF INVENTORIES AS OF 1 JANUARY 1968 (Rounded off to $78,281.00 in Table VII, *supra*) |

Mr. Price pointed out that AMP had no finished goods on hand as of 1 January 1968 and explained that this was why his computations for that year only included in-process and raw material inventories. *See* Table VI, *supra.* However, he conceded that if AMP had had finished goods on hand as of 1 January 1968, then he would have recognized the "book value" of such goods as "true cash value."

On cross-examination by Guilford County, Mr. Price stated that AMP had obtained the services of the professional appraisal firm of Dawson, Desmond and Van Cleve to prepare and file the business property abstracts of the Greensboro plant for the years in question. *See* Table II, *supra.* Price admitted that the values he testified to in Column 3, Table VII, *supra,* were "inconsistent with the values Dawson, Desmond and Van Cleve gave to Guilford County" in the business property abstracts filed by and signed by them for each of the respective years. *See* Table VII, *supra.* He sought to explain this inconsistency as follows:

> ". . . The reason for this difference is that we asked the Dawson, Desmond and Van Cleve firm to evaluate true

cash value for us because at that time, frankly, we did not know how to do it. We did not know how to go from book value to cash value, and I was busy with other things, other responsibilities. . . . They were qualified at that point. . . . They knew how and I did not. So they handled it. We gave them all the necessary basic information on which they could make their determination. We did not get into a computation of true cash value, our own computation, until after Guilford County told us in 1968 that we owed them a lot of money. Frankly, that shook us up because we thought everything was fine. I was very disturbed about it. It's our policy to report correct figures and we don't like things to backfire like this. . . . We learned to do this after you people forced us to get into it. We thought everything was all right. Now we find out that the agents, Dawson, Desmond and Van Cleve, using their judgment in all those years, were too high except one time. [1965—see Table VII.] I guess they did the best they could."

On cross-examination by the State Board, Mr. Price elaborated further on the alleged misfeasance of AMP's agent as follows:

". . . As to why the figures we have testified to are generally lower than the figures reported by Dawson, Desmond and Van Cleve, they represent many taxpayers, a broad section. Most taxpayers have raw materials that can be used interchangeably between different manufacturers and I feel that they failed to recognize that we could only get scrap for those materials and I didn't know it at the time. I hadn't gotten into it. They failed to recognize that our raw materials were so unique that we do get nothing but scrap for them. They used general valuation criteria and failed to take into consideration our unique position and, as I say, I did not know it at the time. . . . They will never disclose exactly their method because they are giving away their trade secrets and their know-how. . . . I don't know how they arrived at the computation."

Finally, Mr. Price accounted for the lack of any "finished goods" at the Greensboro plant on 1 January 1966, 1 January 1967, and 1 January 1968 as follows:

". . . The Company decides where it will keep finished goods inventories as a matter of efficiency in doing busi-

ness. It is clear that in those years the Company decided that finished goods from the Greensboro Plant would be shipped to another location to be managed there. That is a management decision."

AMP's final witness before the State Board was Mr. William H. Westphal, a partner in the firm of A. M. Pullen, Inc., Certified Public Accountants, and a recognized expert in taxation. Mr. Westphal, in answer to a hypothetical question, stated that it was his opinion that on the valuation date raw materials and in-process inventories had a true value in money equivalent to their scrap value. He said that scrap value was "the best available evidence of the amount of cash or accounts receivable into which the subjects may be transmuted at the given date, the assessment date." Mr. Westphal based his expert opinion on the following:

". . . To arrive at this conclusion, I would like to say first that I am giving this statute the definition that seems reasonable to me under the circumstances, taking the terms and words and phrases that are used in their various contexts in the usual meaning. I am considering that this means that one approaches the focal assessment date and makes the determination at that date of approximately how much cash could be derived from the sale of the subjects, that is the underlying materials, that are available for sale if they should be sold at that date in their present state. To me, this does not mean that we should project into the future and undertake to ascertain what this might be sold for if we went on the assumption that certain processes would be added and that there would be certain added expenditures of labor and overhead. I think the crucial question is what will these products bring in their presently existing state at this particular time, because this does not make a reference to book value, or cost, or lower of cost or market, but the cash realizable value.

* * * * * * *

". . . The Statute . . . seems to me to speak clearly and unmistakably of cash value, the cash into which these subjects, these properties, might be transmuted at that specific date if sold, not on a forced sale basis, but in an orderly manner following the general procedures of the firm, the manner in which property in that condition is sold, and this I think is what we are determining here. . . . So here

we are not using a method that anticipates a completion of the goods. We are not assigning an accounting technique, a going concern value to this inventory on the assumption that this is what it is worth to this taxpayer in the course of trade or business. We are trying to determine what the cash value would actually be, and I think these sales prices are the best evidence of the amount into which these goods could be transmuted."

Guilford County presented the following evidence, summarized except where quoted, to the State Board. Mr. C. R. Brooks, Guilford County Tax Supervisor since 1 July 1965, testified, in pertinent part, as follows:

". . . The instructions contained in the business property tax returns contain the following language, 'All property must be reported at 100 per cent of cost to the nearest dollar amount, even though it may not be completely paid for. The dollar amount should come from your records, such as books of account, invoices, or tax depreciation schedules.' I interpret this language to mean that the reporting values should be given to the County directly from the records of the books of a taxpayer. These values should also be the same as that reported on the State Income and franchise returns."

Brooks further testified, on cross-examination by AMP, that he "assumed" that the cash value of the inventory is determined by the cash value figures furnished on the State tax returns. However, he added that he did not know the State's requirements for its tax returns insofar as whether they called for cash value or book value. In his opinion, there was "no difference between the reporting on the State corporate income tax returns, income and franchise returns, and that reported on the ad valorem listings because of the cash factor," although he had made no inquiry to determine the correctness of this opinion.

Finally, Mr. Brooks testified as follows as to the previous testimony of AMP's expert, Mr. Westphal:

"I heard Mr. Westphal's statement that book value is used as an item for measuring income and not value. As to whether I take exception to his statement, I think you are confusing ad valorem tax with income reporting. This is based on my assumption that State income tax reporting

and County ad valorem tax reporting is on the same basis, or should be on the same basis. As I have previously stated, that is my assumption which is not based on any knowledge that I have about the State returns."

Mr. Ronald Waters, a staff accountant in the office of the Guilford County Accountant, testified that he had been employed by the County from 1965 through 1969 as Assistant Tax Supervisor. He further stated that in this capacity he was in charge of the Business Personal Property Section of the Tax Department and had occasion to conduct audits of a number of firms who listed property for ad valorem tax purposes. Of all the firms he audited, approximately 95% reported inventories with values for ad valorem tax purposes consistent with the values given to the State for income and franchise tax purposes.

By order issued 5 May 1970 the State Board found that the value of AMP's inventories for ad valorem tax purposes was represented by the figures reflected in its books and records and that the differences between the book values and the amounts listed for ad valorem tax purposes constituted "unlisted property" and was therefore subject to discovery and assessment of additional taxes and penalties under G.S. 105-331. The additional amount subject to taxation was determined as follows:

Table IX

| *Year* | *Actual Inventory in Guilford County* | *Amount Listed* | *Additional Amount Subject to Tax* |
|---|---|---|---|
| 1964 | $ 464,758.00 | $ 399,278.00 | $ 65,480.00 |
| 1965 | 1,034,066.00 | 448,101.00 | 585,965.00 |
| 1966 | 1,012,055.00 | 460,734.00 | 551,321.00 |
| 1967 | 614,604.00 | 454,801.00 | 159,803.00 |
| 1968 | 400,725.00 | 238,651.00 | 162,074.00 |
| Totals | $ 3,526,208.00 | $ 2,001,565.00 | $ 1,524,643.00 |

As noted by the Court of Appeals, the action by the State Board, in effect, sustained the assessment of the Tax Supervisor and its subsequent confirmation by Guilford County. Pursuant to the provisions of Article 33 of Chapter 143 of the General Statutes, AMP appealed from the final decision of the State Board to the Superior Court Division of the General Court of Justice for Guilford County. That court, per Judge Exum, re-

versed and vacated the final decision of the State Board on the grounds that it was not supported by competent, material and substantial evidence and was affected by errors of law. Specifically, Judge Exum found that:

1. AMP, in listing its inventories for ad valorem tax purposes with Guilford County for the years involved, "In good faith took steps to arrive at the true cash value of its inventories in each of the years in question in accordance with the provisions of G.S. 105-294, and the valuations thus determined were duly and timely listed with Guilford County."

2. AMP produced competent, material and substantial evidence to justify the ad valorem tax valuation listed by it and that there was "no competent, material and substantial evidence in the record that said valuations were understated."

3. All the competent, material and substantial evidence before the State Board was contrary to its finding that AMP's inventory figures for income and franchise tax purposes (i.e., book value) constituted the "true cash values" of said inventories for ad valorem tax purposes.

4. The conclusion of the State Board that the valuation of the inventories is to be determined by the inventory records maintained for income tax purposes (i.e., book value) was contrary to law.

5. The conclusion of the State Board that the differences between "book value" of inventories as listed for income tax purposes and the values listed by AMP on ad valorem abstracts constituted unlisted property and was subject to discovery and assessment of additional taxes and penalties was contrary to law.

From the above judgment filed by Judge Exum on 25 January 1974, Guilford County appealed to the North Carolina Court of Appeals which, as previously noted, reversed. Thereafter, AMP's petition for certiorari to the North Carolina Court of Appeals was granted by order of this Court on 4 February 1975.

Other facts pertinent to decision, including the grounds for the determination by the Court of Appeals, will be set forth in the opinion.

*Adams, Kleemeier, Hagan, Hannah & Fouts, by William J. Adams, Jr., Robert G. Baynes and Paul H. Livingston, Jr., for petitioner appellant.*

*W. B. Trevorrow, Guilford County Attorney, and William L. Daisy, Assistant Guilford County Attorney, for respondent appellee.*

COPELAND, Justice.

This controversy involves two drastically differing methods for valuing AMP's *in-process* and *raw material* inventories on hand as of 1 January for the years 1964 through 1968, inclusive. There is apparently no controversy as to the proper standard for valuing AMP's *finished goods* inventory as of 1 January 1964 and 1965 (AMP had no such inventory on hand on 1 January 1966, 1967 and 1968), since AMP readily concedes that the "book value" of such goods is equivalent to their "true value in money." As to the former, however, AMP takes the position that since it can only sell its *in-process* and *raw material* inventories to its suppliers of brass and copper, the only "true value in money" of these inventories is their "scrap value." On the other hand, Guilford County takes the position that the "true value in money" of these same inventories on the relevant dates is their "book value" as listed by AMP on its North Carolina corporate and franchise tax returns. We believe that both positions are basically erroneous. However, since we are here reviewing the actions of a state administrative agency, with limited scope of review, the basic issue does not necessarily involve the relative merits or demerits of either position.

**[1]** The duties of the State Board are quasi-judicial in nature and require the exercise of judgment and discretion. *Albemarle Electric Membership Corp. v. Alexander,* 282 N.C. 402, 409, 192 S.E. 2d 811, 816 (1972). Upon a review of an order of the State Board (now the Property Tax Commission—*see* G.S. 105-288), the Superior Court is without authority to make findings at variance with the findings of the Board when the findings of the Board are supported by competent, material and substantial evidence. *See, e.g., Albemarle Electric Membership Corp. v. Alexander, supra; In re Reeves Broadcasting Corp.,* 273 N.C. 571, 160 S.E. 2d 728 (1968); *In re Property of Pine Raleigh Corp.,* 258 N.C. 398, 128 S.E. 2d 855 (1963). G.S. 143-315 (now G.S. 150A-51 effective 1 February 1976), in defining the

scope of review and power of the court in disposing of decisions of certain administrative agencies (including the State Board), provides:

> "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious."

Accordingly, applying the above stated rules to the instant case, the basic issue for determination is whether the decision of the State Board was supported by "competent, material, and substantial evidence." In deciding this issue, it is clear that no court of the General Courts of Justice can weigh the evidence presented to the State Board and substitute its evaluation of the evidence for that of the Board. *See, e.g., Clark Equipment Co. v. Johnson,* 261 N.C. 269, 134 S.E. 2d 327 (1964).

**[2]** It is also a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct. *See, e.g., Albemarle Electric Membership Corp. v. Alexander, supra. See also* 7 Strong, N.C. Index 2d, Taxation § 25 (1968). "All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed." 72 Am. Jur. 2d State and Local Taxation § 713 (1974). *See also* 84 C.J.S. Taxation § 557 (1954). As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous. *See* 72 Am. Jur. 2d State and Local Taxation, *supra. Accord, Albemarle Electric Membership Corp. v. Alexander, supra,* 282 N.C. at 409-10, 192 S.E. 2d at 816.

The purpose underlying this presumption of correctness arises out of the obvious futility of allowing a taxpayer to fix the final value of his property for purposes of ad valorem taxation. *See* Brandis, Listing and Assessing of Property for County and City Taxes in North Carolina 108, *cited in Albemarle Electric Membership Corp. v. Alexander,* 282 N.C. at 410, 192 S.E. 2d at 817.

If the presumption did not attach, then every taxpayer would have unlimited freedom to challenge the valuation placed upon his property, regardless of the merit of such challenge.

**[3]** Of course, the presumption is only one of fact and is therefore rebuttable. But, in order for the taxpayer to rebut the presumption he must produce "competent, material and substantial" evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property. *See Albemarle Electric Membership Corp. v. Alexander, supra,* 282 N.C. at 410, 192 S.E. 2d at 816-17. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high. Id.* The Court of Appeals held that AMP failed to overcome this burden. 23 N.C. App. at 571, 210 S.E. 2d at 67-68. For the reasons hereinafter set forth, we agree.

I

We find nothing in this record tending to show that the county tax supervisor employed an "arbitrary" method of valuation. *But see In re Carolina Quality Block Co.,* 270 N.C. 765, 155 S.E. 2d 263 (1967).

On the other hand, the record clearly shows that the county tax supervisor used an "illegal" method of valuation. Specifically, we point to the following testimony of the witness Brooks (Guilford Tax Supervisor) on cross-examination:

> ". . . The Tax Department tries to follow the Statutes as set out in the North Carolina Machinery Act which governs the listing of ad valorem taxes. I do not know where in the General Statutes I was authorized to instruct the tax-

payer to list as property value: 'the dollar amount should come from your records such as books of account, invoices, or tax depreciation schedules.' As to the instruction, 'Determination of Assessed or Tax Value—this will be done by the Tax Supervisor using market or cash value as a basis (GS 105-294), multiplied by the assessment ratio which is set annually,' I make the assumption that the cash value of the inventory is determined by the cash value figures furnished on the State tax returns. I do not know the State's requirements for its tax returns insofar as whether they call for cash value or book value is concerned. I was with Burlington Industries as a Production Controller prior to coming with Guilford County. I was not an Accountant. I have never held a position as an Accountant. I have examined the State tax returns of other taxpayers. I am not familiar with the requirements of the State. There is no difference between the reporting on the State corporate income tax returns, income and franchise returns, and that reported on the ad valorem listings because of the cash factor, although I have personally not made any investigation to determine it.

"I heard Mr. Westphal's statement that book value is used as an item for measuring income and not value. As to whether I take exception to his statement, I think you are confusing ad valorem tax with income reporting. This is based on my assumption that State income tax reporting and County ad valorem tax reporting is on the same basis, or should be on the same basis. As I have previously stated, that is my assumption which is not based on any knowledge that I have about the State returns."

**[4]** In this State there is no statutory authority that permits the county tax supervisor, as a *per se* rule, to equate "book value" with true value in money as a uniform measure of assessment for purposes of ad valorem tax valuation. *See* G.S. 105-294 (now G.S. 105-283). *See also In re McLean Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972), *rehearing denied*, 282 N.C. 156, *cert. denied*, 409 U.S. 1099 (1973). The legislative intent on this matter is crystal clear. The 1969 General Assembly specifically rejected with an unfavorable report the following proposed legislation (H. B. 631) entitled: "An Act to Amend Chapter 105 of the General Statutes to Provide for the Listing

of Inventories for Ad Valorem Tax Purposes at a valuation Consistent with Value Reported on Income Tax Returns.":

> "At the time of listing tangible personal property, each taxpayer or person, firm or corporation, whose duty it is to list property for taxation and who reports goods, wares, merchandise and other taxable personal property as inventory on an income tax return to the North Carolina Department of Revenue shall list such tangible personal property at the valuation shown on such income tax return."

Tax Supervisor Brooks "assumed" that State income tax reporting and county ad valorem tax reporting were on the same basis, *"or should be on the same basis."* This assumption was clearly erroneous. Additionally, we point out that the North Carolina General Assembly, and no one else, determines how property in this State "should" be valued for purposes of ad valorem taxation. The North Carolina General Assembly has specifically rejected a *per se* rule that would equate inventory value as reported on State tax returns with the value of such inventory as reported for purposes of ad valorem taxation. Hence, in requiring the taxpayers of Guilford County to list their property at the value reported on State tax returns (i.e., "book value"), the tax supervisor was acting contrary to the mandate of the North Carolina Machinery Act. Such procedure constituted an "illegal" method of valuation.

II

The next question presented is whether AMP produced competent, material and substantial evidence that tended to show the asssessment increasing the valuation of its inventories for the years 1964 through 1968 was substantially greater than the true value in money of the property as originally stated on its abstracts filed with the county. *See* Table II, *supra.*

In the judgment filed on 25 January 1974 Judge Exum concluded that there was "competent, material and substantial evidence in the record to justify the ad valorem tax valuations listed by" AMP in the abstracts for the years 1964 through 1968. *See* Table II, *supra.* We find nothing in the record to support such a conclusion.

The evidence before the State Board indicated that all the abstracts for the years in question were filed for the taxpayer

by the appraisal firm of Dawson, Desmond and Van Cleve. The witness Price testified that AMP procured the services of this firm because "at that time" AMP did not know how to compute the true cash value of its own inventories. Specifically, Price testified:

> ". . . [W]e asked the Dawson, Desmond and Van Cleve firm to evaluate true cash value for us because at that time, frankly, we did not know how to do it. We did not know how to go from book value to cash value, and I was busy with other things, other responsibilities. . . . They were qualified at that point and I was not. They knew how and I did not. So they handled it. We gave them all the necessary basic information on which they could make their determination. We did not get into a computation of true cash value, our own computation, until after Guilford County told us in 1968 that we owed them a lot of money. Frankly, that shook us up because we thought everything was fine. I was very disturbed about it. It's our policy to report correct figures and we don't like things to backfire like this. I thought Dawson, Desmond and Van Cleve was doing the job and that they had worked out all right and agreed on the listings. . . ."

The witness Price also testified that the professional appraisal firm of Dawson, Desmond and Van Cleve specialized in appraising personal property "throughout the country" and he guessed "they did the best they could" in appraising AMP's inventories during the years in question. However, Price added that after AMP learned how to appraise its own inventories following notification of the increased assessment, he came to realize that "Dawson, Desmond and Van Cleve, using their judgment in all those years, were too high except one time." *See* Table VII, *supra.*

**[5]** The record does not reveal one scintilla of evidence offered by AMP to substantiate the amounts reported by the Dawson firm in the abstracts filed for the years 1964 through 1968. The only explanation for the absence of such evidence was offered by the witness Price. He testified as follows:

> ". . . As to why the figures we have testified to are generally lower than the figures reported by Dawson, Desmond and Van Cleve, they represent many taxpayers, a broad section. Most taxpayers have raw materials that can

be used interchangeably between different manufacturers and I feel that they failed to recognize that we could only get scrap for those materials and I didn't know it at the time. I hadn't gotten into it. They failed to recognize that our raw materials were so unique that we do get nothing but scrap for them. They used general valuation criteria and failed to take into consideration our unique position and, as I say, I did not know it at the time. I don't know that they added anything for labor or overhead. *They will never disclose exactly their method because they are giving away their trade secrets and their know-how.* I can see this one point that they didn't know that those raw materials were scrap value. *I don't know how they arrived at the computation."*

In the absence of any evidence in the record, we find error in Judge Exum's conclusion that there was competent, material and substantial evidence to justify the ad valorem valuations *listed* by AMP in the abstract forms.

III

The next question is whether AMP offered competent, material and substantial evidence that the increased assessment "substantially exceeded" the true value in money of its inventories as such inventory values were computed by AMP *subsequent to notification of the assessment. See* Tables VII and VIII, *supra.* Judge Exum concluded that AMP had met its burden in this regard. For the reasons hereinafter stated, we believe this conclusion was erroneous.

Initially, it is important to note that the inventories involved do not include *finished goods* (except for the years 1964 and 1965), but are exclusively inventories of *non-defective in-process items* and of *undamaged raw materials.* Accordingly, all references hereinafter made to AMP's "inventories" are to be understood, except where qualified, as being limited to such *raw materials* and *goods in-process.*

The only evidence offered by AMP as to the "true value in money" of these inventories was the testimony given by Messrs. Herbert Cole, George Beck, and Ernest L. Price, all officers employed by AMP. These witnesses, through their combined testimony, asserted that all of AMP's inventories constituted "scrap" so far as "true value in money" was concerned. All of this testimony was designed to support AMP's theory that the

only value its inventories had was scrap value. AMP's desired interpretation of G.S. 105-294 (now G.S. 105-283) is based on the assumption, obviously fictional, that on 1 January of each year it is required to sell all of its inventory, whether such inventory is in raw material or in an in-process state, to the only possible buyers of such materials, the scrap mills.

G.S. 105-294 (now G.S. 105-283) provides, in pertinent part, as follows:

> "All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. *The intent and purpose of this section is to have all property and subjects of taxation appraised at their true and actual value in money, in such manner as such property and subjects of taxation are usually sold, but not by forced sale thereof;* and the words 'market value,' 'true value,' or 'cash value,' whenever used in this chapter, shall be held to mean for the amount of cash or receivables the property and subjects can be transmuted into when sold in such manner as such property and subjects are usually sold." (Emphasis supplied.)

Our interpretation of G.S. 105-294 is in complete accord with the following taken from the opinion of the North Carolina Court of Appeals:

> "The important provision of G.S. 105-294 is the requirement that property is to be appraised at its true and actual value in money, in such manner as such property is usually sold, but not by forced sale thereof. We believe that the best and most reasonable test of true value in money, in such manner as such property is usually sold, but not by forced sale thereof, is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used. The present statute, G.S. 105-283, effective January 1, 1974, adopts such a test." 23 N.C. App. at 568, 210 S.E. 2d at 65.*

*We point out that the present statute was effective as of 1 July 1971, the date the General Assembly ratified Chapter 806, 1971 Session Laws. The 1973 amendment, effective 1 Jan-

uary 1974, and referred to by the Court of Appeals, had no relation to the statutory test for determining true value in money. *See* Section 11, Chapter 695, 1973 Session Laws.

In applying our interpretation of G.S. 105-294 to the instant fact situation, it is necessary to separately analyze the following three distinct types of property that constituted all of AMP's inventories (with the exception of finished goods) on the relevant valuation dates.

A. SCRAP METAL AND DAMAGED RAW MATERIAL.

The evidence before the State Board tended to show that AMP's Greensboro plant generated substantial amounts of scrap metal during the course of a normal work week. For example, the witness Cole testified that the slitting, pancaking, stamping and metal plating processes all produced substantial amounts of scrap. Also, Cole pointed out that when a coil of brass or copper (raw material) was damaged during one of the various "handling" operations (e.g., if a coil was dropped, the impact would dent the metal edges) it became useless since such a damaged coil could not be processed through the forming dies. It appears, however, that the vast majority of scrap resulted from numerous malfunctions occurring during the manufacturing process, i.e., the slitting, pancaking, etc.

The witness Beck testified that during the years 1964 through 1968 approximately one-half of every pound of raw material received at AMP's Greensboro plant was reduced to scrap from all of the above listed causes. He further testified that the mills supplying AMP with this raw material regularly repurchased this scrap at published prices roughly equivalent to 40% of initial raw material costs.

**[6]** Under G.S. 105-294 all property must be appraised at its "true value in money," which is defined to mean "the amount of cash or receivables the property and subjects can be transmuted into *when sold in such manner as such property and subjects are usually sold.*" As to the approximately 40,000 pounds of brass and copper scrap accumulated by AMP during the course of a normal week of operations, we believe the "scrap prices" offered by the supplying mills, to whom such scrap was "usually" and "freely" sold by AMP, would be equivalent to the "true value in money" of such material for purposes of ad valorem taxation. Therefore, if Guilford County had attempted to assess this property at "book value" then it is clear that AMP

produced sufficient evidence to show that such assessment "substantially exceeded the true value in money" of this property. But, as previously noted, there is no evidence in this record that AMP's inventories on 1 January of the pertinent years included any of these type properties, i.e., true scrap metals. Perhaps AMP had no such property on hand at these dates because it regularly shipped out the accumulated scrap each week. Therefore, the fact that AMP carried its burden of proof as to this property is of no consequence. Even if AMP had had such inventories on hand, its value, as compared to the other inventories, would be insignificant, since AMP never allowed over 40,000 pounds of scrap to accumulate at its Greensboro plant.

B. NON-DEFECTIVE IN-PROCESS INVENTORY.

**[7]** In the hearing before the State Board, AMP contended that this property should likewise be valued with reference to the "scrap prices" since it supplying mills provided the only possible market for these materials. We find no merit whatsoever in this argument.

As to this type of inventory, the record is totally devoid of any evidence that AMP "usually" and "freely" sold such materials back to its supplier for scrap prices. In fact, the evidence is that AMP NEVER made such sales. In this connection, AMP's taxation expert, Mr. Westphal, stated that, with the exception of scrap metal, AMP did not "usually" sell its in-process inventory. Westphal added that he knew of "almost no firms that did so." It is obvious that no on-going business entity would adopt such a sales plan. It would be ridiculous to do so.

Of course, AMP does not seriously contend that it would sell its entire in-process inventory at scrap prices. On the contrary, AMP argues that since none of its customers will buy uncompleted in-process goods it can only realize scrap value from the sale of such items. However, it is clear that AMP is an on-going business entity and plans to complete all goods in-process. Implicit in the language and in our interpretation of G.S. 105-294 is the on-going entity assumption. Therefore, AMP's position that it is not assigning a "going concern value" to its in-process inventory, but instead is assigning a "scrap value," contradicts both the letter and the spirit of the statutes. G.S. 105-294 expressly states that *"true value in money" is not to be arrived at by a forced sale of the property.* It is clear that

the statutory concept of "true value in money" is NOT equivalent to the cash realizable by a forced sale. Even AMP's tax expert conceded that under G.S. 105-294 a forced sale would not measure the true value in money of the *in-process inventory*. Specifically, he stated:

> "The statute you referred to [G.S. 105-294] seems to me to speak clearly and unmistakably of cash value, the cash into which these subjects, these properties, might be transmuted at that specific date if sold, *not on a forced sale basis, but in an orderly manner following the general procedures of the firm, the manner in which property in that condition is sold, and this I think is what we are determing here.*" (Emphasis supplied.)

Accordingly, since all of AMP's evidence before the State Board was based on the theory that the only valuation that could be placed on its *in-process inventory* was scrap value, we find that AMP failed to produce the requisite evidence sufficient to show that the assessment "substantially exceeded the true value in money" of this property. AMP failed to carry the burden imposed upon it.

It must be conceded that there is no market for AMP's *non-defective in-process inventory* other than the scrap market, which we have determined to be wholly unsatisfactory for purposes of determining ad valorem valuations. However, the mere fact that there is no market for a particular property does not deprive it of "market value," "true value," or "cash value." Market value can be constructed of elements other than sales in the market place. *See, e.g., Albemarle Electric Membership Corp. v. Alexander, supra. See generally* D. Dobbs, Remedies 390-99 (West 1973) (hereinafter cited as *Dobbs).*

For instance, it frequently becomes necessary to determine the value of corporate stock for the purpose of computing federal estate tax, state inheritance tax, and state intangible tax. In a closed corporation, where there are few stockholders, there is generally no existing market that can be used for this purpose. Yet, the fact that such corporate stock is not regularly traded on a market does not render it virtually valueless. In this situation, the stock is valued by trying to determine what an investor would pay for it by capitalizing the earnings from the corporate property; by determining the book value of the stock, deducible from the corporate balance sheet; or by considering

the financial status of the corporation with regard to its capital, surplus and undivided profits. *See generally* C. Lowndes and R. Kramer, Federal Estate and Gift Taxes 418-91 (West 1962). Stock value can also be computed by determining what it would cost to reproduce the corporate property at the time of valuation, i.e., reproduction costs. *Id. See also* 72 Am. Jur. 2d State and Local Taxation § 757 (1974).

This same principle has also been applied by the courts to the measure of damages for the loss of personal property having no market value. *See, e.g.,* Annot., 12 A.L.R. 2d 902 (1950). "Where there is the destruction of personal property without a market value, it does not mean the property is valueless and that damages cannot be recovered by the [owner]." *Rhoades, Inc. v. United Airlines, Inc.,* 224 F. Supp. 341, 344 (W.D. Pa. 1963), *aff'd,* 340 F. 2d 481 (3d Cir. 1965). In these cases where there is no market price that will fairly compensate the owner for damage to or destruction of his goods, the following factors have been considered in determining value: (1) The original cost, or cost of labor and materials; (2) the earnings the property has produced or is likely to produce if it is of commercial value, provided the earnings are reasonably likely to continue or that they are reasonably close in point of time; and, most commonly, (3) the cost of repair or replacement with a deduction for depreciation where goods are replaced. *See* Dobbs, *supra,* at 390-91.

Cost of replacement or repair, with suitable adjustments for the fact that the damaged or destroyed property was old and had depreciated in value, is perhaps, as previously noted, the most commonly considered factor in fixing value of personal property that has no market. *See* Dobbs, *supra,* at 392. *See generally* Annot., 12 A.L.R. 2d, *supra,* at 923-29. The usual formula employed for determining the value of the destroyed property in such cases deducts the accrued depreciation on the damaged property from the replacement costs. *See* Dobbs, *supra,* at 392.

In some of these cases, however, in addition to no effective market, there is also no standard cost for repairs or replacement. Professor Dobbs demonstrates the problem as follows:

> ". . . This [no market plus no standard cost for repairs or replacement] is notably true where property of a public utility, such as an electric power company is damaged. The public utility may replace a damaged power pole

> that has been in the ground for 30 years. For its accounting purposes such poles have an estimated life of 40 years. . . . But individual poles may last much longer than 40 years (or less), and the 40 year figure is only an average. It is quite possible that the company would not have had to replace the pole for another fifty years, or, because of technical changes like underground conduits, that it would never have had to replace it at all." Dobbs, *supra,* at 393.

On facts similar to those described by Professor Dobbs, courts have differed about depreciation. In *New Jersey Power & Light Co. v. Mabee,* 41 N.J. 439, 197 A. 2d 194 (1964), the court took the position that the power company should recover the full cost of replacement without deduction for depreciation at all. The court stated: "[W]e cannot say with reasonable assurance that the installation of a new pole did more than remedy the wrong done. An injured party should not be required to lay out money, as defendants' approach would require, upon a questionable assumption that one day its worth will be recaptured." *Id.* at 442, 197 A. 2d at 196.

Our Court, relying on *Mabee,* took a similar view in *Carolina Power & Light Co. v. Paul,* 261 N.C. 710, 136 S.E. 2d 103 (1964). In that case, in an opinion by Justice Higgins, this Court stated:

> "North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediately after the injury. The purpose of the rule is to pay the owner for his loss. If the damaged article has market value, the application of the before and after rule is relatively simple. Even in that case, however, the cost of repairs is some evidence of the extent of the damage. [Citation omitted.] However, if there is no market, there can be no market value. The foundation for the before and after rule is lacking. Cost of repairs is then about the only available evidence of the extent of the loss. Ordinarily, power systems are not on the market. Less so are small component parts of the system." *Id.* at 710-11, 136 S.E. 2d at 104.

We think that the principles employed in the above cited damage cases and stock valuation cases can be properly applied to our problem. Therefore, in determining the true value in

money of AMP's non-defective in-process inventory, we believe that the proper valuation standard would be the cost of replacing the inventory, plus labor and overhead. In terms of a formula, this equals replacement cost plus labor and overhead.

C. NON-DAMAGED RAW MATERIAL INVENTORY.

**[8]** The witness Price testified on examination by the State Board that the raw material inventory was valued at scrap because "[t]here are no other manufacturers of similar products who would buy these [coils of brass and copper] substantially at cost, because we have a very peculiar product. It is highly engineered and specifications of those materials are not like cotton or textiles. We have a very special raw material with a very special type of specification and *generally speaking* no one else can use them because they are made for our specific product." (Emphasis supplied.)

Based on the above, AMP contended that this inventory only had a true value in money equivalent to its scrap value. If this proposition was untenable as to *non-defective in-process inventory,* which we have found to be the case, then it is likewise untenable here. If anything, AMP's argument as to *raw material inventory* is even weaker since this inventory is readily distinguishable from the *in-process* type. In fact, there is no evidence in the record that AMP changed this *non-damaged raw material* in any way subsequent to its receipt. AMP contends that because it is a "specialized" raw material, *generally speaking,* no one else can use it. But surely there are other electronic manufacturing firms or other firms using brass and copper, that could use these undamaged brass and copper coils. Even the witness Price seems to concede this point when he qualifies his statement by the phrase "generally speaking."

It is ludicrous to assert that this property, the undamaged raw materials, which constituted approximately 82% of all the taxable property on hand on 1 January 1966, 1967 and 1968, lost approximately sixty percent of its value upon being transferred from the delivery truck into AMP's warehouse facilities. AMP asked the State Board to believe that for each $10,000.00 of raw materials it purchased, said materials automatically lost $6,000.00 in value upon being placed in its warehouse. Such a contention defies all logic and common sense.

AMP contended that its non-defective *in-process* inventory had a scrap value because none of its customers would purchase

totally worthless electronic terminals. Based on this assumption, AMP argued that the only other market for purposes of ad valorem valuation consisted of the scrap mills. We found that market to be wholly unsatisfactory for such purposes. In a like manner, we find the scrap market totally unsatisfactory for purposes of valuing the raw material inventory.

For the above stated reasons, we believe that the true value in money of AMP's non-damaged raw material inventory would be equivalent to the cost of replacing such inventory on the critical date. Thus, as to this inventory, we also find that AMP failed to meet its burden.

IV

**[9]** The next issue for decision is whether there was any competent, material and substantial evidence before the State Board to support the finding that the valuations imposed by Guilford County constituted the true value in money of AMP's inventories as that term is defined in G.S. 105-294.

As we have previously pointed out, there is no statutory authority in North Carolina that permits a county tax supervisor, as a *per se* rule, to equate the "book value" of property as listed on the taxpayer's North Carolina income tax return with the true value in money of such property for purposes of ad valorem taxation. But, it does not necessarily follow from the above statement that *book value* can never be an adequate measure of the true value in money or property, i.e., business inventories. Whether the county used the correct *method* of computing ad valorem valuation is not the determinative issue. "Of more importance than the method used in determining the valuation is the result reached." *Newberry Mills, Inc. v. Dawkins,* 259 S.C. 7, 15, 190 S.E. 2d 503, 507 (1972), *quoted with approval in Albemarle Electric Membership Corp. v. Alexander, supra.*

The "book values" used by Guilford County as *indicia* of market value in this case were based upon AMP's own figures furnished to the State of North Carolina for income and franchise tax purposes. AMP defines "book value" to be "the lower of cost or market." Simple logic establishes, therefore, that "book value," as defined by AMP, cannot be higher than market value. Thus, "book value" *in this case* is necessarily a measure of market value, or at least of a figure no higher than market value.

AMP's use of the "lower of market or cost" formula in determining inventory values is necessarily related to federal income taxation. Internal Revenue Code section 471 permits use of inventories taken on such basis as conforms "as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income." Pursuant to the statute, Regulation No. 1-471-2(c) provides: "The basis of valuation most commonly used by business concerns and which meet the requirements of section 471 are (1) cost and (2) cost or market, whichever is lower."

The witness Westphal described AMP's accounting system as to how book value was computed as follows:

> "In the case of lower of cost or market method, one undertakes to determine what the raw materials would cost the taxpayer at the valuation date if purchased in the quantities in which he usually purchases such material. There is added to that at the various levels of process what may be determined to be the reproduction cost to bring it up to that level. And the same is true with the finished goods. So with the lower of cost or market you are determining how much on the valuation date it would cost you to replace that inventory in that condition."

It is apparent that AMP's accounting procedures are structured so as to define and compute "book value" as replacement cost plus labor and overhead. This accounting method is in complete accord with what we have previously stated to be the proper standard for valuing AMP's non-defective in-process and non-damaged raw material inventories. Hence, it follows that the State Board's finding *in this particular case* that "book value" is evidence of "true value in money" for ad valorem tax purposes was based on sufficiently competent, material and substantial evidence and was not contrary to law. We therefore find no error in this finding by the Board.

V

**[10]** Finally, there is no doubt that the differences between the total values originally listed by AMP on the abstracts and the values found by the State Board to be the true value in money of AMP's inventories constituted discoverable property under G.S. 105-331. In the recent case of *In re Strong Tire Service,*

*Inc.*, 281 N.C. 293, 188 S.E. 2d 306 (1972), this Court, in an opinion by Chief Justice Bobbitt, stated:

> "The abstract form permitted taxpayer to list its inventories in bulk [as was the situation with the instant case]. Since neither itemization nor identification was required, the extent or 'Amount' of taxpayer's inventory was shown only by the figure entered under the word 'Total.' Thus, taxpayer was permitted to identify and list its inventories by value rather than by description. In the absence of special circumstances, it was contemplated that the reported value of the inventory would be its value as shown by taxpayer's records.
>
> * * * * * * *
>
> ". . . Taxpayer's contention that in each of the years 1963-68 it listed its entire inventories for ad valorem taxation is unimpressive. When inventories are identified and listed only by value, gross understatement of value is evidence that not *all* of taxpayer's inventories were listed.
>
> "We think the evidence was sufficient to support the State Board's finding . . . that taxpayer 'failed to list that portion of its inventory represented by the difference between the amount shown by its records and the amount reported to Guilford County as inventory,' and that taxpayer 'filed the abstracts with full knowledge that they did not accurately reflect its inventories' for the years 1963-68." *Id.* at 298-99, 188 S.E. 2d at 309-10.

We believe that *In re Strong Tire Service* fully answers the arguments advanced by AMP in this case. Hence, it would serve no useful purpose to discuss this matter at further length.

Accordingly, for the reasons we have stated herein, the judgment of the North Carolina Court of Appeals is

Affirmed.

Justice EXUM did not participate in the consideration or decision of this case.

Justice LAKE dissents.

STATE OF NORTH CAROLINA v. JAMES TYRONE WOODSON AND LUBY WAXTON

No. 127

(Filed 26 June 1975)

1. **Homicide §§ 2, 4— murder in perpetration of robbery — guilt of all conspirators**

When a murder is committed in the perpetration or attempt to perpetrate any robbery, burglary, or other felony, G.S. 14-17 declares it murder in the first degree, and in those instances the law presumes premeditation and deliberation and the State is not put to further proof of either; furthermore, when a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree.

2. **Conspiracy § 5— competency of co-conspirator to testify**

A co-conspirator is an accomplice and is always a competent witness, assuming of course he is *compos mentis.*

3. **Conspiracy § 5— co-conspirator's testimony — effect of plea bargain on competency**

A witness who is otherwise competent to testify is not rendered incompetent by the fact that he has a promise of immunity or lenience for himself; therefore, the trial court correctly held that two witnesses were competent and that their status as co-conspirators testifying for the State bore upon the weight and credibility of their testimony and not upon its competency.

4. **Constitutional Law § 36; Homicide § 31— first degree murder — death sentence constitutional**

Imposition of the death penalty in a first degree murder case did not violate the Eighth and Fourteenth Amendments of the U. S. Constitution or the N. C. Constitution, Art. I, §§ 19, 27.

5. **Criminal Law § 22— exemption from prosecution in exchange for testimony**

On the ground of public policy, it has been uniformly held that a state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not.

6. **Constitutional Law § 30; Criminal Law § 23; Solicitors— authority of solicitor to plea bargain — constitutionality of agreement.**

In this State the Solicitor is a constitutional officer authorized and empowered to represent the State, and he had full authority to make an agreement with two of the four conspirators to an armed robbery and a murder to accept pleas of guilty to lesser offenses than armed robbery and first degree murder in exchange for their testimony against their co-conspirators who were charged with armed robbery and first degree murder; furthermore, the agreement violated neither

the Fourteenth Amendment rights of the co-conspirators with whom the agreement was not made nor their rights under N. C. Constitution, Art. I, §§ 19, 27.

7. **Constitutional Law § 30; Criminal Law § 23— four conspirators — plea bargain with two — constitutionality**

Appellants' contention that the solicitor's selection of two out of four conspirators with whom to plea bargain was arbitrary and denied them equal protection of the laws is untenable, the evidence being that all four were of the same race; that one of the two with whom an agreement was not made planned and directed the robbery and fired the shot which killed the victim and wounded a third person; that the other at no time tendered any plea but contended he was innocent because he had acted under duress from the other appellant; that both appellants were adults while the two conspirators who testified for the State were teen-agers, one being the younger, impressionable brother of the appellant who had planned the robbery.

Justice EXUM concurring.

APPEAL by defendants under G.S. 7A-27(a) from *McKinnon, J.*, 2 December 1974 Special Session of the Superior Court of HARNETT.

At the 24 June 1974 Session, in separate bills, defendants, James Tyrone Woodson, aged 23, and Luby Waxton, aged 24, along with Leonard Maurice Tucker, aged 19, and Johnnie Lee Carroll, aged 18, were indicted under G.S. 15-144 for the murder of Mrs. Shirley Whittington Butler on 3 June 1974. At the same time they were also indicted for the armed robbery of Mrs. Butler on 3 June 1974 and for conspiracy to commit armed robbery. In addition, defendant Waxton was indicted for feloniously assaulting Mr. R. N. Stancil on 3 June 1974 with a .22 caliber pistol with the intent to kill him, thereby inflicting upon him serious injuries, not resulting in death.

At the 2 December 1974 Criminal Session, in exchange for their testimony as State's witnesses against Waxton and Woodson, the solicitor for the State dismissed the armed robbery charge against Carroll and the first-degree murder charges against both Tucker and Carroll. Tucker was permitted to plead guilty to the armed robbery of Mrs. Butler and as an accessory after the fact to her murder. Carroll, who is a half-brother of defendant Waxton, was permitted to plead guilty as an accessory after the fact to both the murder and armed robbery of Mrs. Butler.

At the trial, the State's first witnesses were several police officers, whose testimony tended to show:

About 10:30 p.m. on 3 June 1974, a police officer of the City of Dunn entered the E-Z Shop on Fairground Road and found the body of Mrs. Butler, an employee of the shop, lying behind the cash register. She had been shot through the head at close range. The cash drawer had been removed from the register. Lying on the counter were a pack of Kool cigarettes, a dollar bill, a pack of matches, and a box of Cracker-Jacks. In due course, these items were collected and sent to the S.B.I., and Tucker's fingerprints were found on the pack of Kools.

Shortly after the discovery of Mrs. Butler's body police headquarters received a call from Mr. Stancil, who lived just across the street from the E-Z Shop. He reported he had been shot and requested help. The detective who went to his assistance found him bleeding badly and immediately took him to the hospital.

Mr. Stancil testified that at about 10:15 p.m. he went to the E-Z Shop and, as he entered, he noticed that Mrs. Butler was not in her usual place. A person, who was leaving in a hurry, said to him something which sounded like, "look out." Almost simultaneously Stancil heard an explosion and felt pain in his back. He started toward the back of the store but, observing that blood was spurting from his arm, he went home to call for help. A bullet had entered his back, just to the left of his spine, and lodged in his arm. Mr. Stancil never saw Mrs. Butler, and he could not identify the person he saw leaving the shop.

George Willie Carroll (George Willie), the brother of Johnnie Lee Carroll (Carroll) and half-brother of Waxton, testified that about 8:30 p.m. on 3 June 1974 he lent his car to his brothers; that about 10:35 p.m. they had not returned it, and he went to the police station and "reported he wanted his car located." Later that night, George Willie, accompanied by Waxton, Carroll, and Tyrone Woodson, returned to the police station and reported that "the boys" had brought his car back.

Detective Mohiser testified that at 6:00 a.m. the next morning, June 4th, he went to the home of Waxton's mother and requested Waxton to accompany him to the police station. Waxton did so, and after 20-30 minutes Mohiser returned him to his mother's. Immediately thereafter Waxton (so he testified later) arranged with a friend to take him and defendant Wood-

son to the Fayetteville airport, where they enplaned for Newark, N. J. There they remained until June 14th when Detective Mohiser returned them to Dunn.

On 16 June 1974 at 3:50 p.m., Woodson gave Detective Mohiser the first statement he obtained from any of the four. In it he implicated himself, Waxton, Tucker, and Carroll in the robbery and killing. On the basis of the information he furnished, Carroll and Tucker were arrested. At 7:30 p.m. on June 16th, Tucker signed a confession which implicated Woodson, Waxton, and Carroll. On June 27th Carroll gave the officers a statement, but it was not reduced to writing and signed.

Prior to the time Tucker and Carroll were called as witnesses for the State, counsel for defendants objected to their competency as witnesses on the grounds that they had been indicted with Waxton and Woodson as co-conspirators and principals for the murder and robbery of Mrs. Butler and, if convicted, all would have been subject to the same punishment; that, as a result of "negotiations and plea bargaining" with the solicitor for the State, on 2 December 1974, Tucker and Carroll had been permitted to plead guilty to lesser offenses; that in consequence they were "prejudicial witnesses against Waxton and Woodson," and to permit them "to testify in an attempt to place the blame for the incident" on defendants infringes upon defendants' right to a fair trial; and that, after permitting Tucker and Carroll to plead guilty to lesser crimes, the solicitor's election to put Woodson and Waxton on trial upon a charge for which the mandatory punishment upon conviction is death "is unjust, constitutes an unequal application of the laws of the State and denies them the equal protection of the laws as guaranteed by both the State and federal constitutions."

The court, "being of the opinion that the matters raised go to the weight and credibility of the witnesses and not to their competency to testify," overruled the objections to the competency of Tucker and Carroll as witnesses and permitted them to testify.

Tucker's testimony, summarized except when quoted, is briefed below:

He entered pleas of guilty to the armed robbery of Mrs. Butler and to being an accessory after the fact to her murder in an attempt to save himself, knowing that upon these pleas he

could receive sentences totaling 40 years. He first discussed this case with the officers on June 16th, at which time he gave them a statement.

Tucker, a native of New Jersey, came to Dunn on 13 May 1974 and stayed around "without any income, drinking wine, and smoking marijuana." He became acquainted with Waxton and Woodson about two weeks after his arrival in Harnett County. On June 3rd he and Woodson spent a good part of the day drinking wine for which Woodson had paid.

About 9:30 p.m. Waxton came to Tucker's trailer. He inquired for Woodson, who was not there, and told Tucker to follow him. In about three minutes Tucker walked toward Woodson's trailer, which was about a block away. As he approached the trailer, he saw Waxton hit Woodson in the face with his hand and heard him advise Woodson that if he didn't join the group either Tucker or Waxton would kill him. Woodson had previously told Tucker that he did not plan to take any part in the robbery. The three men then proceeded to Waxton's trailer, where Carroll gave Woodson a towel to put over his eye. Waxton got a nickel-plated Derringer pistol from a cabinet and put it in his pocket. Tucker took Waxton's .22 automatic rifle from the couch and handed it to Woodson. Waxton and Tucker then got in the back seat of an automobile which belonged to Carroll's brother, George Willie. Woodson laid the gun down in the front seat of the car and got in beside Carroll, who drove the car away.

Waxton announced that they were going to rob the E-Z Shop. A week earlier he had told Woodson and Tucker he was going to rob a place. As Carroll drove by, they saw a customer entering the shop; so Carroll drove a short distance down the road and stopped. Waxton was giving all the orders and he directed Woodson to test-fire the rifle by shooting it into the ground. After he had done so the group then drove back to the E-Z Shop and parked. Up until then, the plan had been that Woodson would accompany Waxton into the store, but at "the last minute" Waxton changed his mind and gave Woodson the duty to cover the front door. He told Tucker to go into the store with him and instructed Woodson to stay outside "and don't let nobody in."

As the two walked to the store Waxton told Tucker to ask for a pack of cigarettes. In the store they saw Mrs. Butler

behind the counter, and Tucker asked her for a pack of Kools, which she handed to him. Tucker paid for the cigarettes and moved down to the right of the counter. Waxton then asked for a pack of Kools. As Mrs. Butler handed it to him, he procured the Derringer from his back pocket and fired one shot into the left side of her head. She fell to the floor and Waxton jumped over the counter, took the money tray out of the open cash register, and put it on the counter. Tucker picked up the tray and started to the door. When he reached the door he met Mr. Stancil coming in. He told Stancil "to look out" and continued toward the car. Outside, Tucker heard a second shot from inside the store. He got into the car and Waxton "came out of the store walking fast with some paper money in his hand." The four then went to the home of Waxton's mother. There he and Tucker went into the bathroom and counted the money, about $280.00, which Waxton kept.

From the home of Waxton's mother, the four went downtown to the Shaft Inn. George Willie was there and Carroll went with his brother to the police station. Upon their return to the Inn, Carroll took the others back to Waxton's trailer.

Carroll's testimony, summarized except when quoted, tended to show:

He has lived in Dunn all his life. In June 1974 he was unemployed and living with his mother. Prior to June 3rd he had known Tucker three or four days and Woodson about six months. His half-brother, Waxton, at age 18, left North Carolina and went to New Jersey. Waxton returned to North Carolina in 1974 and thereafter Carroll saw him almost daily. Waxton showed him some of the karate "moves" he had learned in New Jersey. On June 3rd he and Waxton borrowed the automobile belonging to their brother George Willie, who lent it to Waxton "for about 10-15 minutes." About 9:00 p.m. Carroll drove the car to Waxton's trailer. As he approached it, he saw Waxton coming across the field with Woodson and Tucker walking behind him. At the trailer Woodson told him that Waxton had punched him in the eye because he had been drinking, and Carroll gave him a towel to cover the eye.

Soon thereafter Woodson took a rifle from Tucker and got in the front seat with the rifle in his hand. Both Woodson and Tucker went willingly and did whatever they did willingly. He himself participated in the crime on his own. Waxton did not

make him. Carroll drove the car past the E-Z Shop and stopped on a dirt road, where Woodson got out and fired the rifle into the ground twice. The four then drove back to the E-Z Shop. Carroll parked the car and Waxton told Tucker to go into the store with him. They got out of the car leaving Woodson and Carroll sitting in the front seat. Woodson was the first to see Mr. Stancil come across the street. He got out of the car with the rifle but Carroll pulled him back and told him to put the rifle down. Mr. Stancil went into the store as Tucker was coming out with a cash register money tray in his hand. Prior to that, Carroll had heard one shot fired. After Tucker came out and the man went in, he heard one more shot. By the time Tucker got to the car, Waxton came out running with some dollar bills in his hand. He said, "let's go," and Carroll drove the car back to his mother's house.

Back at home Carroll took the rifle from the car and put it in the pantry. He and Woodson sat in the living room while Tucker and Waxton went into the bathroom. About ten minutes thereafter the four went downtown, where they met George Willie. He and Waxton "walked to the police station and got it straight about the car." Carroll then took Waxton, Woodson, and Tucker to Waxton's trailer. Carroll next saw Waxton about 4:00 a.m. on June 4th when he and Woodson came to his mother's house. Waxton told Carroll to get rid of the cash tray, which he had put in the pantry, and Carroll buried it beneath his mother's house. That morning he went with Waxton and Woodson to Fayetteville when Jethro Wynn took them to the airport. Carroll received none of the money from the robbery.

Carroll saw Waxton and Woodson when they were brought back to North Carolina on June 14th, and he himself was arrested on June 16th. On June 4th he had talked to Chief Cobb and had denied that Waxton had anything to do with this case. What he told Chief Cobb on that date was untrue. On June 16th he didn't say anything. On June 27th he made a statement to Chief Cobb after being advised of his constitutional rights.

On cross-examination Carroll testified, "I made a trade to save my own life. I am not trying to put anything on Luby [Waxton]; I'm just telling what happened. I agreed to come up here and testify in order to save my own neck."

Chief Cobb's testimony tended to show that the statement which Carroll gave him on June 27th was in substantial accord

with his testimony; that as a result of the information Carroll gave him, he found the money tray buried under his mother's house where he had said it was; that Carroll told him all previous statements were untrue; that he had made no notes on June 27th of the questions he asked Carroll and the answers which he gave, and Carroll signed no statement; that he had tried unsuccessfully to locate the pistol which killed Mrs. Butler.

At the close of the State's evidence defendants moved (1) to dismiss the charges against them because Tucker and Carroll had given certain testimony which did not appear in the "summary of 'Statement of State's Witnesses' " which the solicitor furnished counsel prior to trial; and (2) "if not dismissed then, in any event, a juror be withdrawn and a new trial ordered." The Court denied these motions.

On the ground that the following items were not contained in the summary defendant Woodson then specifically moved to strike the statements (1) "that Woodson took the gun from Tucker" at Waxton's trailer; (2) "that Woodson got out of the car and test-fired the rifle by shooting it twice on the ground" before the group stopped at the E-Z Shop; (3) "that Woodson had a gun before, during, at and after the robbery while they were in the car"; and (4) that Woodson with the gun attempted to get out of the car to stop Stancil." This motion was also denied.

During the course of the arguments on these motions the solicitor told the court "for the record that Mr. McCormick (Woodson's attorney) and [he] had had several pleading negotiation sessions" and that it was his impression that Woodson would enter a plea on Monday morning along with Tucker and Carroll. Whereupon Mr. McCormick informed the court that he had never stated to the solicitor that his client would plead guilty; that he told him he "would make certain recommendations to his client" Woodson, but he had "consistently told the solicitor that Woodson says that he was not guilty." The solicitor's response was that although Mr. McCormick did not offer him a plea but, as a result of their discussions, it was "his impression" that Woodson would enter pleas in his cases just as Tucker and Carroll had done.

At the conclusion of the foregoing discussion, defendant Waxton, through his attorney, Mr. Johnson, requested the court's permission to make a motion in camera. Whereupon, in

the absence of the jury, and in the presence of only Judge McKinnon, defendant Woodson and his attorney, Mr. McCormick, Mr. Glen Johnson, the solicitor, the court reporter, and a deputy sheriff, defendant Waxton tendered to the State "a plea of guilty to being an accessory after the fact of murder and guilty of armed robbery, the same crimes to which Tucker had pled guilty." Mr. Johnson explained to the judge and the solicitor that Waxton had said to him "that he thought he was entitled to the same treatment that Tucker had received and he wanted to do the same thing Tucker had done." Whereupon the court inquired of the soilicitor, "What is your position on that?" and the solicitor answered, "I cannot accept the pleas."

Each defendant testified in his own behalf and offered no other evidence. Waxton's testimony, summarized except when quoted, tended to show:

Waxton, a native of North Carolina, after living nine years in New Jersey, returned to Dunn in November 1973. Woodson, whom he had known for eight years in New Jersey, came with him, and the two lived together in a mobile home park. Waxton met Tucker, also a resident of the park, about two weeks prior to 3 June 1974. Having "talked about it and planned it in advance," Waxton, Woodson, Carroll, and Tucker had agreed to rob the E-Z Shop that night, Woodson and Carroll were unemployed. "They said they wanted money; so they were going to pull a job. I said, 'Why not'?"

About 9:00 p.m. on June 3rd, Waxton went looking for Woodson because Woodson "knew we was going to rob the E-Z Shop." He found him at the trailer of his girl friend. Woodson had been drinking, but he was not drunk. An argument ensued. "He said something to disrespect me and I said something to disrespect him; so I hit him." Waxton then left without having mentioned the robbery to Woodson. Woodson followed behind him and, when they got to Waxton's trailer, Carroll was there in George Willie's car. Waxton owned a 1973 Pontiac and a 1963 Volkswagen, but they used George Willie's car in the robbery. Tucker came over from another trailer and inquired if everybody was ready to go. Everybody said YES, and the four left in George Willie's car with Carroll driving. Woodson had Waxton's rifle, which Waxton had said he bought "to kill snakes."

They then drove by the E-Z Shop, which was only about a mile from Waxton's trailer, and went on a dirt road where

Woodson insisted on testing the rifle to "make sure it would fire." After he had fired it twice, they proceeded to the E-Z Shop. Woodson and Carroll remained in the car while Waxton and Tucker went inside.

Waxton's version of what happened inside is as follows: "I was about to ask for a package of Kool cigarettes but before I spoke, Tucker asked for a package of cigarettes. After she gave him the cigarettes he shot her. I then jumped over the counter and started getting the money out of the cash register. I got a handful of money and then got afraid so I started running out. As I ran out I met Mr. Stancil and I called Tucker and told him, 'let's go, somebody is coming.' After I got a short distance from the car I heard another shot. I didn't have any gun or weapon at any time there in the store and I didn't have any gun or weapon after I came out of the store. When I heard the second shot Leonard [Tucker] was coming out and we both got in the car. We were not at the Food Store more than five minutes."

From the E-Z Shop the four went to the home of Waxton's mother, where he counted the money in the bathroom. There was $325.00 and he divided it equally. Tucker handed the gun, a nickel-plated Derringer he had obtained overseas, to Waxton's mother and asked her to keep it for him. Later Tucker changed his mind and took the gun with him when they left to go downtown. There they saw George Willie, who told them he thought they had pulled a robbery. When they denied the accusation, he asked them to accompany him to the police station. They went and George Willie told the police he had found his car. The next morning, after Detective Mohiser had talked to him, Waxton and Woodson took a plane to New Jersey, where they stayed until Mohiser brought them back to North Carolina. After he and Woodson had been in the Dunn jail for "a while," Waxton asked Mohiser to bring Woodson over and let him tell the detective "who did the shooting." Mohiser complied with the request and "brought Woodson across the hall to him" and asked Woodson who did the shooting. Woodson said Tucker had done it.

Waxton testified that he told the officers Tucker shot the lady but Mohiser told him he "was telling something that was not true"; that the officers never gave him an opportunity to make a statement before he took the stand; that they only listened to what Tucker, Woodson, and Carroll had to say.

Woodson's testimony, summarized except when quoted, tended to show: He and Waxton were good friends. In November 1973 Waxton had brought him to North Carolina to help him escape the drug habit which he had acquired in New Jersey. At first he had lived with Waxton or his mother and George Willie had gotten him a job. On June 3rd Woodson was living with his girl friend. From time to time Waxton reminded Woodson of what he had done for him.

Waxton had "mentioned" the robbery to Woodson on the morning of June 2nd, but he "never agreed to go along." Woodson and Tucker spent most of the day on June 3rd drinking wine which had been purchased with money Woodson's girl friend had given him. He and Tucker had agreed that they would not be in any robbery. That evening when Waxton found Woodson at his girl friend's trailer, Waxton cursed him and told him he was drunk. When he told Waxton it made no difference because he was not going anywhere, Waxton hit him in the eye and said, "If I don't kill you Tucker will. Come on; let's go!"

Woodson was "pretty high" but he wasn't drunk. He knew what he was doing. He decided to go with Waxton and followed him to his trailer. There Tucker handed him Waxton's rifle, and he got in the car with it of his "own free will." He knew there was going to be a robbery, and he knew Waxton had the Derringer. No one forced him to go. He does not recall testing the gun. On the way to the E-Z Shop was the first time Waxton told him "to watch the front door and not let anybody in." He might have gone in with Waxton if he had asked him. Woodson, however, "was laying back with the towel over his eye, the rifle by his side." When he heard the first shot from inside the store, he jumped up and saw Tucker coming out the door and Mr. Stancil going in, but he made no move to stop him. Then he heard a second shot. Tucker was outside the building and almost immediately Woodson saw Waxton emerging with paper money in his hand.

From the E-Z Shop the four went to the home of Waxton's mother. Waxton handed his .22 Derringer with the nickel-plated, pearl handle to his mother. He and Tucker had the money. They went into the bathroom and closed the door, but "there was no division of the money . . . at that time." After going downtown and seeing George Willie, Woodson and Waxton returned to the home of Waxton's mother. There Woodson "started to mention about him shooting the woman," but *the woman* was the last

word he got out of his mouth before Waxton hit him in the other eye and staggered him. "He told me never in my life to mention that woman's name again, ever."

The next morning, after Waxton returned from the police station, he told Woodson "to get a few pieces" (clothes); that they were going to New Jersey. Jethro Wynn took them to the airport and Carroll went along. At the airport Waxton gave Woodson money from the robbery with which to buy his ticket and then balled up the rest of the money and told him "to hold it." In New Jersey, at the home of Waxton's mother-in-law, he "gave back all the money" to Waxton. When Woodson was later picked up, he returned to North Carolina voluntarily.

Later, in the Dunn jail, Woodson heard Waxton "when he was hollering about making a confession—he wanted to speak to Mohiser." The detective took him over "in front of Waxton," who told Mohiser he knew who shot the woman and that he would tell him where the pistol was if he would pick Tucker up and lock him up. Woodson did not make any statement at that time because he "had already made [his] signed statement." He heard Waxton tell Mohiser "that he did not do the shooting; that it was Leonard Tucker."

As to Woodson the jury returned verdicts of "Guilty of Murder in the First Degree as charged," and "Guilty of Armed Robbery as charged." Upon these verdicts the charge of armed robbery having been merged in the charge of first-degree murder, the court imposed only the mandatory sentence of death.

As to Waxton the verdicts were "Guilty of Murder in the First Degree as charged," "Guilty of Armed Robbery as charged," and "Guilty of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury as charged." Upon the charge of felonious assault the court adjudged that Waxton be imprisoned for twenty years. Upon the murder and robbery convictions, the robbery charge having been merged in the charge of first-degree murder, the court imposed the mandatory sentence of death.

Each defendant appealed from the sentence of death directly to this Court under G.S. 7A-27(a), and, upon Waxton's motion, we certified his appeal from the sentence imposed upon his conviction of felonious assault for initial appellate review by this Court under G.S. 7A-31(a).

*Rufus L. Edmisten, Attorney General and James E. Magner, Jr., Assistant Attorney General, for the State.*

*Edward H. McCormick for James Tyrone Woodson, defendant appellant.*

*W. A. Johnson for Luby Waxton, defendant appellant.*

SHARP, Chief Justice.

Patently, defendants' motion to dismiss the charges against them and their contentions that because certain items of evidence were omitted from the summaries furnished them by the solicitor are without merit and require no discussion. Each defendant went upon the stand and voluntarily testified to facts which make him guilty of murder in the first degree. As counsel concede, the only significant difference in their testimony relates to who fired the shot which killed Mrs. Butler during the robbery of the E-Z Shop; and, since each admitted he was one of the four who conspired to rob the shop, legally it makes no difference whether Waxton or Tucker fired the shot.

**[1]** "When a murder is 'committed in the perpetration or attempt to perpetrate any . . . robbery, burglary or other felony," G.S. 14-17 declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is not put to further proof of either. . . . Furthermore, when a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." (Citations omitted.) *State v. Fox,* 277 N.C. 1, 17, 175 S.E. 2d 561, 571 (1970).

**[2]** Had the testimony of Tucker and Carroll been incompetent, the testimony of defendants themselves would stymie their contention that its admission constituted prejudicial error. However, the testimony of their co-conspirators was competent. "A co-conspirator is an accomplice, and is always a competent witness; assuming of course he is *compos mentis.*" *State v. Goldberg,* 261 N.C. 181, 202, 134 S.E. 2d 334, 348 (1964). "It is obvious . . . that in practically every case where an accomplice testifies as a witness for the prosecution, he is induced to do so by a promise, or at least by a hope and expectation, of immunity or leniency for himself, and that the rule which makes an

accomplice a competent witness would be of little benefit if he were made incompetent by the mere fact that he had received such a promise.

**[3]** "In accordance with this view, the courts, both English and American, have held with substantial unanimity that a witness who is otherwise competent to testify is not rendered incompetent by the fact that he has a promise of immunity or lenience for himself." Annot., 120 A.L.R. 742, 751 (1938); *see State v. Watson,* 283 N.C. 383, 196 S.E. 2d 212 (1973); annot., 24 L.R.A. (N.S.) 442-443 (1910).

As Justice Barnhill (later Chief Justice) said in *State v. Roberson,* 215 N.C. 784, 787, 3 S.E. 2d 277, 279 (1939), "It bears against the credibility of a witness that he is an accomplice in the crime charged and testifies for the prosecution; and the pendency of an indictment against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State; so, too, the existence of a promise or just expectation of pardon for his share as accomplice in the crime charged. 2 Wigmore on Evidence, 2d Ed., 350." *See* 1 N.C. Evidence § 45 (Brandis Rev. 1973).

Judge McKinnon correctly held that Tucker and Carroll were competent witnesses and that their status as co-conspirators testifying for the State bore upon the weight and credibility of their testimony and not upon its competency.

**[4]** G.S. 14-17, as rewritten on 8 April 1974 by the enactment of N. C. Sess. Laws, ch. 1201, § 1 provides that murder in the first degree "shall be punished with death." Defendants contend, however, that capital punishment "under the laws of North Carolina [would] violate U. S. Const. amend. VIII and amend. XIV, § 1, and N. C. Const. art. 1, §§ 19, 27." In the last three years this Court has several times rejected these contentions. They have been thoroughly considered and further discussion would be merely repetitious. *See State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142 (1975).

Albeit three members of the Court dissented as to the death penalty in each of the foregoing cases and voted to remand for the imposition of a sentence of life imprisonment; the dissents were not based upon the premise that the death

sentence constituted cruel and unusual punishment or that there were any constitutional infirmities in capital punishment *per se*. On the contrary, the thesis of the dissents was (1) that the decision of the United States Supreme Court in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), decided 29 June 1972, had invalidated the death penalty provisions of G.S. 14-17 (and also G.S. 14-21, G.S. 14-52, and G.S. 14-58), enacted in 1949; and (2) that until the statutes which made death the punishment for first-degree murder, first-degree burglary, rape, and arson were rewritten or amended by the General Assembly, this Court could not reinstate capital punishment.

On 8 April 1974 the General Assembly rewrote G.S. 14-17 and G.S. 14-21 to provide the death sentence for first-degree murder and first-degree rape. At the same time it rewrote G.S. 14-52 and G.S. 14-58 to provide life imprisonment for burglarly in the first degree and arson. As to first-degree murders and first-degree rapes committed *after* 8 April 1974, by its rewrite of G.S. 14-17 and G.S. 14-21, the General Assembly eliminated the grounds upon which three members of the Court had dissented to the imposition of the death sentence for such crimes committed prior to that date. The felony-murder for which Waxton and Woodson have been convicted was committed on 3 June 1974—56 days after the legislature redeclared the public policy of this State with reference to capital punishment. Until changed by the General Assembly, or invalidated by the Supreme Court of the United States, that policy must stand.

Counsel for defendants, although aware of the *Waddell* and *Jarrette* decisions, as well as the subsequent ones based on them, have understandably felt constrained to repeat the constitutional challenge to the death penalty.

Defendants next contend that since Waxton, Woodson, Carroll, and Tucker, the four conspirators, are equally guilty of first-degree murder it would be "fundamentally unfair" to permit two of them to plead guilty to offenses less than capital in exchange for their testimony against the others. Defendant Waxton, who tendered at the close of the evidence the same plea which Tucker tendered prior to the trial, contends that the solicitor's refusal to accept his plea was an arbitrary exercise of power which denied him due process and the equal protection of the laws. Defendant Woodson, who tendered no plea and contended throughout that he was not guilty, argues

that "due process and equal protection" require that he receive no greater punishment than his accomplices could have been given under their pleas.

**[5]** "From the earliest times, it has been found necessary, for the detection and punishment of crime, for the state to resort to the criminals themselves for testimony with which to convict their confederates in crime. While such a course offers a premium to treachery, and sometimes permits the more guilty to escape, it tends to prevent and break up combinations, by making criminals suspicious of each other, and it often leads to the punishment of guilty persons who would otherwise escape. Therefore, on the ground of public policy, it has been uniformly held that a state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not. (Citations omitted.)" *Ingram v. Prescott,* 111 Fla. 320, 321-322, 149 So. 369 (1933); *Henderson v. State,* 135 Fla. 548, 185 So. 625, 120 A.L.R. 742 (1938). For the history of the "ancient modes of practice" when accomplices "turned State's evidence," see *United States v. Ford,* 99 U.S. 599, 25 L.Ed. 399 (1879); 1 Wharton's Criminal Law and Procedure § 165 (1957); 22 C.J.S., *Criminal Law* § 46(1) (1961); 8 R.C.L., *Criminal Law* § 101 (1915); Notes: 18 Am. & Eng. Ann. Cas. 747 (1911); 24 L.R.A. (N.S.) 439 *et seq.* (1910).

In many states the prosecuting attorney has no authority, without the court's consent, to make a binding agreement with one charged with a crime that if he will testify against others, he himself shall be exempt from criminal liability or be allowed to plead guilty to a lesser offense. "In states in which a prosecuting attorney may enter a *nolle prosequi* without the consent of the court, he may grant a witness immunity from prosecution by contract without approval of the court." 21 Am. Jur. 2d, *Criminal Law* § 153, *see also* §§ 514-518 (1965); 24 L.R.A. (N.S.) 442-443 (1910); 18 Am. & Eng. Ann. Cas. 748-749 (1911); annot., 85 A.L.R. 1177 (1933). The courts treat such promises as pledges of the public faith and, when made by the public prosecutor, the court will see that the public faith which has been pledged by him is kept. *Camron v. State,* 32 Tex. Crim. 180, 22 S.W. 682, 40 Am. St. R. 763 (1893); *see State v. Hingle,* 242 La. 844, 139 So. 2d 205 (1962); *State v. Ward,* 112 W.Va. 552, 165 S.E. 803, 85 A.L.R. 1175 (1932); *State v. Graham,* 12 Vroom, 15, 32 Am. Rep. 174 (N.J. 1879); *United States v.*

*Lee,* Case No. 15,588, 26 F. Cas. 910 (1846); *United States v. Woody,* 2 F. 2d 262 (D. Mont. 1924); *United States v. Brokaw,* 60 Fed. Supp. 100 (S.D. Ill. 1945); Annot., 43 A.L.R. 3d 281 *et seq.* (1972).

**[6]** In North Carolina "[t]he Solicitor is a constitutional officer authorized and empowered to represent the State." His announcement prior to the trial that the State would not seek a verdict of guilty of first-degree murder but would ask for a verdict of second-degree murder or manslaughter is tantamount to taking a *nolle prosequi* or an acquittal on the charge of first-degree murder. *State v. Miller,* 272 N.C. 243, 245, 158 S.E. 2d 47, 49 (1967); *State v. Rogers,* 273 N.C. 330, 159 S.E. 2d 900 (1968).

As pointed out in *State v. Lyon,* 81 N.C. 600, 603 (1879), the shortest and best mode of carrying out a promise of immunity is for the solicitor to exercise the right vested in him "when, in his judgment, the case calls for it, to enter a *nolle prosequi* and allow the prisoner's discharge, which practically accomplishes the same ends as [a] pardon." The solicitor had full authority to make the agreement which he made with Tucker and Carroll, and we hold that it violated neither the Fourteenth Amendment rights of defendants Waxton and Woodson nor their rights under N. C. Const., art. 1 §§ 19, 27.

As Mr. Justice White said in delivering the opinion of the Court in *Brady v. United States,* 397 U.S. 742, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970), "[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State. . . ." *Id.* at 753, 25 L.Ed. 2d at 759, 90 S.Ct. at 1471. In *Lisenba v. California,* 314 U.S. 219, 227, 86 L.Ed. 166, 175, 62 S.Ct. 280, 285 (1941), Mr. Justice Roberts noted that "the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate."

In *Newman v. United States,* 382 F. 2d 479 (D.C. Cir. 1967) the sole question presented was whether it was a denial of the appellant's constitutional rights for the United States Attorney to accept a guilty plea tendered by appellant's co-defendant for a lesser offense under the indictment, while refusing to accept the same plea from the appellant. Both were indicted for housebreaking and petty larceny. The co-defendant was allowed to

plead guilty to the misdemeanors of petty larceny and attempted housebreaking; the appellant was tried and convicted of the crimes charged. He contended that the United States Attorney's conduct had denied him due process and equal protection in that both "were equally guilty . . . and to permit one party an avenue of escape with relatively minor punishment while refusing the same procedure to Appellant violates the standard of fairness demanded by the law by the Constitution. . . ." *Id.* at 480.

In rejecting the appellant's contentions Burger, Circuit Judge (now Chief Justice of the United States Supreme Court), pointed out that the United States Attorney is charged with the faithful execution of the laws and prosecution of offenses against the United States, and, as such, he must have broad discretion. "To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task; of course, this concept would negate discretion. Myriad factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire into or review his decision." *Id.* at 481-482.

"Mere selectivity in prosecution creates no constitutional problems. *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962). To invoke the defense [denial of equal protection under the Fourteenth Amendment] one must prove that the selection was deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification." *United States v. Steele*, 461 F. 2d 1148, 1151 (9th Cir. 1972). *See* Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Col. L. Rev. 1103, 1119-1120 (1961).

**[7]** In this case we perceive no possible constitutional infirmity in the solicitor's selection, no abuse of discretion, and no arbitrary classification. All four of the defendants are black and their religious views are undisclosed. The evidence that Waxton planned and directed the robbery and that he fired the shots

which killed Mrs. Butler and wounded Mr. Stancil is overwhelming. No extenuating circumstances gave the solicitor any incentive to accept the plea he tendered at the close of the State's evidence.

Woodson at no time tendered to the State a plea of any kind. Throughout the trial he contended that he was innocent because he had acted under duress from Waxton. It is not surprising that the jury rejected this defense in view of his testimony that on the night of the robbery he knew what he was doing; that he got into the car of his own free will after having known all day that "there was going to be a robbery"; that he he had not seen Waxton during the day and "he could have gone anywhere if he had desired to do so"; that his staying in the car with the rifle outside the E-Z Shop and Carroll's driving the car "was just as much a part of the plan as was Waxton's and Tucker's going into the store." *See* 21 Am. Jur. 2d, *Criminal Law* § 100 (1965).

We note, however, the learned and painstaking trial judge fully instructed the jury on coercion as an excuse for crime and gave Woodson the full benefit of his contention that he went with the group to rob the E-Z Shop under compulsion from Waxton. The jury were instructed that if Woodson went along and did what he did only because of a well-founded fear of immediate death or great bodily harm at the hands of Waxton he would not be guilty of any crime.

Finally, we note that Waxton and Woodson were adults, aged 24 and 23 respectively; Tucker and Carroll were still in their teens, aged 18 and 19 respectively. Carroll was obviously impressed by Waxton, his older brother who, after an absence of eight years, had returned from New Jersey with a knowledge of karate and much other information he was no doubt willing to impart to a younger brother willing to learn. We find no evidence that the solicitor's selection was deliberately based on an unjustifiable standard.

We have considered the entire record in this case, as well as each defendant's assignments of error, with care commensurate with the gravity of the sentences from which defendants appeal, and in the trial below we find

No error.

Justice EXUM concurring:

This is the first case, since my joining the Court, in which we have considered the application of the death sentence pursuant to Chapter 1201, 1973 Session Laws, ratified April 8, 1974, codified as G.S. 14-17, which makes first degree murder committed after April 8, 1974, punishable by death. All capital cases heretofore considered in which I have participated involved crimes committed before April 8, 1974. Death sentences in these cases have been affirmed by a majority of the Court on the authority of *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 18 (1973). I have dissented in each of these cases from that portion of the opinions sustaining the death sentence *not* on the ground that such a sentence was violative of the Cruel and Unusual Punishment Clauses of the Constitutions of the United States and North Carolina, but on the ground that only the Legislature and not this Court had authority to reinstate the death penalty in North Carolina after our State's statutory scheme for imposing it had been invalidated by *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). See my dissent in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975).

By enactment of Chapter 1201, 1973 Session Laws, effective on April 8, 1974, the North Carolina General Assembly did reinstate the death penalty for the crime of first degree murder and the newly created crime of first degree rape. Consequently, for me, the question of the constitutionality of imposing a sentence of death for conviction of first degree murder duly authorized by legislative enactment is for the first time squarely presented.

It is not an easy question for I am personally opposed to capital punishment. Maintaining it, even for murder, is not in my view wise public policy. I do not believe, however, that its infliction upon one convicted of premeditated murder or murder committed in the course of another felony which itself is inherently dangerous to human life, such as we have here, contravenes the Constitution of the United States or North Carolina.

My belief that capital punishment is unwise as a matter of public policy is based primarily on the proposition that government, if it functions properly, should seek to set an example, to teach the people whom it serves. People ought to be able to look to the basic underlying policies of government and see there

what is inherently right and proper. I agree with Mr. Justice Brandeis who once wrote: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States,* 277 U.S. 438, 485, 72 L.Ed. 944, 959, 48 S.Ct. 564 (1928). The cold, calculated, premeditated taking of human life is an act the brutality and violence of which is not diminished because it is sponsored by the state. We rightly abhor the kind of human being who commits such an act. That the state should respond in kind is, to me, equally abhorrent. The argument that we somehow exalt human life by executing those wretches who murder and rape falls of its own weight. Calculated killings by individuals without doubt cheapen the God-given right to live. So, however, do calculated executions at the hands of the state. Executions are bad examples; they teach, not respect for life, but that some lives are not worth maintaining. It is a short step in the minds of many from execution at the hands of the state to murder and other violence at the hands of people. As Mr. Justice Stewart wrote in his concurring opinion in *Furman,* 408 U.S. at 306, 33 L.Ed. 2d at 388:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. *And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.*" (Emphasis supplied.)

Neither do I believe that capital punishment, even when regularly utilized, deters generally the commission of capital crimes. Practically all of the statistical data available on the subject has been collected and much of it thoroughly analyzed in Bowers, *Executions in America* (D. C. Heath and Company, 1974) (hereinafter, Bowers). The author concludes:

> "To assess the deterrent effects of capital punishment, investigators have conducted studies of various descriptions—examining and comparing nations and jurisdictions within nations for the affects of abolition and other changes in the status of the death penalty, for the effects of fluctuations in and the cessation of executions, and for the impact of the death sentence and the execution in specific cases. Not one of these studies has turned up evidence that the death penalty is superior as a deterrent to punishments used as alternatives. The data presented in Chapters 5 and

6 specifically restrict claims for the deterrent power of the death penalty by showing that the experimental abolition of capital punishment, the nationwide moratorium on executions, and the move from mandatory to discretionary capital punishment, did not encourage or contribute to a rise in criminal homicide.

"The failure of the death penalty to display any unique deterrent effect has been attributed to the fact that it had come to be imposed almost exclusively for irrational actions and that even for such conduct it was unlikely to be imposed. Murder and rape are typically committed in rage, drunkenness, and/or stupefying passion. The offender acts in madness or out of hatred, because of insult or betrayal, without expecting to be caught, or not caring if he is. While the objective likelihood of being put to death for his crime is quite low, it is doubtful that the capital offender is subjectively aware of his chances of escaping execution. Thus, even under the mandatory death penalty, which presumably contributes to the impression that offenders are certain to be executed if caught, potential offenders appear equally oblivious to such impending doom." *Id.* at 193-94.

Bowers has carefully compared homicide rates for an equal period of time before and after 1967 (the year of the last execution in the United States) in death penalty and contiguous abolition states. These comparisons make a convincing case that neither utilization of capital punishment mandatorily or in a discretionary way nor its *de jure* nor *de facto* abolition has had any appreciable effect on the rate of commission of capital crimes. See also *Furman v. Georgia, supra* at 348-54, 33 L.Ed. 2d at 412-415 (Mr. Justice Marshall concurring).

It must be conceded that the raw data available has shortcomings which reduce its probative value. "One is that there are no accurate figures for capital murders; there are only figures on homicides and they, of course, include non-capital killings." *Id.* at 349-50, 33 L.Ed. 2d at 412-13 (Mr. Justice Marshall concurring). The main shortcoming of the statistical arguments is:

" 'Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of

> the fear of being hanged.' This is the nub of the problem. . . ." *Id.* at 347, 33 L. Ed. 2d at 411 (Mr. Justice Marshall concurring).

Deterrence, however, is not the only purpose of sanctions against criminal activity. Retribution has long been recognized by many as another valid purpose. Chief Justice Burger pointed out in his dissent in *Furman*, "The Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes." 408 U.S. at 394, 33 L.Ed. 2d at 439. I, personally, do not believe that retribution has any legitimate place in our criminal justice system. My view is that the goals of sanctions against criminal conduct should be general deterrence to others, special deterrence to the offender himself, restitution to the victim, and rehabilitation of the offender. Punishment in the sense of retribution, vengeance, or retaliation is always in the long run self-defeating.

> "But the punitive attitude persists. And just so long as the spirit of vengeance has the slightest vestige of respectability, so long as it pervades the public mind and infuses its evil upon the statute books of the law, we will make no headway toward the control of crime. We cannot assess the most appropriate and effective penalty so long as we seek to inflict retaliatory pain." Menninger, *The Crime of Punishment* 218 (The Viking Press 1968).

Many disagree. "[R]esponsible legal thinkers of widely varying persuasions have debated the sociological and philosophical aspects of the retribution question for generations, neither side being able to convince the other." *Furman v. Georgia, supra* at 394-95, 33 L.Ed. 2d at 439 (Chief Justice Burger dissenting). While the extent of retribution available is certainly limited by the Cruel and Unusual Punishment Clauses in our state and federal constitutions, in the case now under consideration exaction of the death penalty in a purely retributive sense, while offensive to me personally, does not contravene these constitutional prohibitions.

The point is that as a judge I cannot substitute my personal will for that of the Legislature merely because I disagree with its chosen policy. The utility of capital punishment as a sanction against first degree murder in our scheme of criminal justice is one upon which reasonable, learned, humane, and conscientious persons differ. These differences are nowhere better

documented than in the nine separate opinions filed by the Chief Justice and Associate Justices of the United States Supreme Court in *Furman* and the various authorities relied on in each of the opinions. Whether the effects of capital punishment in a murder case are, indeed, brutalizing or salutary, whether the data available tending to negate the deterrent effect of capital punishment really outweighs arguments in its favor resting on "logical hypotheses devoid of evidentiary support, but persuasive nonetheless," *Furman v. Georgia, supra* at 347, 33 L.Ed. 2d at 411 (Mr. Justice Marshall concurring), and whether in a murder case it should be permitted for purposes of pure retribution are questions upon which honest persons conscientiously and deeply differ. This aspect of the question strongly militates in favor of judicial deference to the legislative will in the case now before us.

I fervently hope that someday North Carolina will join her ten sister states who have legislatively totally abolished capital punishment and some forty-five civilized countries throughout the world who likewise have abolished it (except, in some instances, in time of martial law and "for certain extraordinary civil offenses"). Bowers at 6, 178. The Constitutions of the United States and North Carolina in my view do not require her to do so in cases such as this one.

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DONALD G. RAPE, CAROLINE C. RAPE AND LARRY A. RAPE v. WOODROW W. LYERLY AND WIFE, SUDIE D. LYERLY, KATHERINE L. MACK AND HUSBAND, PHILIP MACK AND A. GRAY LYERLY

No. 94

(Filed 26 June 1975)

1. **Frauds, Statute of § 7; Wills § 2— contract to devise land —writing required**

Although an oral contract to devise land is unenforceable, a valid written contract to devise land is enforceable in equity.

2. **Wills § 2— contract to devise — obligation required to be stated in will**

The mere exercise of the statutory right to dispose of one's property at death is not of itself evidence that the disposition directed is compelled by a contractual obligation; rather, the writing must show the promise or obligation which the complaining party seeks to enforce.

**3. Frauds, Statute of § 7; Wills § 2— contract to devise real property — sufficiency of memorandum**

In an action to enforce an alleged agreement to devise real property for a stated consideration upon specified conditions, the memorandum upon which plaintiffs relied was sufficient as a memorandum to devise for the purposes of the statute of frauds where the memorandum designated the property to be devised, identified the parties, set forth their respective obligations as consideration for their contract, and was signed by the party to be charged therewith; moreover, being in the form of a will, the memorandum fixed the precise manner in which the testator was to dispose of his real property in performance of his obligations under the contract.

**4. Wills § 2— contract to devise land — promise to care for testator — performance of obligation**

Evidence was sufficient to support the jury's findings that testator contracted to devise his real property to his daughter and that the daughter performed her obligations as contemplated by the contract where such evidence tended to show that testator's will contained a provision devising his real property to the daughter upon her obligation to care for testator and his wife during their lives and to pay to three other children sums totalling $8000, the daughter did live with testator and care for him and his wife until the daughter died, and testator expressed to many people his satisfaction with the daughter's care of him.

**5. Wills § 2— contract to devise — death of promisee — substitution of parties — contract continued**

Even though a contract is one which would terminate at the promisee's death, the promisor may waive this feature of the contract and does so where he permits others, associated with the promisee in his lifetime in rendering the performance, to continue after his death and accepts such performance without giving notice within a reasonable time of an intention to consider the obligation as ended.

**6. Wills § 2— contract to devise — death of promisee — substitution of promisee's family**

In an action to enforce an alleged agreement by testator to devise his real property to his daughter Mildred upon her obligation to care for him and his wife and to pay his other three children specified sums, evidence was sufficient to support the jury's finding that, following the death of Mildred, care was furnished testator and his wife by Mildred's husband and children as contemplated by the contract until both died and that testator accepted such services in fulfillment of the agreement.

**7. Wills § 8— revocation — contractual provisions irrevocable**

All wills are by nature ambulatory, and thus their provisions may be changed prior to death by the maker unless by contractual provisions others' rights thereunder become fixed; in other words, a will is revocable only to the extent that the testator has not contracted to make it irrevocable.

8. **Wills § 60— "in terrorem" clause — irrelevance — action brought in good faith**

An "in terrorem" clause in testator's 1969 will was irrelevant in respect of the claim asserted by plaintiffs in this action, since the claim they asserted was under testator's 1959 rather than 1969 will; also, there was ample evidence to support the jury's finding that this action was brought by plaintiffs in good faith.

9. **Executors and Administrators § 19; Limitation of Actions § 4— contract to devise land — three-year statute of limitations applicable**

Plaintiffs were not required to commence this action within the time prescribed in G.S. 28-112 since they asserted no claim against the estate of testator; rather plaintiffs asserted present equitable ownership of testator's real property under a 1959 contract to devise, and the applicable statute of limitations was the three-year statute for breach of contract, G.S. 1-52(1), which did not begin to run until testator's death.

10. **Equity § 2— contract to devise land — laches in bringing action for breach — insufficient evidence of changed circumstances**

There was no change of circumstances sufficient to invoke the doctrine of laches in an action to enforce an alleged agreement to devise real property where the evidence tended to show that one defendant read the 1959 will which contained the promise to devise shortly after it was made, all defendants knew that plaintiffs had been promised certain real property upon the death of testator, one defendant was fully aware that a subsequent will changed the provisions of the prior will to the detriment of plaintiffs, all defendants were fully advised of plaintiffs' claim and the basis therefor shortly after testator's death, and plaintiffs continued in possession of the subject property as they had prior to testator's death.

11. **Evidence § 11; Rules of Civil Procedure § 19— father of plaintiffs — no legal pecuniary interest — testimony of transaction with decedent admissible — father not necessary party**

In an action to enforce an alleged agreement by testator to devise his real property to plaintiffs' mother, a child of testator's who predeceased him, upon her obligation to care for testator and his wife until their deaths, the rights of plaintiffs were determinable as if testator had died leaving a valid, probated will in which he devised his property according to the alleged agreement. Had he done so, plaintiffs would take as the issue of their mother by virtue of G.S. 31-42(a); therefore, their father had no pecuniary legal interest in plaintiffs' real property, and his testimony concerning what was done when testator produced the will containing the alleged agreement was not incompetent under G.S. 8-51, nor was the father a necessary party to this action.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

APPEAL of right under G.S. 7A-30(2) from the decision of the Court of Appeals reported in 23 N.C. App. 241, 208 S.E.

2d 712 (1974), which found "No Error" in the trial before *Judge Crissman* at the 28 January 1974 Session of ROWAN Superior Court, docketed and argued in the Supreme Court at the Fall Term 1974 as Case No. 125.

This is an action to enforce an alleged agreement by James Richard Lyerly to devise his real property in Steele Township, Rowan County, for a stated consideration and upon specified conditions.

Plaintiffs are the children of B. M. Rape (Basil) and Mildred Lyerly Rape (Mildred), deceased daughter of James Richard Lyerly (Mr. Jim) and his wife, Pearl S. Lyerly (Miss Pearl). Mildred died 3 February 1965. Miss Pearl died in October 1966. Mr. Jim died 23 November 1970 at the age of 85 years and six months.

Defendants Woodrow W. Lyerly (Woodrow), Katherine Lyerly Mack (Katherine), and A. Gray Lyerly (Gray), are children of Mr. Jim and Miss Pearl.

Plaintiffs base their claim upon the following provisions of a writing duly executed by Mr. Jim on 21 March 1959 as an attested will, referred to hereinafter as "the 1959 will."

"Fourth: It is my opinion that $16,000.00 is a fair market value of my real property lying in Steele Township, Rowan County, N. C. Since my daughter, Mildred Lyerly Rape and my son, Woodrow W. Lyerly have obligated themselves to care for my wife and myself during our lifetime, all of my real property, I give and bequeath to Mildred Lyerly Rape upon payment by her to the following: 1st. To my son, Woodrow W. Lyerly the sum of $6,000.00 2nd. To my son, Gray Lyerly the sum of $1,000.00 3rd. To my daughter, Katherine Lyerly Mack the sum of $1,000.00."

Plaintiffs alleged the obligation to care for Miss Pearl and Mr. Jim during their lifetime was fully performed, but that Mr. Jim breached his agreement by executing an attested will on 4 September 1969, probated as his Last Will and Testament in November of 1970, in which he attempted to devise the major portion of his real property to defendants. They further alleged defendants' refusal to convey the property devised to their mother, Mildred, in the 1959 will after plaintiffs' demand therefor and the tender by them of all monies specified therein.

Plaintiffs claim all of Mr. Jim's real property under the provisions of the 1959 will.

Defendants denied plaintiffs' essential allegations and, as further defenses, pleaded (1) the statute of frauds, (2) a statute of limitation, and (3) laches. They claim the major portion of Mr. Jim's real property as devisees under the 1969 will.

In the 1959 will, Mr. Jim bequeathed to his wife, Miss Pearl, his household goods and his bank account with the Northwestern Bank of Cleveland, N. C. He bequeathed to Woodrow W. Lyerly (Woodrow), his son, and to Basil, his son-in-law, all other personal property belonging to his estate, "including livestock, farming machinery, and a joint bank account in the names of Woodrow W. Lyerly, B. M. Rape and [himself] with the First National Bank, Mooresville, North Carolina." He appointed Woodrow and Basil as co-executors.

In the 1969 will, Mr. Jim devised, or attempted to devise, his real property in Steele Township, Rowan County, as follows: He devised 27½ acres to Woodrow. He devised a 71-acre tract in the following proportions: "(a) One-third (⅓) interest to [his] daughter, Katherine L. Mack; (b) One-third (⅓) interest to [his] son, A. Grey (sic) Lyerly; (c) One-third (⅓) interest to the surviving issue of [his] deceased daughter, Mildred Lyerly Rape, per stirpes and not per capita." He appointed his daughter, Katherine L. Mack, as executrix.

Uncontradicted evidence discloses the 1959 will was executed by Mr. Jim under the circumstances stated below.

Mildred and Basil were married 14 July 1943. Prior to Basil's return from his service with the armed forces in 1945, Woodrow and his wife had been living with Mr. Jim and Miss Pearl. Upon Basil's return, Woodrow and his wife moved to their own house and Basil and Mildred moved in with Mr. Jim and Miss Pearl.

Mitchell Cress, one of the witnesses to the 1959 will, testified that Mr. Jim told him Woodrow moved out because "the families couldn't get along"; that "the personalities of the two ladies clashed."

Woodrow, Mr. Jim and Basil began joint farming operations in the spring of 1946. Initially they farmed Mr. Jim's land and Woodrow's land. Basil acquired land in 1949 and in 1957. These tracts, and also two leased tracts, were included in their

joint farming activities. These activities included the operation of a dairy, a venture conducted largely by Basil. The three maintained a joint bank account, to which reference was made by Mr. Jim in the 1959 will. Each had authority to write checks on this account for his personal obligations as well as those of the business. Annually, there was an accounting and settlement with reference to the interest of each partner.

Prior to the execution of the 1959 will, only the downstairs portion of Mr. Jim's house was in use. A large hall ran from front to back. There was a front bedroom, a side bedroom, a living room (den), a dining room, and a kitchen. The side bedroom was occupied by Mr. Jim and Miss Pearl. The front bedroom was occupied by Mildred, Basil, and their three children. In 1959 Larry was about 14; Donald was about 10; and Caroline was about 8. The space upstairs, adequate for three rooms, had never been finished. In view of their compelling need for more room, Mildred and Basil were making plans to build a house on their own land. Shortly before the execution of the 1959 will, Basil approached Lewis Klutz, a neighbor and also a carpenter-builder, with reference to building a new house for his family, stating he was "going to move out on his own." Plaintiffs, the Rape children, were "looking forward to . . . being able to have their friends in and not be tied all the time."

As the building plans of Mildred and Basil took shape, Mr. Jim made them a proposition. He said to Basil: "Now, if y'all will stay here and live with me and mamma so long as we live, you can do anything you want to this house and we'll make you safe." He also told Basil that he was going to live with his family; "that he didn't have any other child he could live with." In consequence of this conversation, the Rapes abandoned their plans to build on their own land.

The 1959 will was signed by Mr. Jim in "Tom Ervin's store at Bear Poplar." Mitchell Cress and Walter Ervin, neighbors and friends, were witnesses.

Cress testified that, when Mr. Jim asked him to witness his will, he told him "he was making the will to protect Basil and Mildred for staying and taking care of him and his wife." He further testified to statements made by Mr. Jim in his own yard on an occasion when he (Cress), Woodrow and Basil were present. He said that Mr. Jim then stated he was "leaving the

farm to Basil and Mildred with the other provision for Woodrow to receive compensation for what he might contribute for their upkeep."

Ervin testified that, on an occasion after the 1959 will was signed, Mr. Jim told him he had made the will "to take care of the Rape family for the work that they were doing on their house and they were supposed to take care of them the rest of their lives and he wanted to protect them with this will . . . that he gave the will to Basil after he signed it."

Basil testified that, after he had executed the 1959 will, Mr. Jim called Woodrow, Mildred and Basil together and showed it to them; that each read it and expressed satisfaction; and that Woodrow added, "Me and my wife can't live here with my mother and daddy. . . . [I]f you [Basil] and Mildred would live here with mother and daddy as long as they live, it's perfectly satisfactory with me." Thereupon Mr. Jim handed the 1959 will to Basil. It was put in Basil's safety deposit box and remained there until Mr. Jim's death.

Robert Kennerly, a nephew of Miss Pearl, testified to statements made by Mr. Jim in 1959 when Mr. Jim and Miss Pearl were visiting Kennerly's parents. According to Kennerly, when the subject of Mr. Jim's will and future living arrangements for himself and Miss Pearl were under discussion, Mr. Jim said "that he wasn't living by himself and he couldn't live with Woodrow and Sudie, he had tried that, and he couldn't live in Mooresville because that was too far away from home and he just couldn't live in town and he just couldn't live with Katherine, and he said Gray was in California and he couldn't live with him, and he wasn't living by himself, and he said that Basil and Mildred had got a house planned and were going to move and build on their farm, and he said he told them if they moved they could just build another room because he wasn't living by himself with Aunt Pearl, and Aunt Pearl was present at that time, and he told that on a couple of occasions up at our house."

Plaintiffs' evidence tends to show the following:

Shortly after the 1959 will was executed Basil engaged Klutz to completely "overhaul" the old house in which Mr. Jim and Miss Pearl and the five members of the Rape family were then living. According to Klutz, when he started work "Mr. Jim walked up and he stated that he wanted the house fixed just

like Basil and Mildred wanted it; that it was their house; that he had willed it to them."

The renovation project included the following: A new roof was put on the house. The upstairs area was completed and made into three rooms, a bedroom for Larry and Donald, a bedroom for Caroline, and a storage or junk room. New flooring was put in throughout the house. The flooring in the downstairs bedrooms and large hall was cyprus wood. Elsewhere the flooring was pressed wood overlaid with tile. All rooms were sheetrocked and celotexed. Cabinets were built in the kitchen. The old doors were replaced by 21 wood doors and 3 storm doors. Twenty-six storm windows were installed. Structural changes included the enlargement of the "den" by using a portion of the hall. For the first time, closets were built. Prior to the renovation, in Miss Pearl's room a stick nailed across a corner of the room with a curtain hanging from it was the only place for her clothes. A closet for the use of Mr. Jim and Miss Pearl was built in the back hall. The porches on each of the three sides of the house were ceiled. The carport was roofed and ceiled. A half bathroom was added to the back porch. Necessary repairs were made throughout the house. The total cost, $6,000.00 or more, was paid by Basil.

In 1961 Mr. Jim, then about 76, had a heart attack. Thereafter, he didn't participate actively in the farming operations. However, his health remained good until shortly before his death in 1970. He drove a car, frequently visited his relatives, friends and neighbors, and was visited by them. He was interested and active in community and church gatherings and affairs.

After Mr. Jim's heart attack on 7 July 1961, Woodrow and Basil executed a formal partnership agreement "for the purpose of engaging in the general farming business, including but not limited to the operation of a dairy, a beef herd, and raising various commodities for market and farm use." In general, this agreement called for equal contributions to the capital of the partnership, equal rights to the assets and profits thereof, and equal authority in respect of control and purchases. The "FOURTH" and "NINTH" paragraphs thereof provided that either partner could withdraw from the partnership at any time by offering to sell his share to the other at a specified price. In such case, the other partner was obligated to buy or sell at that price.

Each partner made withdrawals from the partnership account for personal as well as business obligations. An accounting was made at the end of each calendar year. The partnership agreement remained in effect until terminated as of 1 August 1969 under the circumstances described below.

From 1943 until her death in 1966 Miss Pearl was a semi-invalid. She weighed about 200 pounds and spent most of her time in bed. If she was opposed "in any way" she had "one of her tantrums." It seemed to Basil that her sickness "was more of a mental condition than it was a physical condition."

Mildred died 3 February 1965. During the period of nearly six years after the execution of the 1959 will, Mildred had "participated in the operation of the house . . . [and] was the sole person that looked after the household duties, the cooking and the care of Miss Pearl. . . . [S]he was able to be around and do most things until her death except for a short period of time that she was in the hospital on a couple of occasions. She cooked for Miss Pearl and Mr. Jim and she did the washing and ironing for them. As the years passed, the children became very active in the duties on the farm and the daughter helped in the home. After Mildred died, Caroline and Basil ran the house."

Mrs. Nonnie Norman was employed as a servant in the Rape-Lyerly home, working two days a week. She was first employed when Mildred was alive and able to do the cooking and care for Miss Pearl. During this period Mrs. Norman did the "heavy housework," such as washing, ironing, and cleaning. After Mildred's death, Mrs. Norman cleaned the room occupied by Miss Pearl and Mr. Jim and later by Mr. Jim alone. She did some of the cooking on the days she was there, in addition to the washing, ironing and cleaning she had been doing when Mildred was alive.

Testimony as to what occurred shortly after Mildred's death includes the following:

Mrs. George Gardner, whose husband was related to Miss Pearl, testified: "He [Mr. Jim] came to our house not long after Mildred had died. . . . I said, 'What's Basil and the children going to do now?' He said, 'They will have to stay here—live with us and take care of mama and me. We have papers drawn up to that effect.' "

Robert Kennerly testified he was present when Mrs. Gardner asked Mr. Jim what Basil and the children were going to

do. According to Kennerly, Mr. Jim said: "Oh, he can't leave. We have got an agreement. He's got to stay with us . . . they can't leave—they can't move, they have got to look after us."

W. Grady Lyerly and Mrs. Fannie Lyerly Secrest, brother and sister of Mr. Jim, testified to frequent visits with Mr. Jim at their homes and at the Lyerly-Rape home, during the period between the execution of the 1959 will and Mr. Jim's death. Each testified Mr. Jim had often stated that he had given the property to the Rape family because of their agreement to take care of his wife and himself as long as they lived. Mrs. Secrest testified: "He [Mr. Jim] would say, 'Fannie, my parents gave me the homeplace to take care of them and I in turn have given it to Mildred and Basil to take care of me and Pearl.' " These witnesses testified that Mr. Jim continuously praised the manner in which the Rape family had taken care of him and Miss Pearl after Mildred's death and of him after Miss Pearl's death. Mr. Jim's neighbors and friends testified to like effect.

After Mildred's death, according to Mrs. Secrest, Mr. Jim said: " 'We loved Mildred and we miss Mildred and we were heartbroken when Mildred died but so far as me and mama are concerned, we really never had any difference in the way we live. Basil and Caroline have seen to it that we have had the same care that we had when Mildred was here.' He said, 'We could really tell no difference.' He says, 'Now, I don't want you to get me wrong, that it didn't break our hearts to give our daughter up but we have been treated with the same kind of care since she went away as we were while she was here.' That's his words."

During the subsistence of the partnership, obligations of Woodrow's family and of the Rape-Lyerly household, including grocery bills, the wages of domestic servants, etc., were paid from the partnership funds. Too, the taxes on all lands involved in the partnership operations, including Mr. Jim's farm, were paid from the partnership. Partnership funds also provided Mr. Jim with an automobile for his personal use. After termination of the partnership, all expenses of the Rape-Lyerly household, including grocery bills, improvements on the farm, etc., were paid by Basil. A grain bin, which cost $470.00 or $480.00 and was installed on the Lyerly farm, was completed after the termination of the partnership and was paid for by Basil.

The following sequence of events is noted.

By letter dated 16 July 1969, attorneys for Woodrow notified Basil of Woodrow's decision to withdraw from their partnership agreement of 7 July 1961. They advised Basil of Woodrow's offer to sell his interest in the partnership for $40,000.00 and demanded that Basil notify *them* of his decision to buy or sell by 12 o'clock noon on Saturday, 26 July 1969. Basil was directed not to contact Woodrow "or any member of his family."

Basil elected to buy Woodrow's interest in the partnership and pay him the sum of $40,000.00. The contract of sale, dated 9 August 1969, became effective as of 1 August 1969. It provided for the payment of $10,000.00 cash; for the immediate transfer to Woodrow of $15,000.00 "from the retains held by the Rowan Dairy (Long Meadow)"; and for the execution of a note for $15,000.00 payable on or before 1 September 1969.

The Last Will and Testament of Mr. Jim under which defendants claim was executed under date of 4 September 1969; and, on the same date and occasion, Mr. Jim executed and delivered a general power of attorney to his daughter, Katherine L. Mack. Both documents were drafted by Mrs. Frances F. Rufty, an attorney of Salisbury. In the negotiations for Woodrow's withdrawal from the partnership he was represented by a Statesville law firm.

After the 1969 will and power of attorney were signed, Mr. Jim delivered them to Mrs. Mack. They were placed in her husband's safe. The will was kept there until Mr. Jim's death. Three or four days before Mr. Jim's death, Mrs. Mack, exercising the power of attorney, "cleaned out" Mr. Jim's bank account. Upon Mr. Jim's death, the 1969 will was probated. Mrs. Mack qualified as executrix and administered Mr. Jim's personal estate, including the funds withdrawn from his bank account shortly before his death.

After the execution of the 1969 will, Mr. Jim continued to live as theretofore, a member of the Rape-Lyerly household, until his death on 23 November 1970. Neither Basil nor plaintiff had any knowledge or information concerning the 1969 will. During this period Basil built a trench silo on the Lyerly farm at a cost to him of around $1,100.00. Mr. Jim was present when the silo was laid off.

There was no evidence that Miss Pearl or Mr. Jim ever complained to Basil or any member of the Rape family in

respect of the care they received over the years. All the evidence is to the effect that they accepted until death the care the Rape family continued to provide.

Defendant A. Gray Lyerly did not testify. Apparently he resided in California. Defendant Woodrow W. Lyerly (Woodrow) did not testify. Nor did any member of his family testify.

Defendants offered three witnesses: (1) Mrs. Rufty, (2) Newberry Hall, a neighbor, and (3) defendant Katherine L. Mack. Mrs. Rufty testified as to her contacts and conversations with Mr. Jim when she drafted the 1969 will. Mr. Hall testified briefly to visiting Mr. Jim and Miss Pearl. According to Hall, "[Mr. Jim] never talked to me about his business. I never heard him talking about his business to anyone." His testimony lacked pertinent probative value.

Mrs. Mack testified that Mr. Jim made statements to her to the effect that he wanted to change his will because there was no one there at the homeplace to care for him and he didn't think the will was fair the way it was. She testified that she "never told Basil or any of the Rape family about the [1969] will because [her] father told [her], to tell no one." She further testified: "He [Mr. Jim] said that I would have a terrible time administering the estate because Basil was the most unreasonable man that he had ever tried to deal with in his life and that Basil had everybody in the community fooled and that Basil thought he had fooled him but that he had not fooled him, but those were his exact words."

The parties stipulated that described tracts of land in Steele Township, Rowan County, constituted the real property owned by Mr. Jim. They further stipulated that plaintiffs tendered to defendants "all monies provided for" in the 1959 will and that defendants refused plaintiffs' demand that they convey to plaintiffs the real property Mr. Jim had attempted to devise to them in the 1969 will.

The issues submitted, and the jury's answer thereto, were as follows:

"1. Did James Richard Lyerly enter into a contract to leave his real property by will to Mildred Lyerly Rape in return for care of himself and his wife during their lifetime and upon the condition that Woodrow W. Lyerly be paid the sum of $6,000.00;

Gray Lyerly the sum of $1,000.00 and Katherine Lyerly Mack the sum of $1,000.00?

"Answer: Yes.

"2. Did Mildred Lyerly Rape perform, during her lifetime her obligations as contemplated by the contract?

"Answer: Yes.

"3. Following the death of Mildred Lyerly Rape and until the death of James Richard Lyerly and his wife, was care for James Richard Lyerly and his wife furnished by or on behalf of the plaintiffs as contemplated by the agreement, and did James Richard Lyerly accept such services in fulfillment of the said agreement?

"Answer: Yes.

"4. Was this action instituted by the plaintiffs in good faith?

"Answer: Yes."

The court entered judgment which, after recitals, inclusive of the issues, answers thereto, and stipulations, provided:

"IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

"1. A trust in favor of the plaintiffs Donald G. Rape, Caroline C. Rape, and Larry A. Rape, the children of Mildred Lyerly Rape, is hereby imposed upon all right title and interest of the defendants in the following described real property, devised to the defendants by the last will and testament of James Richard Lyerly:

DESCRIPTIONS OMITTED

"2. It appearing to the Court that the plaintiffs have deposited in the office of the Clerk of Superior Court for Rowan County, the sum of $6,000.00 for the benefit of Woodrow W. Lyerly, the sum of $1,000.00 for the benefit of Katherine L. Mack and the sum of $1,000.00 for the benefit of A. Gray Lyerly, it is hereby ORDERED ADJUDGED and DECREED that all right, title and interest of the defendants in the real property hereinabove described is divested from the defendants and is hereby vested in the plaintiffs, Donald G. Rape, Caroline C. Rape, and Larry A. Rape.

"3. The Clerk of Superior Court is directed to disburse the foregoing sums to the defendants upon the occurrence of any of the following events: the abandonment of any appeal which may be taken by the defendants from this judgment, or a final determination of this action in favor of the plaintiffs, following any appeal, confirming the plaintiffs' title to the property herein described. In the event that it should finally be determined that the plaintiffs are not entitled to the interests of the defendants in the property heretofore described, the Clerk of Superior Court shall refund the sums so deposited to the plaintiffs.

"4. The defendants shall recover nothing upon their Counterclaim.

"5. The defendants shall pay the costs of this action, to be taxed by the Clerk."

Defendants excepted and appealed, assigning as error (1) the denial of their motion to dismiss for failure to join Basil as a party; (2) the denial of their motions for summary judgment and for a directed verdict; and (3) errors committed in the conduct of the trial.

Upon defendants' appeal, a majority of the hearing panel of the Court of Appeals found "No Error." Judge Hedrick noted his dissent.

*Kluttz and Hamlin by Lewis P. Hamlin, Jr., Richard R. Reamer, and Malcolm B. Blankenship, Jr., for plaintiff appellees.*

*Collier, Harris, Homesley, Jones & Gaines by Walter H. Jones, Jr., for defendant appellants.*

SHARP, Chief Justice.

We consider first defendants' contentions (1) that the evidence was insufficient to warrant a finding that Mr. Jim contracted to devise his real property as alleged by plaintiffs and (2) that the writing signed by Mr. Jim was insufficient to comply with G.S. 22-2, our statute of frauds.

**[1]** Although an oral contract to devise land is unenforceable, *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 698, 127 S.E. 2d 557, 559 (1962), a valid written contract to devise land is enforceable in equity. *Schoolfield v. Collins,* 281 N.C. 604, 615-16, 189 S.E. 2d 208, 215 (1972).

"An annotation following *Naylor v. Shelton,* 102 Ark. 30, 143 S.W. 117, Ann. Cas. 1914A, 394 (1912), contains this statement: '[W]hile a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will, cannot be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will.' Ann. Cas. 1914A at 399. This statement is quoted with approval in *Stockard v. Warren, supra* at 285, 95 S.E. at 580, and in *Clark v. Butts,* 240 N.C. 709, 714, 83 S.E. 2d 885, 889 (1954)." *Schoolfield v. Collins, supra* at 616, 189 S.E. 2d at 215.

**[2]** Plaintiffs rely upon the 1959 will, specifically the paragraph thereof designated "FOURTH," as a memorandum of a valid contract to devise land in compliance with G.S. 22-2. Its sufficiency *as a contract* must be determined by application of legal principles stated by Justice Rodman in *McCraw v. Llewellyn,* 256 N.C. 213, 217, 123 S.E. 2d 575, 578, 94 A.L.R. 2d 914, 920 (1962), as follows: "The mere exercise of the statutory right to dispose of one's property at death is not of itself evidence that the disposition directed is compelled by a contractual obligation. The writing must show *the promise* or *obligation* which the complaining party seeks to enforce. (Citations omitted.)" (Our italics.)

In *Mayer v. Adrian,* 77 N.C. 83, 88 (1877), Justice Bynum, for the Court stated: "The agreement must adequately express the *intent* and *obligation* of the parties. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely." (Our italics.) This statement is quoted with approval in *Chason v. Marley,* 224 N.C. 844, 845, 32 S.E. 2d 652, 653 (1945), and *McCraw v. Llewellyn, supra* at 217, 123 S.E. 2d at 578, 94 A.L.R. 2d at 920. *See* Restatement, Contracts, Second, Tentative Drafts Nos. 1-7, Revised and Edited § 207 (1973).

**[3]** The memorandum on which plaintiffs rely designates the property to be devised, identifies the parties, sets forth their respective obligations as consideration for their contract, and is signed by Mr. Jim, the party to be charged therewith. Hence, it was sufficient as a memorandum to devise "for the purposes

of the statute of frauds." 72 Am. Jur. 2d, Statute of Frauds § 304 (1974); Annot., "Statute of frauds: will or instrument in form of will as sufficient memorandum of contract to devise or bequeath," 94 A.L.R. 2d 921, 931-34, 947-954. Moreover, being in the form of a will, the memorandum fixes the precise manner in which Mr. Jim is to dispose of his real property in performance of his obligations under the contract. The contract involved in *Bumpus v. Bumpus,* 53 Mich. 346, 19 N.W. 29 (1884), cited by defendants, was held unenforceable because of the vagueness of the obligations of the promisee.

In the Restatement, Contracts, § 207 at p. 279 (1932) and Restatement, Contracts, Second, *supra* at 464, after stating the general requisites of a memorandum, in order to make enforceable a contract within the Statute of Frauds, this illustration is given: "A makes an oral contract with B to devise Blackacre to B, and executes a will containing the devise and a recital of the contract. The will is revoked by a later will. The revoked will is a sufficient memorandum to charge A's estate."

**[4]** There was ample evidence to support the jury's affirmative answer to the first issue, a finding that Mr. Jim contracted to devise his real property to Mildred for the consideration and upon the conditions set forth in the paragraph designated "FOURTH" in the 1959 will. There was also ample evidence to support the jury's affirmative answer to the second issue, a finding that Mildred, during her lifetime, performed her obligations as contemplated by the contract.

We note here that Mildred, Basil, and the Rape children, had lived with Mr. Jim and Miss Pearl from 1945 until 1959. The evidence discloses that in 1959 (1) the five members of the Rape family could not continue to live in the Lyerly house unless additional rooms were provided; and that (2), having lived with Mildred, Basil, and the Rape children for the past fourteen years, Mr. Jim and Miss Pearl knew the kind of care they might reasonably expect in the days ahead, and they desired to continue the relationship with that family.

We further note that, beginning in 1946, the expenses of the two households, Woodrow's household and the Rape-Lyerly household, were paid from partnership funds, and that this continued throughout the subsistence of the formal partnership agreement between Woodrow and Basil, that is, until 1 August 1969. The evidence discloses that these payments, which bene-

fitted Mr. Jim and Miss Pearl directly or indirectly, constituted the care provided by Woodrow in discharge of *his* obligations under the paragraph designated "FOURTH" of the 1959 will.

Defendants contend, however, that even if the paragraph designated "FOURTH" was a valid contract to devise when Mr. Jim signed the 1959 will, it called for *the personal services* of Mildred and therefore terminated at Mildred's death.

Obviously the parties contemplated that Mildred would perform the services required to care for the personal needs of her mother and father in the home. Her health was good when the 1959 will was executed. Her malignancy was discovered in 1961. Successive recurrences after surgery ultimately caused her death in April of 1965.

To support their contentions, defendants cite *Siler v. Gray,* 86 N.C. 566 (1882), and *Stagg v. Land Co.,* 171 N.C. 583, 89 S.E. 47 (1916). These decisions are cited in *Peaseley v. Coke Co.,* 282 N.C. 585, 596, 194 S.E. 2d 133, 141 (1973), in support of the statement therein contained that many courts have held that contracts calling for the personal services of a salesman do not survive his death, "the rationale being that the death of the person who was to perform the personal services makes further performance impossible."

**[5]** Notwithstanding, "even though the contract is one which would terminate at the promisee's death, the promissor may waive this feature of the contract and does so where he permits others, associated with the promisee in his lifetime in rendering the performance, to continue after his death and accepts such performance without giving notice within a resonable time of an intention to consider the obligation as ended." 94 C.J.S., *Wills* § 117(d), p. 879 (1956). *Accord,* 57 Am. Jur. *Wills* § 175, p. 155 (1948); 1 Page on Wills, Section 10.25 (Bowe-Parker rev. 1960); *Soper v. Galloway,* 129 Iowa 145, 105 N.W. 399 (1905); *Prater v. Prater,* 94 S.C. 267, 77 S.E. 936 (1913). For the factual situation in *Soper, supra,* and for apposite quotations from the opinions in *Soper* and *Prater, supra,* reference is made to Judge Britt's opinion for the Court of Appeals. In *Bourget v. Monroe,* 58 Mich. 563, 25 N.W. 514 (1885), and in *Parker v. Macomber,* 17 R.I. 674, 24 A. 464, 16 L.R.A. 858 (1892), decisions cited by defendant, the promissor repudiated the contract to devise upon the death of the person whose serv-

ices constituted the consideration for the contract and refused to accept the services of others in lieu thereof.

**[6]** For present purposes, we assume that upon Mildred's death, Mr. Jim had the right to terminate the contract to devise on the ground that his obligation to devise depended upon the rendition of personal services by Mildred; and we further assume that neither Basil nor plaintiffs had *a legal right* to substitute their services for the services of Mildred. Suffice to say, Mr. Jim did not terminate the contract. On the contrary, the services which Mildred would have performed were rendered by Basil and plaintiffs and accepted by Mr. Jim and Miss Pearl. Moreover, there was plenary evidence that Mr. Jim was outspoken in his praise of the services he and his wife received both before and after Mildred's death and by him until his own death. Instead of seeking to terminate the contract embodied in the 1959 will, the evidence is to the effect that Mr. Jim considered that Basil and plaintiffs were obligated to render and provide the services Mildred would have rendered and provided had she outlived her parents. There was ample evidence to support the jury's affirmative answer to the third issue, a finding that, following the death of Mildred, care was furnished Miss Pearl and Mr. Jim by or on behalf of plaintiffs as contemplated by the contract until both died, and that Mr. Jim accepted such services "in fulfillment of the said agreement."

Defendants further contend that, by operation of law and by provisions therein, the 1969 will revoked the 1959 will.

**[7]** " 'Revocation' has been defined as the avoiding and invalidating of an instrument which, but for the revocation, would have been the last will and testament of the party by whom it was executed." 95 C.J.S., *Wills* § 262, p. 30 (1957). As stated *In re Estate of Ramthun,* 249 Iowa 790, 798, 89 N.W. 2d 337, 341-42 (1958): "All wills are by nature ambulatory, and thus their provisions may be changed prior to death by the maker *unless by contractual provisions others' rights thereunder become fixed.* In other words, a will is revocable only to the extent that the testator has not contracted to make it irrevocable. [citations omitted]." (Our italics.)

The applicable legal principles are well stated in Estate of McLean, 219 Wis. 222, 227-228, 262 N.W. 707, 710 (1935), as follows: "A will made under an agreement based upon a valuable consideration is contractual as well as testamentary, and

equity will enforce the provision made for the promisee. A will so made cannot be revoked by the testator so as to defeat the bequest or devise made by it pursuant to his agreement. Nor can the testator destroy the effect of a provision therein so made by making a subsequent disposition by will of the property so devised or bequeathed by the first will. He cannot so avoid his contract which he has performed. His heirs can gain no advantage by his revocation, if he revoke the will, nor can devisees or legatees under a subsequent will gain any. The execution of the will pursuant to the promise creates a trust in the property devised or bequeathed pursuant to the contract which will be enforced in equity against the heirs or those claiming under a subsequent will." These legal principles are applicable and have been applied to factual situations such as that now under consideration. *Nelson v. Schoonover,* 89 Kan. 388, 131 P. 147 (1913); *Torgerson v. Hauge,* 34 N.D. 646, 159 N.W. 6, 3 A.L.R. 164 (1916).

In the Annotation, "Right to Revoke Will Executed Pursuant to Contract," 3 A.L.R. 172 (1919), the author states: "The general rule is, therefore, that a will executed pursuant to a contract cannot be revoked so as to relieve the testator of its contractual obligation." In addition to *Nelson, supra,* and *Torgerson, supra,* the following decisions involving factual situations in which personal services performed and to be performed were the consideration for the promise to devise land, are cited in support of the quoted statement: *Bolman v. Overall,* 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107 (1886); *Smith v. Tuit,* 127 Pa. 341, 17 A. 995, 14 Am. St. Rep. 851 (1889), Second appeal, *Tuit v. Smith,* 137 Pa. 35, 20 A. 579 (1890); *Bruce v. Moon,* 57 S.C. 60, 35 S.E. 415 (1900). Later decisions to the same effect include the following: *Goodin v. Cornelius,* 101 Or. 422, 200 P. 915 (1921); *Brock v. Noecker,* 66 N.D. 567, 267 N.W. 656 (1936); *White v. Smith,* 43 Idaho 354, 253 P. 849 (1926); *Johnston v. Tomme,* 199 Miss. 337, 24 So. 2d 730 (1946). Also see *Remele v. Hamilton,* 78 Ariz. 45, 275 P. 2d 403 (1954), and *Cagle v. Justus,* 196 Ga. 826, 28 S.E. 2d 255 (1943), and cases cited therein.

The 1969 will contained an "in terrorem" clause, providing in part that "if any person entitled to any legacy, bequest or devise under the terms of this Will shall, directly or indirectly, . . . institute any proceedings, suit or action, for the purpose of . . . changing the effect of this Will, wholly or in part, then

and in that event, all the legacies, bequests or devises declared in favor of such person by this Will . . . shall immediately thereupon be revoked and become wholly void and of no effect." Based on this provision, defendants alleged as a counterclaim that plaintiffs, by the institution of this action, had forfeited the rights to which they would have been entitled under the 1969 will.

**[8]** The counterclaim was properly dismissed since the rights of plaintiffs under the 1959 will had become irrevocable. The "in terrorem" clause in the 1969 will was irrelevant in respect of the claim asserted by plaintiffs in this action. Plaintiffs have asserted no claim under the 1969 will. Also, there was ample evidence to support the jury's affirmative answer to the fourth issue, a finding that this action was brought in good faith. In this connection, see *Ryan v. Trust Co.*, 235 N.C. 585, 588, 70 S.E. 2d 853, 855 (1952); and *Haley v. Pickelsimer*, 261 N.C. 293, 134 S.E. 2d 697 (1964).

**[9]** Defendants further contend plaintiffs did not commence this action within three months from the rejection by defendants' counsel of plaintiffs' claim as set forth in a letter from plaintiffs' attorney to defendants.

G.S. 28-112, on which defendants base their contention, does not apply. These statutes refer to claims of creditors of an estate, payable out of the assets of the estate. Plaintiffs assert no claim against the estate of Mr. Jim. Nor have they filed any claim with the executrix thereof. They assert present equitable ownership of the real property under the 1959 contract to devise, contending the beneficial interest in such real property did not pass under the 1969 will and did not become a part of Mr. Jim's estate.

The three-year statute of limitations for breach of contract, G.S. 1-52(1), did not begin to run until Mr. Jim's death. *Stewart v. Wyrick*, 228 N.C. 429, 432, 45 S.E. 2d 764, 766 (1947); *Speights v. Carraway*, 247 N.C. 220, 222, 100 S.E. 2d 339, 341 (1957). This action was commenced well within this limitation.

**[10]** Defendants, seeking to invoke the equitable defense of laches, contend this action is barred because of plaintiffs' delay in commencing it. The contention is without merit. The doctrine of laches applies only when circumstances have so changed during the lapse of time it would be inequitable and unjust to permit the prosecution of the action. *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938).

According to uncontradicted evidence, Woodrow read the 1959 will shortly after Mr. Jim signed it. To what extent, if any, the other defendants were advertent *to the exact* provisions thereof is unclear. It is implicit in the evidence, however, that the entire Lyerly family knew that the Rapes had been promised the homeplace at Mr. Jim's death. Mrs. Mack was fully aware that the 1969 will changed the provisions of the prior will to the detriment of plaintiffs. All defendants were fully advised of plaintiffs' claim and the basis therefor shortly after Mr. Jim's death. Plaintiffs continued in possession of the subject property. They did not participate in any way in the administration of the personal estate under the 1969 will, nor did they accept any distribution from Mr. Jim's personal estate. This factual situation discloses no change in circumstances sufficient to invoke the doctrine of laches.

**[11]** Assuming their motion for a directed verdict was properly denied, defendants contend a new trial should be awarded because of errors in the conduct of the trial. They assign as error the admission over their objection of the testimony of Basil concerning what was said and done when Mr. Jim produced the 1959 will, submitted it to Mildred, Basil, and Woodrow, for reading and approval, and delivered it to Basil for safekeeping. They contend that Basil's testimony was incompetent under G.S. 8-51 in that he was a person interested in the outcome of this action against the devisees of Mr. Jim and that he was testifying in his own behalf against those devisees with reference to a personal transaction between himself and Mr. Jim.

For conditions prerequisite to the disqualification of a witness under G.S. 8-51, see *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043 (1890); *Peek v. Shook,* 233 N.C. 259, 261, 63 S.E. 2d 542, 543 (1951); *Sanderson v. Paul, supra* at 58-59, 69 S.E. 2d at 158; 1 Stansbury's N. C. Evidence, § 66 (Brandis Rev. 1973).

Parenthetically, we note here that Basil is *not* a party to this action. Defendants' motion to dismiss this action upon the ground that Basil is a necessary party was denied by the judge presiding at the October 1972 Session. We also note that Basil filed in the Court of Appeals a disclaimer of any interest in the real property formerly owned by Mr. Jim. Notwithstanding, the question is whether Basil had a legal pecuniary interest in the event of the action *at the time he was examined as a witness at*

*trial. Sanderson v. Paul,* 235 N.C. 56, 61, 69 S.E. 2d 156, 160 (1952).

It may be conceded Basil's testimony that Mr. Jim delivered the 1959 will to him for safekeeping was a personal transaction within the meaning of G.S. 8-51. Obviously, both Mr. Jim and Woodrow contemplated that Basil would cooperate with Mildred and assist her in the discharge of her obligations under the 1959 contract-will. However, this document imposed no legal obligation on Basil to perform personal services for Miss Pearl and Mr. Jim. Nor did it impose any obligation on Mr. Jim to devise his real property or any interest therein to Basil. Since decision is based on the ground stated below, it is unnecessary to decide whether the fact that Basil was present and saw and heard what occurred when the 1959 contract was entered into between Mildred, Mr. Jim, and Woodrow, constituted a personal transaction between Basil and Mr. Jim. In this connection, see 1 Stansbury, *supra* at § 73, p. 223.

Although a "person interested in the event" of the action is disqualified, his interest must be a "direct legal or pecuniary interest" in the outcome of the litigation. "The key word in this phrase is 'legal,' the cases as a whole showing that the ultimate test is whether the *legal rights* of the witness will be affected one way or the other by the judgment in the case. The witness may have a very large pecuniary interest *in fact*—as the interest of a wife in an important law suit to which her husband is a party—and still be competent, while a comparatively slight *legal* interest will disqualify the witness." 1 Stansbury, *supra* at § 69, p. 211, and cases there cited.

Plaintiffs do not claim ownership of Mr. Jim's property *as heirs* of their mother. They base their claim solely on the 1959 contract-will. The obligations assumed by Mildred, having been fully performed on her behalf and accepted by Mr. Jim in fulfillment of the contract until his death on 23 November 1970, plaintiffs contend the attempt by means of the (secret) 1969 will to change the disposition of Mr. Jim's real property constituted a breach of contract and, in respect of the real property, did not revoke the 1959 contract.

"[A] decree for specific performance is nothing more or less than a means of compelling a party to do precisely what he ought to have done without being coerced by a court." 71 Am. Jur. 2d, *Specific Performance* § 1, p. 10 (1973). *Accord, McLean v. Keith,* 236 N.C. 59, 71, 72 S.E. 2d 44, 53 (1952).

"It is sometimes said that the will is irrevocable in equity, but the meaning of that simply is that while equity knows that the will has been revoked, it will nevertheless decree that the property shall be held for those who would have taken if the will had not been revoked." Constigan, Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession, 28 Harv. L. Rev. 237, 250 (1915), quoted in *Knox v. Perkins,* 86 N.H. 66, 163 A. 497 (1932).

The foregoing impels the conclusion that the rights of plaintiffs are determinable as if Mr. Jim had died leaving a valid, probated will, in which he devised his real property in the manner set forth in the paragraph designated "FOURTH" in the 1959 contract-will. Had he done so, plaintiffs would take as *the issue* of Mildred by virtue of G.S. 31-42(a) which provides: "Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution *to such issue* of the devisee or legatee as survive the testator in all cases where *such issue* of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will." (Our italics.)

Plaintiffs having acquired ownership *as issue* of Mildred, Basil had no pecuniary *legal* interest in plaintiffs' real property; therefore, his testimony was not incompetent under G.S. 8-51. For the same reasons, he was not a necessary party to this action.

In *Linebarger v. Linebarger,* 143 N.C. 229, 55 S.E. 709 (1906), cited by defendants, the Court held the wife of one of the caveators, a son of the testator, was not a competent witness to declarations of the testator. Basing decision on the statute now codified as G.S. 8-51, the Court said: "It is clear that if the caveators succeeded in their contention, the husband of the witness, as one of the heirs at law, became the owner of an undivided interest in the real estate. It is well settled by a number of decisions that the wife immediately upon the seizin, either in law or deed of the husband, becomes entitled to 'an inchoate right of dower or estate in the land' of her husband. [Citations omitted.] She therefore had an interest in the property dependent upon the result of the controversy and, under the ruling in

*Pepper v. Broughton,* 80 N.C. 251, was incompetent." *Id.* at 231, 55 S.E. at 710.

In *Helsabeck v. Doub,* 167 N.C. 205, 83 S.E. 241 (1914), in the husband's action against the administrator to recover compensation for personal services rendered to the decedent, the Court held plaintiff's wife was a competent witness to declarations of the decedent. The Court noted that "the wife had no interest [within the meaning of G.S. 8-51], as upon a recovery by the plaintiff no right growing out of the married relationship would attach to the money recovered." The Court further noted that *Linebarger v. Linebarger, supra,* was "not in point, because the property in controversy was land, and the wife's inchoate right to dower attached immediately upon the recovery by her husband." *Id.* at 205-206, 83 S.E. at 241. For the reasons noted in *Helsabeck v. Doug, supra, Linebarger* is not applicable to the facts of the case we are considering.

Defendants also assign as error, based on G.S. 8-51, the admission over their objection of portions of Basil's testimony with reference to personal services he and plaintiffs performed for Miss Pearl and Mr. Jim. For the reason discussed above, this contention is without merit. In this connection, we note that Basil was cross-examined at length with reference to such services; that Mr. Jim's brother and sister, Miss Pearl's nephew, Mr. Jim's friends and neighbors, also testified to such services and to Mr. Jim's statements of satisfaction with reference thereto; and that two of the plaintiffs (Donald and Caroline) testified, without objection, with reference thereto.

Defendant also assigns as error the admission of testimony of oral statements made by Mr. Jim to various relatives and neighbors concerning the arrangement he had made for the care of himself and of Miss Pearl. This testimony, much of which was admitted without objection, was the subject of extensive cross-examination as well as direct examination. It was competent as tending to show that Mr. Jim regarded the arrangement he had made *as contractual,* as contended by plaintiffs and denied by defendants, not to prove an oral agreement. Admittedly, plaintiffs' recovery must be on the 1959 contract-will, irrespective of any variations in declarations Mr. Jim may have made to relatives and neighbors relative to the exactness of the agreement he had made.

The testimony of statements made by Mr. Jim relating to the arrangement he had made for the lifetime care of himself

and his wife, as well as those relating to his appreciation and acceptance of the services rendered, was competent, these statements being declarations against interest and inconsistent with a right to avoid the obligations of the 1959 contract-will. *Smith v. Perdue,* 258 N.C. 686, 129 S.E. 2d 293 (1963); *Hager v. Whitener,* 204 N.C. 747, 169 S.E. 645 (1933); 1 Stansbury, *supra* at § 147, pp. 493-499. On the other hand, the statements attributed to Mrs. Mack were self-serving declarations which, upon objection, should have been excluded.

All of defendants' remaining assignments of error have been considered. None discloses prejudicial error or presents a legal question of sufficient significance to merit discussion.

The evidence fully supported the verdict, and the judgment based thereon is in accordance with applicable law. Hence, the decision of the Court of Appeals is affirmed.

Affirmed.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

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McDANIEL LEWIS, GEORGE SMART AND ALL OTHER CITIZENS, RESIDENTS AND TAXPAYERS OF THE STATE OF NORTH CAROLINA SIMILARLY SITUATED, PLAINTIFFS v. THOMAS J. WHITE, SMITH BAGLEY, HARGROVE BOWLES, JR., JOHN T. CHURCH, E. L. DAVIS, JR., EDWIN GILL, J. GORDON HANES, JR., LEWIS R. HOLDING, W. HANCE HOFLER, THOMAS S. KENAN III, DON S. MATHESON, L. P. McLENDON, JR., JEANELLE (MRS. DAN K.) MOORE, MARY (MRS. JAMES H.) SEMANS, CHARLES STANFORD, JR., EDWARD DURELL STONE, DOING BUSINESS AS EDWARD DURELL STONE ASSOCIATES, AND RALPH REEVES, JR., DOING BUSINESS AS HOLLOWAY-REEVES ARCHITECTS, DEFENDANTS

No. 100

(Filed 26 June 1975)

**1. Injunctions § 11; State § 2.5— State buildings — Art Museum Building Commission — open meetings law**

The open meetings law, G.S. 143-318.1 *et seq.*, does not render void all action taken at a meeting of any governmental body of this State or of one of its political subdivisions if such meeting was not open to the public, and plaintiffs are not entitled to an injunction

prohibiting the Art Museum Building Commission from performing any of its statutory duties or exercising any of its statutory authorities until all of its meetings are held as open meetings.

2. **Injunctions § 11; State § 2.5— State buildings — Art Museum — possible directions by 1975 Legislature**

The possibility that the 1975 General Assembly might give further directions to the Art Museum Building Commission concerning the location and construction of a State Art Museum cannot be the basis for restraining the Commission from acting in accordance with directions previously given.

3. **State § 2.5— Art Museum Building Commission — Executive Budget Act**

The Art Museum Building Commission is subject to the provisions of the Executive Budget Act, G.S. 143-30 through G.S. 143-31.2.

4. **Injunctions § 11; State § 2.5— Art Museum Building Commission — failure to comply with Executive Budget Act — claim for injunctive relief**

Plaintiff's complaint states a claim for relief to enjoin the Art Museum Building Commission from carrying out any activities in relation to the location and construction of an art museum until they comply with certain statutes where it alleges that the Commission has failed to comply with the provisions of the Executive Budget Act requiring it to present its budget to the Director of the Budget, to construct all buildings in strict accordance with budget requests and to refrain from receiving bids on such a construction project until the results of a study and review by the Director of the Budget of the Commission's budget requests have been incorporated into the Commission's plans and specifications for construction of the art museum.

5. **State § 2.5— State buildings — N. C. Capital Building Authority — art museum**

The powers of the North Carolina Capital Building Authority (now the Department of Administration) under G.S. Ch. 129, Art. 7, do not extend to the planning and construction of a State Art Museum since those powers have been specifically conferred on the Art Museum Building Commission by G.S. 143B-58.

6. **State § 2.5— art museum — approval of Governor and Council of State**

The Art Museum Building Commission, having acquired approval of its selection of the site for an art museum from the Governor and Council of State then in office, is not required by G.S. 143B-58(1) to obtain the approval of each succeeding Governor and Council of State taking office prior to the completion of the museum building.

7. **Injunctions § 11; State § 2.5— art museum — allocation of site by Department of Administration**

An allegation that the Department of Administration has not allocated the Polk Prison site to the Art Museum Building Commission for the location of an art museum as required by G.S. 143-341(4)g states a claim for relief to enjoin the Commission from proceeding with its plan to construct an art museum on that site.

**8. Injunctions § 11; State § 2.5— art museum — Environmental Impact Statement**

Allegations that the construction of an art museum at the Polk Prison site would significantly affect the quality of the environment of the State and that the Art Museum Building Commission must therefore file an Environmental Impact Statement prior to proceeding with such construction fail to state a claim for injunctive relief against the Commission since there is nothing in the Environmental Policy Act of 1971, G.S. 113A-1 *et seq.*, which makes the filing of such statement a condition precedent to the commencement of construction of a building for which State funds have been appropriated, and since, nothing else appearing, the substitution of an art museum for a prison will not adversely affect the environment.

**9. Injunctions § 11; State § 2.5— art museum — air pollution control — permit from Environmental Management Commission**

Allegations that the parking facilities and the heating and air conditioning units for the proposed art museum are subject to the air quality or emission control standards established pursuant to G.S. 143-215.107 and that the Art Museum Building Commission has not obtained a permit from the Environmental Management Commission are insufficient to state a claim for injunctive relief against the Commission where there is no allegation that or wherein the proposed parking facilities and heating and air conditioning units "contravene or will be likely to contravene such standards," since such contravention or likelihood of contravention is, by the terms of the statute, a condition precedent to the necessity for a permit from the Environmental Management Commission.

**10. State § 2.5— site of art museum — discretion of Art Museum Building Commission**

The Art Museum Building Commission, with the approval of the Governor, the Council of State and the North Carolina State Capital Planning Commission, may select whatever site it deems most appropriate for the building of a State Art Museum.

**11. Injunctions § 11; State § 2.5— art museum — planning of "Cultural Complex" — claim for injunctive relief**

An allegation that the Art Museum Building Commission has exceeded its statutory authority in that it is planning not only the construction of an art museum but also the construction of a "Cultural Complex," including various other buildings for the purpose of housing therein various activities cultural in nature but not components of an art museum, states a claim for injunctive relief against the Commission since G.S. 143B-58 confers upon the Commission no authority to plan or construct anything but an art museum building and accessories necessary and proper for its successful operation.

**12. State § 4— action against State Commission — doctrine of sovereign immunity**

A suit against a State officer or a State Commission to prevent him or it from performing his or its official duties is a suit against the State within the meaning of the doctrine of sovereign immunity.

**13. State § 4— defense of sovereign immunity — burden of proof**

Officers who seek to defend an action on the ground of sovereign immunity must show they were acting within the scope of their authority.

**14. Injunctions § 11; State § 4— sovereign immunity — exceeding statutory authority**

The doctrine of sovereign immunity does not authorize the dismissal of the complaint of a citizen and taxpayer who alleges that the members of a State Commission, in excess of their statutory authority, or contrary to law, propose a diversion of State tax funds from the purpose for which such funds were appropriated or other misuse of such funds or of other State property, or are acting in disregard of a statute designed to protect the State from misuse or waste in the expenditure of its tax funds.

Justice MOORE did not participate in the consideration or decision of this case.

APPEAL by plaintiffs from *Bailey, J.*, at the 27 September 1974 Session of WAKE, heard prior to determination by the Court of Appeals.

The plaintiffs, citizens, residents and taxpayers of the State of North Carolina brought this action on behalf of themselves and all other citizens, residents and taxpayers of the State similarly situated. The defendants, other than Stone and Reeves, are the members of the Art Museum Building Commission, hereinafter called the Commission. The Defendants Stone and Reeves are architects employed by the Commission.

The prayer for judgment in the complaint is for a temporary restraining order, a preliminary injunction and a permanent injunction restraining the defendants from any further activities in regard to the location and construction of the proposed State Art Museum Building, hereinafter called the Museum, on the land, just outside the city limits of Raleigh, whereon the Polk Youth Center Prison is presently operating; a permanent injunction restraining the defendants from engaging in activities in relation to the establishment of a "Cultural Complex," or any other activities except the planning of the Museum "in accordance with the statutes"; and a permanent injunction restraining the defendants from carrying out any activities in relation to the location and construction of the Museum until they comply with certain statutes.

The complaint purports to allege ten distinct claims as bases for the relief sought. For convenience in discussion thereof, these may be designated as follows:

1. The Commission has exceeded its statutory authority in selecting the Polk Prison site as the site for the Museum;

2. The Commission has exceeded its statutory authority in planning for the construction at the Polk Prison site of a "Cultural Complex," including numerous buildings other than the Museum;

3. The Commission has exceeded its statutory authority by holding secret meetings not open to the press and to members of the public;

4. The 1975 Session of the General Assembly (convened after the filing of this action) "will consider" appropriate directions to the Commission which the Commission is attempting to circumvent by instructing its architects to proceed immediately with the construction of the Museum at the Polk Prison site;

5. The Commission has failed to comply with requirements of the State Budget Act, and, until it does comply therewith, construction of the Museum is beyond its statutory authority;

6. The Commission has failed to consult with the North Carolina Capital Building Authority, which has supervisory authority over the Commission, and thus has exceeded its statutory authority;

7. The Commission has failed to secure the approval by the present Governor of its selection of the Polk Prison site as the site for the Museum;

8. The Commission has failed to follow statutory procedures in procuring the transfer of the Polk Prison site to the Commission;

9. The Commission has failed to comply with the Environmental Policy Act by filing an Environmental Impact Statement as required by that Act;

10. The Commission has failed to obtain from the Board of Water and Air Resources a permit for the construction of the Museum at the Polk Prison site as required by statute.

The allegations in the first claim for relief are incorporated by reference in each of the other claims for relief. The key allegation therein is as follows:

> "7. The Defendant White as Chairman and the fourteen other members of the Art Museum Building Commission individually have exceeded the statutory authority granted to them by selecting for the new North Carolina Art Museum Building a site outside of the North Carolina State Government Center. The site selected by the Chairman and the Members is located outside the city limits of Raleigh on the land now occupied by the Polk Youth Center and adjacent property."

The Commission filed its answer responding separately to each claim for relief, denying certain allegations in each claim. On the same day the Commission moved to dismiss the complaint and, alternatively, for judgment on the pleadings. The stated grounds for the motion are: (1) The court lacks jurisdiction over the subject matter for the reason that this is a suit against the State, which is not alleged to have waived its sovereign immunity against suit, and the plaintiffs are without standing to sue; and (2) the complaint fails to state a claim upon which relief can be granted.

Upon the filing of the complaint, Judge Bailey issued a temporary restraining order and ordered the defendants to appear before him to show cause why a preliminary injunction should not be granted pendente lite. Upon the hearing pursuant to such show cause order and upon the motion of the Commission to dismiss, Judge Bailey dismissed the action against the Commission upon the following grounds: (1) The doctrine of sovereign immunity; (2) the plaintiffs have no standing to sue with reference to Claims No. 3, 5, 6, 7, 8, 9 and 10, and in Claim No. 4 state no facts upon which relief can be granted. Judge Bailey further dismissed the action as to the Defendants Stone and Reeves on the ground that they are not alleged to have taken any action except as architects acting under instructions of the Commission and the action, having been dismissed against the Commission, should also be dismissed as to these defendants.

The judgment of Judge Bailey did not conclude that the plaintiffs' Claims No. 1 and No. 2 fail to state a claim upon which relief can be granted or that the plaintiffs have no standing to sue thereon. As to these two claims for relief, the judgment of dismissal rests upon the doctrine of sovereign immunity.

In their brief the plaintiffs state, "Appellants would concur in a dismissal as to the Defendants Stone and Reeves so long as the individual members of the Commission are not cloaked in governmental immunity."

*Kimzey, Mackie & Smith, by James M. Kimzey and Stephen T. Smith, for plaintiff appellants.*

*Rufus L. Edmisten, Attorney General, by T. Buie Costen, Assistant Attorney General, for State Art Museum Building Commission, defendant appellee.*

*Joyner & Howison, by William T. Joyner, R. C. Howison, Jr., James E. Tucker and Edward S. Finley, Jr., for State Art Museum Building Commission and its named members, defendant appellees.*

*Maupin, Taylor & Ellis, by C. B. Neely, Jr., for defendant architects, appellees.*

LAKE, Justice.

A motion to dismiss for failure to state a claim upon which relief can be granted, like the common law general demurrer, admits, for the purpose of the motion, the well-pleaded material allegations of the complaint, but it does not admit the plaintiff's conclusions of law, such as his interpretation of statutory provisions. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161.

Deferring, momentarily, consideration of the defendants' claim of sovereign immunity to suit, we consider first the conclusions of the Superior Court that in Claims 3 to 10, inclusive, the complaint fails to state a claim upon which relief can be granted or that the plaintiffs have no standing to sue thereon.

The material allegations of Claim No. 3, summarized, are that all meetings of the Commission have been conducted in secrecy and the Commission has refused to permit minutes, records, tapes or other documentation of its activities to be made available for scrutiny by the press or the public; in this the members of the Commission are exceeding their statutory authority, G.S. 143-318.1 to G.S. 143-318.7, inclusive, requiring such meetings to be open to the press and to the public; actions taken by the members of the Commission at meetings not open to the public are void; consequently, any actions emanating from such meetings should be restrained.

G.S. 143-318.1 provides:

> "*Public policy.*—Whereas the commissions, committees, boards, councils and other governing and governmental bodies which administer the legislative and executive functions of this State and its political subdivisions exist solely to conduct the peoples' business, it is the public policy of this State that the hearings, deliberations and actions of said bodies be conducted openly."

G.S. 143-318.2 requires that all official meetings of the governing and govenmental bodies of the State, including all State Commissions "which have or claim authority to conduct hearings, deliberate or act as bodies politic and in the public interest" shall be open to the public. G.S. 143-318.6 provides that any citizen who is denied access to such a meeting "in addition to other remedies shall have a right to compel compliance with the statute by application to a court for a restraining order, injunction or other appropriate relief."

The prayer for relief as to this claim is that the defendants be enjoined from carrying out any activities which the statute authorizes them to conduct "until all of their meetings are held as public meetings * * * and all minutes * * * and other documentation of their prior secret meetings be made public." The answer of the defendants denies that the meetings of the Commission have been held in secret, except insofar as this is authorized by the statute (G.S. 143-318.3, dealing with executive sessions). However, upon consideration of the motion to dismiss, the allegations of fact in the complaint must be taken as true and the court is not concerned with the denials of those allegations in the answer of the defendants.

**[1]** We find nothing in G.S. Ch. 143, Art. 33B, which supports the contention of the plaintiffs that all action taken at a meeting of any governmental body of the State, or of one of its political subdivisions, is completely void if such meeting was not open to the public. In the absence of a clear expression of legislative intent that this be the effect of a violation of G.S. 143-318.2, we decline so to hold. The complainants do not seek in this action an order directing that they, and other members of the class for whom they sue, be admitted to future meetings of the Commission or be given the right to examine minutes or other documents showing action taken at meetings heretofore held. They seek to enjoin the Commission from performing any of its statu-

tory duties or exercising any of its statutory authorities until "*all* of their meetings are held as open meetings." (Emphasis added.) Such an injunction would make it impossible for the Commission to carry out its statutory duties. Compliance with such an injunction, which would be a condition precedent to the carrying out of further activities by the Commission, could not be shown until there were no more meetings of the Commission to be held.

We find no error in the conclusion and order of the Superior Court with reference to Claim for Relief No. 3.

**[2]** The allegations of the complaint with reference to Claim for Relief No. 4 are, in summary, that the North Carolina General Assembly, in its 1975 Session, "will consider" giving appropriate directions to the Commission and the defendants should be restrained from acting toward the construction of the Museum at the site chosen by them until the 1975 Session of the General Assembly has an opportunity to give the Commission "appropriate direction." At the time the present suit was filed and at the time the Superior Court entered its order dismissing Claim for Relief No. 4, the 1975 Session of the General Assembly had not been convened, indeed its members had not been elected. The possibility that the 1975 Session of the General Assembly, now in session, may see fit to give further directions to the Commission concerning the location and construction of the Museum cannot be a basis for restraining the Commission from acting in accordance with directions heretofore given.

There was no error in the conclusion and order of the Superior Court with reference to Claim for Relief No. 4.

**[4]** The material allegations of the complaint with respect to Claim for Relief No. 5, summarized, are that G.S. 143-30 to G.S. 143-31.1, inclusive, a portion of the Executive Budget Act, requires the Commission to present its budget to the Director of the Budget, to construct all buildings in strict accordance with such budget requests and to refrain from receiving bids on such construction projects until the results of a study and review by the Director of the Budget of the Commission's budget requests have been incorporated into the Commission's plans and specifications for the construction of the Museum; the defendants have not attempted to comply with this statutory requirement and, therefore, are acting beyond their statutory authority in planning and constructing the Museum at the Polk Prison prop-

erty; for this reason the defendants should be enjoined from proceeding with the planning and construction of the Museum until they comply with these statutory requirements.

It is the contention of the defendants that the Commission was created with the duty to construct a building of a particular and extraordinary type and character and that the construction of such a building was not contemplated by the provisions of G.S. 143-30 through G.S. 143-31.2. Thus, they say, these statutes are not applicable to them.

G.S. 143-1 provides that the word "Commission" as used in the Executive Budget Act, with an exception not here pertinent, shall mean "any State agency, and any other agency, person or commission by whatsoever name called, that uses or expends or receives any State funds." G.S. 143-16 provides, "Every State * * * commission * * * shall operate under an appropriation made in accordance with the provisions of this Article, and no State * * * commission * * * shall expend any money except in pursuance of such appropriation and the rules, requirement and regulations made pursuant to this Article." G.S. 143-28 provides, "It is the intent and purpose of this Article that every * * *commission * * * that expends money appropriated by the General Assembly or money collected by or for such * * * commission * * * under any general law of this State, shall be subject to and under the control of every provision of this Article."

G.S. 143-30 provides that the several commissions of the State to which appropriations are made for permanent improvements "shall, before any of such appropriations * * * are available or paid to them * * * budget their requirements and present the same to the Director of the Budget." G.S. 143-31 provides that all buildings and other permanent improvements shall be erected in strict accordance with the budget requests of such commission filed with the Director of the Budget.

**[3]** The obvious purpose of these statutory provisions is to guard against improvident, extravagant or unauthorized expenditure of State funds in the construction of a building by any commission or agency of the State. We find nothing in the Executive Budget Act which supports the contention of the defendants that they are not subject to its provisions. We find nothing in G.S. Ch. 140, Art. 1A, by which the Commission was originally created or in G.S. 143B-58 by which the Com-

mission was "recreated" and endowed with certain powers, which indicates a legislative intent to exempt the Commission from the requirements of the Executive Budget Act. The answer of the defendants denies all allegations of the plaintiffs' Claim for Relief No. 5 with reference to the failure of the defendants to comply with the requirements of that Act. However, as above noted, upon consideration of a motion to dismiss, the Superior Court, and, upon appeal, this Court, must take as true the allegations of the complaint concerning the failure of the defendants to comply with the Executive Budget Act.

**[4]** We, therefore, hold that Claim for Relief No. 5 does state a claim upon which relief may be granted.

**[5]** The material allegations of the complaint with reference to Claim for Relief No. 6 are that G.S. 129-40 to G.S. 129-47, inclusive, provide that the North Carolina Capital Building Authority shall have and exercise supervision over the construction of all State buildings within the City of Raleigh and its environs, except those specifically exempted by G.S. 129-42.1, which exemption does not include the Museum; the defendants have sought to construct the Museum without consulting the North Carolina Capital Building Authority and, therefore, are acting in excess of their statutory authority.

G.S. 129-42 conferred upon the North Carolina Capital Building Authority powers which have now been transferred by G.S. 143A-86 to the Department of Administration. These powers include the power to select and employ architects, engineers and other consultants for the planning and supervision of the construction of buildings. The selection of such architects and engineers is to be made by the Authority (now the Department of Administration) from nominees of the agency or institution for which the building is to be constructed. G.S. 129-42.2. It is provided in G.S. 129-42.1 that the Authority shall exercise such powers for certain specifically named agencies and institutions of the State, any other State agency or institution which elects to come under the provision of this Article of the General Statutes "and all State agencies in the City of Raleigh and its environs," with exceptions not here pertinent.

G.S. 143B-58 by which the Commission was "recreated" expressly empowers the Commission "to employ architects to prepare plans for the State Art Museum Building, to assist and advise the architects in the preparation of those plans, and to

approve on behalf of the State all plans for the State Art Museum Building." It also empowers the Commission to enter into contracts on behalf of the State for the construction of a museum building and for the employment of consultants and the purchase of services, materials, furnishings and equipment for the Museum. It further provides that the Commission shall have the power to "supervise generally the location, construction, furnishing, equipment, renovating and care of the State Art Museum Building," and authorizes it to "call upon the Department of Administration [the transferee of the powers of the North Carolina Capital Building Authority] for such assistance as the Commission may require in carrying out its duties."

Since the Commission proposes to construct the Museum at the present site of the Polk Prison, which we judicially notice to be within the environs of the City of Raleigh, the Commission is among the State agencies included within G.S. 129-42.1, nothing else appearing. However, if the Commission be thus brought within G.S. Ch. 129, Art. 7, there is an obvious conflict between G.S. 129-42 conferring upon the Authority the power to select and employ architects and other consultants and G.S. 143B-58 conferring that power upon the Commission. G.S. 143B-58, being the specific statute, controls in this situation. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E. 2d 663; *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582; *Utilities Comm. v. Coach Co.*, 236 N.C. 583, 73 S.E. 2d 562; *Young v. Davis*, 182 N.C. 200, 108 S.E. 630; Strong, N. C. Index 2d, Statutes, § 5. We, therefore, hold that the powers of the North Carolina Capital Building Authority (now the Department of Administration) under Ch. 129, Art. 7, of the General Statutes do not extend to the planning for and construction of the Museum.

We find no error in the conclusion and order of the Superior Court with reference to Claim for Relief No. 6.

**[6]** The material allegations of Claim for Relief No. 7, summarized, are that the Commission's selection of the present site of the Polk Prison as the site for the construction of the Museum does not have the approval of the present Governor, whereas G.S. 143B-58(1) requires such approval and, therefore, the Commission is acting in excess of its statutory authority and should be restrained until such approval by the present Governor is obtained.

G.S. 143B-58 provides:

> *"Art Museum Building Commission—creation, powers and duties.*—There is hereby recreated the Art Museum Building Commission of the Department of Cultural Resources and the State Art Museum Building Commission shall have the following powers and duties:
>
> "(1) With the approval of the Governor and Council of State and the North Carolina State Capital Planning Commission to determine the site for the building of the State Art Museum in accordance with directions, if any, from the General Assembly. * * * "

The defendants in their answer assert that the present Governor has given his approval in writing to the Commission's selection of the site for the Museum. As above noted, this answer may not be taken into account in consideration of the motion to dismiss, since the allegations of fact in the complaint are taken to be true for the purposes of determining such motion.

It does not appear from the complaint when the Commission determined upon the Polk Prison site as the location of the Museum, nor does it appear that such determination did not have the approval of the then Governor and Council of State. The allegation that it does not have the approval of the "current" Governor would seem to imply that the site selection did have the approval of his predecessor. We find nothing in G.S. 143B-58(1) to suggest that, having obtained the approval of the Governor and Council of State then in office, the Commission must continue to seek and obtain the approval of each succeeding Governor and Council of State taking office prior to the completion of the Museum Building.

We find no error in the conclusion and order of the Superior Court concerning Claim for Relief No. 7.

**[7]** The material allegations of Claim for Relief No. 8, summarized, are that the Polk Prison site is currently owned by the Department of Administration or by the Department of Social Rehabilitation & Control; before the property can be transferred to the Commission, the requirements of G.S. 146-74 through G.S. 146-78 or, alternatively, the provisions of G.S. 160A-274 and G.S. 143-341(4)g must be met, which has not been done; consequently, the defendants are acting without authority in planning the construction of the Museum upon that site.

In their answer to Claim for Relief No. 8, the defendants admit the applicability to this matter of G.S. 143-341(4)g but assert that they have complied with its provisions. They deny the applicability to this matter of the other statutes here relied upon by the plaintiffs.

G.S. 146-74 to G.S. 146-78, inclusive, deal with conveyances in fee of State owned land. In the present matter, the defendants do not propose any conveyance by the State of the land on which they propose to locate the Museum. Therefore, these statutes are not applicable and afford no basis for any relief sought by the plaintiffs in this action. G.S. 160A-274 relates to exchanges, leases, sales and agreements for the joint use of property entered into by governmental units. It has no application to this matter.

G.S. 143-341 relates to the powers and duties of the Department of Administration. Paragraph (4)g provides that the Department of Administration has the power:

> "To allocate and reallocate land, buildings, and space in buildings to the several State agencies, in accordance with rules adopted by the Governor with the approval of the Council of State. Provided, that the authority granted in this paragraph shall not apply to the State Legislative Building and grounds."

This statute, as the defendants in their answer concede, does apply to the present matter. Without allocation of the proposed site to the Commission by the Department of Administration, the Commission would be acting in excess of its statutory authority were it to construct the Museum thereon. The allegation by the defendants in their answer that they have complied with this statute may not be taken into account by the Superior Court, or by us, in determining the motion of the defendants to dismiss for failure to state a claim on which relief can be granted.

Therefore, Claim for Relief No. 8 states a claim upon which relief may be granted.

**[8]** The material allegations of the complaint with reference to Claim for Relief No. 9 are that the defendants have failed to comply with the Environmental Policy Act, in that the construction which they propose at the Polk Prison site would significantly affect the quality of the environment of the State

and so the defendants must file an Environmental Impact Statement prior to proceeding with such construction, which they have not done.

In their answer to this claim for relief, the defendants allege that the proposed construction will not significantly affect the quality of the environment of the State and, consequently, no such statement is required to be filed by them.

The statutes cited by the plaintiffs in this claim for relief constitute the Environmental Policy Act of 1971. G.S. 113A-2 states the purposes of this Act as follows:

> "To declare a State policy which will encourage the wise, productive, and beneficial use of the natural resources of the State without damage to the environment, maintain a healthy and pleasant environment, and preserve the natural beauty of the State; to encourage an educational program which will create a public awareness of our environment and its related programs; to require agencies of the State to consider and report upon environmental aspects and consequences of their actions involving the expenditure of public moneys; and to provide means to implement these purposes."

G.S. 113A-4 provides that "to the fullest extent possible" any State agency shall include in every recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment of this State, a detailed statement setting forth the environmental impact of the proposed action and certain other types of information.

Nothing in this Act makes the filing of such statement a condition precedent to the commencement of construction of a building for which State funds have been appropriated. Furthermore, the complaint does not purport to state any respect in which the construction of an art museum at the present site of the Polk Prison could adversely affect the environment of the State or its natural beauty or the beneficial use of its natural resources. It is perfectly obvious that, nothing else appearing, the substitution of an art museum for a prison will not adversely affect the environment.

In the absence of any allegation in the complaint as to how such proposed substitution could adversely affect "the qual-

ity of the environment of the State," we find no error in the conclusion and order of the Superior Court dismissing Claim No. 9.

**[9]** The material allegations of the complaint with reference to Claim for Relief No. 10 are that the defendants have not obtained a permit from the Board of Water & Air Resources as required by G.S. Ch. 143, Art. 21B (G.S. 143-215.105 to G.S. 143-215.114, inclusive), and, consequently, the proposed construction by them at the site of the Polk Prison is in excess of their statutory authority.

G.S. Ch. 143, Art. 21B, deals with air pollution control. It declares the policy of the State to be "to provide for the conservation of its water and air resources." G.S. 143-215.105; G.S. 143-211. It provides that the air quality program of the State shall be administered by the Department of Natural & Economic Resources (formerly the Board of Water & Air Resources). G.S. 143-215.106. The Environmental Management Commission is directed to develop, after proper study, a comprehensive plan or plans for the prevention, abatement and control of air pollution in the State. G.S. 143-215.107. It is provided in G.S. 143-215.108 that after the effective date of any air quality or emission control standards so established, no person shall, without first obtaining a permit from the Environmental Management Commission and complying with the conditions prescribed by such permit, "establish or operate any air contaminant source" or do other specified things, none of which other things is alleged to be contemplated by the defendants in the proposed construction of the Museum at the Polk Prison site.

The plaintiffs allege in Claim No. 10 that "the parking facilities and the heating and air conditioning units for the Art Museum Building are subject to the air quality or emission control standards which have been established pursuant to G.S. 143-215.107. Assuming, as we must for the purpose of passing upon the motion to dismiss, that this allegation is true, the plaintiffs do not allege that or wherein the proposed parking facilities or the proposed heating and air conditioning units for the proposesd Museum "contravene or will be likely to contravene such standards." Such contravention, or likelihood of contravention, is, by the terms of the statute itself, a condition precedent to the necessity for a permit from the Environmental Management Commission. G.S. 143-215.108.

Consequently, there was no error in the order of the Superior Court dismissing Claim No. 10.

Although the Superior Court did not dismiss Claim No. 1 or Claim No. 2 on the ground that the allegations thereof were insufficient to state a claim upon which relief can be granted or that the plaintiffs lack standing to sue thereon, since this matter must be remanded to the Superior Court for further proceedings, we deem it advisable to consider the sufficiency of the complaint in these respects also.

**[10]** The material allegations of Claim No. 1 are that the clear intent of the statutes creating the Commission and conferring powers upon it "is that the location of the North Carolina Art Museum Building should be within the North Carolina State Government Center, which is defined as that area of the City of Raleigh bounded by Edenton Street, Person Street, Peace Street, the Right of Way of the Main Line of the Seaboard Coastline Railway, and North McDowell Street"; the defendants "have exceeded the statutory authority granted to them by selecting for the new North Carolina Art Museum Building a site outside of the North Carolina State Government Center," this being the Polk Prison site; the defendants should, therefore, be restrained from proceeding with such course of action.

The Commission was created by Chapter 1142 of the Session Laws of 1967. By that Act it was given the power and duty, among others, "with the approval of the Governor and Council of State and the North Carolina State Capital Planning Commission, to determine the site for the building of the State Art Museum on land which has been denominated as Heritage Square," which land is that designated in the complaint as the North Carolina State Government Center.

The Act of 1967 was amended by Chapter 545 of the Session Laws of 1969 by deleting from the above quoted provision the words, "on land which has been denominated as Heritage Square."

By Chapter 476, § 39, of the Session Laws of 1973, the Commission was "recreated" and declared to have the certain powers and duties, including the power "with the approval of the Governor and Council of State and the North Carolina State Capital Planning Commission to determine the site for the building of the State Art Museum in accordance with directions, if any, from the General Assembly." This is the present power

of the Commission with respect to the determination of the site for the construction of the Museum. G.S. 143B-58.

Both the language of G.S. 143B-58 and its legislative history lead, inescapably, to the conclusion that, no further directions having been given to the Commission by the General Assembly, the Commission, with the approval of the Governor, the Council of State and the North Carolina State Capital Planning Commission, may select whatever site it deems most appropriate for the building of the Museum. It is not limited to "Heritage Square" or even to the City of Raleigh. The Legislature having given this wide discretion to the Commission, subject only to the specified approvals, the courts are not authorized to substitute their judgment for that of the Commission concerning the proper location of the Museum.

It necessarily follows that Claim No. 1 does not state a claim upon which relief can be granted and the defendants' motion to dismiss this claim for that reason should have been granted.

**[11]** The material allegations of the complaint with respect to Claim No. 2 are that the Commission has exceeded its statutory authority in that it is planning not only the construction of an art museum but also the construction of a "Cultural Complex," including various other buildings at the Polk Prison site for the purpose of housing therein various activities, cultural in nature but not components of an art museum, and should be restrained from continuing such unauthorized activity.

The defendants in their answer to Claim No. 2 deny any plans for or activities in connection with the construction of any building other than the Museum. This answer raises a question of fact, but for the purpose of passing upon the motion to dismiss the complaint, the allegations of the complaint must be deemed admitted. *Sutton v. Duke, supra.* G.S. 143B-58 confers upon the Commission no authority to plan or construct anything but an art museum building and accessories necessary and proper for its successful operation.

Consequently, Claim No. 2 does state a claim upon which relief may be granted.

The doctrine of sovereign immunity—that the State cannot be sued in its own courts, or in any other, without its consent—is firmly established in the law of North Carolina. *Orange*

*County v. Heath,* 282 N.C. 292, 192 S.E. 2d 308; *Steelman v. City of New Bern,* 279 N.C. 589, 184 S.E. 2d 239; *Electric Co. v. Turner,* 275 N.C. 493, 168 S.E. 2d 385; *Shingleton v. State,* 260 N.C. 451, 133 S.E. 2d 183; *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18; *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 577; *Insurance Co. v. Unemployment Compensation Commission,* 217 N.C. 495, 8 S.E. 2d 619. In *Electric Co. v. Turner, supra,* Justice Higgins, speaking for this Court, called the doctrine "axiomatic." In *Schloss v. Highway Commission, supra,* Justice Barnhill, later Chief Justice, speaking for the Court, said it "is an established principle of jurisprudence in all civilized nations."

**[12]** It is equally well established that a suit against a state officer or a state commission to prevent him or it from performing his or its official duties is a suit against the State within the meaning of this doctrine. *Electric Co. v. Turner, supra; Insurance Co. v. Gold, Commissioner of Insurance,* 254 N.C. 168, 118 S.E. 2d 385; *Insurance Co. v. Unemployment Compensation Commission, supra.* As Chief Justice Devin said in *Williamston v. R. R.,* 236 N.C. 271, 72 S.E. 2d 609, "Courts will not undertake to control the exercise of discretion and judgment on the part of members of a commission in performing the functions of a State agency." *Accord: Pharr v. Garibaldi, supra.*

**[13]** On the other hand, the official status of the defendants, standing alone, does not immunize them from suit. *Pharr v. Garibaldi, supra.* As Justice Barnhill, later Chief Justice, speaking for the Court in *Schloss v. Highway Commission, supra,* said: "When public officers whose duty it is to supervise and direct a State agency attempt to enforce an invalid ordinance or regulation, or invade or threaten to invade the personal or property rights of a citizen *in disregard of law,* they are not relieved from responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State." (Emphasis added.) *Accord: Shingleton v. State, supra; Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359; *Pue v. Hood,* 222 N.C. 310, 22 S.E. 2d 896. "While the activities of governmental agencies engaged in public service imposed by law ought not to be stayed or hindered merely at the suit of an individual who does not agree with the policy or discretion of those charged with responsibility, the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot

be denied." *Teer v. Jordan, supra.* Officers who seek to defend an action on the ground of sovereign immunity must show they are acting within the scope of their authority. *Schloss v. Highway Commission, supra.*

The proceeds of State tax levies appropriated by the General Assembly for one purpose may not lawfully be disbursed by State officers for a different purpose and a citizen and taxpayer of the State may sue to restrain such illegal diversion of public funds. *Styers v. Phillips,* 277 N.C. 460, 178 S.E. 2d 583; *State v. Davis,* 270 N.C. 1, 153 S.E. 2d 749; cert. den., 389 U.S. 828; *Teer v. Jordan, supra; Gardner v. Retirement System,* 226 N.C. 465, 38 S.E. 2d 314; *Freeman v. Commissioners of Madison,* 217 N.C. 209, 7 S.E. 2d 354. In *Wishart v. Lumberton,* 254 N.C. 94, 118 S.E. 2d 35, Justice Rodman, speaking for the Court, said, "If the governing authorities were preparing to put public property to an unauthorized use, citizens and taxpayers had the right to seek equitable relief." In *Merrimon v. Paving Co.,* 142 N.C. 539, 55 S.E. 366, Justice Henry G. Connor, speaking for the Court, said, "That a citizen in his own behalf, and that of all other taxpayers, may maintain a suit in the nature of a bill in equity to enjoin the governing body of a municipal corporation *from transcending their lawful powers* or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.,—is well settled." (Emphasis added.)

**[14]** Thus, the doctrine of sovereign immunity does not authorize the dismissal of the complaint of a citizen and taxpayer who alleges that the members of a State commission, in excess of their statutory authority, or contrary to law, propose a diversion of State tax funds from the purpose for which such funds were appropriated or other misuse of such funds or of other State property, or are acting in disregard of a statute designed to protect the State from misuse or waste in the expenditure of its tax funds. As above noted, the plaintiffs' Claims No. 2, 5 and 8 allege such proposed acts of the defendants in excess of their statutory authority. In their answer to these respective claims for relief, the defendants have denied any act or proposed act in excess of their authority or in violation of the statutes relied upon by the plaintiffs. Thus, as to these claims for relief, the pleadings raise issues of fact which have not been determined by the Superior Court. The burden is upon the plaintiffs to prove

the alleged violations or proposed violations of the law by the defendants. When given the opportunity to present their evidence in support of their allegations, they may or may not "get to first base," but they are entitled to their turn at bat, which right the judgment of the Superior Court erroneously denied them.

We, therefore, remand this matter to the Superior Court of Wake County for trial of the issues raised by the pleadings with reference to Claims for Relief No. 2, 5 and 8. The judgment of the Superior Court dismissing Claims for Relief No. 1, 3, 4, 6, 7, 9 and 10 is affirmed. The judgment of the Superior Court dismissing the action as against the Defendants Stone and Reeves is affirmed.

Affirmed in part.

Reversed in part and remanded.

Justice MOORE did not participate in the consideration or decision of this case.

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STATE OF NORTH CAROLINA v. THOMAS LEE KING AND JOSEPH KING

No. 8

(Filed 26 June 1975)

1. **Criminal Law § 92— father and son charged with same crime — consolidation proper**

In a prosecution for robbery with a dangerous weapon and first degree murder, the trial court did not err in consolidating for trial cases against defendants who were father and son where the offenses charged were of the same class, related to the same crimes, and were so connected in time and place that most of the evidence at trial on one of the indictments would be competent and admissible at the trial on the others, each defendant relied on an alibi as a defense, and defendants' defenses were not antagonistic.

2. **Constitutional Law §§ 32, 33; Criminal Law § 55— blood and hair samples — presence of counsel at taking — admissibility**

In a prosecution for robbery with a dangerous weapon and first degree murder, the trial court did not err in allowing the State to introduce evidence against defendants regarding extraction of blood and hair samples from them and comparisons made between defend-

ants' blood and that of the victims where there was evidence that the victims sustained blows to the head and stabbings, one victim hit one of the defendants in the head with a hammer, bloodstained clothing was seized from one defendant's house, and a witness testified that he transported one defendant in his cab on the night of the crime and that defendant had bloodstains on his clothing; furthermore, defendants cannot complain of absence of their counsel when the blood samples were taken since counsel were specifically allowed, if they so desired, to be present but were not, and the court offered to have the blood withdrawing procedure disregarded and another one staged in counsel's presence, but counsel made no request therefor.

3. **Criminal Law §§ 51, 99— expert witnesses — finding of expertise — no expression of opinion by court**

Evidence with respect to qualifications of witnesses in the fields of blood typing, fingerprint identification and comparison, forensic serology and pathology fully supported the trial court's findings that the witnesses were experts and the trial court's rulings to that effect made in the presence of the jury did not amount to an expression of opinion regarding the credibility of the witnesses.

4. **Criminal Law § 114— jury instruction as to expert witness — no expression of opinion**

Trial court's statement to the jury that "an experienced fingerprint analyst of the N. C. Bureau of Investigation and his supervisor" testified in behalf of the State was made in recapitulating the State's evidence and was amply supported by the testimony concerning the training and experience of the witnesses.

5. **Criminal Law § 42— robbery with dangerous weapon — hammer near crime scene — admissibility**

In a prosecution for robbery with a dangerous weapon and first degree murder, the trial court did not err in allowing into evidence a hammer found by officers on the day after the crime 385 feet from the scene of the crime lying under a dump truck where the surviving victim testified that the hammer introduced in evidence was similar to the one with which her assailant hit her, and blood found on the hammer was of the same group as that of the victim.

6. **Criminal Law § 95— statement of defendant implicating codefendant — restrictive instruction proper**

The introduction of an out-of-court statement of one codefendant directly implicating the other entitles the other, upon even a general objection, to a restrictive instruction, and if the codefendant who made the statement implicating the other does not testify and is thus not available for cross-examination, a restrictive instruction is not sufficiently palliative and the complaining defendant is entitled to a new trial.

7. **Criminal Law § 95— no statement implicating codefendant — no restrictive instruction required**

Defendants were not entitled, upon their general objections, to restrictive instructions from the trial judge, since no statement of either codefendant implicating the other was admitted in evidence.

8. Criminal Law § 113— jury instructions — failure to define "attempted" — recapitulation of defendants' evidence

In a prosecution for armed robbery with a dangerous weapon and first degree murder, the trial court did not err in failing to define the word "attempted," nor did the court err in his jury instruction by failing to state all of the evidence favorable to the defendants.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death penalty.

APPEAL by defendants pursuant to G.S. 7A-27(a) from *Hasty, J.*, at the 15 July 1974 Session of GASTON Superior Court.

On indictments proper in form, defendants were convicted of robbery with a dangerous weapon and first degree murder. The trial judge ruled that the act of robbery with a dangerous weapon was an essential element of the State's proof of murder in the first degree and that the robbery charges merged into the murder charges. Judgments imposing the death penalty as to each defendant were entered on the first degree murder convictions.

The trial of these cases began on 15 July 1974 and ended on 31 July 1974. The record of the trial, in two volumes, consists of 621 pages. For this reason our summary of the evidence, in order to be fair to both the State and defendants, of necessity is given in some detail.

The State's evidence is summarized as follows: On Saturday night, 16 February 1974, Mr. Leo Davis, age 72, and his wife Missouri Davis, age 65, were living in their five-room brick home at 402 North Pine Street in Gastonia where they had lived for thirty-three years. They retired for the evening about 9:00 p.m. At approximately 11:00 or 11:30 p.m., the doorbell rang and Mr. Davis went to the door and opened it. Mrs. Davis followed her husband to the door because she knew he did not see well. The two defendants entered through the opened door and Thomas King told Mr. Davis, who bought and sold guns, that he wanted to see one of his rifles. Joseph King, father of Thomas King, took a seat in the den on a couch about two or three feet from where Mrs. Davis was sitting in a chair. Thomas looked at the rifle and then gave it back to Mr. Davis. As Mr. Davis turned to replace the rifle on the rack, Thomas "reached in his pocket and got something and hit [Mr. Davis] in the head with it." Mrs. Davis then hit Thomas in the back with her fist, saying, "Don't you hit him like that." At that point, Joseph hit Mrs.

Davis from behind with a hammer and "skint the top of [her] head off." Mrs. Davis observed Thomas place his hands around her husband's neck as Joseph dragged her into the bedroom, pushed her onto the floor, hit her with the hammer, and stabbed her five times in the chest. When Joseph dropped the hammer, she picked it up and hit him several times with it. Soon thereafter, Thomas entered and demanded money, and Mrs. Davis opened the safe in the bedroom for them. Finding no money there, defendants again demanded money, whereupon she gave them $180 from her pocketbook. Defendants then tied Mrs. Davis with a sheet, cut the cord to the telephone, and left. When Mrs. Davis untied herself, she saw her husband's lifeless body lying in the den. She then went to a neighbor's and called the police. She was taken by ambulance to Gaston Memorial Hospital and soon after to Charlotte Memorial Hospital where she remained for approximately two weeks.

Mrs. Davis further testified that a metal box containing over $300 in half-dollars and quarters was missing from her safe after the robbery. She did not see anyone remove the box from the safe but she had seen it there when she opened the safe. Thomas was wearing a white shirt with light blue pants and Joseph was wearing dark clothes and a yarn cap on the night in question. The face of neither was covered in any way. Mrs. Davis noticed a scar or laceration on Thomas's lip. When the two men entered her home on the night of 16 February 1974, she was of the opinion, judging from the tone of the conversation, that her husband knew these men. She later remembered Joseph from his having lived in that neighborhood ten to twelve years earlier, although she had not known Thomas during that period.

Mrs. Davis selected the pictures of both defendants from photographic lineups as being the men who had committed these crimes.

Donald Robinson, a driver employed by Yellow Cab Company, received a call about 1:00 a.m. on 17 February 1974 to go to Circle View Drive in Gastonia. There he picked up the two defendants. Thomas entered the front seat and Joseph entered the back seat. Thomas was wearing light blue pants and a dark blue "dress-type" coat. The pants had a heavy stain on the right leg. Joseph's face and head were scratched and bloody. They told Robinson "something about being in a poker game and [getting] in a fight." Thomas referred to Joseph as "some-

thing like 'Pappy'." Robinson let them out at Houser's Superette on the corner of Wilkinson Boulevard and West Club Circle about three miles from where he picked them up. Thomas paid the $1.70 fare in coins, "mostly quarters."

Mrs. Brenda Lowrance testified that between 12:40 and 12:50 a.m. on 17 February 1974, defendant Thomas King came to her door on Circle View Drive in Gastonia and asked to use a telephone to call a cab. Thereupon, Mrs. Lowrance called a cab for him. Mrs. Lowrance lives about three-fourths of a mile from the Davis residence.

Charles Heffner of the Gastonia Police Department testified that while investigating this case in the early afternoon of 17 February, he found a hammer under a large truck 385 feet from the Davis residence. The residence itself was in general disarray, and there were brownish red stains throughout.

Marvin Barlow of the Gastonia Police Department testified that a small metal box was found at the Davis residence immediately outside the bedroom door. From this box three latent fingerprints were lifted and these were later identified by expert witnesses as belonging to Thomas King.

At about 7:30 a.m. on 19 February 1974, Gastonia police officers arrested Joseph King at his home at 130 West Club Circle Drive. During a lawful search of the premises, officers discovered on the living room couch a dirty blue jacket that had stains on the left shoulder.

Miss Laura Ward, a forensic serologist with the State Bureau of Investigation, testified that tests made on the coat found at Joseph King's residence on 19 February 1974 revealed the presence of human blood stains. Some of these stains were group "O" and some were group "A." An examination of the hammer in evidence revealed human blood stains of group "O." Miss Ward tested Joseph's blood and found it to be group "A." Mrs. Davis's blood was found to be group "O."

There was medical testimony to the effect that Leo Davis died as a result of asphyxiation due to manual strangulation.

Defendants' evidence is summarized as follows: When Joseph King was arrested on the morning of 19 February, it appeared to officers he had not shaved for several days. Joseph was cooperative with officers, and explained to them that scratches and a bruise on his head were caused when he hit

his head on a rusty nail in the basement of his house. He further told officers that although he knew Mr. Davis he had not seen him since he moved ten years ago from the neighborhood where the Davises lived. Joseph King did not testify at trial.

Defendant Thomas King testified that he was 23 years old and that he knew Mr. and Mrs. Davis because as a teenager he did yard work for them over a period of about two years. At about 2:30 or 3:00 p.m. on 16 February 1974, he went to Charlotte with a friend named Ronald Bridges to shoot pool at a place called Smitty's. He was wearing a dark blue jacket and burgundy pants and at no time that night was he wearing blue pants. He left Smitty's about 8:00 or 8:30 p.m. and returned home to Gastonia. He went to the home of his in-laws because he was unable to get heating oil for his house. There, he had a late supper and made arrangements to have his wife and children stay there for the night. He called his parents' home to arrange to sleep there for the night because there was not enough room for him at the home of his in-laws. When he called there, his father Joseph King was intoxicated. He then left to go a couple of blocks to a package store to get a six-pack of beer. He planned to catch a ride from there to his parents' house. While thumbing a ride to the package store, he caught a ride with a man who said he was going to Charlotte to shoot pool. Thomas decided to go to Charlotte with this man, and was let out at the Little Rock Cue Lounge in Charlotte between 10:00 and 10:30 p.m. There he saw a waitress named Debbie, Jeff Anderson, Lindsey Caldwell, and a girl whose nickname was "Sam." Of these, only "Sam" testified at trial. He shot pool at the Little Rock Cue Lounge until 12:00 or 12:15 a.m. At that point, he caught a ride with a man named Bill Patrick whom he had never seen before. Bill Patrick did not testify at trial.

Upon entering Gastonia, Bill Patrick's 1969 Chevelle had a flat tire. This occurred about 12:45 or 1:00 a.m. Patrick did not have a spare tire so he and Thomas walked to the Lowrance residence nearby, knocked on the door, and asked the lady who answered the door to call a cab for them. Thomas told Patrick to come with him to his father's house and they would make arrangements for Patrick's car. Thomas told the cab driver to stop at Houser's Superette because he wanted to make a purchase. There, he and Bill Patrick left the cab and he paid the driver $1.70 with quarters he had gotten at the pool hall. There was no blood on the clothing of either defendant or Bill Patrick.

Bill Patrick went to a pay phone booth and defendant went inside the superette and purchased a fifth of wine. After buying the wine, defendant and Bill Patrick parted and defendant walked the short distance to his parents' house. He entered the house about 1:10 or 1:20 a.m. and observed his father "passed out" on the couch in the living room. Thomas continued to the bedroom, got into bed, and began to read. His father awoke and entered the bedroom, and he and Thomas began struggling for the wine. Joseph, who was intoxicated, hit Thomas in the nose and Thomas retaliated with blows to the face which caused Joseph to hit his head on the door facing. Thomas then gave his father the bottle of wine and his father returned to the couch.

Thomas further testified that he was employed in the business of selling baby pictures and had been so employed for more than four years. His income for 1973 was between $10,000 and $11,000. He denied going to the Davis residence on 16 February 1974 and denied that he ever had a scar or any sort of laceration on his lip. He further denied that he changed clothes on 16 February 1974 or that he had blood on his trousers at any time during that period. Thomas stated that he has never referred to his father as "Pappy" or "Pop" in his life. He also denied that the fingerprints found on the metal box were his.

Ronald Lee Bridges testified that on the afternoon of 16 February 1974 he and Thomas shot pool together at Smitty's in Charlotte until about 8:00 or 8:15 p.m. Defendant had on deep red pants at that time.

David Timothy Messick testified that Thomas King's general reputation is good. He and Thomas cleaned up the Davis yard together on one occasion when they were younger. On cross-examination, Messick testified that the two boys were twelve or thirteen years of age when they did this.

Jimmy Johnson testified that he saw Thomas King and another boy cut the Davis yard on several occasions when Thomas was about sixteen years of age.

Eight witnesses, including Thomas's employer, testified that Thomas's character and general reputation were good.

Alvin Leon Carr testified that about 10:45 p.m. "on a Saturday about five or six months ago" he saw Thomas at the Little Rock Cue Lounge. Carr did not remember the date or anything

about what Thomas was wearing at the time. He did not see a woman named "Sam" shooting pool.

Samantha Elizabeth McAnulty (Sam) testified that she saw Thomas at the Little Rock Cue Lounge on 16 February 1974. She remembered what she was doing on 16 February because that is her birthday. Thomas was still there at 12:30 a.m. On cross-examination, she testified that she could not swear that she had ever seen Thomas before that date, that she does not remember with whom he was playing, and that she does not know anyone named Bill Patrick.

Mrs. Ollie Lewis testified that she is the mother-in-law of Thomas King and that he was wearing burgundy pants and a dark blue coat on the night of 16 February 1974 and during the next day. He left her house about 9:30 p.m. on 16 February and did not say where he was going.

Mrs. Thelma Seay King testified that she is the mother of Thomas King and wife of Joseph King. Joseph had been drinking since Thursday and was intoxicated when Mrs. King went to work Saturday morning, 16 February 1974. Joseph was wearing dark blue trousers and a dark blue shirt. When Mrs. King returned from shopping between 6:00 and 7:00 p.m., Joseph was home alone and was still intoxicated. She read between 7:00 and 10:30 p.m. and then went to bed. Sometime that night she heard noises from inside the building as if someone had fallen, but she did not get up. When she awoke the next morning about 6:30 or 7:00 a.m., she saw her husband on the couch wearing the same clothes and in the same condition as the night before. There were two or three wine bottles around him. The end table near the couch was out of place but she did not notice anything else. She saw her son in bed in the bedroom, and he explained that he had stayed there for the night because he had no oil at his house and because of his father's condition he did not want to bring his wife and children there. If Thomas was drinking when Mrs. King saw him, she could not tell it. Thomas was wearing burgundy pants, a T-shirt, and jacket, and she noticed no stains on his clothing. Thomas told his mother that he and his father had had a scuffle the night before. In her opinion, when she went to bed about 10:00 or 10:30 the night before, her husband was not able to go anywhere by himself.

Mrs. King further testified that a light blue pair of pants was in her clothes hamper on 17 February 1974 when she put

other clothes there but she did not know how long the pants had been there. She noticed that the blue pants had a stain somewhere on the front. She stated that her son Timothy owns these blue pants and that, in her opinion, Thomas could not wear them. She also testified that these pants had been in the hamper since sometime in January 1974.

Timothy Eugene King, brother of Thomas and son of Joseph, testified that he owned the jacket found on the couch and the pair of light blue pants found in the hamper. His blood type is "O," and the stains on both articles of clothing were there when he last saw them in January 1974. The stains were the result of work-related injuries that caused him to bleed and of a blow which he received in the mouth during a fight at which he was a bystander. He further testified that the pants fit him but are too small for his brother Thomas.

On rebuttal the State offered testimony that police officers discovered the blue pants in evidence during the search of the Joseph King residence on 19 February 1974 in a laundry hamper in the bathroom. Analysis of a stain on the right leg of these pants revealed the presence of blood, group "O." Thomas King's blood was found to be group "A."

*Attorney General Rufus L. Edmisten, Assistant Attorney General Thomas B. Wood and Associate Attorney Archie W. Anders for the State.*

*Frank Patton Cooke for Thomas Lee King, defendant appellant.*

*Robert H. Forbes for Joseph King, defendant appellant.*

MOORE, Justice.

**[1]** Joseph King moved for a separate trial and assigns as error the denial of his motion. These defendants were charged in separate bills of indictment with identical crimes. The offenses charged are of the same class, relate to the same crimes and are so connected in time and place that most of the evidence at the trial on one of the indictments would be competent and admissible at the trial on the others. Each defendant relied on an alibi as a defense and their defenses were not antagonistic. Under such circumstances, the trial judge was authorized by G.S. 15-152 (repealed by Sess. Laws 1973, c. 1286, s. 26, effective July 1, 1975) in his discretion to order their consolidation for

trial. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966); *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965); *State v. Morrow*, 262 N.C. 592, 138 S.E. 2d 245 (1964).

No statement made by either defendant was admitted which tended to incriminate or prejudice the other defendant. Hence, the rule as set out in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), as applied in *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968), does not apply.

Defendant further contends, however, that the action of Judge Hasty in consolidating the cases for trial was void because it overruled a prior order entered by Judge Grist, and that one superior court judge cannot overrule an order entered by another superior court judge. It should first be noted that the order of Judge Grist to which defendant refers was entered at a hearing held for the purpose of setting bond. This hearing was held on 13 June 1974 and after hearing a number of witnesses, Judge Grist entered an order denying the motion for allowance of bond for each defendant. He then added that the cases were held for further consideration, and

> "That the State has indicated that [it] will *probably* not proceed in both cases at the same term and counsel for the defendant, Joe King, Mr. Robert H. Forbes, has indicated he would *likewise move* that the matters not be consolidated for trial.
>
> "It further appearing to the Court that the cases were calendared for trial during the week of June 10, 1974, and that the defendants were ready for trial and that it became necessary that the State move for a continuance because of the absence of private prosecution, Mr. Grady B. Stott, and the Court having considered the motion for a bond as a further motion for a speedy trial;
>
> "THE COURT ORDERS that the State be required to elect as to which case it desires to try and that said case be placed on the calendar for trial in Gaston County on July 15, 1974." (Emphasis added.)

At the hearing before Judge Grist on 13 June 1974, no motion for a severance was pending. Such motion was not made until 9 July 1974. Judge Grist never considered this motion, and his order of 13 June only referred to future probabilities. There-

fore, Judge Hasty did not overrule Judge Grist. This contention is without merit.

The cases were properly consolidated for trial and the foregoing assignment of error is overruled.

**[2]** Defendants next contend that the trial court erred in allowing the State to introduce evidence against defendants regarding extraction of blood and hair samples from them and the comparison of blood from defendants and Missouri Davis with exhibits introduced into evidence by the State. Defendants contend that there was no factual basis for allowing these blood samples to be drawn and hair samples taken. There is no merit in this contention.

When the State moved to require defendants to submit to the extraction of blood samples and to furnish hair samples, Judge Snepp, after hearing evidence and arguments of counsel, made findings of fact fully supported by the evidence as follows:

"(1) On 16 February 1974, the dead body of Leo Davis was found by police at his home in Gaston County. It was also discovered that his wife had sustained multiple head wounds.

"(2) Mrs. Davis advised the investigating officers that two subjects assaulted her and her husband in their home; that one wore a head covering of some type; that one used a hammer as a weapon; that in a struggle with one of the persons she hit him with the hammer.

"(3) Investigating officers found a toboggan-style cap in the Davis home with hair inside it. Mrs. Davis has advised investigating officers that the cap was not her property or her husband's.

"(4) Investigating officers found a claw-type hammer lying under a truck one-half block from the Davis home. There appeared to be dried blood on the hammer.

"(5) Mrs. Davis, who is still in the hospital as a result of her injuries, has made a photographic identification of the defendants as the persons who assaulted her and her husband.

"(6) On 19 February 1974, investigating officers under authority of a search warrant searched the home of

the defendant, Joseph King, and seized clothing which appeared to be bloodstained. Apparent bloodstains were also found on the woodwork in the home.

"(7) Donald Robinson, a cab driver for Yellow Cab Company, has informed investigating officers that early in the morning after this occurrence the defendant, Tommy King, was a passenger in his cab and that the said defendant had apparent bloodstains on his clothing.

"(8) Blood samples from Mr. and Mrs. Davis have been obtained and sent to the State Bureau of Investigation for analysis.

"(9) Samples of stains on the hammer and clothing have been sent to the State Bureau of Investigation for analysis, and the bureau has advised investigating officers that the stains are blood.

"(10) The defendant, Joseph King, has stated to investigating officers that he received some cuts at his home which resulted in the bloodstains to his clothing.

"(11) The defendants both appear to be healthy males, and there is no evidence that either suffers from any illness, disease, or physical disability which would make a reasonable withdrawal of blood deleterious to his health.

"(12) That it is reasonably necessary for the State to secure hair samples and bloodstain samples from the defendants and that they will be of material aid in determining whether the defendants committed the offenses charged."

Based on these findings, Judge Snepp properly ordered that blood and hair samples be taken.

Defendants' counsel concede that their constitutional rights were not violated by the involuntary withdrawal of blood and taking of hair samples, citing *State v. Cash,* 219 N.C. 818, 15 S.E. 2d 277 (1941), and 21 Am. Jur. 2d, Criminal Law § 364 (1965).

Defendants further contend, however, that defendants' counsel had a right to be present when the blood samples were taken, but were not. For that reason they argue that the court erred in denying their motion to suppress all evidence having to do with their furnishing blood samples and the comparison of these

samples with stains found on items of clothing and other objects at or around the scene of the crime and with the blood of the victims.

As a foundation for denying this motion, Judge Hasty found, in summary:

> (1) That counsel for the defendants were specifically allowed, if they so desired, to be present when blood was extracted from their clients and a copy of said Order was served on counsel on 28 February 1974;
>
> (2) That counsel was not present during the taking of these samples on 28 February 1974;
>
> (3) That counsel at their request were furnished samples of the tests conducted at the hospital;
>
> (4) That while counsel addressed complaints to their absence at the hospital during the taking of the defendants' blood, they conceded that their serious objection was to their being compelled to furnish blood and the introduction of evidence based thereon;
>
> (5) That counsel were repeatedly told that they could have all blood tests results when received and were or would be furnished same; *and most importantly*
>
> (6) That the court indicated, should it be the request of defense counsel, that it would order the blood withdrawing procedure disregarded, and another one staged in their presence. *No such request was made.* (Emphasis added.)

Thus, counsel for defendants, by their failure to appear when the samples were taken and to request further blood tests, effectively waived their right to complain on appeal. Even without such waiver their argument here would be unavailing, for as we said in *State v. Wright,* 274 N.C. 84, 90-91, 161 S.E. 2d 581, 587 (1968):

> "The authorities hold, however, that handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and outside the protection of the Fifth Amendment privilege against self-incrimination. *Schmerber v. California,* 384 U.S. 757, 16 L.ed. 2d 908, 86 S.Ct. 1826; *Gilbert v. California* [388 U.S. 263, 18 L.Ed. 2d 1178, 87

S.Ct. 1951 (1967)]; *U. S. v. Wade* [388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967)]; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873; Annotation: Accused's Right to Counsel under the Federal Constitution, 18 L.ed. 2d 1420. Such pretrial police investigating procedures are not of such a nature as to constitute 'critical' stages at which the accused is entitled to the assistance of counsel guaranteed by the Sixth Amendment and made obligatory upon the states by the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335, 9 L.ed. 2d 799, 83 S.Ct. 792; *Escobedo v. Illinois,* 378 U.S. 478, 12 L.ed. 2d 977, 84 S.Ct. 1758; *Pointer v. Texas,* 380 U.S. 400, 13 L.ed. 2d 923, 85 S.Ct. 1065. . . . "

This assignment is overruled.

**[3, 4]** Defendants next contend that the trial judge erred in finding Bryan Stimball (in the field of blood typing), W. G. Layton, Jr. (in the field of fingerprint identification and comparison), Laura Ward (in the field of forensic serology), Dr. Eugene Rutland, Jr. (in the field of pathology), and Steve Jones (in the field of fingerprinting) to be experts in their respective fields and that, in announcing his findings in the presence of the jury, the judge expressed an opinion regarding the credibility of these witnesses contrary to G.S. 1-180.

Defendants further contend that the trial judge erred by reemphasizing these findings in his charge to the jury by stating that "an experienced fingerprint analyst of the North Carolina Bureau of Investigation and his supervisor" testified in behalf of the State. These contentions are without merit. Our cases have consistently held:

> "Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . .
>
> "A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it. . . ." 1 Stansbury's N. C. Evidence § 133 (Brandis Rev. 1973), and cases therein cited.

The evidence with respect to the qualifications of each witness fully supports the findings and it is quite obvious that the rulings finding these witnesses to be experts in their respective fields could not have been understood by the jury as anything

other than rulings upon the qualifications of the witnesses to testify as to their opinions. ". . . 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. . . ." *State v. Frazier*, 280 N.C. 181, 197, 185 S.E. 2d 652, 663 (1972).

The statement in the charge to which defendants now object was made by the trial judge in recapitulating the State's evidence and was amply supported by the testimony concerning the training and experience of these two witnesses. If defendant at the time deemed this statement to be inaccurate, he should have called the error to the trial judge's attention then and there in order to give him opportunity to correct it. His failure to do so waived whatever error, if any, there might have been. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *O'Berry v. Perry*, 266 N.C. 77, 145 S.E. 2d 321 (1965); *State v. Cornelius*, 265 N.C. 452, 144 S.E. 2d 203 (1965); *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829 (1948); *Manufacturing Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32 (1942). This assignment is overruled.

**[5]** Defendants assign as error the action of the trial court in admitting into evidence the hammer found by officers some distance from the scene of the crime and at a later time, and in permitting the testimony by witnesses with relation thereto. The hammer was found 385 feet from the den area of the Davis home lying under a dump truck at approximately 1:15 p.m. on 17 February 1974. Defendants contend that it was so remote from the commission of the crime both by distance and time that it was inadmissible.

Mrs. Davis testified that the hammer introduced into evidence was similar to the one with which Joe King hit her. Blood found on the hammer was group "O" as was the blood of Mrs. Davis.

Any object which has a relevant connection with the case is admissible in evidence and weapons may be admitted when there is evidence tending to show that they were used in the commission of the crime. 1 Stansbury's N. C. Evidence § 118 (Brandis Rev. 1973); *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973); *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968).

The testimony of Mrs. Davis that the hammer was similar to the one used to hit her was sufficient identification for the purpose of introducing it into evidence. *State v. Bass, supra; State v. Patterson, supra; State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936).

The lapse of time occurring between the crime on 16 February and the discovery of the hammer nearby on 17 February was not a significantly long period. This lapse of time and the distance from the scene of the crime to where it was found would not render the evidence incompetent but would only affect its probative force. 22A C.J.S., Criminal Law § 712 (1961); *State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85 (1972); *State v. Payne,* 213 N.C. 719, 197 S.E. 573 (1938); *State v. Macklin, supra. See State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975). This assignment is overruled.

Defendants next contend that the trial court erred in several instances in failing, upon general objection, to instruct the jury that certain evidence was to be considered against only one of the defendants and that such evidence was incompetent as to the other. Defendant Thomas King contends that it was error to fail to instruct that evidence of the officers' discovery and Mrs. Davis's identification of the coat found on the couch at Joseph King's residence could not be considered against Thomas King; that such an instruction should have been given regarding the court's findings that the search of Joseph King's residence was valid; and that such an instruction should have been given regarding evidence of the taking and analysis of the blood of Joseph King. Defendant Joseph King contends that the same instruction as to him should have been given regarding the State's evidence of blood tests of Thomas King and regarding evidence of comparison of fingerprints lifted from the small metal box with fingerprints of Thomas King. In support of their contentions, defendants cite *State v. Franklin,* 248 N.C. 695, 104 S.E. 2d 837 (1958). Defendants' reliance is misplaced.

*Franklin* involved a trial for forgery and uttering where, as here, cases of two defendants were consolidated for trial. There the State offered testimony of police officers that defendant Keith told them that defendant Jack Franklin gave him the fraudulent check and told him to get it cashed, and that Franklin wrote the check in Keith's house. We granted a new trial, holding that the statement of Keith to officers was hearsay

as to Franklin, and that the trial judge should have given, upon defendant's general objection, restrictive instructions. In the present cases, none of the evidence of the State offered against one defendant directly implicates the other in the crimes charged, and no statment made by either defendant was introduced. Hence, *Franklin* does not apply.

**[6, 7]** It is clear that the introduction of an out-of-court statement of one codefendant *directly implicating* the other entitles the other, upon even a *general* objection, to a restrictive instruction. *State v. Franklin, supra.* And, if the codefendant who made the statement implicating the other does not testify and is thus not available for cross-examination, a restrictive instruction is not sufficiently palliative and the complaining codefendant is entitled to a new trial. *Bruton v. United States, supra; State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968). We are here presented with a different situation in which *no* statement of either codefendant implicating the other was admitted in evidence. Here, on several occasions when defendants *specifically* objected and requested restrictive instructions, the trial judge, in an abundance of caution, gave such instructions. We cannot discern how the trial judge could on other occasions, upon *general* objections, understand that he was being asked to give restrictive instructions, especially when such evidence in no way implicated the objecting defendant. This assignment is overruled.

The trial judge instructed the jury: "By law, any killing of a human being by a person committing or attempting to commit robbery with a dangerous weapon . . . is first degree murder, punishable by death."

**[8]** Defendants assign as error the failure of the trial judge to define the word "attempted." In *State v. Godwin,* 267 N.C. 216, 147 S.E. 2d 890 (1966), we said:

> ". . . It is not to be assumed that the jurors were ignorant and the words, 'annoy, molest and harass,' are in such general usage and so well understood by the average person that it would have been a waste of time to define them. Had the defendant thought their definition of sufficient importance to request it, it is quite likely that the court would have defined them but the failure to make such request waives any possible error. *S. v. Caudle,* 208 N.C. 249, 180 S.E. 91; *S. v. Holland,* 216 N.C. 610, 6 S.E. 2d 217."

And, in *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853 (1956), we said:

> ". . . While the judge did not define in detail what is meant by 'an attempt to commit robbery,' the language used is accordant with ordinary meaning of the word attempt, and is clearly understandable. *S. v. Jones,* 227 N.C. 402, 42 S.E. 2d 465. . . ."

Under this same assignment defendants contend that the trial judge erred in his instruction to the jury regarding the evidence by failing to state all the evidence favorable to the defendants. G.S. 1-180 requires the trial judge to apply the law to the various factual situations presented by the evidence. *State v. Keziah,* 269 N.C. 681, 153 S.E. 2d 365 (1967). The judge is not required to recapitulate all the evidence. He is only required to state the evidence necessary to explain the application of the law thereto. The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction. *State v. Henderson, supra; State v. Noell, supra.* A party desiring further elaboration on a subordinate feature of a case must aptly tender request for further instructions. *State v. Noell, supra; State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14 (1965).

In the present cases, to make sure that the jury understood that he was not summarizing all the evidence, the trial judge stated:

> "Members of the Jury, I did not attempt to recapitulate or summarize all of the evidence in the cases. I only reviewed, as I recalled, what certain of the evidence offered by the State and the defendants tends to show. You will note I use this phrase, 'tends to show.' I did this because what, if anything, the evidence does show, is for you as the jury to determine. I only referred to such of the evidence as I deemed necessary to explain and apply the law in the cases. All of the evidence is before you and you are not to understand that I am emphasizing any part of the evidence over and against any other part of the evidence. All of the evidence is important and it is your duty to remember it all, consider it all and weigh it all in arriving at your verdicts in these cases. Therefore, if your recollection of what the evidence was differs from that of the

District Attorney or counsel for the State and counsel for the defendants or even the Court says it was, you will rely and be governed entirely and solely upon your own recollection of what the evidence was in these cases."

An examination of the charge discloses that the judge complied with the statutory requirement of G.S. 1-180. This assignment of error is overruled.

An examination of the entire record discloses that defendants received a full and fair trial, free from prejudicial error.

No error.

Chief Justice SHARP, dissenting as to the death penalty:

The murder for which defendant was convicted occurred on 16 February 1974, a date between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974)—an opinion in which Justice Higgins and I joined—, I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in *State v. Waddell, supra,* at 453 and 476, 194 S.E. 2d at 30 and 47.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 437, 212 S.E. 2d 113, 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

AYERS v. BROWN

No. 145 PC.

Case below: 25 N.C. App. 678.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

IN RE GREER

No. 187 PC.

Case below: 26 N.C. App. 106.

Petition for writ of certiorari to North Carolina Court of Appeals denied 9 July 1975.

MUNCHAK CORP. v. CALDWELL

No. 147 PC.

Case below: 25 N.C. App. 652.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

MYERS v. HOLSHOUSER

No. 153 PC.

Case below: 25 N.C. App. 683.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

PRUNEAU v. SANDERS

No. 141 PC.

Case below: 25 N.C. App. 510.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. ALLEN

No. 19.

Case below: 25 N.C. App. 623.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 26 June 1975.

STATE v. BRANNON

No. 22.

Case below: 25 N.C. App. 635.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 26 June 1975.

STATE v. BREEZE

No. 154 PC.

Case below: 26 N.C. App. 48.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

STATE v. BRYANT

No. 135 PC.

Case below: 19 N.C. App. 55.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

STATE v. CROWE

No. 120 PC.

Case below: 25 N.C. App. 420.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

STATE v. CURRY

No. 148 PC.

Case below: 25 N.C. App. 101.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 26 June 1975.

STATE v. HARRIS

No. 18.

Case below: 25 N.C. App. 404.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 26 June 1975.

STATE v. JACOBS

No. 143 PC.

Case below: 25 N.C. App. 500.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

STATE v. McDOWELL

No. 167 PC.

Case below: 24 N.C. App. 590.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

STATE v. MILLSAPS

No. 152 PC.

Case below: 26 N.C. App. 41.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. OXENDINE

No. 166 PC.

Case below: 24 N.C. App. 444.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

STEWART v. STEWART

No. 130 PC.

Case below: 25 N.C. App. 628.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 June 1975.

# APPENDIXES

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RULES OF APPELLATE PROCEDURE

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SUPREME COURT FEE SCHEDULE

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AMENDMENTS TO
RULES GOVERNING ADMISSION TO
THE PRACTICE OF LAW

# NORTH CAROLINA RULES OF APPELLATE PROCEDURE

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They shall be effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N. C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N. C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N. C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

The Drafting Committee Notes and an Appendix of Tables and Forms prepared by the Committee are published with the rules for their possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, they are not authoritative sources on parity with the rules.

Duly adopted by the Court in conference this 13th day of June, 1975.

EXUM, J.
For the Court

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NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ARTICLE I. APPLICABILITY OF RULES



ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

## ARTICLE I. APPLICABILITY OF RULES

### RULE 1

### SCOPE OF RULES; TRIAL TRIBUNAL DEFINED

(a) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies to the Court of Appeals; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) **Definition of Trial Tribunal.** As used in these rules, the term *trial tribunal* includes the superior courts, the district courts, the North Carolina Utilities Commission, the North Carolina Industrial Commission, and the Commissioner of Insurance.

**Drafting Committee Note**

**Sources of parallels in former rules or statutes:** None.

**Commentary.**

**Subdivision (a)** charts the coverage of this unitary set of Rules of Appellate Procedure as promulgated by the Supreme Court effective July 1, 1975. This coverage includes all appeals to and review by the Court of Appeals and the Supreme Court. It does *not* include certain other "appeals" within the General Court of Justice: i.e. appeals from clerk of superior court to judge of superior court under G.S. §§ 1-272 et seq.; from quasi-judicial bodies to superior court, as under G.S. §§ 150A-43 et seq.; and from magistrate to district court for trial de novo under G.S. §§ 7A-228 et seq.

**Subdivision (b)** expresses a fundamental limitation on the scope of the rule-making power of the Supreme Court under which these Rules are promulgated. The essential rule-making power is grounded in the Constitution which, in Art. IV, § 13(2), confers upon the Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." The same section forbids exercise of that power in a way which would "abridge substantive rights or abrogate or limit the right of trial by jury." This Rule further disclaims any power or intention by the Court that the Rules be interpreted in any way to alter the jurisdiction of the

courts of the appellate division as prescribed by Constitution and statute. This simply expresses a further restriction on the rule-making power which, though not explicit in the Constitution as is the limitation above noted, is certainly implicit in the general "separation of powers" provision, Art. 1, § 6.

**Subdivision (c)** is self-explanatory.

## RULE 2

## SUSPENSION OF RULES

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

### Drafting Committee Note

**Sources or parallels in former rules or statutes:** None.

**Commentary.** This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules. The power does not of course depend upon its express reservation by the Court in the body of the Rules. It is included here as a reminder to counsel that the power does exist, and that it may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court. The phrase "except as otherwise expressly provided" refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules (i.e. Rules 14 and 15) or in "jurisdictional" statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by any court.

# ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

## RULE 3

## APPEAL IN CIVIL CASES — HOW AND WHEN TAKEN

(a) **From Judgments and Orders Rendered in Session.** Any party entitled by law to appeal from a judgment or order of a superior

or district court rendered in a civil action or special proceeding during a session of court may take appeal by

(1) giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) **From Judgments and Orders Rendered Out of Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(c) **Time When Taken by Written Notice.** If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under Rule 59 to alter or amend a judgment; (iv) a motion under Rule 59 for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivisions (a)(2) and (b) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and

the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

**Drafting Committee Note**

**Sources or parallels in former rules or statutes.** Subdivisions (a), (b), (c): G.S. §§ 1-279, 1-280. Subdivisions (d) and (e): None.

**Commentary.**

**Subdivision (a)** carries forward the traditional code practice which has permitted appeal to be taken from judgments rendered during a session of court by either of two means: 1) oral notice given "at trial," or 2) written notice filed and served within a specified period (10 days from "entry" per subdivision (c)). The opportunity to give oral notice is extended by the Rule to other settings than the traditional "at trial" and "during a session," to include additionally the setting described as "at a hearing" on any of the typical post-verdict motions under Rules 50 and 59 of the Rules of Civil Procedure. The phrases "during a session" and "at trial" are carried forward from the old code statutory sections to describe the traditional setting for oral notice. Although questions could always have existed as to when "trial" begins and ends, bench and bar have always equated "at trial" with "in open court" and there simply has not been this difficulty. See, e.g., *Mason v. Commrs. of Moore County*, 229 N.C. 626, at 627, 628 (1948). The underlying notion behind charging all parties with notice of appeal given orally "at trial" is undoubtedly the same as that which dictates that oral *motions* suffice to charge all persons with notice when made during the course of trial, a principle long recognized in our pre-1970 code practice, *Collins v. N. C. State Hwy. & P.W. Comm.*, 237 N.C. 277 (1953), and now expressly embodied in N.C.R.Civ.P. 7(b)(1). It is in keeping with this principle that the Rule now extends the opportunity for giving oral notice of appeal to these specific, frequently used post-verdict motion hearings. Here too it seems fair to charge with notice, since parties must have been given notice of the hearings themselves. N.C.R.Civ.P. 7(b)(1), 5(a). In any event, an appellant may always elect in either setting to give written notice (within the prescribed period) rather than oral notice. And if, as will frequently be the case, the hearing is adjourned without ruling, the appellant will perforce have to use written notice when the order is later entered.

This Rule does not speak to the related matter of providing a record entry of the fact that appeal has been duly taken by either mode. The code provision, former G.S. § 1-280, cryptically required that, however appeal was taken, the appellant should "cause his appeal to be entered by the clerk on the judgment docket." This requirement of formal entry "on the judgment docket" was early held not mandatory, just so long as the record showed in some adequate way that appeal was duly taken by either mode. *Atkinson v. Asheville St. Ry.*, 113 N.C. 581 (1893). The traditional way of insuring this record entry—particularly appropriate for the oral notice—

came to be by using practically standardized "appeal entries" which, along with recitations concerning security and time-tables for perfecting appeal, contain a notation that appeal has duly been taken. These Rules carry forward the developed requirement of such record entry. See Rule 9(b)(ix). This latter provision clearly authorizes continued use of the customary "appeal entries" to record the taking of appeal by oral notice. In the case of appeal by filing written notice, a copy of the written notice, with filing date per Rule 9(c)(3), will clearly suffice as the record entry of the fact that appeal has been duly taken. See Committee Form 5 "Appeal Entries," with explanatory Note.

**Subsection (2) of subdivision (a)** requires that service of copies of a written notice of appeal be made by the appellant upon all *other* parties, not just *adverse* parties as under the formerly controlling code provision, now repealed G.S. § 1-280. The primary reason for extending the requirement of notice to other than adverse parties is to tie into the provision of subdivision (c) which tolls the time for taking appeal as to all other parties when any party takes a timely appeal. Another reason is that it may sometimes be difficult to determine just who is such an "adverse" party. Co-parties may in some situations be "adverse." *Rose v. Baker*, 99 N.C. 323 (1888) (interest of co-defendant not given notice of appeal may not be adversely affected upon appellate review). This rule avoids any necessity for making such a determination. Rule 26, which is cross-referred in subdivision (e) of this Rule for the manner of making service, provides such simple and ready means that the requirement of all-party service seems not burdensome.

**Subdivision (b)** carries forward the traditional practice by which appeals from judgments not rendered in session (hence not subject to appeal by oral notice "at trial") may of course be taken by filing and serving written notice of appeal within the time provided in subdivision (c).

**Subdivision (c)** provides the timetable for taking appeal by written notice. It thus is in play in all situations where appeal is not taken by oral notice. The basic time limit is the traditional 10 days of code practice. But this time commences to run from a different point than did the period under former statutes (as judicially interpreted). Under former law, the time was stated to run from the date of "rendition" of a judgment in session, and from the date of "notice" of a judgment rendered out of session. G.S. § 1-279. By judicial interpretation these points in time had been fixed, respectively, as the last day of the session and as the date when the judgment was filed in the clerk's office. 2 McIntosh, *North Carolina Practice and Procedure in Civil Cases*, § 1783(1) 2d ed. 1956). Under this Rule 3 the time begins to run with respect to *any* civil judgment, whether rendered in or out of session, from the date of its "entry." "Entry" is a word of art with a precise meaning now dictated by Rule 58 of the Rules of Civil Procedure. However satisfactory the procedure under Civil Rule 58 generally, its clear specification of the act which accomplishes "entry" of a judgment of any kind, coupled with its requirement that this be made a matter of record, provides counsel with sure means of determining for purposes of appeal that judgment has been entered and the time of its entry. This subdivision contains two other important innovations. The first causes the running of appeal time to be tolled by the filing of a post-verdict motion

under either Rule 50, 52 or 59 of the Rules of Civil Procedure, with the period recommencing upon the entry of an order upon the motion. (A result only partially achieved by 1971 amendment to G.S. § 1-279 which gave this effect only to Rule 59 motions.) The second avoids any further need for the so-called "protective" appeal by a party who is content to abide the judgment unless some other party takes appeal, but who wants to go up as an appellant if this transpires, and who therefore has been forced to give notice of appeal against the possibility that another party will take appeal at the last moment. This awkwardness is avoided by the provision that the timely taking of appeal by any party automatically gives all other parties 10 additional days from that time to note appeal.

**Subdivision (d)** includes a new requirement of specific elements to be included in a written notice of appeal. These conform to generally accepted ideas of what such a notice should contain and, indeed, to customary practice in this state. See F.R.App.P. 3(c) and 3 *Douglas Forms*, Form 1168. In particular, the specification of the exact order or the portion of a judgment from which appeal is taken may save against occasional confusion. Federal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal. See, e.g., *Higginson v. U.S.*, 384 F. 2d 504 (6th Cir. 1967) (wrong order designated; deemed corrected by correct identification in brief); *Graves v. General Insurance Corp.*, 381 F. 2d 517 (10th Cir. 1967) (designation of wrong court harmless under circumstances). See Committee Forms 1 and 2.

**Subdivision (e)'s** cross-reference to the general "Filing and Service" rule, Rule 26, is made in order to insure counsel's attention to the variety of means by which service of the required copies of the notice of appeal may be made. See Commentary to subdivision (a), section (2). Since "taking" appeal by written notice requires both filing and service within the 10-day period, App. R. 3(a)(2), counsel must be careful to effect *service* as well as filing within the time. The most obvious way to do this is by the use of mail which, properly posted, is effective upon posting, or, where convenient, hand delivery to counsel or to an employee or partner at his office. App. R. 26(c). Service by an officer, though authorized by this same subdivision of Rule 26, is of course less subject to control, and will be effective only upon consummation of service.

**General.** It should be noted that the statutes which have heretofore been the sole sources for the procedure in "taking" appeal, G.S. §§ 1-279, 1-280 (for civil appeals) and G.S. § 15-180 (which for criminal appeals simply borrowed the civil procedure), have been substantially amended to incorporate the basic changes in this procedure which is now incorporated in this Rule 3 and in following Rule 4 (for criminal appeals). Indeed, the controlling statutes and Rules now simply replicate each other. See G.S. § 1-279, as re-written in 1975, and G.S. § 15-180.3, enacted in 1975, to parallel the two rules in the respects described in the rule commentaries.

## RULE 4

## APPEAL IN CRIMINAL CASES — HOW AND WHEN TAKEN

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after the last day of the session at which rendered.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a) (2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

### Drafting Committee Note

**Sources and parallels in former rules and statutes:** G.S. §§ 15-180, 1-279, 1-280.

**Commentary.**

See the *General Commentary* to Rule 3 which points out the statutory amendments made in conjunction with promulgation of these rules to bring the two into conformity on the procedure for taking appeal from the trial courts.

**Subdivision** (a) carries forward traditional practice by which in criminal cases (borrowing the code procedure for civil appeals) appeal may be taken either by oral notice given at trial or by written notice within a specified time after judgment. The traditional time of 10 days is also carried forward. Under formerly controlling statutes (G.S. § 1-279, borrowed for criminal appeals by G.S. § 15-180) this time commenced to run upon "rendition" of judgment, and by judicial interpretation this event was fixed as the last day of the session at which rendered. This judicial gloss is now incorporated expressly in the Rule to accord with customary practice. (Note that this differs from the starting point for the running of time in civil appeals, which is the date of "entry" of judgment under Rule 58 of the Rules of Civil Procedure. See commentary to subdivision (a) of Rule 3.)

Taking appeal, when written rather than oral notice is given, involves both *filing* and *service* of the notice, with service of copies required only upon *adverse* parties. (Note again a difference from the procedure in civil appeals, under which per App. R. 3(a) and (b) service is required upon all *other* parties.) Obviously, when a criminal defendant appeals, there is only one such adverse party, the State. G.S. § 1-5. In the infrequent situations in which the State may appeal, G.S. § 15-179, if there are multiple defendants, service must be upon all of them. The reasons for not requiring criminal defendants to serve copies upon any co-defendants are: 1) the practical difficulty of doing so in situations of confinement, and 2) the absence of any provision in criminal appeals similar to that in Rule 3(c) for civil appeals which tolls the running of appeal time for all other parties when timely appeal is taken by any party.

Because it is not the practice to enter any judgments or orders from which appeal would lie in a criminal action except during a session of court, this Rule 4 does not contain any provision like that in App. R. 3(b) which provides for appeals in civil actions from judgments rendered out of session. If an appealable judgment or order were to be entered out of session (whether authorized or not), it is obvious that appeal must then be taken by filing and serving written notice.

**Subdivision (b).** See commentary to subdivision (d) of Rule 3, and Committee Forms 1 and 2.

**Subdivision (c).** See commentary to subdivision (e) of Rule 3.

## RULE 5

## JOINDER OF PARTIES ON APPEAL

(a) **Appellants.** If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) **Appellees.** Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder.** After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

**Drafting Committee Note**

**Sources and parallels in rules and statutes:** None.

**Commentary.**

While former statutes and rules obviously contemplated appeals involving multiple parties, and occasionally alluded to the special problems thereby created (as in Sup. Ct. R. 19(2)), they were basically designed to fit the single appellant-single appellee pattern. Specifically, they made no direct provision for joinder on appeal of either appellants or appellees. Since this can be a helpful procedure, this Rule 5 directly authorizes it and lays down quite simple procedures to accomplish joinder. While joinder of appellants will be much more common, appellees may also desire to join on occasion, and subdivision (b) provides for this. The main advantage derived from joinder on either side is reduction in the paper work and effort required, particularly in respect of service of various papers required to be served on all parties. Subdivision (c) cross-refers to a provision in Rule 26, the general filing and service rule, which makes service on any party joined on appeal service on all so joined, thereby insuring this advantage.

Related Rules dealing with other aspects of multiple-party appeals are Rule 11(d) (single record on appeal despite multiple appellants proceeding separately); Rule 26(f) (service on numerous parties proceeding separately); and Rule 11(b) and (c) (procedure for settling record where multiple appellees proceeding separately).

## RULE 6

## SECURITY FOR COSTS ON APPEAL IN CIVIL ACTIONS

(a) **In Reguar Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. §§ 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. § 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision

(c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. §§ 1-285, 1-286, 1-287, 1-288; Court of Appeals Rule 6(a).

**Commentary.**

**Subdivision (a)** simply cross-refers to the statutes which require that ordinarily security for costs be provided as a condition to the right to prosecute an appeal and prescribe the mode of setting and perfecting such security. This basic requirement bears so directly upon the financing of the court system that it seems properly a matter for legislation rather than judicial rule-making as the authoritative source. Cross-reference in these Rules is simply in the interest of the completeness of their coverage of each critical step in the process.

**Subdivision (b)** similarly cross-refers to the statutory exception to the basic requirement—that of appeals in forma pauperis—and is for the same purpose as stated for subdivision (a).

**Subdivision (c)** carries forward a requirement of former Court of Appeals Rule 6(a) that the appeal bond be filed *with* the record on appeal. That rule did not, as does this, make alternative provision for filing certificate of the provision of cash deposit in lieu of bond, an alternative clearly permitted by G.S. § 1-286.

**Subdivision (d)** picks up procedures formerly spelled out in G.S. §§ 1-285 and 1-287 by which failures properly to provide required security or to file evidence thereof with the record on appeal may be brought to the attention of the appellate court and made the basis of dismissal or of correction. These provisions have been removed from the cited statutes by 1975 amendments on the basis that they pertain more properly to the appellate rule-making power. The substance of these procedures is unchanged, so that no change of established practice is involved. The cross-reference is to the general motion practice rule, Rule 37.

## RULE 7

## SECURITY FOR COSTS ON APPEAL IN CRIMINAL ACTIONS

(a) **In regular course.** Except as provided in subdivision (b) of this rule, a defendant convicted in the superior court of any criminal offense must as a condition of the right to appeal give adequate security for the costs of the appeal. The procedure for setting and perfecting the security is as provided for appeals in civil cases by G.S. §§ 1-285 and 1-286.

(b) **Indigent Appeals.** An indigent entitled to counsel under the provisions of G.S. Chapter 7A, Subchapter IX who has been convicted in the superior court need give no security for the costs of appeal.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. §§ 15-180, 15-181, 1-285, 1-286, 1-287, 1-288; Court of Appeals Rule 6(a).

**Commentary.**

**Subdivisions (a) and (b)** in effect restate the basic requirements for the provision of security in criminal appeals found in G.S. §§ 15-180, 15-181,

1-285, and 1-286. The purpose of this replication in the rule of provisions found in authoritative statutes is as stated in the Commentary to subdivision (a) of Rule 6.

**Subdivision (c).** See Commentary to subdivision (c) of Rule 6.

**Subdivision (d).** See Commentary to subdivision (d) of Rule 6.

## RULE 8

## STAY PENDING APPEAL IN CIVIL ACTIONS

When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

### Drafting Committee Note

**Sources and parallels in former rules and statutes:** Former Sup. Ct. R. 34(2).

**Commentary.**

The act of taking appeal in a criminal case automatically stays execution of judgment pending disposition of the appeal. G.S. § 15-184. The situation is not as simple with respect to civil judgments, and this Rule speaks to that situation in order to interrelate the procedures for obtaining stay of execution of such judgments at the trial court level with the supersedeas writ practice by which stay may be obtained from an appellate court under the provisions of App. R. 23.

The procedure for obtaining stays at the trial court level is controlled by N.C.R.Civ.P. 62. That rule contains internal provisions for obtaining stays of some judgments by motion, and cross-refers to certain statutes which provide for automatic stays of other specific judgments by deposit of security in the trial court. The basic thrust of this Rule 8 and the interrelated supersedeas rule, App. R. 23, is to require that, ordinarily, a party

must have attempted unsuccessfully to obtain or to hold a stay order at the trial court level under the provisions of N.C.R.Civ.P. 62, before being permitted to seek stay by writ of supersedeas from the appellate court. "Stay order" as used in this rule includes orders which are in effect continuations of injunctive relief which has been vacated by the trial court judgment or order from which appeal has been taken, or which "suspend," pending disposition of an appeal, injunctive relief granted by the judgment or order from which appeal is taken. See N.C.R.Civ.P. 62(c).

## RULE 9

## THE RECORD ON APPEAL — FUNCTION, COMPOSITION, AND FORM

(a) **Function.** In appeals of right from the district courts and superior courts, review is solely upon the record on appeal constituted in accordance with this Rule 9.

(b) **Composition.**

(1) **In Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a copy of a stipulation of counsel showing the same; (iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law; (viii) a copy of the judgment, order, or other determination from which appeal is taken; (ix) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (x) copies of all other papers filed and transcripts of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned, and (xi)

exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **In Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a copy of a stipulation of counsel showing the same; (iv) copies of all petitions and other pleadings filed in the superior court; (v) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (vi) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (vii) so much of the evidence taken before the board or agency and in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the superior court, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the superior court, set out as provided in Rule 10.

(3) **In Criminal Actions.** The record on appeal in criminal actions shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court; (iv) copies of docket entries or of a stipulation of counsel showing all arraignments and pleas; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instruc-

tions to the jury, a transcript of the entire charge given; (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken; (viii) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (ix) copies of all other papers filed and proceedings had in the trial courts which are necessary for an understanding of all errors assigned, and (x) exceptions and assignments of error set out as provided in Rule 10.

(4) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(5) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(6) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative the appellate court may order additional portions of a trial court record sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal amended to correct error shown as to form or content.

(c) **Form — General Provisions.**

(1) **Evidence — How Set Out.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(b) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form.

Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substan-

tial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Exhibits.** (i) Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by stipulation of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(ii) Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed as part of the record on appeal. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the court to which appeal is taken. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the record on appeal.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively. At the end shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. §§ 1-282, Sup. Ct. (and Ct. App.) Rules 19, 20, 21, 22, 23, 26.

**Commentary:**

General. This Rule, in subdivision (b), contains a fundamentally new approach to prescribing the composition of the record on appeal. The tradi-

tional formula of the code and implementing rules of a "record proper," supplemented where required by a "settled case on appeal," is here abandoned in favor of a detailed enumeration of required items for each of the three types of cases which can be appealed from the trial courts to the appellate courts: civil actions, subd. (b)(1); criminal actions, subd. (b)(3); and appeals from superior court administrative agency reviews, subd. (b)(2). Over the years the practice had already essentially moved around the theoretical code design, as the exact composition of the "record proper" became less and less clear. The device of a specific listing of items is designed to make more certain the process of composing the record on appeal and so to reduce some of the confusion clearly indicated in records and court discussions of imperfectly composed records arising to some extent from the code terminology and its related procedures.

While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal, it retains the two most fundamental features of the code approach: 1) use of authenticated copies of trial court record items (plus reporter's transcript), rather than the original trial court papers themselves; and 2) a forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on the original papers" approach now utilized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief. The selection process under this Rule is dictated with respect to enumerated items which may or may not be relevant from case to case, such as jury instructions and other elements of the trial process, by those provisions which admonish inclusion only "when necessary to understand errors assigned." It is in this way that the case-by-case flexibility of composition of the code's "settled case" is carried forward. Counsel should be alert to one fundamental change which this approach involves. Formerly, if appeal could be prosecuted on the "record proper," appellant need not either obtain agreement of appellee nor make service upon him of a "statement of case on appeal," but could merely have the clerk certify the items constituting the "record proper," and docket this as the complete "record on appeal" in the appellate court. See, e.g., *Edwards v. Edwards*, 261 N.C. 445 (1964) (appeal from judgment on the pleadings). Under the new rule, even in such a case he must either obtain agreement of counsel to these items as the "record on appeal" under Rule 11(a), or serve them upon him in a "proposed record on appeal" for acceptance under Rule 11(b) or judicial settlement under Rule 11(c).

While the Rule requires routine inclusion in the record on appeal of all those items which clearly would have been considered parts of the "record proper" under the code (e.g. items iii, iv, vii, viii of subd. (b)(1) for civil appeals), it should be noted that Rule 12(c) provides that even these items may be excluded from those work copies of the formal record on appeal actually prepared by the appellate court clerk for direct consideration by the members of his court. This lays the basis for a two-stage selection process which if carefully followed will produce: 1) an original record on appeal, available for inspection by the court, which is broad enough in scope to allow fair consideration in relevant context of all errors

properly to be considered; but 2) "work" copies for individual members of the courts from which have been excluded any formally required items in the original record (such as pleadings, jurisdictional statements or papers) which are not relevant to consideration of particular errors assigned by the parties. Cf. former Sup. Ct. R. 22 and see Commentary to Rule 12(c).

**Subdivision (b)(1)-(3).** While most of the items enumerated for inclusion in the original records on appeal in these three catagories of cases are self-explanatory, it may be helpful to relate some to practice under former statutes and rules.

Item (ii) in subsections (1), (2), (3): "a statement identifying the judge, etc." This is designed to perform the function of the "organization of the court" item indirectly required by former Sup. Ct. R. 22, and traditionally included by counsel in widely varying form in the original record on appeal. The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of the particular trial judge and tribunal, whether or not any jurisdictional question has been directly raised by the parties on appeal. See N.C.R.Civ.P. 12(h)(3) (lack of subject matter jurisdiction may be noted by court at any stage of proceedings). The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice. If peripheral questions of "organization" such as the composition of grand or petit jury are to be drawn in question, this should be done by specific assignment of error with relevant parts of the record specially included.

Item (iii) in subsections (1) and (2), "a copy of the summons, etc.". This is designed to provide a record showing of the existence of "judicial" jurisdiction of the trial tribunal, whether personal over the defendant, in rem, or quasi in rem, and however based and exercised. Under Code practice it had consistently been understood that the *summons* constituted a part of the "record proper," so must be included in the original record on appeal. *Cressler v. City of Asheville*, 138 N.C. 482 (1905) ("summons, pleading and judgment"). And Sup. Ct. R. 22 built indirectly upon this by providing that the summons so included need not be included in the "printed" copies prepared by the Clerk. Both of these prescriptions, framed in an earlier day of simple process and jurisdiction rules, were too narrowly confined in terms, seemingly only to cases where personal jurisdiction has been acquired by personal service of process. This new Rule speaks more contemporaneously and accurately to the underlying necessity, which is for a record showing of "judicial" jurisdiction, whether over person or property, and whether acquired by service of summons, publication, notice, appearance, waiver, or however.

Item (ix) in subsection (1); (viii) in subsections (2) and (3), "a copy of the notice of appeal, etc.". This carries forward existing practice, not formerly required by statute or rule but by judicial decision, e.g., *Atkinson v. Asheville St. Ry.*, 113 N.C. 581 (1893), of including in the record on appeal a showing of appeal properly taken and perfected. This establishes as a matter of record the jurisdiction of the *appellate court* in the particular case. The way in which this has traditionally been shown is by the standardized "appeal entries" which show appeal taken orally "in open court," "further notice waived" (unnecessary), accompanied by any judicial extensions of the statutory times for serving "case" and "counter case,"

and the amount of appeal bond. This may certainly be continued under this Rule, but the Rule would also be complied with by inclusion of a copy of a written notice of appeal with proof of service under Rule 3(a)(2), or 3(b) and with separate showing of any judicial orders extending times for perfecting appeal. See Committee Form 5, "Appeal Entries."

**Subdivision (b)(4).** Self-explanatory. Cf. former Sup. Ct. R. 19(1).

**Subdivision (b)(5).** Former Sup. Ct. R. 26 provided for recovery of the costs of printing records and briefs by the party prevailing, but limited recovery on a maximum page/maximum per page cost basis. This operated indirectly, and in experience not too successfully, as a deterrent to inclusion in the record on appeal of unnecessary matter. Former Sup. Ct. RR. 26 and 19(5) also provided a more direct sanction of costs against the party responsible for the inclusion of unnecessary matter in the record on appeal, without regard to outcome of the appeal. This sanction had apparently seldom been invoked. This subdivision of the new rule abandons the page/cost per page limitations on recovery of printing costs by a prevailing party, and retains the sanction of imposing costs of unnecessary portions on the offending party. It has two new features: 1) the sanction is not dependent upon an opposing party's objection, but may be imposed by the court on its own initiative; 2) the costs are chargeable directly against *counsel* as well as a party in the court's discretion.

**Subdivision (b)(6).** Self-explanatory. Cf. former Sup. Ct. R. 19(1).

**Subdivision (c)(1).** The problem of incorporating evidence in the record on appeal has two aspects: 1) determining that portion of the total received (or offered) to be included, and 2) the mode of setting out *testimonial* evidence. This subdivision addresses the latter aspect.

The best possible incorporation of testimonial evidence in a record on appeal would 1) include no more than is minimally required for reviewing errors assigned; 2) set out in narrative summary form that which merely lays an undisputed factual context or provides an undisputed factual background; and 3) set out in question-and-answer form all that wherein shades of meaning, nuances of expression, and ambiguity of question or response bear obviously upon the sense and credibility of testimony. An all-narrative summary undoubtedly obscures the true sense of much critical testimony, tends to encourage inclusion of unnecessary portions, and is exceedingly time-consuming. An all-verbatim transcript inevitably includes long passages of confused questions and answers frequently leading finally to the establishment of purely peripheral fact which, though necessary as context or background, is not really disputed and could be compressed fairly into summary form. Generally speaking, it is obvious that a narrative form is easier for the reviewing court to use, while a verbatim question-and-answer form is easier for counsel to prepare. The problem has been and remains one of accommodation to these conflicting interests and values. This subdivision attempts a new accommodation. Its first sentence continues, for obvious reasons, the traditional requirement that evidence whose admission or exclusion is assigned as error be included in question-and-answer form. The rest of the subdivision involves a limited relaxation of the former flat requirement of narrative form for all other testimonial evidence included. The idea expressed is that this remains the ordinarily preferred and re-

quired form, but with the option given to use question-and-answer form where the narrative would obscure particular testimony's true sense. With this option given, it may inevitably become the object of disagreement between counsel during the process of composing the record on appeal. To aid both counsel and any judge required to settle such a dispute as to form, the last paragraph of this subdivision is devoted to a general statement of the considerations properly to be used in determining the fitness of the particular mode in dispute. These are to be brought into play in the normal process, set out in Rule 11, of settling the record—whether by agreement, acceptance through adversarial exchange, or judicial settlement. In this process the appellant will obviously have the first opportunity to choose the form or forms to be used (after having first selected those portions of the total evidence which are to be included in any form). This choice might be exercised informally in a proposal to the appellee for an agreed record on appeal, or in a formal "proposed record on appeal" served upon the appellee. In the latter situation an appellee might either formally object to the proposed form, or include a different form in his "proposed alternative record on appeal." In either case, judicial settlement as to the propriety of the disputed form would then be forced.

**Subdivision (c)(2)** deals in its two subsections with two different kinds of exhibits which may be required items in the record on appeal. Subsection (i) deals with documentary exhibits (which ordinarily will not have been introduced in evidence) which are attached to or are parts of items required to be included in the record on appeal under Rule 9(b) (such as pleadings). On motion these may be excluded as unnecessary to the appeal from the item of which they are a part or to which they are attached, though the item itself must be included in the record on appeal. Subsection (ii) deals with evidentiary exhibits, both documentary and other, which are required items in the record on appeal. If documentary, three copies must be filed with the record. If not documentary only the original, for obvious reasons, need be filed. To protect clerks in their custodial responsibility against the possible loss or damage to such exhibits, G.S. § 7A-106, the rule provides that these may be transmitted directly by the clerk to his appellate court counterpart without relinquishing their custody to counsel.

**Subdivision (c)(3).** Self-explanatory. From former Sup. Ct. R. 19(1)

**Subdivision (c)(4).** Self-explantory. From former Sup. Ct. R. 19(1).

## RULE 10

## EXCEPTIONS AND ASSIGNMENTS OF ERROR IN RECORD ON APPEAL

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made

the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) **Exceptions.**

(1) **General.** Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.

(2) **Jury Instructions; Findings and Conclusions of Judge.** An exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury or to make a particular finding of fact or conclusion of law which was not specifically requested of the trial judge shall identify the omitted instruction, finding, or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

(c) **Assignments of Error — Form.** The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and

without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to which it is directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) **Exceptions and Cross Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), or may be included by the appellee in a proposed alternative record on appeal under Rule 11(b).

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. § 1-282; Sup. Ct. Rules 19(3) and 21.

**Commentary.**

**General.** A necessary feature of any system of appellate procedure which uses a selectively composed record on appeal rather than the entire trial court record is some such sifting process as that embodied in the "exception/assignment of error/questions presented in brief" process brought forward in these rules from code practice. The function and operation of this essential process have been poorly described in former rules and statutes and erratically applied in practice. It is the purpose of this Rule 10 better to describe both intended function and details of operation in an effort to improve practice in this critical area.

**Subdivision (a)** seeks to express the intended function of this process, and does so in a paraphrase of various formulae used by the courts over the years in their frequently frustrated attempts to police the practice. See, e.g., *State v. Dishman*, 249 N.C. 759 (1959); *Nye v. Devel. Co.*, 10 N.C. App. 676 (1971). The sifting function which is implicit in this statement might be expressed in more specific form as follows. 1) Every judicial action at the trial court level constitutes potentially prejudicial error to the party disfavored by it; hence the total of such actions which disfavor the eventually losing or "aggrieved" party constitute the pool of potentially reversible errors on appeal. 2) But no such error ought be the subject of

appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it, or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel. The classic way of making a required suggestion of error in the trial court is by the formal "exception" orally announced, or presented in writing in apt time. Other less formal means of suggesting error may of course be equally effective, so that an "exception" may be "preserved" by them. N.C.R.Civ.P. 46(b) ("formal exceptions . . . unnecessary"). Other error may be considered of such serious consequence that it requires no suggestion from counsel, and is by law "deemed excepted to." N.C.R.Civ.P. 46(c) (instructions to jury). 3) Whether an exception to it has been actually taken or merely "deemed" taken, the fact that error will be asserted on appeal in respect of particular judicial action must be noted in the record on appeal, first for the benefit of the adverse party, then for the reviewing court. This requires that each such exception be there "set out" in some way which sufficiently identifies the judicial action to which it is addressed. 4) All such exceptions should then be made the basis of formal "assignments of error" in the record on appeal. These constitute in effect the "pleadings" on appeal, for they signal to the adversary the points of law which will be urged on appeal. Each should be confined to a single issue of law, and all exceptions pertinent to this issue should be visibly "grouped" under that assignment of error. This fixes the potential scope of review, and therefore enables the appellee to assess the appropriateness of the record on appeal as proposed by the appellant. 5) From among these "assignments of error" the appellant may choose in the final stage of the sifting process to use all or less than all as the basis for the questions formally to be presented for review in his written brief. These "questions presented" ultimately define the scope of review. Hence the formula: "questions presented must be supported by assignments of error which must be supported by exceptions." Or, obversely: "exceptions not made the basis of assignments of error, and assignments of error not made the basis of questions in the brief, are deemed abandoned." The last sentence proviso expresses the limited exceptions to this basic scheme. The three defects there identified are all of such fundamental significance—going to the jurisdiction of the court and to the question whether the judgment is supportable on the issues before the court—that no exception or assignment of error is required to permit their consideration on appeal. Cf. former Sup. Ct. R. 21 and see *Burroughs v. Realty Co.*, 19 N.C. App. 107 (1973). This subdivision is designed to highlight the underlying purpose behind the exception/assignment of error process in order to make more understandable the desired form and function of the two devices. These are then addressed in the next two subdivisions.

**Subdivision (b)(1).** The first sentence builds upon the point developed in the commentary to subdivision (a), that only those "exceptions" may be set out in the record on appeal and so made the basis of assignments of error which were taken in the trial court by the classic mode of the spoken or written word "exception"; or "deemed" taken from other conduct, as by objecting to the admission of evidence, N.C.R.Civ.P. 46(a)(2), or from other action plainly indicating opposition to judicial action taken or proposed, N.C.R.Civ.P. 46(b); or "deemed" taken without *any* action by counsel simply because the error is considered sufficiently fundamental, as in instructions to the jury, N.C.R.Civ.P. 46(c).

It is obvious from this that it is rarely the case that an "exception" set out in the record on appeal will necessarily reflect the actual taking of a formal exception at trial. This points to the true, and limited, function of the exception "set out" in the record on appeal: it is merely to provide a visible reference point in the record on appeal for the reviewing court to locate the particular judicial action assigned as error. Recognition of this quite limited function of the exception in the record on appeal explains the next two sentences in the subdivision. By the first, it is provided that a formal "bill of exceptions" need no longer be filed. Without using the exact term, former Sup. Ct. R. 21(c) plainly contemplated the filing of such a "bill" in all situations "when no case settled is necessary", i.e., when the judicial action to be assigned as error occurred with respect to a matter included in the "record proper"—such as the entering of judgment on the pleadings. When formal exception to such action at the trial court level was required in order to "preserve" exception for inclusion in the record on appeal, a written bill filed with the trial court was obviously necessary. Under N.C.R.Civ.P. 46, however, no "formal exception" to such an order is now necessary just so long as counsel resisted allowance of the motion. An exception may now be set out in the record because by this trial rule it is deemed "preserved" by that action. Of course this does not obviate the necessity that there shall have been such a plain indication by counsel of his opposition, and a written "exception" filed with the court would clearly still perform that function, whether denominated a "bill" or not. The next sentence makes plain this limited function by emphasizing that it consists simply of pointing out in the record on appeal the particular judicial action to be assigned as error, and that this does not require any statement of grounds or argumentation. The last sentence of this subsection carries forward traditional practice of consecutive numeration of the exceptions set out in the record on appeal. See Committee Form 6 A-C for illustrative examples.

**Subdivision (b)(2)** carries forward in its first sentence traditional practice for the clear identification of portions of the judge's charge to which exception is being set out in the record. The second sentence involves a change in the practice recently required by the court for identifying instructions whose *omission* is to be assigned as error. This requirement has been that at least a paraphrase of the instruction which counsel contends should have been given should be set out in brackets following the instructions actually given, with an appropriately numbered exception identifying it. *Duke Power Co. v. Rogers*, 271 N.C. 318, 321 (1967). By this new rule it is sufficient in such case to give the *substance* of the instruction which allegedly should have been given, rather than attempting even to paraphrase the instruction as it is contended the judge should actually have phrased it. See Committee Form 6 D.2. The same requirement is made applicable to the related subject of an exception to the failure to make certain findings of fact or conclusions of law in a non-jury case. The last sentence carries forward an established rule of decision which has prohibited "broadside exceptions" to multiple findings or conclusions. *Logan v. Sprinkle*, 256 N.C. 41 (1961).

**Subdivision (c)** in its first three sentences restates in condensed form the basic function and desired form of the assignment of error as developed in judicial decisions over the years. As indicated in the general commen-

tary to this Rule, the essential function of this device is to identify for the appellee's benefit all the errors possibly to be urged on appeal, hence the total possible scope of review, so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position on all these points. This being the function, it is sufficient that the assignment of error simply identify without argumentation the basis upon which it is asserted that error was committed, and that it identify, by simply listing ("grouping") them, the various exceptions upon which it is based. The last sentence represents a fundamental change in the required form, as the court in deference to the burden imposed upon counsel abandons the long-standing requirement that each assignment of error contain within itself those portions of the record necessary to its consideration. This rule apparently originated in 1908 in the case of *Thompson v. Railroad,* 147 N.C. 412 (1908) where the Court, faced with a particularly sketchy set of assignments, adopted it in order to avoid the necessity for "making a voyage of discovery" through the record in order to deal with each assignment. This rule has been exceedingly difficult to police consistently, see *Douglas v. Mallison,* 265 N.C. 362 (1965), and *State v. Douglas,* 268 N.C. 267 (1966), and is abandoned in this rule in the hope that counsel will specify the basis of their assignments and identify the exceptions underlying them with sufficient clarity that the Court can fairly and expeditiously consider them as framed. See Committee Form 7 for illustrative examples.

**Subdivision (d)** introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgments might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgments were actually based. There has not been a clear-cut procedure of this sort. Such parties may not protect their judgments by becoming cross-appellants, since they are not parties aggrieved under G.S. § 1-271. *Bethea v. Town of Kenly,* 261 N.C. 730 (1964). Nor has there been a general provision by which they might as appellees "conditionally" assign error in the event the appellate court should "aggrieve" them by its decision depriving them of their favorable judgment below. Such a provision has been worked into the aggrieved party statute, G.S. § 1-271, to protect an appellee in the limited situation where as verdict winner below he wishes to argue conditionally on appeal for new trial as opposed to the judgment n.o.v. sought by appellant. It is undoubtedly the case that on occasion the Court has protected an appellee in this situation by drawing on the principle that "review is to correct judgments and not reasons." See, e.g. *Jamerson v. Logan,* 228 N.C. 540 (1948) (though plaintiff appellee's verdict not supportable on issues submitted, case remanded rather than reversed on basis prima facie case well pleaded and proved on theory not submitted to jury). But in such situations, it may well be that the appellant has not been fairly apprised of this possibility and so enabled to meet this conditional position. Both appellees and appellants should be protected in this situation, and this subdivision seeks to provide this protection by allowing an appellee conditionally to present such issues but only on the basis of cross-assignments of error which will have alerted appellant to this possibility and permitted him to protect himself both in terms of composition of the record on appeal and in preparing his brief and oral argument on the

"cross-questions." Rule 28(c), which prescribes the contents of briefs, follows up on this by permitting an appellee who has made such cross-assignments of error to present in his brief for appellate review the questions thereby raised. And Rule 16, which deals with review by the Supreme Court of Court of Appeals determinations, ties in by permitting a party who as appellee presented such "cross-questions" in the Court of Appeals to present them for further review in the Supreme Court, whether he appears there as appellant or as appellee.

## RULE 11

## SETTLING THE RECORD ON APPEAL; CERTIFICATION

(a) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 30 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 15 days after service upon him of appellant's proposed record on appeal, an appellee may file in the office of the clerk of superior court and serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal the appellant or any

other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of superior court, and served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of such a request the judge shall by written notice to counsel for all parties set a place and a time not later than 15 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the judge shall settle the record on appeal by order.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other dermination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Certification of Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in this Rule 11, the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification. The clerk of superior court shall forthwith inspect the items presented and, if they be found true copies and transcriptions, certify them, noting the date of certification on the appropriate docket.

(f) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. §§ 1-282, 1-283, 1-284.

**Commentary:**

**General.** Using the change of terminology dictated by abandonment of the "record proper"—"case on appeal" function, see Commentary to Rule 9, this Rule carries forward the developed code process whereby the record on appeal is "settled" for filing in the appellate court—by party agreement, adversary approval through exchanges, or judicial order. The Rule also substantially alters the basic timetable for this process. See Table IV in the Committee's Table of Appendix and Forms. This new timetable attempts to accommodate to the realities of contemporary practice—most importantly, to the time required for securing a reporter's transcript—while nevertheless providing minimal basic times for the critical intervals. These basic intervals may of course then be altered in individual cases by extensions of time upon demonstrated necessity therefor. App. R. 27. This Rule leaves off the total process for perfecting an appeal at the time the record on appeal as settled is presented to the clerk of superior court for certification. The next step—filing the record in the appellate division—is picked up by Rule 12.

**Subdivision (a)** carries forward traditional practice (not heretofore expressly authorized in statute or rule) by which the parties may of course stipulate their agreement to the composition of a record on appeal. The time limit of 30 days expressed in this subdivision is tied to the basic 30-day period within which, by subdivision (b), an appellant must serve proposed record on appeal, or risk dismissal. These times must be related in order to keep the process moving. But the limit does not prevent later settlement by agreement. Obviously, even after adversarial exchange has begun, the parties should be free at any time to stipulate the record, and this is provided in subdivision (c).

**Subdivision (b)** describes the opening of the traditional adversarial exchange process, but on an altered basic timetable—30 days for appellant to serve his proposed record (against 15 days under former G.S. § 1-282), and 15 days for appellee to respond (against 10 days under

former G.S. § 1-282). The subdivision concludes on the hypothesis that within the time permitted *all* appellees have either affirmatively approved or failed to make proper objection to the appellant's proposed record, whereupon by force of the rule this becomes the record on appeal. The specification of approval by *all* appellees accommodates to the possibility that in a multiple-appellee situation less than all will so approve by either means. That possibility is dealt with in the next subdivision.

**Subdivision (c)** picks up the adversarial exchange process at the point where a sole appellee or any one or more of multiple appellees have, within the time permitted them, filed objections or proposed alternative records on appeal (formerly "counter case" per G.S. § 1-283). At this point, any one of three different situations may exist: 1) there is a single appellee in the case; 2) there are multiple appellees, only one of whom files objections or a proposed alternative record; 3) there are multiple appellees, more than one of whom file objections or proposed alternative records. Former statutes dealt only with situation 1); this Rule deals with all three. 1) In the single-appellee situation, failure by the appellant to make timely request for judicial settlement results in settlement in accordance with the appellee's objections or proposed alternative record. Former G.S. § 1-283, which expressly dealt only with the single-appellee hypothesis, gave the same result. 2) Where only one of multiple appellees makes objection or serves proposed alternative record, the Rule permits request for judicial settlement either by appellant or by other appellees, failing which the record on appeal is settled in accordance with the one objecting appellee's objections or proposed alternative record. 3) In the third situation, where more than one of multiple appellees timely object or serve proposed alternative records, again the Rule permits request for judicial settlement either by appellant or any other appellees. But if there is failure by all parties in this situation so to request settlement, an impasse is created which cannot be resolved by dictating settlement in accordance with a single set of objections or alternative record. Here there is inevitably inconsistency or conflict between multiple objections and proposed alternatives. The solution of the Rule is a forced one which imposes the penalty for failure to request settlement where it should be, on appellant. The appeal is deemed abandoned by him as to all appellees who did file objections or proposed alternative records. The appeal would stay alive against any approving or non-objecting appellees with the appellant's proposed record on appeal constituting the record. However, if within the time permitted any appellee in this situation requests settlement, the process continues to judicial settlement.

This subdivision also contains alterations in timetables controlling the actions described: 10 days to request settlement, measured from date within which last appellee might have filed objections (against 15 days from date of service of objections under former G.S. § 1-283); 15 days to hold settlement conference, measured from date judge receives request (against 20 days from receipt of request under former G.S. § 1-283).

**Subdivision (d)** picks up and elaborates upon a provision in former Sup. Ct. R. 19(2) for the composition of a single record on appeal in cases where there are multiple appellants. In any situation where there are both multiple appellants and multiple appellees, the process described

in subdivision (c) would be picked up at the point where the multiple appellants had agreed (by whatever procedure) to a single proposed record on appeal, and had served this upon the several appellees.

**Subdivision (e).** Former G.S. § 1-284, reflecting the two-component record on appeal of code practice, laid upon the clerk of superior court the literal duty to assemble the two (record proper and case on appeal) as soon as the latter was submitted to him in "settled" form, and then to "transmit" the whole to the appellate court clerk duly certified. In this as in other aspects of the practice built around the record proper-case on appeal model, practice had long since moved around design, and the clerk's function had become a much more modest one—of merely certifying the whole "record on appeal" as presented to him. This subdivision conforms to the developed practice, by its terms so confirming the clerk's function, and leaving to the appellant the responsibility for taking the next step—filing the record on appeal in the appellate division in accordance with succeeding Rule 12.

**Subdivision (f)** is a reminder that all the times provided in this Rule may be extended for cause under the procedures set out in Rule 27.

## RULE 12

## FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF RECORD

(a) **Time for Filing Record on Appeal.** Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal.** Prior to or at the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. §§ 1-288 or 15-181, the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed by him.

(c) **Copies of Record on Appeal.** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant shall pay to the clerk of the appellate court a deposit fixed by

the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. § 1-284, Ct. App. R. 3, 5.

**Commentary:**

**Subdivision (a).** The 150-day outer limit for filing a record on appeal in the appellate court conforms to the 150-day limit to which, under former rules, time might be extended by a trial tribunal for "docketing" appeal, former Ct. App. R. 5. The basic time intervals provided by App. R. 11 for perfecting appeal total 90 days to filing in the appellate division (as contrasted with 60 days under former statutes G.S. §§ 1-282, 283), thus giving a leeway of 60 days. The 150-day limit may itself be extended on motion, but only by the appropriate *appellate* court. App. R. 27(c). As indicated in the commentary to App. R. 11, these time limits are intended to accommodate realistically to minimal constraints of contemporary practice.

**Subdivision (b).** This subdivision differentiates "filing" the record on appeal (a responsibility and function of the appellant) and "docketing" the appeal (a function of the clerk of appellate court). "Docketing" is the critical reference point in time for continuing the timetable for processing appeals (from this is measured the time for filing appellant's brief, App. R. 13), hence the requirement of this subdivision that the clerk give immediate notice to the parties of the date on which this ministerial act has been performed by him.

**Subdivision (c).** This subdivision continues the developed practice under which the responsibility for preparing printed "work-copies" of the formal record on appeal is routinely placed upon the appellate court clerk. (Cf. former Sup. Ct. Rules 22, 23, and 25, which in terms gave an option for prior printing by the appellant.) Hence the provision that only a single copy need be filed. This subdivision also contains the important provision alluded to in the General Commentary to Rule 9 for a further paring down of the "work-copies" from the original record on appeal by stipulation of parties. Cf. former Sup. Ct. R. 22. The mode of reproducing "work-copies" is not specified in this subdivision, in order to accommodate possible alternatives to the mimeographing specified by former rules. This as well as the number of copies is simply left to administrative direction of the particular court to its clerk.

## RULE 13

## FILING AND SERVICE OF BRIEFS

(a) **Time for Filing and Service.** Within 20 days after the appeal is docketed in the appellate court, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. Within 20 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party shall pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

**Drafting Committee Note**

**Sources and parallels in former rules or statutes:** Sup. Ct. Rules 25, 26, 27, 27½, 28, 29 (and Ct. App. counterparts).

**Commentary.**

**General.** This Rule deals directly only with the filing and service of briefs in appeals from the trial courts. It does not apply to intra-appellate division appeals under Article III, which contains its own provisions on the subject. Administrative agency appeals under Art. IV incorporate the provisions of this Rule by reference. This Rule does not deal with the form, function, and content of briefs, a matter which App. R. 28 controls.

**Subdivision (a)** is self-explanatory as to operation. Freed from the "district call" mode of hearing appeals, this rule simply continues the open-ended timetable for taking the various steps in the appellate process.

**Subdivision (b)** is self-explanatory. For general background, see the Commentary to App. R. 12(c).

**Subdivision (c)** carries forward in minor restatement certain provisions of former Sup. Ct. Rules 28 and 29.

## ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

### RULE 14

### APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. § 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right may be filed with or contained in the notice of appeal.

(b) **Same; Content.**

(1) **Appeal Not Presenting Constitutional Question.** In an appeal which is not asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken and shall state the basis upon which it is asserted that appeal lies of right under G.S. § 7A-30.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall contain the elements specified in Rule 14(b)(1) and in addition shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court many note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought. Within 15 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party shall pay to the Clerk a deposit fixed by the Clerk to cover the cost of

reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

**Drafting Committee Note**

**Sources or parallels in former rules or statutes:** Supp. Rules 3, 5, 6, 7, 8.

**Commentary:**

**General.** This Rule 14 and succeeding Rule 15 cover in general all matters covered by former Supplementary Rules 1-13. This rule deals comprehensively with appeals of right under G.S. § 7A-30, and Rule 15 with discretionary appeals upon certification either prior to or following Court of Appeals' determination. Various rules in *General Provisions* Article VI apply to different aspects of the practice covered by these two rules: App. R. 25 (dismissal for failure to perfect appeal); App. R. 26 (filing and service); App. R. 27 (computation and extension of time); App. R. 28 (function and content of briefs); App. R. 29 (calendaring and call of appeals); App. R. 30 (oral argument); App. R. 31 (petition for rehearing); App. R. 37 (motion practice).

**Subdivision (a)** carries forward the time limit provided in former Supp. R. 3(a). The provisions for tolling by filing of a petition for rehearing and for tolling as to all other parties by filing a notice of appeal by any party are new. Reciprocally, a notice of appeal or petition for discretionary review waives the rehearing option. App. R. 31(f). Note changed language "issuance of mandate" rather than "certificate of the clerk," to conform to the language of App. R. 32.

**Subdivision (b)** carries forward in unchanged substance the provisions of former Supp. R. 3(b).

Note that the only requirement as to substantive content of the notice of appeal is for the jurisdictional basis (in fact and law) for the asserted right to have Supreme Court review. It is not necessary in the notice of appeal to specify the whole range of questions which the appellant is entitled to present and intends to present if the appeal is entertained as properly based jurisdictionally. This is the office of the new brief required by subdivision (d)(1) of this rule to be filed in the Supreme Court. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence the appeal of right . . . is based," but

extends to all questions "properly presented in the new briefs." See, so holding independently of a direct rule provision, *State v. Colson,* 274 N.C. 295, at 305 (1968) (appeal properly grounded in substantial constitutional question entitles to review on any other questions properly presented) ; but cf. *State v. Horn,* 285 N.C. 82, at 84 (1974) (dictum apparently *contra;* but Court indicated consideration nevertheless of the non-constitutional questions). The Rules herein cited, by clearly codifying the rule announced in *Colson,* remove any question on the point.

See, for an illustrative form of notice of appeal under this Rule, Committee Form 3.

**Subdivision (c).** The first sentence of subsection (1) carries forward unchanged in substance the provisions of former Supp. R. 5(a). The last sentence of this subsection is new and preserves to the Supreme Court the opportunity to enforce these Rules independently of any prior acceptance by the Court of Appeals of a record on appeal. Subsection (2) is designed to conform to developed clerical practice under the former Supplementary Rules, and makes the transmission and docketing of records on appeal within the appellate division purely a ministerial function of the respective clerks. Details of the manner of procurement or reproduction of copies of the record and of the number and recipients of distribution remain to administrative direction of the court.

**Subdivision (d).** Subsection (1) alters the timetable for filing and service provided by the former Supplementary Rules: from 10 days to 20 days from date of docketing the record for the appellant's brief; from 20 days after docketing of the record to 15 days after service of appellant's brief, for the appellee's brief. The provision for filing but single copies of briefs for reproduction of copies by the clerk conforms to the practice described in the Commentary to Rule 13(b) for filing briefs in appeals from the trial courts. While this subsection deals basically only with filing and service requirements, leaving function and content to App. R. 28, which covers that subject as to *all* briefs, there is the important requirement in this subsection that the briefs filed under this Rule 14 in the Supreme Court shall be *new.* This removes the option given by former Supp. R. 8 to file a brief which merely *supplements* the Court of Appeals brief. The reason for requiring new briefs in all cases is developed in detail in the Commentary to App. R. 28(d). That subdivision permits incorporation in whole or in part of all or portions of the *argument* section of the briefs filed in the Court of Appeals into the argument section of the *new* brief required by this subdivision.

Subsection (2) carries forward unchanged in substance a comparable provision in former Sup. Ct. RR. 28 and 29.

## RULE 15

## DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any

party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15, Art. 22.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. § 7A-31 for discretionary review. The petition shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders: Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner, to cover the costs thereof.

(g) **Filing and Service of Briefs.**

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the

Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 20 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 15 days after a copy of appellant's brief is served upon him.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will

be certified for review by the Supreme Court only upon a determination by that Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms *appellant* and *appellee* have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, *appellant* means a party who appealed from the trial tribunal; *appellee,* a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, *appellant* means the party aggrieved by the determination of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 15.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Supp. Rules 1, 2, 4, 5, 6, 7, 8, 11, 13.

**Commentary:**

**General.** For coverage of this rule in conjunction with that of App. R. 14, see General Commentary to the latter. Note that this Rule 15 deliberately avoids use of the term "certiorari" to describe the procedure by which under the jurisdictional statute, G.S. § 7A-31, the Supreme Court exercises its discretionary power to review cases originally docketed for review in the Court of Appeals. Instead, the terms "certification," "certify for review," "petition for discretionary review," are used to conform directly to the statutory language and the procedure therein described, and to distinguish this procedure from that for review by the extraordinary writ of certiorari, which is dealt with in App. R. 21.

**Subdivision (a)** lays the basis for the rule's coverage of both by-pass and post-determination review procedures.

**Subdivision (b)** carries forward the time limits for petition for discretionary review provided in former Supp. R. 1 (by-pass) and Supp. R. 2 (post-determination). For commentary on the provision for tolling by filing a petition for rehearing in the Court of Appeals and the reciprocal effect of waiver of rehearing by petition for discretionary review, see Commentary to App. R. 14(a).

**Subdivision (c).** The provision for accompanying a post-determination petition with a copy of the Court of Appeals' opinion is from former Supp.

R. 5(b). The other provisions supplant and serve the function of those provisions of former Supp. Rules 1 and 2 which borrowed certiorari writ practice by reference to former Sup. Ct. R. 34.

Note that the rule requires only that the petition contain a statement of the jurisdictional basis (in fact and law) for the review being sought. It is *not* necessary in the petition to specify the whole range of questions which the petitioner is entitled to present and intends to present if the case is certified for review. That is the office of the new brief required by subdivision (g)(2) of this rule to be filed upon certification. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence . . . the discretionary review is based," but extends to all questions then "properly presented in the new briefs."

See, for an illustrative form of a petition for discretionary review under this Rule, Committee Form 4.

**Subdivision (d).** Former Supp. Rules 1 and 2 in effect borrowed the certiorari *writ* practice sketched in former Sup. Ct. R. 34 for the discretionary review practice which is the subject of this new Rule 15. One of the former rule's features was a provision for response by other parties to such a petition. This subdivision carries this forward by direct statement.

**Subdivision (e).** Subsections (1) and (2) state directly what was merely implicit in former Supplementary Rules, which did not speak directly to the decision process on petitions for discretionary review. Subsection (3) carries forward, unchanged in substance but with some elaboration, the provision of former Supp. Rules 6, 8, and 13.

**Subdivision (f).** Subsection (1), first sentence, carries forward, unchanged in substance, the provisions of former Supp. R. 5(a). The second sentence is new. See Commentary to comparable App. R. 14(c)(1).

Subsection (2) conforms to developed clerical practice not directly stated in former Supplementary Rules. See Commentary to App. R. 14(c)(2).

**Subdivision (g).** Subsection (1) carries forward, unchanged in substance, the provisions of former Supp. RR. 6 and 11 controlling the filing and service of briefs in "by-pass" review situations whether on party or court initiative.

Subsection (2) carries forward the essential provisions of former Supp. RR. 7 and 8 controlling the filing and service of briefs in cases involving review by the Supreme Court of Court of Appeals determinations, but with two significant alterations from former practice: 1) The timetable for filing and service is changed: as to the appellant's brief, from 10 days to 20 days after docketing in the Supreme Court (see App. R. 15(e)(3) for time when docketing occurs); as to the appellee's brief, from 20 days after docketing in the Supreme Court to 15 days after service of appellant's brief. 2) The option to file *supplementary* briefs is removed; filing of *new* briefs is required. See Commentary to App. R. 14(d)(1).

Subsection (3) covers the filing of briefs in both by-pass and post-determination review cases. In by-pass review situations the responsibility for filing in the Supreme Court will depend upon whether the party has

already filed his brief in the Court of Appeals before the case is certified for review. App. R. 15(g)(1). In post-determination situations filing will always be by the party and will be of the *new* brief required by App. R. 15(g)(2). This subdivision (3) is simply saying that in whatever situation only one copy of that brief need be filed in the Supreme Court to satisfy the *filing* requirement.

Subsection (4) carries forward, unchanged in substance, a comparable provision in Supp. RR. 28 and 29.

**Subdivision (h)** carries forward the comparable provision in former Supp. R. 2, and is drawn ultimately from G.S. § 7A-31.

**Subdivision (i).** From former Sup. Ct. R. 4.

## RULE 16

## SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. No assignments or cross-assignments of error to the decision of the Court of Appeals are required as the basis for the presentation of questions for review by the Supreme Court. A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals. A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

(b) **Appellant, Appellee Defined.** As used in this Rule 16, the terms *appellant* and *appellee* have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, *appellant* means the party aggrieved by the decision of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 16.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Supp. R. 2 (only first sentence of subdivision (a)).

**Subdivision (a)** is designed to give hitherto lacking detailed guidance to counsel in dealing with the special problems posed by second review in a two-tiered appellate court system. The first sentence is drawn directly from the last sentence of former Supp. R. 2, and expresses the critical feature of second review by the higher court: that it is the decision of the first reviewing court which is under direct review. The rest of the subdivision is new and lays down certain corollaries to this root principle. These take into account the following points: 1) that the parties may or may not have changed positions as appellant and appellee on the second review; 2) that, following App. RR. 10(d) and 28(c), questions may properly be presented for review at both levels by both appellants and appellees; 3) that the *potential* scope of review by the higher court is limited only by the questions properly presented on first review in the first reviewing court, and not by the scope or basis of the latter's decision. See *State v. Colson,* 274 N.C. 295 (1968); 4) that within this *potential* scope of second review, the *actual* scope should be limited to those precise questions chosen and identified by the parties in their briefs as those for review by the higher court. Other rules which operate in important conjunction with this Rule 16 are cross-referred to emphasize the interrelation: 1) App. Rules 14(d)(1) and 15(g)(2) both force the conscious choice of precise questions for higher court review by their requirements that in both appeals of right and in discretionary appeals, both parties shall file *new* briefs in the Supreme Court; 2) App. R. 28, dealing with the function and content of briefs, requires both parties to state the questions being presented for review by the court to which appeal is taken, and in subdivision (c) spells out the procedure by which appellees in the Court of Appeals may in their briefs present questions for review. See Commentary to App. Rules 10(d) and 28(c). Notice that neither party is required to make assignments of error or cross-assignments of error with respect to the Court of Appeals decision.

**Subdivision (b)**, by its forced definition of terms, permits a single set of descriptives "appellant" and "appellee" to be used in designating the parties in discretionary review cases as well as appeals of right, and within the discretionary review category, to both party-initiative and court-initiative situations. It is drawn from former Supp. R. 4.

## RULE 17

## APPEAL BOND IN APPEALS UNDER G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court, the party who takes appeal shall, upon filing the record on appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $200, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis.

### Drafting Committee Note

**Sources and parallels in former rules and statutes:** Supp. R. 18.

**Commentary:**

This rule simply carries forward, in slightly re-stated form, the provisions of former Supp. R. 18. It does state explicitly, in the second sentence of subdivision (b), what is only implied in the former Supplementary Rule—that upon certification for review of a Court of Appeals determina-

tion on initiative of the Supreme Court, no appeal bond is required. Notice that these provisions for securing costs in intra-Appellate Division appeals are independent of those of App. Rules 6 and 7 for securing the costs of initial appeal from the trial courts, except to the extent that security there given stands good on the by-pass appeal under subdivision (c).

## ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO COURT OF APPEALS

### RULE 18

### TAKING APPEAL; RECORD ON APPEAL — COMPOSITION AND SETTLEMENT

(a) **General.** Appeals of right under G.S. § 7A-29 to the Court of Appeals from the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance (hereinafter "agencies" or "agency") shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Rule 18, Rule 19, and Rule 20.

(b) **Time and Method for Taking Appeals.** The times and methods for taking appeals from the agencies shall be as provided respectively in G.S. § 62-90(a) for appeals from the Utilities Commission; G.S. § 97-86 for appeals from the Industrial Commission and G.S. § 58-9.5(1) and (2) for appeals from the Commissioner of Insurance.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any of the agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a copy of stipulation of counsel showing the same; (iii) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination; (iv) a copy of any findings of fact and conclusions of law and of the order, award, decision, or other determination of the agency from which appeal was taken; (v) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form pro-

vided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for understanding of all errors assigned; (vii) copies of such other papers filed and transcripts of such other proceedings had before the agency or any of its individual commissioners, deputies, or divisions as are necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the agency, and of all appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled for certification and filing in the Court of Appeals by any of the following methods:

(1) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal constitute a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant may, within 30 days after appeal is taken, file in the office of the agency and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 15 days after service of the proposed record on appeal upon him, an appellee may file in the main office of the agency and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference, Referee, or Agency Head; Failure to Request Settlement.** If any appellee timely files objections, amendments, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the Chairman of the Utilities Commission or the

Commissioner of Insurance to convene a conference to attempt settlement of the record on appeal in appeals from their respective agencies, or the Chairman of the Industrial Commission to settle the record on appeal in appeals from that agency. A copy of such request shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed any appellee makes request in the same manner.

Within 20 days after receipt of a request for agency-supervised conference in appeals from the Utilities Commission and the Commissioner of Insurance, the agency head shall convene a conference of all parties to the appeal by written notice. At the conference the agency head or his delegate shall attempt to accomplish a settlement of the record on appeal by agreement of the parties. If no such agreement is accomplished, the agency head shall forthwith request the Chief Judge of the Court of Appeals to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of the reference order.

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission shall by written notice to counsel for all parties set a place and a time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order.

(e) **Certification of Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in Rule 18(d), the appellant shall present the items constituting the record on appeal to the agency head for certification. The agency head or his delegate shall forthwith inspect the items presented and if they be found true copies and transcriptions, so certify them, noting the date of certification on the appropriate docket of the agency.

(f) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. §§ 62-90(a) (Utilities Commission appeals); 97-86 (Industrial Commission appeals); 58-9.5(1) and (2) (Commissioner of Insurance appeals).

**Commentary.**

**General.** The statutes referred to in the sources and parallels noted above have provided details of the appellate procedure for appeals from the three state agencies indicated directly to the Court of Appeals. In conjunction with promulgation of these rules, those provisions have been stripped from the respective statutes by amendment, and are now incorporated in this Rule 18 as a practically comprehensive procedure for appeals from all three agencies. That procedure is uniform except in one respect, spelled out in subsection (3) of subdivision (d), concerning the mode of settlement of the record on appeal where the parties fail to agree. See the Commentary to that provision. The prescribed procedure substantially parallels, as did the statutory provisions, that provided for appeals from the trial courts. There are a few deviations, which are specifically identified in the Rule and App. R. 20 as matter retained in the governing statutes.

**Subdivision (a)** "borrows" in general the appellate procedure prescribed in these rules for appeals from the trial courts, except as that procedure is specifically spelled out in this Rule 18, or is retained in statutory prescriptions which are in turn identified in this and the succeeding two rules which make up this Article IV. This Rule 18 takes the procedure, including that left to statutory prescription, generally down to the point of certification of the record on appeal. At that point subdivision (f) specifically defers to the subsequent procedures provided in these rules for appeals from the trial courts.

**Subdivision (b)** defers to the retained statutory provisions because of their possible jurisdictional significance.

**Subdivision (c)** follows the format of App. R. 9(b) in specifying for agency appeals the items constituting the record on appeal. The items identified either duplicate or are appropriate analogues to comparable items specified for civil appeals.

**Subdivision (d)** parallels, practically identically, the procedure for settling records on appeal from the trial courts as specified in App. R. 11. There is one variation among the three agencies, which is dealt with in subsection (3): the mode of "judicial" settlement in the event of failure to settle by party agreement or exchange. Here, taking into account the possible involvement of the agency itself in appeals from the Utilities Commission and the Commissioner of Insurance, settlement is to be attempted first by an agency-supervised conference, and if this fails, by a referee appointed by the Chief Judge of the Court of Appeals. In Industrial Commission appeals, wherein the agency is not potentially a party in interest, settlement

is to be by the agency head in the manner of the judge of a trial court. There is also a related variation in the timetable for settling records in agency appeals from that provided for trial court appeals: the agency head has 20 days rather than 15 days to call a settlement conference. Cf. App. R. 11(c).

**Subdivision (e)** parallels the comparable procedure for certification of trial court records. Cf. App. R. 11(e), substituting the agency head or his delegate as the certifying authority.

**Subdivision (f)** borrows all necessary further procedures—which would include those provided in App. R. 12 for filing the record on appeal and in App. R. 13 for filing and serving briefs—from the trial court appeal procedures. While this subdivision does not specifically refer to them, the procedures laid down in the rules found in Art. VI, "General Provisions," governing such matters as filing and service, extensions of time, content of briefs, etc. are by their terms also applicable, as appropriate, to these agency appeals.

## RULE 19

## PARTIES TO APPEAL FROM AGENCIES

(a) **From Utilities Commission.** The complainant in the original complaint before the Commission, each of the other parties to the proceeding before the Commission, and the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

(b) **From Industrial Commission.** The claimant before the Commission and the employer against whom claim is made and any other parties to the proceeding before the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

(c) **From Commissioner of Insurance.** The complainant in the original complaint before the Commissioner, each of the other parties to the proceeding, and the Commissioner may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. § 62-90(a) (Utilities Commission); 97-86 (Industrial Commission); 58-9.5(1) and (2) (Commissioner of Insurance).

**Commentary.**

These provisions are simply borrowed from the statutes which have hitherto completely controlled appeals from these three agencies. They are

included in these rules because of the rather unique alignments of parties in agency appeals, including the agencies themselves in Utilities Commission and Commissioner of Insurance appeals. Cf. Commentary to App. R. 18(d).

## RULE 20

## MISCELLANEOUS PROVISIONS OF LAW GOVERNING IN AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the Court of Appeals, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

**Drafting Committee Note**

**Sources or parallels in former rules or statutes:** None.

**Commentary.**

This rule is necessitated by the fact that as to the matters specified statutory procedures peculiar to the three agencies and differing from parallel procedures provided in these rules continue to control. This disclaimer of rule authority avoids any possible conflict. The matters specified are deemed to pertain so closely to legislative control of these quasi-judicial bodies, including their financing and the limits of the powers delegated to them by the legislature vis-a-vis those of the legislature and the courts (i.e. scope of judicial review, and permissible mandates of the reviewing court) that they must continue to be controlled by statute rather than appellate rule-making authority.

## ARTICLE V. EXTRAORDINARY WRITS

## RULE 21

## CERTIORARI

(a) **General.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right to appeal from an interlocutory order exists; or by the Supreme Court in appropriate circumstances to permit review of the judgments and orders of the Court of Appeals when

the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action.

(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Reponse; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 34.

**Commentary.**

**General.** This rule builds upon and attempts to clarify the certiorari writ practice provisions of former Sup. Ct. R. 34. As indicated in the General Commentary to App. R. 15 dealing with discretionary review by the Supreme Court under G.S. § 7A-31, that practice is by these Rules clearly differentiated in form and in terms from the extraordinary writ practice described in this Rule 21. The former Supplementary Rules in effect "borrowed" the Sup. Ct. R. 34 certiorari writ practice as the procedure by which determinations were made by the Supreme Court to "certify" Court of Appeals determinations for discretionary review under G.S. § 7A-31. Former Supp. R. 2(a)(3). In these rules, App. R. 15 prescribes internally a "certifi-

cation" practice for such cases; and this Rule 21 is confined in terms and in form to the traditional extraordinary writ function of classic certiorari as a means of review outside the regular appeal route.

**Subdivision (a)** establishes that certiorari may lie from either appellate court to permit review of trial tribunal judgments when ordinary appeal right has been lost or does not exist because of the interlocutory character of the judgment. ("Trial tribunal" includes, per App. R. 1, the district and superior courts, and the three state agencies from which appeals lie to the Court of Appeals.) Further, that certiorari may lie from the Supreme Court to review Court of Appeals determinations when the right to regular appeal has been lost. Specification of which of the appellate courts may properly issue the writ to trial tribunals is left to subdivision (b). And the practice within either court is left to subdivision (c).

**Subdivision (b)** points to the correct appellate court to petition for the writ in any case. It is that court to which either party *might* have a right to appeal from any final judgment of the tribunal sought to be reviewed. This means that the petition must always be addressed to the Court of Appeals in any case before the three state agencies of Article IV, and in any case before the trial courts except a criminal case wherein a sentence of death or life imprisonment is possible or has been entered. In the latter case the petition must be addressed to the Supreme Court. In any case in the Court of Appeals wherein the writ may be sought, it must obviously by this Rule be sought in the Supreme Court. In cases where the writ is denied by the Court of Appeals, the petitioner must seek review of that determination under the general appeal provisions of App. R. 14 (of right) or App. R. 15 (discretionary review) as the case may dictate. Only if the right to seek regular review by either of these routes has been lost by failure to take timely action could a petitioner refused certiorari in the Court of Appeals seek review of that refusal by a second petition to the Supreme Court.

**Subdivision (c)**, following traditional practice in the use of this discretionary writ, provides no specific time limit for filing the petition. The question of timeliness in a particular case is to be determined as a part of the general question of its propriety as an extraordinary mode of review. The other provisions of this subdivision elaborate upon the more sketchy descriptions of the practice contained in former Sup. Ct. R. 34.

**Subdivision (d)** carries forward in restated form, but unchanged in substance, the provisions of former Sup. Ct. R. 34.

See Committee Form 8, "Petition for Writ of Certiorari Under Rule 21", for an illustrative form.

## RULE 22

## MANDAMUS AND PROHIBITION

(a) **Petition for Writ; to Which Appellate Court Addressed.** Applications for the writs of mandamus or prohibition directed

to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court.** Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** None.

**Commentary:**

General. Presumably because of the essentially liberal and flexible formula for determining appealability of interlocutory orders found in G.S. § 1-277, an extensive use of mandamus and prohibition to review such orders has not developed in our practice. Nevertheless, there are interlocutory orders from which appeal of right is held not to lie even under this formula. And in particular cases there may be need for immediate review of such orders to permit the affected party effectively to continue, such as discovery orders denying access to material deemed essential by the party. See, e.g., *Carolina Overall Corp. v. East Carolina Linen Supply, Inc.*,

1 N.C. App. 318 (1968) for such a possibility. Here mandamus and prohibition have traditionally provided an available means of review, particularly in systems such as the federal with fairly rigid "final judgment" constraints on appealability, and may be useful in our practice under such occasional circumstances as those above suggested. On occasion it would appear that certiorari has been used in circumstances where mandamus or prohibition would have been more appropriate (though they come eventually to the same thing, it must be admitted). See, e.g., *Brice v. Salvage Co.*, 249 N.C. 74 (1958).

The functions of mandamus and prohibition are similar and may well be interchangeable. (In jurisdictions where they have widespread usage it is common to petition for a "writ of mandamus or, alternatively, prohibition"). However, they have traditionally served different functions and are strictly appropriate for different situations. Mandamus lies most appropriately to compel a judicial action erroneously refused, or to correct judicial action erroneously taken, or to compel the exercise of judicial discretionary action when the taking of any action has been refused. Prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought.

Mandamus by appellate writ under this rule is to be distinguished from that procedure (now abolished) by which under former G.S. §§ 1-511 et seq. a "civil action in the nature of mandamus" was available as an original proceeding in the superior courts to compel the performance of purely ministerial duty by a public official. That office is now performed by a straightforward civil action for injunctive relief against the official.

**Subdivision (a).** As indicated, the petition for mandamus and prohibition is technically against the judicial officer sought to be controlled in respect of judicial action taken or refused, and is in form an original proceeding against him. On the rare occasions that prohibition has been used in our practice, in recent times at least, it seems clear that this traditional form has not been observed. See, e.g., *State of N. C. ex rel. Payne v. Ramsey*, 262 N.C. 757 (1964). The main feature of the traditional form is the opportunity it provides for the affected judicial officer to participate directly. This feature may be important when the conduct drawn in question is alleged to contain elements of abuse of power, or to reflect a recurring pattern in similar cases. On most occasions, however, this will not be the case, and the judicial officer will simply leave the matter to be contested between the true parties in interest.

**Subdivisions (b) and (c)** set out the essentials of the writ practice, and conform generally to the traditional patterns of motion practice with or without direct participation of the judicial officer as technical respondent.

## RULE 23

## SUPERSEDEAS

(a) **Pending Review of Trial Tribunal Judgments and Orders.**

(1) **Application—When appropriate.** Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Same—How and to Which Appellate Court Made.** Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions.** Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when an appeal of right has been taken, or a petition for discretionary review or for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition: Filing and Service; Content.**

The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be

verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral arguments will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay.** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 34(2).

**Commentary.**

**General.** This rule builds upon the bare reference to supersedeas writ practice found in former Sup. Ct. R. 34(2). It provides in these Rules the sole grounds and procedures by which an appellate court may

stay enforcement or execution of the judgment of a trial tribunal pending the appellate court's review of that judgment by appeal or on application for certiorari, mandamus, or prohibition. Supersedeas by appellate court writ is a different procedure than that provided in App. R. 8 for stay by trial court order. The two rules are interrelated by appropriate cross-references.

**Subdivision (a)** deals only with supersedeas to stay enforcement of trial tribunal judgments. Supersedeas to stay Court of Appeals judgments is dealt with in following subdivision (b). This subdivision (a) lays down two conditions to seeking stay of enforcement of trial tribunal judgments: 1) the case must either be on appeal or the petitioner must be seeking review by one of the extraordinary writs. The procedure is thus ancillary and may not be undertaken except in conjunction with appellate review of the judgment in question; 2) there must have been a prior unsuccessful attempt to obtain or to hold an effective stay of the judgment in the trial tribunal. The procedures by which this may be attempted at that level are spelled out in App. R. 8. This latter condition may be avoided only upon an alternative one—that under the circumstances, seeking to obtain stay at the trial court level would simply be impracticable.

Subsection (2) directs the petition in all cases except death and life imprisonment cases to the Court of Appeals. Thus, a party may not appeal to the Court of Appeals and seek initially to obtain stay by supersedeas from the Supreme Court. Upon denial of the petition by the Court of Appeals, the petitioner could then turn to the Supreme Court with a petition for supersedeas to that court (rather than seeking review of that denial by appeal or discretionary review in the Supreme Court).

**Subdivision (b)** deals with the much more rare practice for seeking supersedeas from the Supreme Court in respect of Court of Appeals' determinations. Here again, as in petitions for supersedeas directed to trial tribunal judgments, it is required that the petition be in conjunction with an attempt to obtain review of the judgment in question by the Supreme Court. But, unlike supersedeas running to trial tribunals, there is no requirement here that stay must first have been sought in the Court of Appeals.

**Subdivision (c)** expands upon the procedure provided in former Sup. Ct. R. 34(2). See Committee Form 9, "Petition for Writ of Supersedeas."

**Subdivision (d)** expands upon the procedure provided in former Sup. Ct. R. 34(2)(3).

**Subdivision (e)** had no counterpart in former rules. It provides for relief comparable to that of the t.r.o. in injunction practice, for stay pending the court's determination of the base petition. By the last sentence, this may in extreme cases be issued ex parte.

## RULE 24

## FORM OF PAPERS: COPIES

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** None.

**Commentary.**

**General.** This applies to the practice to obtain any of the writs authorized by App. Rules 21, 22, or 23.

## ARTICLE VI. GENERAL PROVISIONS

## RULE 25

## DISMISSAL FOR FAILURE TO COMPLY WITH RULES

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise to perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions made under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the

chairman of the commission; or, if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N. C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** G.S. §§ 1-282, 287.1; Ct. App. Rules 5, 17, 18, 50.

**Commentary.** This rule states a blanket authority in the appropriate courts to dismiss cases on appeal for failure to take any timely action in the appellate process, from serving proposed case on appeal to filing the record on appeal. The consequence of failing thereafter to file briefs within permitted times is dealt with separately by App. Rules 13(c) (appeals from trial tribunals), 14(d)(2) (appeals of right from Court of Appeals and 15(g)(4) (discretionary appeals from Court of Appeals). Former practice with respect to the proper court to entertain motions to dismiss is varied slightly in this rule. Under former Sup. Ct. R. 17 a motion to dismiss for failure to make timely filing of a record on appeal was made to the appellate court in conjunction with a motion to docket the appeal. This Rule 25 simply directs the motion for any failure to take timely action to the court wherein the case is then docketed. In the instance of a record not yet filed in the appellate court with time therefor elapsed, this now means the trial tribunal. The rule also makes plain that which is merely implied in former statutes and rules: that upon motion to dismiss the court may for good cause excuse an untimely action or nonaction and permit delayed action rather than dismissing. This replaces the more complicated procedure for "redocketing" or "reinstatement" upon such a showing which was provided by former Sup. Ct. RR. 17, 18. The provisions of App. R. 27(c) for extensions of time or for the taking of action after time expired are related in an obvious way to these provisions for dismissal upon initiative of the opposing party.

## RULE 26

## FILING AND SERVICE

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by

the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined on the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** None.

**Commentary.**

General. This rule deals comprehensively with the procedures for filing and serving papers in any context where these are required by

these rules. The attempt in general is to conform to parallel requirements in the N. C. Rules of Civil Procedure governing filing and service of papers in the trial courts.

**Subdivision (a).** The key point here is the provision that although filing may be accomplished by mailing as well as by hand delivery to the appropriate clerk's office, its timeliness is measured in either case by the time of receipt in the clerk's office.

**Subdivisions (b)(c)(d).** Paralleling the provisions of N.C.R.Civ.P. 5, these subdivisions provide practical, expeditious modes of accomplishing and proving required service of papers. Of particular importance is the provision in subdivision (b) making service by mail complete upon due deposit in the mails, a provision which expedites the requirement in subdivision (b) that papers be served "at or before" filing. Of importance here is the provision of App. R. 27(b) which gives any person so served by mail an additional 3 days to take required action following service.

**Subdivisions (e)(f).** These subdivisions are other instances of the attempt to accommodate the rules to the case involving multiple parties, and are designed to expedite conformance with the party-service requirements in the situations described. Cf. N.C.R.Civ.P. 5(c). The specification "proceeding separately" accommodates to the alternative possibility that "numerous" parties may have voluntarily joined under App. R. 5, in which case by force of App. R. 26(e) service upon one automatically is service upon all.

## RULE 27

## COMPUTATION AND EXTENSION OF TIME

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not a holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal prescribed by these rules or by law.

A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken. All other motions for extensions of time are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. After the appeal is docketed in the appellate division such motions are made to the appellate court where docketed. Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state. Such motions may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Subd. (a) and (b): None. Subd. (c): G.S. § 1-282, Ct. App. Rules 5, 17, 18, 50.

**Commentary.**

**Subdivisions (a) and (b).** These subdivisions parallel for appellate procedure the provisions of N.C.R.Civ.P. 6(a) and (e) for trial court procedures.

**Subdivision (c).** As in the corollary provisions of App. R. 25 governing the procedure for dismissals for untimely action or for nonaction, this subdivision lays down a blanket authority in the appropriate courts to extend any of the critical time intervals provided in these rules, with the important exception of the times for taking appeal. The general rule stated is that such motions are made to that court wherein the action is currently docketed. An important exception to this is the provision that the outer time limit of 150 days from taking appeal to file the record on

appeal provided by App. Rule 13(a) may only be extended by the appellate court to which appeal has been taken. This parallels the provision formerly in Ct. App. R. 5 that the 90-day outer limit for "docketing" a record on appeal might be extended by the appellate court.

The final paragraph of this subdivision is new and authorizes extensions of time by the trial tribunals to be made ex parte, and without prior notice, but with the requirement of post-order notice to all parties of any extension granted. While this is a liberalization of former practice, it is thought justified, in view of the matter involved, to expedite action. App. R. 36, cross-referred as the source for identifying trial division judges empowered to grant extensions of time, also liberalizes the practice by opening this to a wider range of such judges than was formerly provided by now repealed G.S. § 1-282, which limited this to "the trial judge." Again, the idea is that given the matter involved, expedition of action is the most important consideration.

## RULE 28

## BRIEFS: FUNCTION AND CONTENT

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the following order:

(1) A statement of the questions presented for review.

(2) A concise statement of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court. It should additionally contain a short, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review.

(3) An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

(4) A short conclusion stating the precise relief sought.

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain an argument and a conclusion in the form provided in Rule 28(b)(3) and (4) for an appellant's brief. It need contain no statement of the questions presented nor of the case, unless the appellee disagrees with the appellant's statements and desires to make a restatement of either, or unless the appellee desires to present questions in addition to those stated by the appellant. Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant. Within 20 days after service upon him of an appellee's brief presenting such questions, an appellant may file and serve upon all parties a reply brief limited to those additional questions presented in the appellee's brief.

(d) **Incorporation of Court of Appeals Argument into Supreme Court Brief by Reference.** All or any portions of the argument section of a brief filed in the Court of Appeals may be incorporated by reference into the argument section of a new brief required to be filed in the Supreme Court by Rules 14(d)(1) or 15(g)(2).

(e) **References in Briefs to the Record.** References in the briefs to exceptions and assignments of error shall be by their numbers and to the pages of the printed record on appeal at which

they appear. Every reference to an assignment of error should include a reference to the particular exception(s) pertinent to the point for which the reference is made. Reference to parts of the printed record on appeal shall be to the pages where the parts appear. Where reference to the printed record on appeal is made in support of a contention that there was insufficient evidence to support a verdict, finding, or order, the reference may be to those pages within which all the evidence is set out.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties prior to the oral argument. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs.** Except for a reply brief filed under subdivision (c) of this Rule 28, or unless the court upon its own initiative orders a reply brief to be filed and served, none will be received or considered by the court.

(i) **Amicus Curiae Briefs.** A person may file an amicus curiae brief only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative. A person may apply for leave to file such a brief by motion filed with the clerk of the appellate court and served upon all parties within 5 days after the appeal is docketed in the appellate court. The brief shall be conditionally filed with the motion for leave. The motion shall identify the interest of the applicant and state the reasons why an amicus curiae brief is desirable. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument. The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities pre-

sented in the amicus curiae brief which are not presented in the main briefs of the parties. A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

**Drafting Committee Note**

**Sources and parallels in current statutes and rules:** Sup. Ct. Rules 27, 27½, 28, 29.

**Commentary.**

**General.** This Rule defines the function and prescribes the form and content of *all* briefs, whether on appeals from the trial tribunals, or from the Court of Appeals to the Supreme Court. It does not deal with filing and service requirements. These appear in App. RR. 13 (appeals from trial tribunals), 14(d) (appeals of right from Court of Appeals) and 15(g) (discretionary review of Court of Appeals).

**Subdivision (a).** This statement of function builds upon well-established practice developed over the years. Its basic point is that the questions formally presented to the court in the briefs define the actual scope of review which has been earlier narrowed by the choice of exceptions to be brought forward in assignments of error. This serves to focus attention on the true function of assignments of error—that they serve primarily merely to alert the appellee to those portions of the record which will be relevant to consideration of the appellant's contentions on appeal. Since some of these may be abandoned, it is the questions presented in the briefs rather than the assignments of error which provide the court's direct source for consideration of error. In this light, the provisions of App. R. 10 which strip the assignment of error to a non-argumentative statement of the substance of the error suggested, with a mere reference to those exceptions set out in the body of the record upon which it is based, is justified. See Commentary to App. R. 10(c).

**Subdivision (b)** builds upon the more sparsely stated content requirements of former Sup. Ct. RR. 27, 27½, and 28. Subsection (2) attempts to formulate a clear standard of expectation as to the form and content of that element described as the "statement of the case." This element of the brief (confusedly denominated in many as the "statement of case on appeal") has been a frequent source of unhelpful prolixity and occasional abuse, as contested fact has been stated as established fact or in argumentative form. Against this tendency, the rule emphasizes a desire for conciseness, an outline of the essential nature of the case with its bare procedural history, and a nonargumentative statement of just so much undisputed factual background and context as will aid the court in its study of the briefs and records in light of the questions presented.

**Subdivision (c).** The most important provision in this subdivision is that which authorizes the formal presentation by appellees of questions for consideration by the court on a conditional basis. The conditional aspect is that in response to the appellant's brief the court will find error as assigned by the appellant. Two types of conditional questions are posited. The first must rest upon formal cross-assignment of error by the

appellee, and this, per App. R. 10(d), may be based upon any error which is asserted by the appellee to have deprived him of an alternative basis for supporting his judgment. The other is already provided by N.C.R.Civ.P. 50(d) in its authorization for appellee presentation of the question (without any cross-assignment of error) whether a new trial should be awarded him as a matter of grace rather than giving judgment n.o.v. for the appellant where the court determines that the appellee's verdict is not supportable on the evidence. This provision is also important in its relationship to App. Rule 16 wherein the scope of Supreme Court review of Court of Appeals decisions is defined in terms of the questions properly raised by appellees as well as appellants in the Court of Appeals. The Commentary to that rule should be read in conjunction with this.

**Subdivision (d).** This is an important adjunct to the requirement in Rules 14(d)(1) and 15(g)(2) that *new* briefs be filed for Supreme Court review of Court of Appeals determinations. The compelling reason for that requirement is to force a reconsideration and possibly a restatement of the questions to be presented on this second review. See Commentary to App. R. 16. Even when a party desires to present exactly the same set of questions presented to the Court of Appeals, their restatement in the new brief will not be unduly burdensome. But restating the entire argument advanced in support of the party's position on these questions could well be. Hence this provision allows all or portions of the *argument* section in a Court of Appeals brief to be incorporated by reference in a new Supreme Court brief. This brief must nevertheless contain a reformulation or restatement of the other required elements: questions presented; statement of case (which has changed by whatever action the Court of Appeals has taken); and relief sought (which will have changed most obviously if the parties are now reversed as appellant and appellee).

**Subdivision (e)** carries forward traditional practice for making references in the brief to particular items or portions of the record on appeal. The specification that reference is to be made to pages of the "printed" record refers to the "work copies" as prepared by the clerk pursuant to App. RR. 12(c), 13(b), 14(d)(1), 15(g)(3). These of course will bear different pagination than does the formal record on appeal filed by the appellant, and may indeed contain fewer items by stipulation of the parties under App. R. 12(c). This of course means that final references must await preparation by the clerk of these "printed" or "work" copies, but the time intervals between filing of the formal record and the deadline for filing briefs is adequate. App. R. 13(a).

**Subdivision (f).** If parties have formally joined on the appeal under App. R. 5, they will of course file joint briefs. This subdivision permits joinder on brief by parties not formally joined for all purposes on an appeal.

**Subdivision (g)** carries forward in slightly restated form a comparable provision in former Sup. Ct. R. 27.

**Subdivision (h)** had no counterpart in former rules, but expresses generally understood practice. The cross-reference is to that subdivision

of this Rule which gives a right to an appellant to file a reply brief in any situation where an appellee has exercised the right to present "cross-questions," the reply brief being limited to these.

**Subdivision (i)** had no counterpart in former rules.

## RULE 29

## TERMS AND SITTINGS OF COURTS; CALENDAR FOR HEARINGS

(a) **Terms and Sittings.**

(1) **Supreme Court.** There shall be two terms of the Supreme Court each year—a Spring Term commencing on the first Tuesday in February and a Fall Term commencing on the first Tuesday in September. During the terms appeals will be calendared for hearing as provided in subdivision (b) of this rule, and will be heard in accordance with a schedule promulgated by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.**

Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or of the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. When a reply brief is allowed by rule or ordered by the Court, the appeal will be calendared or re-calendared for hearing at a time not less than 10 days after the time for filing the reply brief.

Drafting Committee Note

**Sources and parallels in former rules and statutes:** Sup. Ct. RR. 1, 4, 5, 6, 7, 8, 9, 45; Ct. App. R. 1.

**Commentary.**

**Subdivision (a)** carries forward, with a minor modification to be noted, the provisions of former rules of both appellate courts regarding their respective terms and sittings.

Subsection (1) retains the Supreme Court's traditional Spring and Fall Terms of Court, from former Sup. Ct. R. 1. It abandons the stated hours for sitting during these terms which were provided in superseded Sup. Ct. R. 45. The last sentence substitutes for this a scheduling procedure which does not specify particular hours of sitting.

Subsection (2) retains, from superseded Ct. App. R. 1, that Court's maintenance of a continuous term, with sittings of the panels for hearings being controlled by administrative action of the Chief Judge in accordance with published schedules.

**Subdivision (b)** consummates abandonment of the "district call" mode of calendaring cases for hearing in both appellate courts. As indicated, cases are now calendared without regard to their districts of origin, and generally instead on the basis of their order of docketing. The provision in the fourth sentence for a minimum of 30 days between filing of appellant's brief and the hearing of argument gives a leeway of at least 10 days between the filing of appellee's brief and the oral argument in appeals from the trial tribunals, App. R. 13(a); and a minimum of 15 days between the filing of appellee's brief and the time of oral argument in appeals from the Court of Appeals, App. RR. 14(d)(1), and 15(g)(2).

## RULE 30

## ORAL ARGUMENT

(a) **Order and Content of Argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) **Time Allowed for Argument.**

(1) **In General.** Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for

such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel.** Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties.** If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) **Submission on Written Briefs.** By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. RR. 10, 15, 30.

**Commentary.**

**Subdivision (a).** The first sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(1). The second sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(2), in its requirement that appellant include a statement of the case in his opening argument. However, as appears in subdivision (b), this rule does not give him automatically an additional 10 minutes (over appellee's time) to devote to this. The last sentence of this subdivision (a) is new and its purpose is to encourage proper utilization of the oral argument as a complementary, not merely repetitive, device to the argument in written brief.

**Subdivision (b)** builds upon the less detailed provisions of former Sup. Ct. R. 30(2), (3), and (4) which controlled the allocation of times for arguments. As indicated in the Commentary to subdivision (a) the basic times allocated by the rule are varied to cut back the appellant's time to parity of 30 minutes with that given appellee. If appellant considers that his duty to state the case justifies an extension in the particular case, he may request it. The specific identification of adverse interests between co-parties as a possible basis for extending the basic time of 30 minutes given to all of them simply recognizes that this is probably the most frequent basis upon which extensions may justly be sought. The penultimate sentence is drawn from former Sup. Ct. R. 30(4). The last sentence is new as a direct

statement but has certainly been implicit in the practice under former rules.

Subsection (2) restates without substantive change the provisions of former Sup. Ct. R. 30(5).

**Subdivision** (c) supplants former Sup. Ct. R. 15 in dealing with the problem of non-appearance at oral argument. The former rule dealt more broadly with failures to "prosecute" in general, presumably including non-appearance at the hearing set for oral argument.

**Subdivision** (d) carries forward in restated form but without substantive change the provisions of former Sup. Ct. R. 10.

## RULE 31

## PETITION FOR REHEARING

(a) **Time for Filing: Content.** A petition for rehearing may be filed in a civil action within 20 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as the petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who, for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been of counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies thereof shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or

less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted, and if the court has ordered oral argument, shall give notice of the time set therefor, which time shall be not less than 30 days from the date of such notice. The case will be reconsidered solely upon the record on appeal, the petition to rehear, and new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 10 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 44.

**Commentary.**

**General.** Traditional practice in this relatively seldom invoked procedure has been fairly complex and burdensome, featuring the requirement that a petition to be considered at all must be supported by the certificates of two disinterested attorneys that each considers the court's decision in error, and the direction of the petition to specific (non-dissenting) members of the court rather than to the court itself, with these members then acting for the court in respect of the grant or denial of the petition. The first of these features is retained in this new rule; the latter is completely changed.

**Subdivision (a)** shortens the time for filing a petition from 40 days under former Sup. Ct. R. 44(1) to 20 days. It carries forward, in restated form but unchanged in substance, the provisions as to content and the attorney certificate requirement of former Sup. Ct. R. 44(2).

**Subdivision (b)** involves a complete change from the former practice by which the petition was addressed to specific members of the court who then determined for the court, and without further recourse to the court, whether the rehearing should be allowed. Under this subdivision (b) the petition is directed to the appropriate court. The manner in which the court will then determine whether to grant the rehearing is not spelled out and is left to administrative determination of the particular court.

**Subdivision (c)** accommodates to the new provision for court determination of the petition rather than specific member determination which is embodied in subdivision (b). The time for determination by the court after filing of the petition is the same 30 days provided in former Sup. Ct. R. 44(4) for determination by the court members to whom the petition was directed after it was delivered to them. The second sentence restates more explicitly the provisions in former Sup. Ct. R. 44(1),(5) for determination to grant or deny the petition solely on the basis of the petition, without oral argument or response from the other party. The provisions for allowance as to less than all points prayed is carried forward in restated form from former Sup. Ct. R. 44.

**Subdivision (d)** carries forward, in restated form but unchanged in substance, the provisions of former Sup. Ct. R. 44(5) as to the matter to be considered by the court if rehearing is allowed, including the provision that oral argument will only be permitted by order of court. The provision for setting a time for oral argument if one is ordered is new. The times provided in the new rule for filing new briefs when rehearing is allowed is unchanged as to the petitioner (10 days from notice of grant) but changed as to the opposing party (from 20 days after grant of petition to 20 days after service upon him of petitioner's brief) from the provisions of former Sup. Ct. R. 44(5).

**Subdivision (e)** substantially changes the procedure for obtaining stay of execution of the trial court judgment upon filing of a petition for rehearing from that provided in former Sup. Ct. R. 44(7). Under the new rule, this is done at the trial court level pursuant to the provisions of App. R. 8, rather than by the Court members who under former Sup. Ct. R. 44 considered the petition.

**Subdivision (f)** is new, having no counterpart in former rules. It operates reciprocally with provisions of App. R. 14(a) and App. R. 15(b), which provide that the filing of a timely petition for rehearing tolls the running of the time to give notice of appeal or to petition for discretionary review from a Court of Appeals determination. The time for petitioning for rehearing is 20 days from issuance of mandate; that for giving notice of appeal or petitioning for discretionary review is 15 days from the same date. This means that if a party is to keep alive options for both rehearing and appellate review of Court of Appeals determinations, he must within the 15 days allowed to appeal or petition for discretionary review file a petition for rehearing. He loses any opportunity for possible rehearing if

within the time given for appeal or discretionary review petition he takes either of the latter actions. His option to petition for rehearing, however, will continue to exist for 5 days after expiration of the time within which he might have appealed or petitioned for discretionary review if he failed or chose not to do either during that time.

## RULE 32

## MANDATES OF THE COURTS

(a) **In General.** Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) **Time of Issuance.** Unless a court orders otherwise, its clerk shall issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.

### Drafting Committee Note

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 38.

**Commentary:**

**Subdivision (a)** builds upon former Sup. Ct. R. 38, but with some alteration of the terminology traditionally employed to describe the formal action by which an appellate court's determination of an appeal is made operative. This action is most accurately described as being the issuance of the court's *mandate* to the court from which appeal was taken. The former rule, above cited, spoke of transmitting "certificates of the decisions" of the court or, alternatively, of ordering "an opinion certified down," and in general usage the court's action has come to be referred to as "certifying decisions" or "opinions." But the court itself has employed the more accurate and comprehensive terminology when called upon to analyze and interpret the significance of the action in a particular situation. See, e.g. the opinion in *D & W, Inc. v. City of Charlotte,* 268 N.C. 720 (1966). This rule employs the terminology here suggested as the more accurate. The mandate *includes,* but is not solely a certified copy of the court's opinion or judgment. And in some cases, it may take the form of a direct order to the trial tribunal, as in *D & W v. City of Charlotte, supra;* or *Collins v. Simms,* 257 N.C. 1 (1962) (exact text of judgment mandated).

**Subdivision (b).** The time of issuance of a mandate has importance under these rules as the reference point for taking appeal of right from the Court of Appeals to the Supreme Court (App. R. 14(a)); for petitioning the Supreme Court to certify a Court of Appeals decision for discre-

tionary review (App. R. 15(b)); and for petitioning either appellate court for rehearing (App. R. 31(a)). Accordingly it is important for counsel to be alerted to the ordinary course indicated in subdivision (b) by which issuance occurs 20 days after filing of the court's opinion with its clerk.

## RULE 33

## ATTORNEYS

(a) **Appearances.** An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in oral argument.

(b) **Agreements.** Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. RR. 32, 33.

**Commentary.**

**Subdivision (a)** restates, in an attempt at clarification, the provisions of former Sup. Ct. R. 33.

**Subdivision (b)** restates, with only minor variation and no change of substance, the provisions of former Sup. Ct. R. 32.

## RULE 34

## FRIVOLOUS APPEALS; COSTS

If a court of the appellate division determines that an appeal has been taken frivolously and for purposes of delay, it may be dismissed at the cost of the appellant upon motion of the appellee or upon the court's own initiative.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 17(1).

**Commentary.**

This rule carries forward, in restated form but without change of substance, the provisions of former Sup. Ct. R. 17(1).

## RULE 35

## COSTS

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) **Direction as to Costs in Mandate.** The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) **Costs of Appeal Taxable in Trial Tribunals.** Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) **Execution to Collect Costs in Appellate Courts.** Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Subd. (a)-(c): None. Subd. (d): Sup. Ct. R. 43(2).

**Commentary.**

**General.** Former rules did not speak directly to standards or procedures by which the appellate courts should tax costs of appeal which by law were properly assessable by these courts. By statute, G.S. § 7A-11 (Supreme Court) and 7A-20(b) (Court of Appeals) both appellate courts have the authority to fix by rule the fees to be assessed against litigants for costs incurred in those courts. This is done by separate special rule outside the scope of these Rules.

**Subdivision (a)** lays down the basic standard by which, following traditional practice, those costs properly assessable by the appellate court are taxed to the losing party.

**Subdivision (b)** repeats a provision also included in App. R. 32(a) "Mandates of the Courts."

**Subdivision (c)** takes into account the fact that some costs of appeal are assessable in the trial court, and can only be assessed after the final determination on appeal of the losing party who is to bear them. See G.S. § 6-33, 7A-304(b), 7A-305(d)(5).

**Subdivision (d)** builds on former Sup. Ct. R. 43(2) in providing for direct execution to collect costs taxed by the appellate courts.

## RULE 36

## TRIAL JUDGES AUTHORIZED TO ENTER ORDERS UNDER THESE RULES

(a) **When Particular Judge Not Specified by Rule.** When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed;

and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) **Upon Death, Incapacity, or Absence of Particular Judge Authorized.** When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** None.

**Commentary.**

**Subdivision (a).** The only judicial action which under these Rules must be taken by a "particular" judge is that of settling the record on appeal. Per G.S. § 1-283 and App. R. 11(c), only the judge from whose judgment appeal is taken may settle the record. All other judicial actions permitted to be taken by trial judges under these rules, including dismissals for failure to perfect appeals under App. R. 25, and extensions of time to take action under App. R. 27(c), come under the provisions of this subdivision. This involves a change from former practice which permitted only the "trial judge" to extend the time within which "case on appeal" (now "proposed record on appeal") might be served.

**Subdivision (b)** is complementary to newly re-written G.S. § 1-283 which provides for the continued authority of the only judge authorized to settle a record on appeal despite the expiration of his term after appeal has been taken from his judgment.

## RULE 37

## MOTIONS IN APPELLATE COURTS

(a) **Time; Content of Motions; Response.** An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a

specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination.** Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 36.

**Commentary.**

General. Motion practice in the appellate division is fairly limited. It extends to such matters as obtaining dismissals under App. R. 25; extensions of time under App. R. 27(c); peremptory settings for oral argument under App. R. 29(b); modification in the times allocated for oral argument under App. R. 30(b); additions or amendments to the record on appeal under App. R. 9(b)(6); and substitution of parties under App. R. 38. This Rule 37 builds upon and expands the rudimentary directions for motion practice found in former Sup. Ct. R. 36.

**Subdivision (a)** carries forward from former Sup. Ct. R. 36 the point that motions may be made down to the very time of oral argument, unless a specific time limit applies to the particular motion. This necessitates the provision in the penultimate sentence of this subdivision which accommodates to the possibility that a motion may be filed within 10 days of argument so that the normal response time of 10 days cannot be given.

**Subdivision (b)** contains an accommodation to the occasional emergency situation requiring ex parte relief, or possibly to a situation created by extremely late filing of motion so that it is impracticable to await reponse if effective relief is to be given. The protection given the adverse party in such a situation by the penultimate sentence is like that available to parties subjected ex parte to t.r.o.'s who may move to dissolve. Given the modest forms of relief which may be obtained by motion practice in the appellate

division, all interests are thought adequately protected by this provision. The last sentence, providing that determination is ordinarily without oral argument, is new.

## RULE 38

## SUBSTITUTION OF PARTIES

(a) **Death of a Party.** No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) **Substitution for Other Causes.** If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) **Public Officers; Death or Separation from Office.** When a person is a party to an appeal in an official or representative

capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 37.

**Commentary.**

**General.** This rule deals with the situation created by the loss of legal capacity of a party by death or other occurrence at those stages of litigation after an appealable order or judgment has been entered for or against the erstwhile party. Former Sup. Ct. R. 37 dealt in limited fashion with the situation under the title "Abatement and Revivor." This treated only the death possibility. This new rule attempts to deal more clearly with the total situation.

**Subdivision (a)** deals only with the situation created by *death* of a party acting in an *individual* (as opposed to official) capacity. Substitution for such a party for other reasons than death is treated in subd. (b). The problem of substitution for parties acting in *official* capacities is treated in subd. (c). After stating the basic non-abatement principle in its lead sentence, subdivision (a) then deals successively with the different situations created by death of parties in two distinct time intervals. The first is treated in the first paragraph and is that interval between the taking of appeal and its final disposition. The distinction made as to the proper persons to be substituted depending upon whether the action is "real" or "personal" is dictated by such cases as *Paschal v. Autry*, 256 N.C. 166 (1962), which hold in a variety of contexts that in real actions the cause passes to successors in interest, not personal representatives, so that judgments only against the latter would not bind the former. The substitution procedure described applies whether the deceased party was appellant or appellee. The last sentence of the first paragraph accommodates to the possibility that in a personal action, where the personal representative is the proper substitute party, none has been appointed. Here the opposing party, whether appellee or appellant, may invoke court intervention to provide a proper substitute. This provision is particularly necessary for appellants whose appeals simply cannot proceed until proper substitution for their deceased adversary is made.

The second paragraph deals with another possible time interval, and one which poses quite different problems. This is the time period after appealable judgment is entered but before appeal has been taken. Here it is necessary to differentiate between the deaths of potential appellants and of potential appellees. The first sentence deals with the death in this inter-

val of a potential appellee. Here the aggrieved party may simply proceed to take appeal within the time limited, without first obtaining substitution. Under our procedure this problem could be posed (except in the most exceptional circumstance) only where the appellant had not taken appeal by oral notice, i.e. when he must both file and serve notice of appeal upon all other parties. This rule does not speak directly to the problem of affecting service in this situation upon the now deceased adverse party. A proper solution would seem to be to serve the party's attorney of record under App. R. 26(c), or if the action is a real action wherein successors in interest are readily ascertainable, upon them as the prospective substitute parties. After appeal has been taken, substitution as described for the post-appeal interval must then be made. The other possibility, of death of the potential appellant during this interval, is handled by authorizing his attorney of record to take appeal, with substitution to follow. (The alternative of appeal by personal representative is unlikely to be available in view of the 10-day limit on taking appeal, but could of course be realized.)

**Subdivision (b)** simply borrows the procedures of subdivision (a) for substitution necessitated by any other cause than death of a party acting in an individual capacity.

**Subdivision (c)** is new, with no counterpart in former rules.

## RULE 39

## DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) **General Provisions.** The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Clerk's Docket Book, Judgment Docket and Minute Book.** There shall be maintained in the offices of the clerks of each of the courts of the appellate division (i) a docket book, (ii) a judgment docket, and (iii) a minute book.

(i) In the docket book the clerk shall enter all appeals, motions, petitions, and orders docketed or entered in the court.

(ii) In the judgment docket the clerk shall enter a brief memorandum of every final judgment or order of the court,

show the party against whom costs are adjudicated, and identify each case by its title and its number in the docket book. The judgment docket shall be indexed and cross-indexed in alphabetical order to the names of all parties.

(iii) In the minute book the clerk shall enter a brief summary of the proceedings of the court in each appeal disposed of and a brief summary of all sittings and ceremonies of the court.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 39.

**Commentary.**

This rule is devoted to a description of those internal administrative and clerical operations of the clerk's offices in the appellate division which it is considered should be known to counsel in their conduct of appellate practice.

## RULE 40

## CONSOLIDATION OF ACTIONS ON APPEAL

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by App. R. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

**Drafting Committee Note**

**Sources and parallels in former rules and statutes:** Sup. Ct. R. 14.

**Commentary.** This carries forward in restated form the provisions of former Sup. Ct. R. 14. That rule made no specific mention of the possibility that consolidation might be on either party or court initiative, but this was certainly implied. This new rule makes more specific the general provision in the former rule regarding the role of parties and court respectively in setting the "course of argument." The provisions of App. R. 30(b) are obviously available to parties in consolidated appeals to move for enlargement of the basic times therein allocated as totals for each "side."

## RULE 41

## TITLE

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R. ____," is also appropriate.

# APPENDIX OF TABLES AND FORMS

## TABLE I

## SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON APPEAL IN CIVIL JURY CASE (per Rule 9(b) (4))

**Note**

Only those items below listed which are required by Rule 9(b) (1) in the particular case should be included. See Rule 9(b) (5) for sanctions against including unnecessary items. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b) (1) (i)
3. Statement of organization of trial tribunal, per Rule 9(b) (1) (ii)
4. Statement of record items showing jurisdiction, per Rule 9(b) (1) (iii)
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon
9. Pre-trial order
10. Plaintiff's evidence, with any evidentiary rulings assigned as error
11. Motion for directed verdict, with ruling thereon
12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(b) (1) (vi)
17. Verdict
18. Motions after verdict, with rulings thereon
19. Judgment

20. Appeal entries, per Rule 9(b)(1)(ix)
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal
23. Clerk's certification of record on appeal
24. Names, office addresses, and telephone numbers of counsel for all parties to appeal

## TABLE II

## SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON APPEAL IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

**Note**

Only those items below listed which are required by Rule 9(b)(2) in the particular case should be listed. See Rule 9(b)(5) for sanctions against including unnecessary items. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b)(2)(i)
3. Statement of organization of superior court, per Rule 9(b)(2)(ii)
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(b)(2)(iii)
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all items from administrative proceeding filed for review in superior court, including evidence
8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(b)(2)(viii)
11. Assignments of error, with pertinent exceptions, per Rule 9(b)(2)(ix)

12. Entries showing settlement of record on appeal
13. Clerk's certification of record on appeal
14. Names, office addresses, and telephone numbers of counsel for all parties to appeal

## TABLE III

## SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON APPEAL IN CRIMINAL CASE (per Rule 9(b)(4))

**Note**

Only those items below listed which are required by Rule 9(b)(3) in the particular case should be included. See Rule 9(b)(5) for sanctions against including unnecessary items. This listing is based on successive trials in both the District Court and the Superior Court, but is of course adaptable to trial only in the Superior Court by exclusion of the items indicated by an *. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b)(3)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(3)(ii)
4. Warrant
5. Judgment in district court*
6. Entries showing appeal to superior court*
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. State's evidence, with any evidentiary rulings assigned as error
10. Motions at close of state's evidence, with rulings thereon
11. Defendant's evidence, with any evidentiary rulings assigned as error
12. Motions at close of defendant's evidence, with rulings thereon

13. State's rebuttal evidence, with any evidentiary rulings assigned as error
14. Motions at close of all evidence, with rulings thereon
15. Court's instructions to jury, per Rules 9(b)(3)(vi), 10(b)(2)
16. Verdict
17. Motions after verdict, with rulings thereon
18. Judgment and order of commitment
19. Appeal entries
20. Assignments of error, with pertinent exceptions, per Rule 10
21. Entries showing settlement of record on appeal
22. Clerk's certification of record on appeal
23. Names, office addresses and telephone numbers of counsel for all parties to appeal

## TABLE IV

## TIMETABLE FOR APPEALS FROM SUPERIOR AND DISTRICT COURTS UNDER ARTICLE II

### Note

All of the critical time intervals here outlined except that for taking appeal may be extended by order of the court. The time for filing record on appeal may be extended past 150 days from the date of taking appeal only by order of the appropriate appellate court. All other times may be extended by the court wherein the appeal is docketed at the time. App. R. 27(c). This timetable does not cover appeals under Articles III (within appellate division) and IV (direct review of administrative agencies).

| *Action* | *Time (Days)* | *From Date of* | *Rule Reference* |
|---|---|---|---|
| Taking Appeal (civil) | 10 | entry of judgment (unless tolled) | 3(c) |

| *Action* | *Time (Days)* | *From Date of* | *Rule Reference* |
|---|---|---|---|
| Taking Appeal (criminal) | 10 | Last day of session (unless tolled) | 4(a) (2) |
| Filing and serving proposed record on appeal | 30 | Taking appeal | 11(b) |
| Filing and serving objections or proposed alternative record | 15 | Service of proposed record | 11(c) |
| Requesting judicial settlement of record | 10 | Last day within which last appellee served could file objections, etc. | 11(c) |
| Settlement of record by judge | 15 | Receipt by judge of request for settlement | 11(c) |
| Certification of record by clerk | 10 | Record on appeal settled | 11(e) |
| Filing record on appeal in appellate court | 10 | Certification by clerk *(but not more than 150 days from taking appeal)* | 12(a) |
| Filing appellant's brief | 20 | Docketing appeal | 12(b), 13(a) |
| Filing appellee's brief | 20 | Service of appellant's brief | 13(a) |
| Oral argument | 30 (usual minimum) | Filing appellant's brief | 29 |

## FORM 1

## NOTICE OF APPEAL TO THE COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A SUPERIOR COURT OR A DISTRICT COURT

**Note**

Appropriate in all appeals of right from district or superior courts, except appeals from criminal judgments imposing sentences of death or of imprisonment for life. G.S. § 7A-27.

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

..... COUNTY — ..... COURT DIVISION

A. B., PLAINTIFF

V.

C. D., DEFENDANT

_____ (trial court case number)

NOTICE OF APPEAL

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

Defendant C.D. gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) (describing it).

(S) .....

....., 19.....

.....
(address)

Attorney for C.D., Defendant

## FORM 2

## NOTICE OF APPEAL TO THE SUPREME COURT FROM A JUDGMENT OF THE SUPERIOR COURT WHICH INCLUDES A SENTENCE OF DEATH OR IMPRISONMENT FOR LIFE

(Caption as in Form 1)

THE STATE OF NORTH CAROLINA

V.

A. B., DEFENDANT

_____
(trial court case number)

NOTICE OF APPEAL

Defendant A.B. gives notice of appeal to the Supreme Court of North Carolina from the judgment (describing it).

(S) _____

_____, 19____.

_____
(address)

Attorney for A.B., Defendant

## FORM 3

## NOTICE OF APPEAL TO THE SUPREME COURT FROM A JUDGMENT OF THE COURT OF APPEALS

### Note

Appropriate in all appeals taken as of right from the Court of Appeals to the Supreme Court under G.S. § 7A-30. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review by certification may be included at the option of the party appealing. It may also be filed separately. See Form 4.

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF

V.

C. D., DEFENDANT

(Court of Appeals case number)

NOTICE OF APPEAL

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

C.D., defendant, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describing it) which judgment (directly involves (a) substantial question(s) arising under Article ....., Section ..... of the Constitution of the (United States) (State of North Carolina), in that it violates rights secured thereunder to the appellant by (here set out with particularity the way in which it is contended the constitutional rights have been violated)); or (was rendered with a dissent by Judge .....); or (was entered upon review of a decision of the North Carolina Utilities Commission in a general rate-making case).

(S) .....

....., 19.....

.....
(address)

Attorney for C.D., Defendant

FORM 4

PETITION TO SUPREME COURT FOR DISCRETIONARY REVIEW OF COURT OF APPEALS JUDGMENT UNDER G.S. § 7A-31

**Note**

For filing either alone or as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that

such appeal lies of right under G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case. The petition for discretionary review may also be included as an alternative within the Notice of Appeal. App. R. 14(a).

(Caption as in Form 3)

A. B., PLAINTIFF

V.

C. D., DEFENDANT

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

(Court of Appeals case number)

PETITION FOR DISCRETIONARY REVIEW UNDER G.S. § 7A-31

C.D., defendant, hereby petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals [describing it] on the basis that [here set out the facts relied upon as constituting the grounds for discretionary review provided in G.S. § 7A-31].

(S) .....

....., 19....

.....
(address)

Attorney for C.D., Defendant

## FORM 5

## APPEAL ENTRIES

### Note

Appropriate as a ready means of providing in composite form for the record on appeal: 1) the entry required by App. Rule 9(b) showing appeal duly taken by oral notice under App. Rule 3(a)(1) or 4 (a) (1); 2)

judicial approval of the undertaking on appeal required by App. Rules 6 or 7; and 3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c). These entries of record may also be made separately. Where appeal is taken by filing and serving written notice, a copy of the notice with filing date and proof of service is appropriate as the record entry required. Per Tables I, II, and III in the Appendix of Tables and Forms, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken. The judge's signature, while not technically required, is traditional, and serves as authentication of the substance of the entries.

Defendant gave due notice of appeal to the Court of Appeals. Appeal bond in the sum of $ ..... adjudged to be sufficient. Defendant is allowed ..... days in which to serve proposed record on appeal, and plaintiff is allowed ..... days thereafter within which to serve objections or a proposed alternative record on appeal.

This ..... day of ....., 19.....

(S) .....
Judge Presiding

## FORM 6

## EXCEPTIONS SET OUT IN RECORD ON APPEAL

**A. Examples related to evidentiary rulings**

**1. Evidence admitted**

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection overruled.

Exception No. 7.

A. The name of E. F.

**2. Evidence excluded**

Q. Did you hear D call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection sustained.

(Witness would have testified: "The name of E. F.")

Exception No. 8.

**B. To ruling on motion for directed verdict**

At the close of all the evidence the defendant renewed his motion for directed verdict on the stated grounds that the plaintiff's evidence established as a matter of law his contributory negligence.

Motion denied.

Exception No. 9.

**C. To refusal of court to submit issue tendered by defendant**

Issues tendered by the defendant:

• • •

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

. . .

The court refused to submit issue No. 2.

Exception No. 10.

D. **Examples related to judge's instructions to jury**

1. **Instruction erroneously given**

[Enclose in brackets portion of instructions to which exception is directed, followed by entry:]

Exception No. 11.

2. **Law not explained, as required by N.C.R.Civ.P. 51**

[Entry to be made at end of instructions given by court:]

The court failed to instruct the jury on the doctrine of last clear chance.

Exception No. 12.

3. **Law not applied to evidence, as required by N.C.R.Civ.P. 51**

[Entry to be made at end of instructions given by court.]

The court failed in instructing the jury to apply the doctrine of last clear chance to plaintiff's evidence, Record pp. 80-90.

Exception No. 13.

## FORM 7

## ASSIGNMENTS OF ERROR

A. **Examples related to pre-trial rulings in civil action**

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ. P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant, on the grounds [that the uncontested affidavits in support of the motion show that no

grounds for jurisdiction existed] [or other appropriately stated grounds].

Exception No. 1, R p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ. P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the grounds that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

Exception No. 2, R p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R. Civ.P. 35, on the grounds that on the record before the court, good cause for the examination was shown.

Exception No. 3, R p. 10.

4. The court's denial of defendant's motion for summary judgment; on the grounds that there was no genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

Exception No. 4, R p. 15.

B. **Examples related to civil jury trial rulings**

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E. F. R pp. 29, 30; on the grounds that the testimony was hearsay.

Exception No. 7, R p. 29.

Exception No. 8, R p. 30.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence; on the grounds that plaintiff's evidence as a matter of law established his contributory negligence.

Exception No. 8, R p. 45.

3. The court's instructions to the jury, R pp. 50-51, explaining the doctrine of last clear chance; on the grounds that the doctrine was not correctly explained.

Exception No. 10, R p. 51.

4. The court's instructions to the jury, R pp. 53-54, applying the doctrine of sudden emergency to the evidence; on the grounds that the evidence referred to by the court did not support application of the doctrine.

   Exception No. 11, R p. 54.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence; on the grounds that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

   Exception No. 9, R p. 80.

C. **Examples related to civil non-jury trial**

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence; on the grounds that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

   Exception No. 1, R p. 20.

2. The court's Finding of Fact No. 10; on the grounds that there was insufficient evidence to support it.

   Exception No. 2, R p. 25.

3. The court's Conclusion of Law No. 3; on the grounds that there are no findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

   Exception No. 3, R p. 27.

FORM 8

PETITION FOR WRIT OF CERTIORARI UNDER RULE 21

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF
V.
C. D., DEFENDANT

(trial tribunal case number)
PETITION FOR WRIT OF CERTIORARI

To the Honorable Court of Appeals of North Carolina:

A.B., plaintiff, respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N. C. Rules of Appellate Procedure to review the [judgment] [order] [decree] of the Honorable E. F., Judge of the Superior [District] Court, dated _____, 19__ [dismissing plaintiff's action] or [entered on a jury verdict for defendant] or [denying plaintiff's motion for physical examination of defendant] etc.; and in support of this petition shows the following:

**Facts**

[Here set out factual background necessary for understanding basis of petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.] [If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.]

**Reasons Why Writ Should Issue**

[Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.]

**Attachments**

Attached to this petition for consideration by the Court are certified copies of the [judgment] [order] [decree] sought

to be reviewed, and [here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.]

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the Superior Court of _____ County to permit review of the [judgment] [order] [decree] above specified, upon errors to be assigned by petitioner in a record on appeal constituted in accordance with the rules of this Court; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, _____, 19____.

_____
Attorney for Petitioner

(Verification by petitioner or counsel)

FORM 9

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF
V.
C. D., DEFENDANT

_____
(trial court case number)

PETITION FOR WRIT OF SUPERSEDEAS

To the Honorable Court of Appeals of North Carolina:

C.D., defendant in the above-titled action, respectfully petitions this Court to issue its writ of supersedeas to stay [execution] [enforcement] of the [judgment] [order] [decree] of the Honorable E. F., Judge of the Superior [District] Court, dated _____, 19____, pending review by this Court of said [judgment] [order] [decree] which [awarded damages in the sum of _____] [enjoined defendant from proceeding with construction of a dwelling described in the decree] etc.; and in support of this petition shows the following:

**Facts**

[Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g. trial judge has vacated the entry upon finding security deposited under G.S. § ..... inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.]

**Reasons Why Writ Should Issue**

[Here set out factual and legal argument for justice of issuing writ: e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.]

**Attachments**

Attached to this petition for consideration by the court are certified copies of the [judgment] [order] [decree] sought to be stayed and [here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition].

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the Superior [District] Court of ..... County staying [execution] [enforcement] of its [judgment] [order] [decree] above specified, pending issuance of the mandate of this Court following its review and determination of the [appeal now pending] [review by extraordinary writ] in the cause; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, ....., 19.....

.....
Attorney for Petitioner

(Verification by petitioner or counsel)

### Note

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as a part of it, or separately, the petitioner may petition for a temporary stay of execution or enforcement pending the court's ruling on the petition for supersedeas. The following form is illustrative of such a petition for temporary stay order either included in the main petition as part of it or filed separately.

### Petition for Temporary Stay

Petitioner applies to the Court for an order temporarily staying [execution] [enforcement] of the [judgment] [order] [decree] which is the subject of [this] [the accompanying] petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this application the petitioner shows that [here set out legal and factual argument for justice of such a temporary stay order: e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas].

# SUPREME COURT FEE SCHEDULE

Pursuant to G.S. 7A-11 the Supreme Court of North Carolina hereby adopts the following schedule of fees for services rendered by the Clerk of the Supreme Court:

| | |
|---|---|
| Docketing appeal in a civil or criminal action where appealing party is not a pauper | $10.00 |
| Docketing petition for certiorari or other petition for extraordinary writ in a civil or criminal case where petitioner is not a pauper (this fee is payable even though docketed with an appeal and is in addition to the regular docketing fee for an appeal) | $10.00 |
| Petition for stay, supersedeas, or other extraordinary writ, payable in advance (no fee to be paid by paupers) | $10.00 |
| Petition to rehear | $20.00 |
| A continuance made at the instance of a party | $ 2.00 |
| Preparing judgment | $ 5.00 |
| Certificate to be admitted to practice in some other court | $ 5.00 |
| Certificate and seal other than for the purpose of being admitted to the Bar in some court | $ 2.00 |
| Certifying case to the United States Supreme Court or to some other court | $20.00 |
| Acknowledgment, oath or affidavit with seal | $ 2.00 |
| Furnishing copies of decisions or other matter of record to publishing houses, litigants, or any other person or corporation, per page | $ .20 |
| Docketing and recording suspensions, disbarment proceedings, etc. | $ 2.00 |
| Recording in the minutes of the Court the names of successful applicants for license to practice law and indexing same in the minute book and card index of attorneys | $ 2.00 |
| Preparing duplicate law license of attorneys licensed by the Supreme Court, where the original has been lost or destroyed | $25.00 |
| Execution, including the seal | $ 2.00 |

The Clerk shall make a deposit of fees received in an account entitled, "State of North Carolina Supreme Court Clerk," and remit monthly to the State Treasurer.

This the 31st day of January, 1975.

Exum, J.

For the Court

# RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The amendments below to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that Rule IV of the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same is hereby amended by rewriting the Rules as appear in 285 N. C. 767 as follows:

## RULE IV

*Registration*

Section 4. Each registration by a resident of the State of North Carolina must be accompanied by a fee of $25.00 and each registration by a non-resident shall be accompanied by a fee of $40.00. An additional fee of $40.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the Board. No part of a registration fee shall be refunded for any reason whatsoever.

BE IT RESOLVED that Rule V of the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same is hereby amended by rewriting the Rules as appear in 281 N. C. 769 as follows:

## RULE V

*Applications of General Applicants*

Section 3. Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of $130.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of $130.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident.

BE IT RESOLVED that Rule VII of the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same is hereby amended by rewriting the Rules as appear in 285 N. C. 767 as follows:

RULE VII

*Requirements for Comity Applicants*

Section 1. (3) Pay to the Board with each written application a fee of $400.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a nonresident, no part of which may be refunded to the applicant whose application is denied;

BE IT RESOLVED that Rule XIII of the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same is hereby amended by rewriting the Rules as appear in 279 N. C. 740 as follows:

RULE XIII

*Appeals*

Section 1. Any applicant may appeal from an adverse ruling of the Board of Law Examiners, or determination of the Board of Law Examiners, as to a regular applicant's eligibility to take the written examination. After a regular applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his license to practice from him.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 28th day of April, 1975.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments of the Rules of the Board of Law Examiners as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1975.

Susie Sharp
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendments of the Rules of the Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 6th day of May, 1975.

Exum, *J.*
For the Court

# ANALYTICAL INDEX

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# WORD AND PHRASE INDEX

# ANALYTICAL INDEX

**Titles and section numbers in this index, e.g., Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.**

## TOPICS COVERED IN THIS INDEX

## APPEAL AND ERROR

**§ 6. Orders Appealable**

Appellate courts may in their discretion review an order of the trial court not otherwise appealable where review will serve the expeditious administration of justice. *Stanback v. Stanback*, 448.

**§ 9. Moot questions**

Where the Court of Appeals determined that a trial on the merits would be facilitated by allowing immediate appeal from pretrial orders, the issue of premature appeal thereupon became moot. *Stanback v. Stanback*, 448.

**§ 36. Service of Case on Appeal**

Plaintiff in a child custody and support action filed a statement of case on appeal within apt time. *Stanback v. Stanback*, 448.

## ASSAULT AND BATTERY

**§ 15. Instructions**

Trial court's instructions on what constitutes secret assault were proper. *S. v. Hill*, 207.

## ATTORNEY AND CLIENT

**§ 7. Compensation and Fees**

In a child custody and support case the court was not required to find as a fact that the party ordered to furnish support had refused to provide adequate support before the court could award attorney's fee. *Stanback v. Stanback*, 448.

## BURGLARY AND UNLAWFUL BREAKINGS

**§ 5. Sufficiency of Evidence**

The State in a first degree murder case was not required to prove both the intent to steal and the intent to murder in order to prove defendant's guilt of burglary. *S. v. Boyd*, 131.

**§ 6. Instructions**

Trial court did not err in instructing the jury that the death penalty would be imposed upon a finding of guilt of first degree burglary. *S. v. Boyd*, 131.

**§ 8. Sentence**

Death penalty imposed in a first degree burglary case is constitutional. *S. v. Boyd*, 131.

## CANCELLATION AND RESCISSION OF INSTRUMENTS

**§ 4. Mutual Mistake**

A sale of realty was not subject to rescission on the ground of mutual mistake where grantors conveyed land subject to restrictive covenant limiting its use to single-family dwellings and the land could not be used for such purpose because it would not support a septic tank or on-site sewage disposal system. *Hinson v. Jefferson*, 442.

## CONSPIRACY



## CONSTITUTIONAL LAW

CONSTITUTIONAL LAW — Continued

Defendant was not denied the right to communicate with his witness by a denial of his request that they be put in the same jail cell. *S. v. Brown*, 523.

There is no merit in defendant's contention that his constitutional rights were violated through the State's delay of the preliminary hearing and denial of his request for a reporter to record the intended testimony of a witness, now deceased, absolving defendant of complicity in the crimes. *Ibid.*

Trial court erred in admission of the complaint for arrest executed by a police officer who did not testify at the trial. *S. v. Jackson*, 470.

Trial court erred in allowing into evidence an extrajudicial statement of a nontestifying codefendant, but such error was harmless. *S. v. Wortham*, 541.

**§§ 32, 33. Right to Counsel and Self-incrimination**

Evidence concerning extraction of blood and hair samples and comparisons made therewith were admissible in a robbery and murder prosecution although counsel were not present during the extraction procedures. *S. v. King*, 645.

**§ 34. Double Jeopardy**

Defendant was not placed in double jeopardy by his convictions of secret assault and felonious assault growing out of the same occurrence. *S. v. Hill*, 207.

**§ 35. Ex Post Facto Laws**

Insertion in G.S. 14-190.1 of a definition of "sexual conduct" conforming to the holding in Miller v. California after the date of defendants' arrest for dissemination of obscenity did not amount to an ex post facto application of the law when that definition is applied to them. *S. v. Hart*, 76.

**§ 36. Cruel and Unusual Punishment**

Imposition of the death penalty is constitutional for rape. *S. v. Vick*, 37; *S. v. Armstrong*, 60; *S. v. Burns*, 102.

Death penalty is constitutional for first degree burglary, *S. v. Boyd*, 131; for first degree murder, *S. v. Gordon*, 118; *S. v. Thompson*, 303; *S. v. Vinson*, 326; *S. v. Wetmore*, 344; *S. v. Buchanan*, 408; *S. v. Robbins*, 483; *S. v. Woodson*, 578.

COUNTIES

**§ 5. County Zoning**

Right of landowners to develop their properties in ways then lawful cannot be frozen by a county's or municipality's undertaking of a general study of zoning. *In re Campsites Unlimited*, 493.

The developer of a lakeside campsite project did not act in bad faith in making and incurring substantial expenditures in the development of the project prior to the adoption of a county zoning ordinance which would prohibit use of the land for such purpose. *Ibid.*

## COURTS

**§ 5. Concurrent Original Jurisdiction**

The superior court in which a child custody and support proceeding was properly instituted prior to establishment of the district court was not divested of jurisdiction to hear a motion in the cause after establishment of the district court, and plaintiff was not entitled to have the proceeding transferred to district court as a matter of right. *Stanback v. Stanback*, 448.

## CRIMINAL LAW

**§ 5. Mental Capacity in General**

Trial court in a rape case did not err in failing to charge on insanity. *S. v. Vinson*, 326.

Unconsciousness is an affirmative defense and the burden rests upon defendant to establish this defense. *S. v. Caddell*, 266.

Trial court in a first degree murder case did not err in failing to charge that insanity which precludes the mental process of premeditation and deliberation was a defense to a charge of first degree murder. *S. v. Wetmore*, 344.

The irresistible impulse doctrine is not recognized in this State. *Ibid.*

**§ 15. Venue**

Trial court did not err in denying defendant's motion for change of venue on ground that prominence of the victim and newspaper publicity would prevent a fair trial in the county. *S. v. Thompson*, 303.

Trial court in an armed robbery case did not abuse its discretion in denying defendant's motion for a change of venue on the ground of unfavorable newspaper articles about local officials. *S. v. Jackson*, 470.

**§ 21. Preliminary Proceedings**

An accused may be tried on a bill of indictment without benefit of a preliminary hearing. *S. v. Vick*, 37.

**§ 23. Plea of Guilty**

Solicitor could properly plea bargain with two of four conspirators to an armed robbery and murder. *S. v. Woodson*, 578.

**§ 26. Plea of Former Jeopardy**

Defendant was not placed in double jeopardy by his convictions of secret assault and felonious assault growing out of the same occurrence. *S. v. Hill*, 207.

**§ 34. Evidence of Guilt of Other Offenses**

Evidence as to defendant's possession of a kitchen paring knife in violation of prison rules was admissible as circumstantial evidence of a planned killing. *S. v. Watson*, 147.

Testimony by a participant in a robbery that he and defendant had previously robbed three similar establishments and that defendant had used the same pistol in all of the robberies was admissible to establish a common plan and was competent on the question of identity. *S. v. Grace*, 243.

Trial court in a kidnapping prosecution did not err in permitting the victim to testify her assailant beat and attempted to rape her. *S. v. Caddell*, 266.

CRIMINAL LAW — Continued

**§ 40. Evidence and Record at Former Trial or Proceeding**

Denial of defendant's motion for a free transcript of a separate trial on similar charges was not prejudicial error. *S. v. McAllister*, 178.

There are no constitutional infirmities in the denial of a free transcript of the district court proceedings to an indigent defendant. *S. v. Brooks*, 392.

**§ 42. Articles Connected with the Crime**

Trial court in a prosecution for kidnapping and first degree murder did not err in allowing into evidence a portion of a check found on defendant at his arrest which bore the name of the deceased. *S. v. Robbins*, 483.

Hammer found near the crime scene was admissible in a prosecution for robbery with a dangerous weapon. *S. v. King*, 645.

**§ 43. Photographs**

Trial court in a kidnapping prosecution properly admitted for illustrative purposes photographs of the automobile in which the victim was abducted and the articles found therein. *S. v. Caddell*, 266.

Trial court in a first degree murder case did not err in allowing into evidence two color photographs of the victims' bodies. *S. v. Young*, 377.

**§ 45. Experimental Evidence**

Trial court properly allowed evidence as to experiments conducted with the murder weapon. *S. v. Jones*, 84.

**§ 46. Flight of Defendant as Implied Admission**

Trial court's instruction on flight was proper without the inclusion of a statement that no presumption of guilt arises from evidence of flight. *S. v. Caddell*, 266.

Evidence as to the sheriff's search for defendant was insufficient to support a jury instruction on the flight of defendant. *S. v. Lee*, 536.

**§ 51. Qualification of Experts**

Trial court's rulings that witnesses were experts made in the presence of the jury did not amount to expressions of opinion regarding the credibility of the witnesses. *S. v. King*, 645.

**§ 53. Medical Expert Testimony**

The trial court's exclusion of a psychiatrist's opinion on direct examination as to the extent of drug use by defendant, if erroneous, was not prejudicial. *S. v. Vinson*, 326.

**§ 55. Blood Tests**

Evidence concerning extraction of blood and hair samples and comparisons made therewith were admissible in a robbery and murder prosecution although counsel were not present during the extraction procedures. *S. v. King*, 645.

**§ 57. Evidence in Regard to Firearms**

It was unnecessary for the State to show chain of custody of a revolver seized at the time of defendant's arrest. *S. v. Boyd*, 131.

CRIMINAL LAW — Continued

**§ 60. Evidence in Regard to Fingerprints**

Trial court did not err in admission of lifted fingerprints and fingerprints taken from defendant after his arrest without permitting defendant to inquire into the expertise of the persons who lifted and took the prints. *S. v. Caddell,* 266.

**§ 62. Lie Detector Tests**

Polygraph test results are not admissible in evidence. *S. v. Brunson,* 436; *S. v. Jackson,* 470.

**§ 63. Evidence as to Sanity of Defendant**

Rebuttal testimony by an officer concerning the manner in which defendant talked and acted while he was bringing defendant back from another state as compared with defendant's manner on the witness stand was competent to show that defendant was trying to convey to the jury the impression he was not sane. *S. v. Caddell,* 266.

**§ 66. Evidence of Identity by Sight**

Rape victim's in-court identification of defendant as her assailant and evidence of police showup identification were properly admitted in evidence. *S. v. Burns,* 102.

Victim's in-court identification of defendant was of independent origin and not tainted by pretrial identification procedures at which defendant was exhibited singly to the victim through a one-way mirror and defendant was the only person who appeared in all photographic, showup and lineup procedures. *S. v. Hunt,* 360.

Trial court did not err in admission without voir dire examination of testimony of a detective concerning a victim's identification of a photograph of defendant prior to trial. *S. v. Vinson,* 326.

In-court identifications of defendant by two robbery victims were not tainted and rendered incompetent by suggestive pretrial photographic lineup or by a showing of one defendant to a witness in a courtroom where defendant was on trial on another charge. *S. v. Jackson,* 470.

**§ 71. "Short-hand" Statements of Fact**

Testimony describing the way defendant crossed a corridor and approached deceased as "spirit of the moment" was admissible as a short-hand statement of fact. *S. v. Watson,* 147.

Victim's use of the word "rape" during a statement to the investigating officer did not constitute an opinion on a question of law. *S. v. Vinson,* 326.

**§ 73. Hearsay Evidence in General**

Testimony concerning a kidnapping and assault victim's cry to a passerby, "Please help me," and his exclamation, "Oh, my God" and words of comfort by the victim's father were not objectionable as hearsay. *S. v. Caddell,* 266.

Trial court erred in admission of the complaint for arrest executed by a police officer who did not testify at the trial. *S. v. Jackson,* 470.

**§ 75. Admissibility of Confessions**

Defendant's confession was not rendered involuntary because his father, a policeman, told him to sign waivers of his rights or because the

CRIMINAL LAW — Continued

record discloses a prolonged interrogation of a highly impressionable young man of low mentality. *S. v. Thompson,* 303.

Defendant's in-custody statement was voluntary. *S. v. Gordon,* 118; *S. v. McAllister,* 178.

**§ 77. Admissions and Declarations**

Psychiatrist's testimony that defendant professed no knowledge of any crime of rape was inadmissible as a self-serving declaration. *S. v. Vinson,* 326.

**§ 84. Evidence Obtained by Search**

Trial court properly admitted items found at the crime scene and a pistol which was in plain sight and was seized upon defendant's lawful arrest. *S. v. Gordon,* 118.

**§ 85. Character Evidence Relating to Defendant**

Court erred in permitting the solicitor to ask defendant's character witness on cross-examination whether he knew defendant had served time and was on probation for other crimes and whether he would have testified to defendant's good character if he had had such knowledge. *S. v. Hunt,* 360.

**§ 86. Credibility of Defendant**

Defendant was properly cross-examined in a forgery case concerning his use of heroin. *S. v. McAllister,* 178.

**§ 87. Direct Examination of Witness**

Trial court did not abuse its discretion in allowing the district attorney to ask a witness a leading question. *S. v. Brunson,* 436.

**§ 89. Credibility of Witnesses; Corroboration**

Trial court did not err in admitting for corroborative purposes testimony that a kidnapping victim said, "Please help me; there is a man going to kill me," when the victim testified she asked the witness for help and told him she was "being raped." *S. v. Caddell,* 266.

**§ 90. Rule That Party May Not Discredit Own Witness**

Sheriff's testimony as to prior inconsistent statement made by a State's witness was incompetent but the trial court's refusal to strike the entire testimony was proper. *S. v. Pope,* 505.

A party may impeach his own witness where the party calling the witness has been misled and surprised or entrapped to his prejudice. *Ibid.*

**§ 91. Time of Trial and Continuance**

Where defendant was charged in separate indictments with secret assault and felonious assault, trial court did not err in denial of motion for continuance of the felonious assault charge made on ground that the indictment in such case was returned just one day prior to trial. *S. v. Hill,* 207.

Denial of defendant's motion for continuance of a first degree burglary case deprived defendant of the opportunity fairly to prepare his defense where the case was called for trial on the same day the indictment was returned and the warrant upon which defendant was arrested charged only a misdemeanor. *S. v. Smathers,* 226.

CRIMINAL LAW — Continued

Trial court in a kidnapping case did not express an opinion in instructing the jury that defendant would not be guilty if defendant was completely unconscious of what transpired when the victim "was taken violently from her driveway at her residence, put in an automobile and held down by an arm, and, thereafter, was beat about the head and sexually molested." *S. v. Caddell*, 266.

**§ 115. Instructions on Possible Verdicts**

Court's charge in a homicide case did not limit the jury's permissible not guilty verdict to a verdict of "not guilty by reason of insanity." *S. v. Wetmore*, 344.

**§ 117. Charge on Credibility of Witness**

Trial court in a rape case did not err in failing to instruct the jury to scrutinize the testimony of the prosecutrix as an "interested" witness absent a request therefor. *S. v. Vick*, 37.

**§ 132. Setting Aside Verdict as Being Contrary to Weight of Evidence**

Motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial judge. *S. v. Vick*, 37.

**§ 135. Sentence in Capital Cases**

Trial court in a first degree murder case erred in refusing to allow defense counsel to question prospective jurors regarding their views toward capital punishment. *S. v. Bell*, 248.

Trial court properly excused a juror who stated that she could not return a verdict of guilty requiring the death penalty under any circumstances. *S. v. Vinson*, 326.

Imposition of the death penalty in a first degree murder prosecution was not cruel and unusual punishment. *S. v. Thompson*, 303; *S. v. Vinson*, 326; *S. v. Wetmore*, 344; *S. v. Buchanan*, 408.

**§ 138. Determination of Sentence**

Trial court did not err in instructing the jury that the death penalty would be imposed upon a finding of guilt of first degree burglary. *S. v. Boyd*, 131.

**§ 146. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases**

Appellant seeking to appeal to the Supreme Court from the Court of Appeals on the ground that a substantial constitutional question is involved must allege and show such question which has not been the subject of a judicial determination. *S. v. Brown*, 523.

**§ 177. Disposition of Cause**

Whether a defendant has been denied his right to a speedy retrial must be determined by application of the same principles applied by the courts in determining whether a defendant has been denied his right to a speedy trial. *S. v. Jackson*, 470.

Delay of seven months from time the decision of the Court of Appeals was filed on defendant's first appeal to the date of his second trial did not violate his statutory right to a speedy trial. *Ibid.*

## DAMAGES

**§ 5. Damages for Injury to Real Property**

Plaintiffs are entitled to damages for loss of use of their house while it was being repaired subsequent to being struck by defendant's truck. *Huff v. Thornton*, 1.

**§ 15. Sufficiency of Evidence as to Damages**

In an action to recover for injury to plaintiffs' residence, evidence was sufficient to be submitted to the jury as to the amount plaintiffs were entitled to recover for damages to their residence and the amount they were entitled to recover for loss of use. *Huff v. Thornton*, 1.

## DIVORCE AND ALIMONY

**§ 17. Alimony Upon Divorce from Bed and Board**

Even if plaintiff made a prima facie showing that defendant intentionally failed to exercise his earning capacity because of a disregard of his marital obligation to support plaintiff, the burden did not shift to defendant to negate plaintiff's showing. *Bowes v. Bowes*, 163.

**§ 18. Alimony and Subsistence Pendente Lite**

Trial judge had authority to direct defendant to transfer title to an automobile as alimony pendente lite. *Yearwood v. Yearwood*, 254.

In awarding alimony pendente lite to plaintiff, court erred in giving plaintiff "the equity accruing" in jointly owned property to the extent of the mortgage payments made by defendant pendente lite. *Ibid.*

**§ 22. Jurisdiction and Procedure in Custody and Support Cases**

The superior court in which a child custody and support proceeding was properly instituted prior to establishment of the district court was not divested of jurisdiction to hear a motion in the cause after establishment of the district court, and plaintiff was not entitled to have the proceeding transferred to district court as a matter of right. *Stanback v. Stanback*, 448.

In a child custody and support case the court was not required to find as a fact that the party ordered to furnish support had refused to provide adequate support before the court could award attorney's fee. *Ibid.*

## EQUITY

**§ 2. Laches**

There was no change of circumstances sufficient to invoke the doctrine of laches in an action to enforce an alleged agreement to devise land. *Rape v. Lyerly*, 601.

## EVIDENCE

**§ 11. Transactions with Decedent**

Testimony by plaintiffs' father concerning a transaction with decedent was admissible in an action to enforce a contract to devise land. *Rape v. Lyerly*, 601.

**§ 45. Nonexpert Opinion Evidence as to Value**

Even though not an expert, a witness who has knowledge of value gained from experience, information and observation may give his opinion

EVIDENCE — Continued

of the value of specific real property with which he is familiar. *Huff v. Thornton*, 1.

**§ 50. Expert Medical Testimony**

A hypothetical question asked of a medical expert included sufficient facts for the expert to express an opinion, but the expert's answer was nonresponsive and did not have a proper basis. *Dean v. Coach Co.*, 515.

**§ 56. Expert Testimony as to Value**

Trial court properly allowed into evidence opinion testimony as to the value of plaintiffs' house before and after it was struck by defendant's truck. *Huff v. Thornton*, 1.

## EXECUTORS AND ADMINISTRATORS

**§ 19. Limitations on Claims Against the Estate**

The three year statute of limitations was applicable to a claim on a contract to devise land. *Rape v. Lyerly*, 601.

## FORGERY

**§ 2. Prosecution**

Bills of indictment charging forgery were sufficient where they set out in exact words and figures the checks alleged to have been forged. *S. v. McAllister*, 178.

In a prosecution for forgery and uttering forged checks, trial court did not err in failing to instruct the jury that the State had to prove that defendant did not have the authority to sign the checks. *Ibid.*

## FRAUDS, STATUTE OF

**§ 7. Contract to Devise**

A revoked will was a sufficient memorandum of a contract to devise real property. *Rape v. Lyerly*, 601.

## HOMICIDE

**§ 2. Parties and Offenses**

All conspirators in a conspiracy to commit a robbery or burglary are guilty of first degree murder if any one of the conspirators murders in the attempted perpetration of the crime. *S. v. Woodson*, 578.

**§ 6. Manslaughter**

Trial court properly instructed the jury that mere words will not excuse a crime of murder and will not constitute adequate provocation to reduce murder to manslaughter. *S. v. Watson*, 147.

**§ 7.5. Unconsciousness**

Unconsciousness is an affirmative defense and the burden rests upon defendant to establish this defense. *S. v. Caddell*, 266.

**§ 12. Indictment**

The State was not required to elect prior to trial whether it was proceeding on the felony-murder rule or on two indictments, one for murder and one for burglary. *S. v. Boyd*, 131.

**HOMICIDE — Continued**

**§ 20. Demonstrative Evidence; Photographs**

Trial court properly allowed a color photograph of deceased to illustrate the coroner's testimony. *S. v. Boyd,* 131.

**§ 21. Sufficiency of Evidence and Nonsuit**

Evidence in a first degree murder trial was sufficient to be submitted to the jury though the evidence did not show that the shots fired by defendant were the ones that killed the victims. *S. v. Gordon,* 118.

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where death resulted from shooting. *S. v. Jones,* 84.

State's evidence of premeditation and deliberation was sufficient for submission to the jury on defendant's guilt of first degree murder. *S. v. Bell,* 248.

Evidence in a first degree murder case was sufficient to be submitted to the jury where it tended to show death by shooting. *S. v. Buchanan,* 408.

Evidence which established the brutal murders of two victims and which linked defendant to the weapon used in the killings, together with the confession of defendant, was sufficient to repel motions for judgment of nonsuit. *S. v. Young,* 377.

State's evidence, including defendant's confession, was sufficient for the jury in a prosecution for first degree murder. *S. v. Thompson,* 303.

**§ 23. Instructions in General**

Court's charge in a homicide case did not limit the jury's permissible not guilty verdict to a verdict of "not guilty by reason of insanity." *S. v. Wetmore,* 344.

**§ 24. Instructions on Presumptions and Burden of Proof**

Trial court properly instructed the jury on the presumptions of unlawfulness and malice arising from evidence that defendant intentionally killed deceased with a deadly weapon. *S. v. Wetmore,* 344.

**§ 25. Instructions on First Degree Murder**

Trial court's instructions on "cool state of blood" were sufficient. *S. v. Watson,* 147.

In a first degree murder prosecution, answer of the trial judge to question of the jury foreman that a "cold blooded" killing means about the same thing as killing in cool blood did not constitute prejudicial error. *S. v. Brunson,* 436.

Evidence did not support court's instruction that jury could infer premeditation and deliberation from the dealing of lethal blows after deceased has been felled and rendered helpless and from a vicious and brutal slaying. *S. v. Buchanan,* 408.

**§ 27. Instructions on Manslaughter**

Trial court properly instructed the jury that mere words will not excuse a crime of murder and will not constitute adequate provocation to reduce murder to manslaughter. *S. v. Watson,* 147.

**§ 28. Instructions on Defenses**

The trial court in a homicide prosecution did not err in failing to instruct the jury on the effect of language "calculated and intended" to bring on an assault. *S. v. Watson,* 147.

HOMICIDE — Continued

Trial court in a first degree murder case did not err in failing to charge that insanity which precludes the mental process of premeditation and deliberation was a defense to a charge of first degree murder. *S. v. Wetmore*, 344.

**§ 31. Verdict and Sentence**

Sentence of death imposed in first degree murder prosecution was constitutional. *S. v. Gordon*, 118; *S. v. Buchanan*, 408; *S. v. Robbins*, 483; *S. v. Woodson*, 578.

Trial court properly imposed a sentence of life imprisonment for first degree murder committed prior to 18 January 1973. *S. v. Brunson*, 436.

## HOSPITALS

**§ 1. Definition; Public, Charitable, and Private**

Cabarrus Memorial Hospital is an agency of Cabarrus County and not a separate municipal agency of the State, and the Industrial Commission did not have jurisdiction of a claim based on alleged negligence of employees of the hospital. *Sides v. Hospital*, 14.

**§ 3. Liability of Hospital to Patient**

Operation of a public hospital by a city or county is a proprietary function, and such hospitals are liable in tort for the negligent acts of their employees. *Sides v. Hospital*, 14.

## INDICTMENT AND WARRANT

**§ 6. Issuance of Warrants**

Trial court erred in admission of the complaint for arrest executed by a police officer who did not testify at the trial. *S. v. Jackson*, 470.

**§ 14. Grounds and Procedure on Motion to Quash**

Trial court did not err in the denial of defendant's motion to quash the indictments without a hearing. *S. v. Brown*, 523.

## INJUNCTIONS

**§ 11. Against Public Boards or Agencies**

The doctrine of sovereign immunity does not authorize the dismissal of a complaint against the Art Museum Building Commission where the complaint alleged the Commission had exceeded its statutory authority. *Lewis v. White*, 625.

**§ 12. Issuance of Temporary Order**

Trial court improperly granted plaintiff a preliminary injunction prohibiting defendant from selling advertising space on plastic telephone directory covers to be distributed to plaintiff's subscribers. *Telephone Co. v. Plastics, Inc.*, 232.

## INSURANCE

**§ 35. Right to Proceeds Where Beneficiary Causes Death of Insured**

A wife convicted of involuntary manslaughter of her husband was not convicted of a "wilful" killing within the meaning of G.S. 31A-3(3)a

RAPE — Continued

Trial court in a rape case did not err in failing to submit lesser included offenses where the evidence showed a completed act of intercourse and the dispute related only to whether the act was by consent or as a result of force or coercion. *S. v. Vick*, 37.

Trial court in a rape prosecution did not err in failing to define "sexual intercourse" and to charge that rape requires penetration by the male organ. *S. v. Vinson*, 326.

**§ 7. Verdict and Judgment**

Imposition of the death penalty for rape is not cruel and unusual punishment. *S. v. Vick*, 37; *S. v. Armstrong*, 60.

## RIOT AND INCITING TO RIOT

**§ 2. Prosecutions**

G.S. 14-288.2 prohibiting engaging in and inciting a riot is constitutional. *S. v. Brooks*, 392.

Warrant was insufficient to charge defendant with inciting a riot. *Ibid.*

In a prosecution for engaging in and inciting a riot, trial court did not err in allowing into evidence items found at the scene of the disorder shortly after defendant was arrested. *Ibid.*

## RULES OF CIVIL PROCEDURE

**§ 19. Necessary Joinder of Parties**

The father of plaintiffs had no pecuniary interest in plaintiffs' real property acquired in a contract to devise and was not a necessary party to an action to enforce such contract. *Rape v. Lyerly*, 601.

**§ 34. Production of Things for Inspection**

Defendant in a child custody and support proceeding failed to show that an inspection of plaintiff's checks and check stubs was both necessary and relevant. *Stanback v. Stanback*, 448.

**§ 52. Findings by Court**

Statement in the judgment that "plaintiff is not entitled to the relief prayed for by her" does not comply with the requirement of Rule 52(a)(1) that the court state separately its conclusions of law. *Hinson v. Jefferson*, 422.

## SEARCHES AND SEIZURES

**§ 1. Search Without Warrant**

Trial court properly admitted items found at the crime scene and a pistol which was in plain sight and was seized upon defendant's lawful arrest. *S. v. Gordon*, 118.

**§ 4. Search Under the Warrant**

Defendant had no standing to challenge admission of evidence seized during a search under warrant of an apartment adjacent to defendant's. *S. v. Gordon*, 118.

## STATE

**§ 2.5. State Buildings**

Plaintiffs failed to state a claim for injunctive relief against the Art Museum Building Commission with allegations of violation of the open meetings law, failure to consult the N. C. Capital Building Authority, failure to acquire approval of the present Governor, failure to file an environmental impact statement, failure to obtain a permit from the Environmental Management Commission, and failure to select a site within the N. C. governmental center; however the complaint did state a claim for injunctive relief with allegations that the Commission failed to comply with the Executive Budget Act, exceeded its authority in planning for construction of a "Cultural Complex," and has not been allocated the Polk Prison site by the Department of Administration. *Lewis v. White*, 625.

**§ 4. Actions Against the State**

The doctrine of sovereign immunity does not authorize the dismissal of a complaint against the Art Museum Building Commission where the complaint alleged the Commission had exceeded its statutory authority. *Lewis v. White*, 625.

## TAXATION

**§ 25. Ad Valorem Taxes**

The ad valorem tax value of brass and copper scraps accumulated by a manufacturer of electronic terminals is the prices offered by the supplying mills to whom such scrap is usually sold, the value of the goods in process is the cost of replacement plus labor and overhead, and the value of the raw material inventory is replacement cost. *In re Appeal of Amp, Inc.*, 547.

Finding by the State Board of Assessment that the book value constituted the true value in money for ad valorem taxation of the raw material and in-process inventory of a manufacturer of electronic terminals was supported by the evidence. *Ibid.*

Differences between inventories listed by a taxpayer on ad valorem taxation abstracts and values found by the State Board of Assessment to be true values constituted discoverable property. *Ibid.*

## TRIAL

**§ 13. Allowing Jury to Visit Scene**

It was within the trial court's discretion to allow a jury view of plaintiffs' damaged house. *Huff v. Thornton*, 1.

## VENDOR AND PURCHASER

**§ 6. Condition of Property and Fraud in Representations as to Value and Condition**

Where grantors conveyed land subject to a restrictive covenant limiting its use to single-family dwellings and the land could not be used for such purpose because it would not support a sewage disposal system, grantors breached an implied warranty arising out of the restrictive covenant. *Hinson v. Jefferson*, 422.

## WILLS

**§ 2. Contract to Devise or Bequeath**

A revoked will was a sufficient memorandum of a contract to devise real property. *Rape v. Lyerly*, 601.

Evidence was sufficient to support jury's finding that testator contracted to devise his land to his daughter upon her promise to care for testator and that the daughter performed her obligation. *Ibid.*

Evidence was sufficient to support jury finding that promisee's family performed the promisee's obligations as contemplated by a contract to devise upon death of the promisee. *Ibid.*

**§ 6. Codicil**

Evidence was insufficient to support jury finding that handwritten letter mailed by testator to his executor and attorney who prepared his will, in which testator stated he wished his third wife to have use of the residence until her death, was intended to be a codicil and was placed by testator with his executor-attorney for safekeeping as a codicil. *In re Will of Mucci*, 26.

**§ 8. Revocation of Will**

A will is revocable only to the extent that the testator has not contracted to make it irrevocable. *Rape v. Lyerly*, 601.

**§ 24. Issues and Verdict**

Once a caveat is filed and the proceeding to probate is transferred to superior court, there can be no probate except by a jury verdict. *In re Will of Mucci*, 26.

Where propounder fails to offer evidence from which a jury might find there has been a testamentary disposition, it is proper for the trial court under Rule 50 to enter a directed verdict in favor of caveators and adjudge, as a matter of law, that there can be no probate. *Ibid.*

## WITNESSES

**§ 1. Competency of Witness**

Trial court did not err in allowing a witness to testify although a psychiatrist testified the witness was suffering from chronic paranoid schizophrenia. *S. v. Wetmore*, 344.

# WORD AND PHRASE INDEX